THE COMMON LAW CHOICE OF LAW RULES FOR RESULTING AND CONSTRUCTIVE TRUSTS

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I. INTRODUCTION

There is a dearth of authority and in-depth discussion concerning what the choice of law rules are for claims involving the assertion that property is held on a resulting or constructive trust. It is usually thought that the choice of law rules set out by the Hague Convention on the Law Applicable to Trusts and on their Recognition (hereafter the 'Hague Trusts Convention'), as enacted into English law by the Recognition of Trusts Act 1987, apply.[1] However, it is arguable that this is not so for some types of resulting and constructive trusts, namely those governed by a foreign law; or, at the very least, that some doubt exists as to whether the Hague choice of law rules apply to all resulting and constructive trusts. It is therefore important that the common law choice of law rules for such trusts is clearly elucidated. Unfortunately, this is an area of the law that is distinctly undeveloped. The aim of this article is to consider what are or should be the common law choice of law rules for resulting and constructive trusts.

Two different types of claims must first be distinguished. Sometimes no clear line is drawn between claims that the transferee is personally liable to account as a constructive trustee and claims involving an assertion that property is held on constructive trust because the transferor has equitable title to the property. The former type of claim involves situations such as where a wrongdoer dishonestly assists in a breach of trust[2] or knowingly receives trust property in breach of trust;[3] or where a fiduciary puts himself in a position where there is the possibility of conflict between his interest and the interest of the trust.[4] A constructive trusteeship that is imposed in these situations concerns the wrongdoer's or fiduciary's personal liability to account for the losses caused to the trust, or profits obtained by exploiting his fiduciary position. It is,

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[1] eg D Hayton *Underhill and Hayton: Law Relating to Trusts and Trustees* (16th edn Butterworths London 2003) (hereafter '*Underhill and Hayton*') 1020–2.

[2] *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378.

[3] *BCCI v Akindele* [2001] Ch 437.

[4] *Guinness plc v Saunders* [1990] 2 AC 663.

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as Moffat terms it, 'a propertyless phenomenon'.[5] In contrast, claims involving the assertion of a 'constructive trust', as opposed to 'constructive trusteeship', would arise when property is transferred pursuant to a contract which subsequently fails;[6] or in a dispute over ownership of the family home upon the breakdown of a relationship.[7] These constructive trusts claims have as their basis the claimant's proprietary entitlement to the property. The same proprietary basis is present when a resulting trust is claimed over property. Resulting trusts give effect to the parties' intentions; thus one arises where the claimant has contributed towards the purchase price of property which is legally in another's name as it is presumed that the claimant did not intend to make a gift to the legal owner.[8] It must be made clear that this paper will focus on these latter, proprietary-based, types of claims. The phrase 'trusts claims' where used below must be understood to refer to these types of claims.

II. THE NON-APPLICABILITY OF THE RECOGNITION OF TRUSTS ACT 1987

A. A question of construction

The Hague Trusts Convention has generated much debate and comment.[9] It is unnecessary for the purposes of this paper to delve at length into the detail of the Convention; only those provisions that are relevant will be looked at. Article 6 of the Hague Trusts Convention dictates that a trust shall be governed by the law chosen, expressly or impliedly, by the settlor. This law need not have any objective connection with the trust. In the absence of choice, Article 7 provides that the trust 'shall be governed by the law with which it is most closely connected'. It then goes on to list several factors that shall be considered in ascertaining the law of closest connection to the trust: the place of administration of the trust designated by the settlor; the *situs* of the assets of

[5] *Trusts Law Text and Materials* (3rd edn Butterworths London 1999) 553. The inappropriateness of the terminology of 'constructive trustee' with respect to a personal remedy has been remarked upon: *Paragon Finance v DB Thakerar and Co* [1999] 1 All ER 400 at 409.

[6] *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 (hereafter '*Westdeutsche*').

[7] *Lloyd's Bank plc v Rosset* [1991] 1 AC 107.

[8] *Midland Bank v Cooke* [1995] 4 All ER 562.

[9] eg J Harris *The Hague Trusts Convention* (Hart Publishing Oxford 2002). A Dyer 'International Recognition and Adaptation of Trusts: The Influence of the Hague Convention' (1999) 32 Vand. J Trans Law 989; E Gaillard and DT Trautman 'Trusts in Non-Trust Countries: Conflict of Laws and the Hague Convention on Trusts' (1987) 35 Am J Comp Law 307; D Hayton 'The Hague Convention on the Law Applicable to Trusts and on Their Recognition' (1987) 36 ICLQ 260; H Kötz 'The Hague Convention on the Law Applicable to Trusts and Their Recognition' in D Hayton (ed) *Modern Developments in Trust Law* (Kluwer The Hague 1999) ch 3; M Lupoi *Trusts: A Comparative Study* (Giuffre Milan 1997), trans S Dix (CUP Cambridge 2000) ch 6; M Lupoi 'The Shapeless Trust' (1995) 3 Trusts and Trustees 15; J Schoenblum 'The Hague Convention on Trusts: Much Ado About Very Little' (1994) 3 J Int Trust & Corp Plan 5; AG Paton and R Grasso 'The Hague Convention on the Law Applicable to Trusts and on their Recognition: Implementation in Italy' (1994) 43 ICLQ 654.

the trust; the place of residence or business of the trustee; and the objects of the trust and the places where they are to be fulfilled. This list is not comprehensive.[10]

The Hague Trusts Convention's choice of law rules are geared towards express trusts: Article 3 states that the Convention applies 'only to trusts created voluntarily and evidenced in writing'. However, Article 20 enables a contracting State to extend the scope of the Convention 'to trusts declared by judicial decisions'. The United Kingdom has availed itself of this opportunity. Section 1(2) of the Recognition of Trusts Act 1987 extends the ambit of the Hague Trusts 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'. The fact that the exact wording of Article 20 is not reproduced in section 1(2) raises problems. In the House of Lords debates, the Lord Chancellor stated that: 'The extension to trusts arising by virtue of judicial decision includes any trusts that are either declared by a court or are created pursuant to an order of the court'.[11] The intention behind section 1(2) thus appears to have been to catch all resulting and constructive trusts within its scope.

However, it is debatable whether the legislation succeeds in doing so. The first limb of section 1(2) brings resulting and constructive trusts that are governed by English law within the Convention's scope. However, the case for the inclusion of foreign trusts is not as clear-cut. The problem centres on the word 'arising'. An institutional constructive trust arises upon the occurrence of certain events; the court's role is merely to declare that such a trust has arisen in the past.[12] The court decision is therefore a mere affirmation of an existing fact and it could not be said that the trust 'arose' from the judicial decision.[13] Likewise, the presumption underlying a presumed resulting trust[14] arises from the moment of transfer of property itself.[15] The court's role is again only to declare a pre-existing trust. In view of this, it is surprising that the wording of section 1(2) was not amended, as it could easily have been, to make it clear that it covers both trusts 'declared' by a court and those 'arising' by virtue of a judicial decision if that was the object of the extension.

[10] AE von Overbeck 'Explanatory Report' para 77 p 387 (hereafter the 'von Overbeck Report').

[11] Hansard HL Debs vol 482 col 940.

[12] Westdeutsch*e* [1996] AC 669 at 716 *per* Lord Browne-Wilkinson.

[13] In contrast, the remedial constructive trust is imposed at the court's discretion and therefore only arises at the moment of judgment: *Rawluk v Rawluk* (1990) 65 DLR (4th) 161 at 185. It therefore clearly falls within the scope of s 1(2). The remedial constructive trust is currently not part of English domestic law: Westdeutsche ibid; *Re Polly Peck (No 2)* [1998] 3 All ER 812.

[14] Automatic resulting trusts, which arise upon the failure of express trusts or when the purposes of the express trusts have been fulfilled, fall within the Convention: von Overbeck Report, para 51 pp 380–1. The phrase 'resulting trust' used here refers only to the presumed resulting trust unless indicated otherwise.

[15] See R Pearce and J Stevens *The Law of Trusts and Equitable Obligations* (3rd edn LexisNexis Butterworths London 2002), ch 8 (esp 233–42).

As matters stand, considerable ambiguity exists as to whether the Hague choice of law rules should be applied to all resulting and constructive trusts.[16] On the one hand, the authors of *Underhill and Hayton* support a purposive interpretation of section 1(2); that is, they think that both trusts which are 'declared' or which 'arise' from a judicial decision would be covered by the second limb.[17] On the other hand, Harris prefers a more literal approach.[18] The literal construction is impliedly supported by *Dicey and Morris* as well since they regard constructive trusts as falling within the subject of restitution,[19] and note that 'it is far from clear' whether resulting trusts that are not of the automatic type 'will be caught' within the scope of the Act.[20]

In the absence of judicial guidance, it is difficult to determine which the correct position is. The answer as to which is the more appropriate construction of section 1(2) may therefore lie in considering arguments of principle.

B. Should the Act apply?

The question is: in principle, *should* the Act be applicable to resulting and constructive trusts?

Harris has noted that the Convention appears to treat trusts as part of the law of obligations as it parallels the contractual choice of law rules set out in the Rome Convention on the Law Applicable to Contractual Obligations.[21] Emphasis is put upon settlor autonomy, in the same way that emphasis is put upon party autonomy in the Rome Convention. In so far as express trusts are concerned, this approach is legitimate as it serves to uphold the intentions of the settlor and protect expectations. However, resulting and constructive trusts are, by their nature, less amenable to the 'settlor autonomy' approach.[22] They arise by operation of law in response to a particular set of events and 'are not direct products of properly manifested intentions to create them'.[23] It is artificial to speak of 'settlor autonomy' with respect to a resulting or constructive

[16] In *Lightning v Lightning Electrical Contractors Ltd*, 23/4/1998 (unreported), Gibson LJ left open the question whether the Recognition of Trusts Act 1987 applied to presumed resulting trusts.

[17] They point out that Art 20, from which s 1(2) originates, refers to 'trusts *declared* by judicial decisions'. However, the French version of Art 20 uses the word 'créés' which appears to mean a trust *imposed* by the court: M Lupoi *Trusts: A Comparative Study* (Milan 1997), above n 9 p 343; Harris, (n 9) 240, p 139 (The official versions of the Convention are available in both English and French.)

[18] ibid 145–8.

[19] Collins (gen ed) *Dicey and Morris on the Conflict of Laws* (13th edn Sweet & Maxwell London 2000) (hereafter '*Dicey and Morris*') para 29-026, p 1096.

[20] ibid para 29-003, pp 1087–8.

[21] Harris (n 9) pp 166–9.

[22] Automatic resulting trusts are not included in this criticism as a choice of law in a trust instrument setting out an express trust which fails could safely be regarded as an indicator of the settlor's intentions as to the applicable law of the consequent automatic resulting trust.

[23] R Chambers 'Constructive Trusts in Canada (Pt 1)' (2001) 15 Trust Law International 214 at 222.

trust in these instances. One may attempt to argue that a choice of law expressed in a failed contract which consequentially gives rise to a trust over property transferred pursuant to the failed contract may serve as an indication of the intentions of the 'settlor' as to the governing law of the trust under Article 6. However, this would be misguided as party expectations regarding the governing law of the contract does not translate into party expectations as to the governing law of any consequent trust that may arise upon the failure of that contract.[24]

It is suggested that, in principle, the Recognition of Trusts Act 1987 should not apply to resulting and constructive trusts. The choice of law rules therein were not formulated with a view to applying to such trusts; hence, not surprisingly, the rules are inappropriate. The fact that the first limb of section 1(2) does extend the scope of the Hague Trusts Convention to resulting and constructive trusts that are governed by English law is regrettable. Such trusts do not fit in comfortably with the Hague Trusts Convention's obligation-based framework. Any attempts to extend its influence further should be resisted. The ambiguity in the wording of the second limb of section 1(2) should therefore be seized upon so that, at the very least, resulting and constructive trusts that are governed by a foreign law should not be regarded as being subject to the Hague choice of law rules. The arguments of principle that are made here support a literal construction of the statute. On this footing, the common law rules governing trusts become important.

III. COMMON LAW RULES: PRELIMINARY POINTS

There is a distinct dearth of literature and authority on the common law choice of law rules for trusts. Most of the limited attention that has been given in this area has focused on express trusts,[25] leaving the conflict of law aspects of resulting and constructive trusts largely uncharted territory. Before considering the choice of law rules for such trusts, a couple of preliminary points must be made.

A. Characterization

It is important to note that resulting and constructive trusts are not causes of action, but rather responses to causes of action. The orthodox position is that

[24] Even if such expectations were present, it is argued that they should take a back seat. As will be shown below, trusts properly belong within the law of property and should be treated as proprietary rights. The policy considerations present when dealing with property rights dictate that party expectations, if present, are to be relegated to the background.

[25] PEN Croucher 'Trusts of Moveables in Private International Law' (1940–1) 4 MLR 111; DF Cavers 'Trusts *Inter Vivos* and the Conflict of Laws' (1930–1) 44 Harv LR 161; VTH Delany 'Charitable Trusts and the Conflict of Laws' (1961) 10 ICLQ 385.

it is the cause of action, or issue at stake,[26] that is classified and not the remedy. Thus, accordingly, the subject for characterization is the event which gives rise to the trust and not the trust itself. For example, a trust arising over a mistaken payment could be seen to arise to reverse the recipient's unjust enrichment;[27] and therefore according to the orthodox view of characterization, the unjust enrichment choice of law rules should apply to govern the consequential trust.[28]

Stevens, however, rejects the proposition that the most appropriate choice of law rule for trusts hinges on whether they properly belong to the law of trusts, the law of property, or the law of unjust enrichment.[29] It is submitted that he is correct. The law of restitution is still developing and as Stevens points out, classification under English domestic law is a controversial issue.[30] Part of the debate involves the question of whether the transferee can be said to be 'enriched' at the transferor's expense when the latter retains equitable title to the property.[31] Added to this is the uncertainty as to whether unjust enrichment comprises merely personal claims, or includes actions where the claimant is asserting proprietary rights (as would be the case for a trusts claim).[32] The latter, commonly known as claims for proprietary restitution, are on the one hand described as based on the principle of reversing the defendant's unjust enrichment;[33] and on the other hand, it is argued that they have nothing to do with unjust enrichment but are based on the vindication of the claimant's proprietary entitlement and hence come within the law of property.[34] No conclusive answer as to the basis for claims of proprietary restitution can yet be asserted.[35]

[26] *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)* [1996] 1 WLR 387.

[27] Burrows *The Law of Restitution* (2nd edn Butterworths London 2002) 66, argues that the constructive trust imposed over the mistaken payment in *Chase Manhattan v Israel–British Bank* [1981] Ch. 105 (facts below text to n 38) should be seen as an example of proprietary restitution reversing unjust enrichment; and indeed, Goulding J's judgment makes extensive reference to the law of restitution and the circumstances under which constructive trusts arise under New York law, New York law being agreed by both parties to be the applicable law of the claim. However, this case is weak support for the application of the unjust enrichment rule to trusts claims; see below, text to n 79.

[28] G Panagopoulos *Restitution in Private International Law* (Hart Publishing Oxford 2000) 70; J Bird 'Choice of Law' in F Rose (ed) *Restitution and the Conflict of Laws* (Mansfield Press Oxford 1995) 82–3.

[29] 'Resulting Trusts in the Conflict of Laws' in P Birks and F Rose (eds) *Restitution and Equity, Vol 1*, *Resulting Trusts and Equitable Compensation* (Mansfield Press London 2000) 153.

[30] ibid.

[31] See W Swadling 'A Claim in Restitution?' [1996] LMCLQ 63; A Tettenborn 'Restitution of property not belonging to one: more awkward than it looks?', WG Hart Workshops, Institute of Advanced Legal Studies, 1–3 July 2002. Cf RB Grantham and CEF Rickett 'Restitution, Property and Ignorance—A Reply to Mr Swadling' [1996] LMCLQ 463.

[32] G Virgo *The Principles of the Law of Restitution* (Clarendon Press Oxford 1999) ch 20; Grantham and Rickett ibid. Cf A Burrows 'Proprietary Restitution: Unmasking Unjust Enrichment' (2001) 117 LQR 412; P Millett 'Restitution and Constructive Trusts' (1998) 114 LQR 399. P Birks *Unjust Enrichment* (2nd edn OUP Oxford 2005) pp 63–9.

[33] Burrows, ibid; and (n 27), pp 60–75; Birks ibid. [34] Virgo (n 32), pp 11–15, p 591.

[35] Although the decision of the majority of the House of Lords decision in *Foskett v McKeown*

What is the relevance of the taxonomy of domestic English law at the conflicts level? While it is generally accepted that characterization in private international law is to be carried out by reference to the *lex fori,* what is applied here is an 'enlightened *lex fori*',[36] that is, domestic characterizations are not applied rigidly. Claims which are unknown under foreign law will be classified in accordance with the closest analogous domestic equivalent.[37] Hence, although characterization in private international law is not a mirror image of the domestic characterization of claims, the classifications under domestic law exert a highly persuasive influence at the conflicts level. This means that the uncertainty in the domestic law of restitution inevitably affects the situation at the private international law level. The lack of widespread agreement as to what the proper cause of action for a trusts claim is impinges on the characterization process. One cannot be sure in which 'box' the claim properly belongs. It follows that depending on the characterization of the indeterminate cause of action as a means of identifying the choice of law rule is not the most sensible option to take.

It is suggested that the better approach is to focus on the response and to characterize the response; in other words, to classify trusts claims by reference to the underlying nature of constructive and resulting trusts. This method goes against conflicts orthodoxy. However, in view of the uncertainty plaguing the proper classification of trusts claims, choosing to characterize the response is the obvious alternative to choosing to characterize the cause of action, on which there is no consensus. In addition, it will be shown below that this unorthodoxy is wholly justified when the true nature of resulting and constructive trusts claims is revealed.

B. Procedural or substantive?

Another issue that arises is whether a trust should be considered as substantive, and hence governed by the *lex causae*, or remedial, and hence governed by the *lex fori* as being a procedural matter. In *Chase Manhattan Bank v Israel-British Bank (London) Ltd*,[38] the plaintiff, a New York bank, had paid $2 million by mistake to another New York bank for the account of the defendant bank, which carried on business in London. While both parties agreed

[2001] 1 AC 102 can be seen as support for the latter construction. Lord Goff and G Jones *Goff & Jones: The Law of Restitution* (6th edn Sweet & Maxwell London 2002), go further and argue that *Foskett* 'leads to the firm conclusion that English law does not recognise a restitutionary proprietary claim' (para 2-007, p 86; emphasis in original). See also *NABB Brothers Ltd v Lloyd's Bank International (Guernsey) Ltd* [2005] EWHC 405, para 36.

[36] O Kahn-Freund *General Problems of Private International Law* (Sitjhoff Leyden 1976) 231; cited by C Forsyth 'Characterisation Revisited: An Essay in the Theory of the English Conflict of Laws' (1998) 114 LQR 141, at 153. The 'enlightened *lex fori*' approach is supported by Auld LJ in *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)* [1996] 1 WLR 387 at 407.

[37] *Re Bonacina* [1912] 2 Ch 394.

[38] [1981] Ch 105 (hereafter '*Chase Manhattan*').

that New York law applied to the claim, the defendant argued that the imposition of a constructive trust should be governed by English law as a remedial matter for the *lex fori*. Goulding J disagreed; his Lordship concluded that the imposition of a constructive trust was a matter of substantive law governed by New York law.[39] Furthermore, Canadian[40] courts have also shown themselves ready to treat trusts claims as raising substantive issues; this is so even though Canada also acknowledges the concept of the *remedial* constructive trust. As is obvious from the name itself, such trusts are considered as remedial devices and their imposition is at the discretion of the court.[41]

It is submitted that this is the correct approach. First, the remedial nature of resulting and constructive trusts is subordinate to the claim itself. This is illustrated by *Chase Manhattan* where Goulding J was not content to treat the imposition of a trust as being the 'mere result of a remedial or procedural rule'.[42] A parallel situation can be found in Article 10(1)(c) of the Rome Convention, which provides that the assessment of damages for breach of contract is to be treated as raising a substantive matter and governed by the choice of law rule for contract. This shows that questions that may instinctively be thought of as being 'remedial' could be classified as being substantive in nature. Secondly, even if trusts can be considered as remedial devices, it does not automatically follow that they should be governed by the *lex fori*. As Castel has pointed out, 'not all questions of remedy are purely procedural. Often a remedy is predicated on and serves to vindicate a substantive right'.[43]

In fact, it is arguable that resulting and constructive trusts are much more than remedial devices. This is most obvious when one looks at the English notion of a resulting or constructive trust which is not imposed by the courts but arises automatically when a certain factual situation exists.[44] For example, a resulting trust over the family home which is in the husband's sole name will arise in favour of the wife if she has contributed to the purchase price.[45] The law does not retrospectively award her a proprietary interest that is proportionate to her contribution; her share arises from the moment of her contribution itself. Resulting and constructive trusts are in reality a response to, not a remedy for, certain events and the response is very much tied up with the substantive right being asserted. It is the nature of the right asserted which holds the key as to the choice of law rule to govern trusts claims.[46]

[39] ibid at 127.

[40] *Pettkus v Becker* (1981) 117 DLR (3d) 257.

[41] See L Barnard 'Choice of Law in Equitable Wrongs: A Comparative Analysis' [1992] CLJ 474, at 475–8.

[42] *Chase Manhattan* [1981] Ch 105 at 127.

[43] *Canadian Conflict of Laws* (4th edn Butterworths Toronto 1997) 147.

[44] *Underhill and Hayton* 1022; Pearce and Stevens (n 15) pp 233–42, p 264.

[45] Unless it is shown that her contribution was meant as a gift to her husband, in which case, the husband owns the property solely.

[46] See Barnard (n 41) p 476; Castel (n 43) p 550.

IV. THE COMMON LAW RULES : THE POSSIBLE APPROACHES

It is suggested that three main approaches could be adopted in order to determine the choice of law rule for trusts. The two extreme positions are to consider trusts as either part of the law of obligations, or part of the law of property. The flexible mid-way approach would take into consideration both the obligatory and proprietary characteristics of the trust. Each of these three approaches will be analysed in turn.

A. Trusts as obligations

Within this heading, one can discern three further sub-approaches. First is to adopt the Hague Trusts Convention choice of law rules for the common law. This has the merit of convenience. Despite the doubts as to whether resulting and constructive trusts fall within the scope of the Act, there is nothing to stop the common law from adopting the same position as under the Hague Trusts Convention. However, for the reasons stated above, this option is unsatisfactory and will not be explored any further here.

The second approach is to treat trusts as concerning equitable obligations to be governed by the *lex fori*. The third option is to consider that trusts involve restitutionary obligations and hence apply the unjust enrichment choice of law rule.[47] These two options will now be examined.

1. Trusts as equitable obligations to be governed by the lex fori

There is a significant body of case law where the principle has been developed that equitable rights are determined by the *lex fori*, even if those rights relate to property situated abroad.[48] While the rule was laid down that an English court has no jurisdiction at common law to rule on questions of title to land abroad,[49] the rationale for the English court's jurisdiction over equitable rights over land located abroad was that it was merely exercising its *in personam* jurisdiction over the defendant : 'this Court cannot act upon the land directly but acts upon the conscience of the person living here . . .'.[50]

[47] Some commentators argue that unjust enrichment includes proprietary restitution as well: Birks (n 32); Burrows (n 32); Millett (n 32). However, the application of the unjust enrichment choice of law rule to trusts claims is considered under the rubric of 'obligations' here because, as will be argued below, most of the authorities in favour of this approach apply the unjust enrichment choice of law rule in the context of a *personal* restitutionary obligation.

[48] eg *Penn v Lord Baltimore* (1750) 1 Ves Sen 444, 27 ER 1132; *National Commercial Bank v Wimborne*, 28 Apr 1978 (unreported); *Angus v Angus* (1737) West temp Hardwicke 23; *Lord Cranstown v Johnston* (1796) 3 Ves 170; *Re Courtney ex parte Pollard* (1840) Mont & Ch 239.

[49] *British South Africa Co v Companhia de Moçambique* [1893] AC 601.

[50] *Lord Cranstown v Johnston* (1796) 3 Ves 170 at 182.

Furthermore:

> The Equity Court has long taken the view that because it is a Court of conscience and acts *in personam*, it has jurisdiction over persons within and subject to its jurisdiction to require them to act in accordance with the principles of equity administered by the court wherever the subject matter and whether or not it is possible for the court to make orders *in rem* in the particular matter.[51]

Nevertheless, it has to be borne in mind that this principle developed under the old system when Equity was solely administered by the Court of Chancery. White has convincingly demonstrated that the jurisdictional rules exercised by the Court of Chancery differ from the present rules.[52] The body of case law standing as authority for the application of the *lex fori* to trusts was from a time when the Court of Chancery insisted on there being a substantial connection between the defendant and England before it deigned to exercise its jurisdiction over the defendant. After the reforms initiated by the Judicature Act 1873, the principles adopted followed those of the common law courts where jurisdiction could be founded on the mere fleeting presence of the defendant within the forum.[53] The requirement of a connection between the defendant and the forum for cases involving equity faded away. Hence, White argues that the earlier authorities have to be reconsidered.[54]

Yet there is more modern authority with which to contend where the *lex fori* has been at the forefront in determining the existence of a trust. In *Lightning v Lightning Electrical Contractors Ltd*,[55] a resulting trust was claimed over property situated in Scotland. Under Scottish law the claim would have failed but it was held that English law was applicable to the claim as both parties were resident in England and the only Scottish connection to the claim was the *situs* of the property. Gibson LJ stated that:

> where a plaintiff invokes the *in personam* jurisdiction of the English court against a defendant amenable to the jurisdiction and there is an equity between the parties which the court can enforce, the English court will accept jurisdiction and apply English law as the applicable law, even though the suit relates to foreign land.[56]

From all this, one could come to two conclusions : first, the consistent insistence on the *in personam* jurisdiction exercised by the English court in trusts cases suggests that a trusts case is personal in nature; and secondly, that

[51] Unreported, 28 Apr 1978, NSWSC (EQ), 1546/1978, quotation from Barnard (n 41), at 488.

[52] 'Equitable Obligations in Private International Law: The Choice of Law' (1986) 11 Sydney LR 92 at 104–6.

[53] *Maharanee of Baroda v Wildenstein* [1972] 2 QB 283.

[54] White (n 52), at 108.

[55] Unreported, 23 Apr 1998.

[56] See also *El Ajou v Dollar Land Holdings plc* [1993] 3 All ER 717 at 736e–737j; *United States Surgical Corporation v Hospital Products International Pty Ltd* [1982] 2 NSWLR 766; *A-G (UK) v Heinemann Publishers Australian Pty Ltd* (1987) 10 NSWLR 86.

English law will be the governing law when equitable rights are at stake. As to the first point, the court may take jurisdiction on the basis of *in personam* jurisdiction, but that does not mean that the decree handed down lacks *in rem* effects. While the court may only formally be acting on the defendant's conscience, a judgment declaring the existence of a trust in reality seeks to affect ownership of property. The court is saying that the defendant does not own the property outright, but holds only the legal title subject to the beneficial rights of the claimant in the property. The emphasis on the *in personam* basis of jurisdiction of the courts should not obscure the underlying proprietary aspect of trusts claims.[57]

As to the point that English law is the governing law for equitable claims, one must be wary of over-reliance on the above cases for choice of law purposes. It has to be stressed that they were mainly concerned with the court's jurisdiction over foreign land, rather than choice of law issues.[58] Having ascertained that they had jurisdiction, the *lex fori* was then usually applied with little analysis.[59] Secondly, in some of the cases, English law was applied as the *lex causae* and not *qua* the *lex fori*.[60] Thirdly, there is little reason to treat equitable claims differently from legal claims and assume that equitable claims will be governed by the *lex fori*. Indeed, it is now generally accepted that claims involving equitable rights and obligations are to be treated in a similar fashion to the nearest legal equivalent.[61] As Bird puts it: 'The historical accident of their development by the Courts of Chancery does not warrant their characterization as equitable for choice of law purposes.'[62] In accordance with the principle that like cases should be treated alike, equitable claims should be subject to the same choice of law process as for legal claims and not automatically consigned to the domain of the *lex fori*.[63]

The rejection of the routine application of the *lex fori* in cases involving equitable rights and remedies[64] has support in the case law. In *Chase*

[57] The courts may have used *in personam* reasoning, but '[t]his piece of historical hoodwinkery can hardly be used in the modern world to pretend that equitable titles are not rights of property': A Briggs 'The Brussels Convention' (1994) 14 YEL 557 at 565–6. The courts are using an *in personam* reason to grant a proprietary interest. For a detailed exposition of the intrinsically proprietary nature of rights asserted under a trust, see below, s IV.C.1.

[58] In *Lightning v Lightning*, unreported, 23 Apr 1998, it was recognized as such, but Gibson LJ stated that 'it seems to me implicit that the English court not unnaturally regarded English law as applicable to the relationship between the parties before it in the absence of any event governed by the *lex situs* destructive of the equitable interest being asserted'.

[59] Barnard (n 41), at 490.

[60] White n 52, at 107. eg *British South Africa Co v De Beers Consolidated Mines Ltd* [1910] 2 Ch 502 (overturned by the House of Lords [1912] AC 52, on a different point).

[61] *El Ajou v Dollar Land Holdings plc* [1993] 3 All ER 717 at 739j, per Millett J; *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 at 387B-C (PC); *Thahir v Pertamina* [1994] 3 SLR 257 at 270B.

[62] Bird (n 28), p 78.

[63] See Stevens (n 29), pp 154–5; Panagopoulos (n 28), p 58; TM Yeo *Choice of Law for Equitable Doctrines* (OUP Oxford 2004) paras 2.19–2.30, pp 61–6, para 10.16, p 337.

[64] The proposition that the *lex fori* should apply because trusts concern remedies has been criticised above; text to nn 38–46.

Manhattan Bank v Israel–British Bank (London) Ltd,[65] New York law was applied to impose a constructive trust upon the defendant. In *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)*,[66] the Court of Appeal applied New York law to test an assertion by the plaintiffs that shares transferred in breach of trust to the defendant were held on constructive trust.[67] At first instance, Millett J remarked that: 'It is no answer to assert that a claim which invokes the intervention of equity is a claim in personam and part of the law of remedies, and—a highly dubious proposition—as such is governed by the lex fori.'[68]

For all the above reasons, it is submitted that trusts should not be classified as being equitable obligations to be governed automatically by the *lex fori*.

2. *Trusts as restitutionary obligations to be governed by the proper law of the unjust enrichment claim*

There is support for the proposition that the choice of law rule for unjust enrichment should be applied to claims involving the assertion of a constructive trust. However, it is doubtful that constructive trusts always arise in response to unjust enrichment.[69] Nevertheless, legal systems which admit the remedial constructive trust as part of their law often recognise unjust enrichment as being the trigger for the imposition of a constructive trust. Under the domestic law of the United States and Canada, constructive trusts are viewed as a remedy imposed by the court to compel the defendant to surrender the enrichment.[70] One could attempt the same analysis for the institutional constructive trust: it arises at the moment the defendant's conscience is affected to prevent his or her unjust enrichment.[71] For example, in the context of a void contract, the constructive trust arises upon the defendant being aware that the property in his hands was transferred under the mistaken assumption that the contract was valid.[72] However, this analysis is not the orthodox explanation for all English constructive trusts and indeed, as Barnard notes, the rationale that unjust enrichment forms the basis for imposing constructive trusts 'does not accord with the majority view in the Commonwealth'.[73]

[65] [1981] Ch 105.
[66] [1996] 1 WLR 387 (hereafter '*Macmillan*').
[67] See also *Pettkus v Becker* (1981) 117 DLR (3d) 257.
[68] [1995] 1 WLR 978 at 989.
[69] Above, text to nn 31–2.
[70] § 160 of the *Restatement of the Law of Restitution* (US); § 1 of the *Restatement (Third) of the Law of Trusts*, comment e, 8; Barnard (n 41), at 478; Castel (n 43), p 550 (Canada); *Pettkus v Becker* (1981) 117 DLR (3d) 257; *Sorochan v Sorochan* (1986) 29 DLR (4th) 1; *Rawluk v Rawluk* (1990) 65 DLR (4th) 161; *Peter v Beblow* (1993) 101 DLR (4th) 621.
[71] Westdeutsche [1996] AC 669 at 715, per Lord Browne-Wilkinson; Virgo (n 32), p 632. Cf Millett (n 32); and Barnard (n 41), at 478, who suggests that Canadian courts would consider the institutional constructive trust (if such trusts survived the development of the remedial constructive trust) as being a remedy imposed to redress equitable wrongdoing and thus apply the choice of law rule for equitable wrongs.
[72] See Westdeutsche, ibid at 715, per Lord Browne-Wilkinson. Cf C Rotherham *Proprietary Remedies in Context* (Hart Publishing Oxford 2002).
[73] Barnard (n 41), at 480 (n 25).

Having said that, there are a number of advocates who support application of the choice of law rule for unjust enrichment to trusts claims. Amongst these advocates is Panagopoulos, who argues that: 'As it is the law of unjust enrichment which gives rise to the proprietary remedy, the issue in dispute is really about the existence of a right to restitution.'[74] *Dicey and Morris* also suggest that constructive trusts are best regarded as within the subject of restitution, although unfortunately they offer little explanation for this stance.[75]

Most of the authorities in favour of applying the unjust enrichment choice of law rule to resulting and constructive trusts stem from *Dicey and Morris*'s Rule 200. This provides that:

> (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 the obligation arises in connection with a transaction involving 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.

In relation to constructive trusts, it appears that Rule 200(2)(c) is applicable.[76] However, most of the authorities cited as support for their contention are weak. The remarks by Millett J in *El Ajou v Dollar Land Holdings*[77] in favour of the 'place of enrichment' rule were *obiter*, as no foreign law had been pleaded. *Chase Manhattan*,[78] another case footnoted in *Dicey and Morris*, is also poor authority. While Rule 200(2)(c) was referred to in counsel's arguments, it was not referred to in the judgment.[79] New York law was agreed by both parties to be the applicable law and the task before Goulding J was merely to determine whether the equitable right of a claimant to trace or claim money paid under a mistake was substantive or procedural in nature.

More recent cases which have also applied Rule 200(2)(c) are similarly weak authority for the proposition that the unjust enrichment choice of law rule should be applied to actions where the claimant is contending that he or she holds a beneficial interest in property. Many of them are in reality concerned with personal liability based on fault; that is, constructive trusteeship, as opposed to a constructive trust. For example, in *Trustor AB v Smallbone*,[80] Smallbone was the managing director of Trustor, a Swedish company. A bank account for Trustor was established in England by Smallbone, without the authority of Trustor's board of directors. Money was

[74] Panagopoulus (n 28), pp 66–7.
[75] Para 29-026, 1096. See also Bird (n 28), pp 82–3; Castel (n 43), p 550.
[76] *Dicey and Morris* 1502–4.
[77] [1993] 3 All ER 717 at 736g–j.
[78] [1981] Ch 105.
[79] Panagopoulos (n 28), p 120.
[80] 9/5/2000 (unreported); hereafter '*Trustor*').

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then misappropriated from this account to, amongst others, the English bank account of Introcom, a company incorporated in Gibraltar and controlled by Smallbone. Introcom later paid some of this money to Smallbone in England. Sir Richard Scott V-C held that Trustor was entitled to treat Introcom as a constructive trustee of the money it had received from the Trustor account. His Lordship referred to *Dicey and Morris'*s Rule 200(2)(c) and held that the proper law of the constructive trust was English law as the money was both paid and received in England. In addition, it was held that Smallbone in turn became constructive trustee of the Trustor money received via Introcom and that this aspect was again governed by English law.[81]

Introcom's liability was founded on knowing receipt. Although there was equivocation as to whether Smallbone's liability was founded on knowing receipt or dishonest assistance,[82] both these claims are clearly not based on the proprietary entitlement of the claimant. Dishonest assistance is seen as a form of equitable wrongdoing; the claim is for personal liability to make monetary compensation, and not the enforcement of a proprietary interest of the claimant.[83] It has been argued that dishonest assistance could be interpreted as a form of restitution for wrongs.[84] While there is a school of thought that restitutionary wrongs constitute a separate cause of action in unjust enrichment under English domestic law,[85] recent judicial statements have refuted this line of thinking.[86] This article is not concerned with the minefield of restitutionary

[81] The Court of Appeal also considered that Smallbone's liability was not confined to the amount that he had personally received. Since Introcom was essentially a creature of Smallbone and the payments made by Introcom of Trustor's money were made with Smallbone's knowing assistance, he was to be jointly and severally liable with Introcom for all the payments made by Introcom with Trustor's money. This aspect of their judgment was applied in *Trustor AB v Smallbone (No 2)* [2001] 1 WLR 1177. Furthermore, Trustor had an additional claim against Smallbone, as the managing director of Trustor, for damages or compensation for conspiracy and breach of duty. The Court of Appeal held that this was to be governed by Swedish law as Trustor is a Swedish company.

[82] See *Trustor AB v Smallbone (No 2)*, ibid at 1180–6.

[83] *Grupo Torras SA v Al-Sabah* [2001] Lloyd's Rep Bank 36, esp [123] and [131].

[84] Virgo, above, n 32, pp 554–5.

[85] J Beatson *The Use and Abuse of Unjust Enrichment* (Clarendon Press Oxford 1991) 25–8, 206–43; IM Jackman 'Restitution for Wrongs' (1989) 48 CLJ 302. See also *Chesworth v Farrar* [1967] 1 QB 407.

[86] *Grupo Torras SA v Al-Sabah* [2001] Lloyd's Rep Bank 36 at [122] and [140]. However, note that while the Court of Appeal rejected an unjust enrichment analysis for dishonest assistance claims, they did not at the same time examine whether such claims were a form of restitution for wrongs. In *Royal Brunei Airlines v Tan* [1995] 2 AC 378 at 386, the Privy Council stated that: 'Recipient liability is restitution-based; accessory liability is not.' However, as Virgo argues, the word 'restitution' was probably used synonymously with 'unjust enrichment' and therefore does not preclude an interpretation of dishonest assistance claims within the restitutionary framework based on a separate cause of action predicated on a wrong and not unjust enrichment; Virgo (n 28), p 555. In relation to equitable wrongs in general, see *Base Metal Trading Ltd v Shamurin* [2004] EWCA Civ 1316; [2005] 1 All ER (Comm) 17. The case concerned the breach of an equitable duty of care owed by a diretor of a company. Although Tomlinson J at first instance ([2003] EWHC 2419 (Comm); [2004] 1 All ER (Comm) 159, at [44]) had referred to a passage in the section in *Dicey and Morris* dealing with the application of Rule 200 to equitable wrongs cases

wrongdoing. Suffice it to say that there is a respectable body of opinion that for private international law purposes, restitutionary wrongs should be classified as 'wrongs' and governed by their own choice of law rule.[87] The causative event for wrongs is the wrong itself, and not unjust enrichment. In contrast, knowing receipt has been judicially accepted as the equitable counterpart of the common law unjust enrichment action for money had and received.[88] While this would rationalize recourse to Rule 200 for such claims, it is again not based on the proprietary entitlement of the claimant to the misappropriated trust money but is instead concerned with the personal fault-based liability of the defendant. This analysis is borne out by the judgment in *Trustor*. Scott V-C's judgment stressed that: 'The impropriety of the payments was known to the recipients.' It was this knowledge of the impropriety which enabled Trustor to treat Introcom and Smallbone as 'constructive trustees'. Thus, although it was held that a 'constructive trust' came into existence upon Introcom's receipt of the money from Trustor, the 'constructive trust' that was imposed here was not based on the notion of Trustor having a proprietary interest in the moneys, but on the wrongdoing on Smallbone and Introcom's part.[89] It is therefore not good authority for the proposition that assertions that property is subject to a resulting or constructive trust are to be governed by the unjust enrichment choice of law rule.

Other cases which also have applied *Dicey and Morris*'s Rule 200 are similarly more to do with wrongdoing rather than being trusts claims.[90] Another such case is *Kuwait Oil Tanker Co SAK v Al Bader (No 3)*.[91] In *Kuwait*, the

(pp 1499–500, para 34-032) in relation to the breach of an equitable duty of care owed by a director of a company, the characterization adopted by the judge is unclear (Arden LJ in the Court of Appeal assumed that a contractual characterization was adopted at [73]) and the Court of Appeal did not consider Rule 200 at all. For a commentary on this case, see Yeo 'Choice of Law for Director's Equitable Duty of Care and Concurrence' [2005] LMCLQ 144.

[87] See Panagopoulos (n 28), pp 81–94; Bird, above, n 28, p 76; R Stevens 'The Choice of Law Rules of Restitutionary Obligations' in F Rose (ed) *Restitution and the Conflict of Laws* (Mansfield Press Oxford 1995) 187–91; Yeo, above, n 63, pp 319–20. In *Base Metal Trading Ltd v Shamurin* [2004] EWCA Civ 1316; [2005] 1 All ER (Comm) 17, the Court of Appeal applied different choice of law rules to the concurrent actions of tort and equitable wrongdoing that arose in that instant case. They applied the law of the place of incorporation of the company to the latter claim. Yeo, ibid at 147, argues that the Court of Appeal characterized the claim within the category of 'corporations' and thus the case does not support a distinct category of 'equitable wrongs' for choice of law purposes. However, the Court of Appeal's approach would not be inconsistent with the existence of a category of 'equitable wrongs' under which the particular wrong of breach of the equitable duty of care by a company director would be governed by the law of the place of incorporation of the company.

[88] *El Ajou v Dollar Land Holdings plc* [1993] 3 All ER 717 at 736g–h, per Millett J. See also *Royal Brunei Airlines v Tan* [1995] 2 AC 378 at 386; *Grupo Torras SA v Al-Sabah* [2001] Lloyd's Rep Bank 36 at [122].

[89] Cf Yeo (n 63), para 9.13, p 313, who adopts a more proprietary interpretation of the case.

[90] *Thahir v Pertamina* [1994] 3 SLR 257; *Arab Monetary Fund v Hashim* [1993] 1 Lloyd's Rep 543, [1996] 1 Lloyd's Rep 589 (CA). See J Bird 'Bribes, Restitution and the Conflict of Laws' [1995] LMCLQ 198; Panagopoulos (n 28), pp 84–6.

[91] 17 Dec 1998 (unreported Moore-Bick J); [2000] 2 All ER (Comm) 271 (CA); hereafter '*Kuwait*'. For commentaries on the case, see A Briggs 'Decisions of the British Courts During

defendants conspired to steal money from the claimant company. The case was mainly concerned with the tort of conspiracy but it was also alleged that the defendants were liable as constructive trustees to make restitution to the claimant. It should be noted that the defendants were members of the senior management of the claimant company and hence owed fiduciary duties to the claimant in respect of the funds under their control. The Court of Appeal adopted a four stage approach: (1) what was the proper law of the relationship between the parties?; (2) what were the duties imposed by that law?; (3) were such duties to be regarded as fiduciary in nature according to English law?; and (4) if so, was it unconscionable for the defendant to retain the disputed assets?[92] Rule 200(2)(c) was then inexplicably[93] applied to determine the proper law of the relationship, and was judged to point towards Kuwaiti law. It is not entirely clear why the unjust enrichment choice of law rule would point towards the proper law of the relationship. In addition, while Nourse LJ rejected the label of 'constructive trustees' for the defendants that was used by Moore-Bick J at first instance,[94] his Lordship opined that they should be treated as if they were *actual* trustees of the funds, by virtue of the fact that they controlled the company's funds and owed fiduciary duties to the company.[95] Notwithstanding the different terminology, this suggests that the basis of the defendants' liabilities was really founded on their committing breaches of fiduciary duty. That being so, this aspect of the claim should have been more naturally associated with equitable wrongdoing than unjust enrichment. The basis of this judgment, in so far as unjust enrichment is concerned, is highly unsatisfactory.

It is submitted that the above cases are not good authority for the proposition that the unjust enrichment choice of law rule should be applied to claims involving the assertion of a constructive trust. It is clear that these cases were not so much founded on the claimant's beneficial interest in the property, but rather the personal liability of the defendants. In other words, they were concerned with 'constructive trusteeship' and not 'constructive trusts'. The type of claim under scrutiny in this article is the latter, not the former.

2000: Private International Law' (2000) 71 BYBIL 435, at 471–2; G Virgo 'Interest, Constructive Trusts and the Conflict of Laws' [2000] RLR 122.

[92] [2000] 2 All ER (Comm) 271 at [192], approving Chadwick J's judgment in *Arab Monetary Fund v Hashim* (unreported 15 June 1994).

[93] See Briggs, above, n 92, at 471–2.

[94] Although, 'constructive trustee' here was used more to denote the defendants' equitable liability for the purposes of awarding compound interest, rather than whether the defendants held identifiable property on an institutional constructive trust. See Virgo (n 92).

[95] [2000] 2 All ER (Comm) 271 at [187]–[189]. His Lordship would limit the phrase 'constructive trustees' to persons who do not owe the principal any fiduciary duties. This restriction of the label of 'constructive trustee' to such persons appears to be a novel development; in *Guinness plc v Saunders* [1990] 2 AC 663, the House of Lords held that a director of Guinness, and who therefore owed the company fiduciary duties, was liable to account for an unauthorized payment he had received as a 'constructive trustee' for Guinness.

This might lead the reader to wonder why so much ink was spilled on these allegedly irrelevant cases. The answer is that analysis of the cases was necessary to dispel the notion that there is good authority for applying the unjust enrichment choice of law rule to claims which are truly based on the assertion of the claimant's beneficial proprietary interest. The analysis was also necessary to illustrate that the cases were not necessarily to be interpreted within an unjust enrichment framework.[96] Even if one disagrees with this view, the fact that there is a healthy debate on this issue is evidence that focusing on the correct characterization of the cause of action would not necessarily lead to the most suitable choice of law solution for trusts claims. Nevertheless, all this does not detract from the recognition that a constructive trust could be said to arise in response to the defendant's unjust enrichment in some circumstances. It does, however, suggest that the unjust enrichment choice of law rule should not be applied.[97]

The above discussion has been focused on constructive trusts. Some have argued that resulting trusts also arise in response to unjust enrichment.[98] As a presumed resulting trust arises on the legal presumption that the claimant intended to retain the beneficial interest, there could be a case for contending that the 'intention' of the claimant would extend to having the law governing the relationship between the parties also govern the trust. Arguably, *Dicey and Morris*'s Rule 200(2)(a), which points towards the governing law of the contract, should be implemented with respect to resulting trust claims arising from a failed contract.[99] In fact, in *Lightning v Lightning Electrical Contractors Ltd*,[100] the Court of Appeal put emphasis on the law governing the relationship between the parties. Although the Court of Appeal did not adopt an unjust enrichment analysis, this decision suggests that perhaps Rule 200(2)(a) is applicable when a resulting trust is alleged to arise in the aftermath of a failed contract. However, it is submitted that any emphasis on unjust enrichment here, as for constructive trusts, would be misplaced. It will be argued below that this stress on unjust enrichment reasoning belies the essential proprietary nature of trusts.[101]

[96] See also Chambers (n 23); Chambers 'Constructive Trusts in Canada (Pt 2)' (2002) 16 Trust Law International 2.

[97] Cf Bird (n 28), pp 82–3.

[98] Chambers (n 23), 228; Stevens (n 29), p 153.

[99] RP Meagher and WMC Gummow *Jacobs' Law of Trusts in Australia* (5th edn Butterworths Sydney 1986), support application of the proper law of the relationship between the parties with respect to constructive trusts of moveables arising from contractual or fiduciary relations between the parties. By this, the authors mean either the law chosen to govern the relationship or, in the absence of choice, the law of closest connection: para 2804, p 712.

[100] Unreported 23 Apr 1998. Facts above, text to n 55.

[101] Below, section IV.C.1.

B. Trusts as a hybrid of obligation and property law: the flexible mid-way approach

The two conflicting positions that could be taken towards trusts are either to regard them as forming part of the law of obligations, or part of the law of property. A flexible mid-way approach, which attempts to take into account the dual nature of trusts, could hold the answer towards reconciling these two contradictory positions.

One obvious model for this approach would be to take the cue from Article 7 of the Hague Trusts Convention. As will be recalled, Article 7 provides that where no law has been chosen to govern the trust, it shall be governed by the law to which it is most closely connected. Factors that should particularly be taken into account are listed as being the place of administration of the trust, the *situs* of the trust assets, the place of residence or business of the trustee and the objects of the trust and places where they are to be fulfilled. As far as constructive and resulting trusts are concerned, the place of administration of the trust and the place of residence or business of the trustee are not particularly significant factors as the trustee has no active administrative or fiduciary duties; his obligation would be merely to convey the property when requested to do so. However, the *situs* of the trust assets should hold particular sway when the assets concerned are immoveables. In addition, the governing law of the relationship between the parties may be an important consideration. If the unjust enrichment analysis of constructive and resulting trusts is accepted, the place of enrichment could also be of importance. This is because the heart of an unjust enrichment claim is considered to be the defendant's enrichment and therefore the place where he or she is enriched is an important connecting factor.[102]

Nevertheless, it is submitted that this law of closest connection approach should be rejected. The uncertainty of any approach that adopts a law of closest connection test is self-evident. Albeit that Article 7 is clearer than the old common law test of closest connection for express trusts, in that it at least sets out a list of relevant factors that should be considered by the court, it is suggested that the inevitable uncertainties of a process dependent on weighing diverse factors make this an undesirable rule to adopt with respect to trusts arising under the common law. If a better option exists, as will be argued below, giving the court leeway to weigh factors up against each other is best avoided.

[102] eg *Dicey and Morris*'s Rule 200(2)(c); Art 9(3) of the proposed Regulation on the Law Applicable to Non-Contractual Obligations (hereafter the 'proposed Rome II Regulation'), COM (2003) 427.

C. Trusts as property

It is suggested that the approach that should be adopted towards constructive and resulting trusts is to regard them as falling within the law of property. The property choice of law rules should be applied to claims involving the assertion of a trust. It will be argued below that such application is founded on persuasive legal reasoning, has many advantages, and represents the best choice of law option.

1. The underlying proprietary nature of trusts claims

It is submitted that trusts claims are proprietary in nature. There are, of course, those who disagree with this view. It has been seen above that the Hague Trusts Convention appears to consider trusts as part of the law of obligations; in other words, rights asserted under a trust seem to be personal in nature.[103] However, the circumstances under which the Convention came to fruition must be borne in mind. The Hague choice of law rules were formulated with a view to acclimatising non-trust States to the trust concept, and in some systems with no concept of equitable ownership, the rights of a beneficiary were thought to be more akin to the law of obligations.[104] Moreover, offshore States keen to attract investors wanted to preserve settlor autonomy and were not comfortable with the more onerous obligations that would have been imposed on them if trusts were subject to the property choice of law rules.[105] It is submitted that a position adopted in negotiation with non-trust and offshore States is not recommended for extension into the common law, which has long known the trust institution. In addition, it should be recalled that the Hague Trusts Convention is primarily focused on express trusts, where the concept of 'settlor' autonomy, which denotes the obligation characteristic of the trust, can more naturally be accepted.

Gretton argues that rights claimed under a trust are not proprietary, or 'real', rights, but only personal rights.[106] He proffers several reasons, amongst which are that: if the beneficiary's right under a trust is real, it should not be trumped by a bona fide purchaser without notice; the general principle is that beneficial rights, unlike real rights in land, need not be, or cannot be, registered; it is the trustee, acting as the owner of trust assets, who will take action against a third party to the trust.[107] In response, it could be retorted that, under

[103] Although the preservation of mandatory property rules in some areas under Art 15 could be taken as support for a limited proprietary view of the Convention.

[104] Paton and Grasso (n 9), at 656; A Dyer and H van Loon *Report of Trusts and Analogous Institutions* (Permanent Bureau of the Hague Conference The Hague 1982) pp 158–70, paras 147–54.

[105] See in general, Harris (n 9), pp 65–77.

[106] 'Trusts Without Equity' (2000) 49 ICLQ 599 at 605–7.

[107] Although if the trustee wrongfully transfers trust property to a third party, it would be the beneficiary who would sue the third party.

English law at least,[108] beneficial rights are unaffected by the insolvency of the trustee,[109] and equitable interests may be stolen,[110] sold or inherited.[111] The mere fact that the rights of a beneficiary under a trust are not identical to legal rights in property is not a good reason of itself to discount the argument that beneficial rights can be proprietary in nature.

One of the most fundamental points on Gretton's list is the fact that beneficial rights can be defeated. If rights asserted under a trust are rights *in rem*, or, in other words, rights that are good against the whole world, surely the fact that they would be defeated by a bona fide purchaser without notice gives lie to this proposition? However, one must remember that even legal title too is never unreservedly 'good against the whole world'. 'Real' rights, such as title to money and other forms of property, can also be lost or defeated in a number of situations:[112] for example, a seller who holds a voidable title passes on a good title to a bona fide purchaser;[113] as does a seller in possession of the goods after sale[114] or a buyer in possession of the goods after sale.[115] As Briggs points out, '[a]bsolute indefeasibility cannot be the mark of ownership'.[116]

Moreover, if the trustee wrongfully transfers trust property to a third party with notice of the trust, it would be the beneficiary who would have a claim against the third party as constructive trustee. This surely indicates that the beneficiary's right is proprietary: 'it strains credibility to maintain that the sum total of the claimant's rights to sue does not add up to a right of property.'[117] In addition, one who accepts that an assertion of a trust involves an obligation and thus is personal in nature must be forced to concede that the obligation would not exist without the concurrent imposition of beneficial ownership upon the claimant. As Stevens points out: 'If the plaintiff at no time has a proprietary interest under a resulting trust, no personal obligations will be owed to him under a resulting trust as no resulting trust ever existed.'[118] The reality is that claimants who assert the existence of a trust are typically after the 'thing' itself, not any personal obligations that may be owed to them under the trust.[119] In connection with this, one should note that the principle laid

[108] Reference will be made to English law first to counter Gretton's points before drawing on foreign trusts and analogous institutions.

[109] *Re Kayford Ltd* (1975) 1 WLR 279. Although Gretton thinks that since trusts such as charitable purpose trusts, where equitable ownership is not attributed to the beneficiaries, are also protected from the trustee's creditors, this factor is not a good indication of the 'real' nature of beneficial rights: n 10, at 606–7.

[110] Section 5(1) of the Theft Act 1968.

[111] Stevens, (n 729), p 148.

[112] ibid.

[113] Section 23 of the Sale of Goods Act 1979.

[114] ibid section 24.

[115] ibid section 25.

[116] Briggs (n 57), at 565. Cf *Webb v Webb (Case No C-294/92)* [1994] I ECR 1717, para 15; [1994] QB 696.

[117] Briggs, ibid. Cf Gretton, above, n 107, at 602.

[118] Stevens (n 29), p 156.

[119] As Yeo notes, 'Trusts arising by operation of law generally do not serve management functions; they are intended to compel the trustee to convey the property to the beneficiary': above, n 63, p 188, para 6.28.

down in *Saunders v Vautier*[120] enables beneficiaries, if they are ascertained and of full capacity, to terminate the trust and demand conveyance of the trust property to themselves as absolute owners. This is a powerful indication that, under English law, the rights of the beneficiaries are ultimately proprietary in nature.

The above is a very Anglo-centric view of the trust but it is equally valid when the trust is governed by the law of a country which adopts the common law conception of the trust.[121] It is of course resulting and constructive trusts governed by a foreign law which are particularly relevant here since, as argued above, such trusts may not fall within the scope of the Recognition of Trusts Act 1987 and are therefore governed by the common law choice of law rules. However, some jurisdictions, particularly civil law jurisdictions, do not accept the concept of duality of ownership which underpins the common law trust; the beneficiary is regarded as merely having a personal claim while ownership of trust property is wholly in the trustee's hands. Yet despite this fundamental conceptual difference, shades of the proprietary principles underpinning common law trusts law can also be found in civil law jurisdictions. For example, the concept of a segregated trust fund is well-established in Scotland, South Africa, India, Japan, and Sri Lanka.[122] Under German law, the 'beneficiaries' ', interests are protected from the creditors of the 'trustee'.[123] A similar situation exists under French law which has developed the concept of 'double patrimony' to that end.[124] Venezuelan trust legislation provides that 'trust' property constitutes a separate patrimony unavailable to the 'trustee's' creditors and that the 'beneficiary' has the right to set aside unlawful transfers by the 'trustee'. It has been argued that these factors show that the 'beneficiaries' ', rights under Venezuelan law are rights *in rem*.[125] Furthermore, even though the Hague Trusts Convention appears to treat trusts as obligations, it should be noted that one of the defining characteristics of an international 'trust' set out under Article 2 is that 'the assets constitute a separate fund and are not a part of the trustee's own estate'. This illustrates that the concept of a segregated fund, an important indicium of the property principles underlying the trust concept, is a cornerstone of the private international concept of a 'trust'.

The Scottish trust may be thought to be a paradigm example of a trust with an overwhelmingly personal character. Under Scottish law, the trustee is the owner of the property held on trust and the beneficiary merely has a personal

[120] (1841) 4 Beav 115.

[121] Such as Australia and Canada.

[122] D Hayton 'Principles of European Trust Law' in Hayton (ed) *Modern International Developments in Trust Law* (Kluwer London 1999) 23.

[123] ED Graue 'Trust-Like Devices under German Law' in WA Wilson (ed) *Trusts and Trust-Like Devices (United Kingdom Comparative Law Series, Vol 5)* (The Chameleon Press Ltd London 1981) 65; Hayton, above, n 123, p 23.

[124] DB Walters 'Analogues of the Trust and of its Constituents in French Law, Approached from the Standpoint of Scots and English Law' in WA Wilson (ed) ibid 130.

[125] Dyer and van Loon (n 125), p 52, para 42.

right against the trustee.[126] However, the beneficiary can recover trust property from a third party who is not a bona fide purchaser for value[127] and the trust property is protected from the trustee's creditors.[128] Moreover, Scottish law has the equivalent of the *Saunders v Vautier*[129] rule. In *Earl of Lindsay v Shaw*, it was recognized that if all possible beneficiaries are of full age and *sui juris*, the 'Court will not interfere to prevent the sole and unlimited proprietors from doing what they like with *their own*'.[130] The phrasing itself strongly suggests that the Court was of the opinion that the beneficiaries' rights were proprietary in nature. All this points towards the conclusion that the right of a beneficiary under a trust governed by Scottish law, ostensibly a mere personal right, has a distinctly proprietary character.[131]

It is suggested that there is a good basis for arguing that one should still regard an interest arising under a resulting or constructive trust as being proprietary even if the law under which the trust arises does not recognize the concept of beneficial ownership over trust property. Although the façade of mere personal beneficial rights may lead one instinctively to categorize trust claims as not belonging in the law of property, civilian conceptions of the trust more often than not hide an underlying proprietary core. Concepts such as a segregated trust fund and the protection of trust property from the trustee's creditors are not consistent with a purely personal model of beneficial rights, nor is the entitlement of a beneficiary to demand conveyance into his own name. The so-called personal right is in most cases so tied up with the property itself that the right has *in rem* effects. It is submitted that the interest is in truth a proprietary one.

To summarize, it is argued that a beneficiary's right under an English conception of a trust is proprietary in nature. It is also argued that a beneficiary's right under a civilian trust would in most cases be better described as proprietary as well since for almost all 'trusts' the 'trust' property is separate from the 'trustee's' own property and is not available to the 'trustee's' creditors.[132] Having shown that all 'trusts' have a fundamentally proprietary characteristic, it will now be considered whether it is best to apply the property choice of law rules to trusts claims.

[126] FH Lawson *A Common Lawyer Looks at the Civil Law* (1953) 201, cited by Gretton (n 107), at 599; Walters (n 125), p 120.

[127] WA Wilson, 'The Trust in Scots Law' in Wilson (ed) (n 124), pp 238, 241.

[128] Dyer and van Loon (n 105), p 44, para 35.

[129] (1841) 4 Beav 115.

[130] 1959 SLT (Notes) 13 (emphasis added).

[131] Of course, now trusts governed by Scottish law would fall under the first limb of s 1(2) of the Recognition of Trusts Act 1987.

[132] If institutions where this is not the case exist, arguably they would not fall under the category of 'trusts' in private international law and would be subject to a different choice of law rule.

2. The case for the application of the property choice of law rules

Giving prime emphasis to the proprietary nature of trusts makes sense in the private international law arena. When it is asserted that property is held on a resulting or constructive trust for the claimant, the establishment of a trust will frequently be a precursor to the claimant ending the trust and compelling the defendant to transfer the property absolutely back into his name.[133] Therefore, the general justifications for the application of the property choice of law rules when outright transfers of property are at issue apply equally when it is a trusts claim.[134]

What exactly are these justifications? In general, the property choice of law rules point towards the *lex situs*.[135] The *lex situs* rule has been justified on several grounds. First, it protects party expectations in that reasonable men will expect that a transaction which transfers title of goods to the transferee according to the law of the country in which the property is situated will be conclusive.[136] Bird, however, argues that it is more likely that where a deliberate and consensual relationship exists between the parties, their expectations would be for the law governing the transaction or relationship, rather than the *lex situs*, to govern unjust enrichment claims between them.[137] This argument was also advanced in *Glencore International AG v Metro Trading International Inc (No 2)*.[138] The case was one part of a complex web of litigation which arose when the defendant MTI, which was engaged in the storage, buying, blending and selling of fuel oil in Fujairah became insolvent. Various claimants asserted proprietary claims over the oil held by MTI. An argument put forward by the counsel for Glencore was that, where property is disposed of by contract, the parties' natural expectation is that property will pass in accordance with the contract so long as there are no third party interests.[139] This pointed towards English law, which was the proper law of the contract between Glencore and MTI. This contention was rejected by Moore-

[133] *Saunders v Vautier* (1841) 4 Beav 115.

[134] Panagopoulos argues that the property choice of law rules were developed to resolve issues arising out of voluntary transfers of property and competing titles and are therefore wholly inappropriate in the case of proprietary restitution: n 28, p 67. With respect, there does not appear to be much basis for this assertion. If the underlying heart of the issue is whether someone has absolute title over property, this is still a proprietary question even if it is labelled as a claim for proprietary restitution.

[135] One exception is the choice of law rule for debts. According to *Raiffeisen Zentralbank v Five Star Trading LLC* [2001] EWCA Civ 68; [2001] QB 825; [2001] 2 WLR 1344, the assignment of debts is to be treated as a contractual question to be governed by the applicable law of the contract of assignment (application of Art 12 of the Rome Convention).

[136] *Macmillan* [1996] 1 WLR 387 at 400.

[137] Bird (n 28), p 118. See also S Cohen, 'Quasi-Contract and the Conflict of Laws' (1956) 31 Los Angeles Bar Bulletin 71 at 75.

[138] [2001] 1 Lloyd's Rep 284 (hereafter '*Glencore*').

[139] See also M Bridge, who endorses a more dominant role for the governing law of the contract at least when it is a two-party case: 'English Conflicts Rules for Transfers of Movables: A Contract-based Approach?' in M Bridge and R Stevens (eds) *Cross Border Security and Insolvency* (OUP Oxford 2001) 123–43.

Bick J who recognized the inconsistency that would have followed from this line of reasoning, that is, that the *lex situs* would decide where title lies when third party rights have intervened, and the law governing the contract where it has not.[140] Moore-Bick J instead endorsed the traditional orthodoxy of having the *lex situs* govern questions of title.[141] It is suggested that his Lordship is correct. Determination of title does not fall within the ambit of the governing law of the contract or putative governing law of a void contract. First, it is well established that there is a distinction between the contractual and proprietary effects of a transfer.[142] The former, such as whether the seller is in breach of supplying goods of satisfactory quality, falls within the remit of the governing law of the contract.[143] The latter, which concerns whether title passes to the buyer, is a matter solely for the *lex situs*. The governing law of the contract becomes relevant only if the *lex situs* takes into account the governing law of the contract in determining the proprietary effects of the transaction.[144] Secondly, even if it could be said that the parties' expectations were to have the governing law of the contract, or putative governing law of the contract, as the case may be, govern the passing of property, this is one area of the law where party autonomy takes a back seat, in part because of the possibility of the intervention of third party rights in proprietary claims.

The practical realities of commercial transactions also furnish a strong justification for the *lex situs* rule. As has been observed, 'Any other rule would require extensive and probably fruitless enquiries into the provenance of the goods and expose the transferee to great uncertainty.'[145] Although this may more readily be accepted in relation to immoveables, it applies with equal force to moveables. Commercial convenience necessarily dictates that questions of title to moveables should also be decided in accordance with the *lex situs*.[146] It would not be reasonable to expect a transferee further to investigate

[140] [2001] 1 Lloyd's Rep 284 at 294–5.

[141] On the basis that, inter alia, application of the *lex situs* would best reflect the natural expectations of reasonable men, the realities of control of moveables, and the practical considerations of trade and commerce : ibid at 294–6.

[142] *Glencore* [2001] 1 Lloyd's Rep 284, at [27]; *Dicey and Morris*, para 24-005 (p 965), para 33-109 (pp 1333–4); PM North and JJ Fawcett *Cheshire and North's Private International Law* (13th edn Butterworths London 1999) 942.

[143] Although admittedly some other contractual rights, such as the rights of stoppage in transit, have a quasi-proprietary character too.

[144] *Zahnrad Fabrik Pssau GmbH v Terex Ltd* 1986 SLT 84; *Glencore* [2001] 1 Lloyd's Rep 284 at [23]–[24]; *Dicey and Morris*, para 33-111, p 1335. However, *Dicey and Morris* also posit an exception to the general rule (Rule 116, p 963, para 24R-001) that the *lex situs* at the time of transfer governs the validity of transfer of a tangible movable. They state: 'If a tangible movable is in transit, and its *situs* is casual or not known, a transfer which is valid and effective by its applicable law will *semble* be valid and effective in England' (para 24E-015, 968). This exception is envisaged to be very limited in scope; it is intended to apply only when the *situs* is indeterminate and unknown to the parties. From the illustrations it appears that the applicable law of the transfer is synonymous with the applicable law of the contract of transfer.

[145] *Glencore* [2001] 1 Lloyd's Rep 284 at [28], *per* Moore-Bick J. See also *Re Anziani* [1930] 1 Ch 407 at 420.

[146] *Winkworth v Christie, Manson & Woods Ltd* [1980] Ch 496 at 512, per Slade J.

past title to ensure that no one else could claim title to the moveables under another system of law. Indeed, it has been pointed out that adding this onus of further investigation on the transferee in many cases would not bring about certainty that his or her title is secure.[147] This is especially so if the transferee is ignorant as to which foreign laws he would need to investigate. As Staughton LJ observed in *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)*:

> A purchaser ought to satisfy himself that he obtains a good title by the law prevailing where the chattel is, for example in Petticoat Lane, but should not be required to do more than that. And an owner, if he does not wish to be deprived of his property by some eccentric rule of foreign law, can at least do his best to ensure that it does not leave the safety of his own country.[148]

Another oft-cited justification for the *lex situs* rule is that it is the *lex situs* which has effective power over the asset concerned. Allied to this is the fact that the claimant is likely to have to turn to the courts where the asset is situated in order to enforce his rights.[149] Again, this is axiomatic with respect to immoveables; however, this justification also extends to moveables. Moore-Bick J explained it thus: 'Practical control over movables can ultimately only be regulated and protected by the state in which they are situated and the adoption of the *lex situs* rule in relation to the passing of property is in part a recognition of that fact.'[150] Admittedly, this rationale is weak if the asset has been moved around such that the *situs* at the time of the relevant transaction no longer coincides with its present *situs*. Such was the situation in *Winkworth v Christie, Manson and Woods Ltd*[151] where works of art stolen from England were sold to the second defendant in Italy and thereafter brought back to England to be auctioned by the first defendants. Under Italian law, the *lex situs* at the time of transfer, the second defendant acquired good title. Slade J upheld the title gained under Italian law to preserve security of title and commercial convenience. This illustrates that although the justification of control is not relevant when the asset has been taken to another jurisdiction after the transfer, the other reasons for the *lex situs* rule still remain.

The above justifications for the application of the *lex situs* when legal title is at issue are result-oriented and expectation-based; most fundamentally, the same justifications are also true for the transfer of an equitable interest. Therefore, it is submitted that the best approach is to apply the property choice of law rules to a claim involving the assertion of a resulting or constructive trust. It is the proprietary characteristic of trusts claims that should be elevated and characterized for choice of law purposes. It has been argued that this choice of law approach can be defended on grounds of principle and pragmatism.[152]

[147] ibid at 513, per Slade J.
[148] [1996] 1 WLR 387 at 400.
[149] ibid at 424.
[150] *Glencore* [2001] 1 Lloyd's Rep 284 at [31].
[151] [1980] Ch 496.
[152] As for the bootstraps problem as to which law applies to the trust, it is suggested that if the alleged trust concerns property located in Ruritania, first, the *lex fori* must be satisfied that there

3. Authority for the application of the property choice of law rules

There is some authority for the application of the *lex situs* for immoveables. §235 of the *Restatement (Second) of Conflict of Laws* provides that: 'The existence and extent of an equitable interest in land are determined by the law that would be applied by the courts of the situs', and then goes on to observe that the courts 'would usually apply their own local law in determining such questions.'[153] In *McGean v McGean*,[154] the question before the court was whether a wife had a beneficial interest in the family home which was in the name of the husband solely. The Superior Court of the District of Columbia applied Maryland law to determine whether a house located in Maryland was impressed with a resulting trust.[155] According to Meagher and Gummow, resulting and constructive trusts of immoveables are also governed by the *lex situs* in Australia.[156]

There is admittedly little authority in favour of the choice of law approach that is advocated here. However, as has been shown above, the other choice of law options available similarly suffer from a lack of solid authority. As such, this lack of authority should not be allowed to obscure the fact that application of the property choice of law rules remains the best option.

4. Criticisms of application of the property choice of law rules to trusts claims

(a) Against conflicts orthodoxy

As has been noted earlier, for choice of law purposes, conflict of laws principles dictate that it is the cause of action, or issue at stake, that is characterized. Yet the method advocated here involves characterizing the response to the causative event, and not the event itself. However, as Harris asserts: 'It is appropriate to recognize that sometimes it is not the nature of the cause of action *but the interest that is ultimately being asserted* that is of greater importance.'[157] This is surely true when the interest involved is a proprietary one, as

is a good arguable case of a valid trust governed by Ruritanian law, Ruritanian law being the law identified by the property choice of law rules; before Ruritanian law, as the putative governing law of the trust, is applied to determine whether there is in fact a valid trust governed by Ruritanian law. See Harris (n 9), pp 276–8.

153 p 39.

154 339 A.2d 384.

155 See also *Hawley & King v James* 1838 WL 2884 (NY Ch); *Hardy v Hardy* 250 F Supp 956; *Arbury v De Niord* 152 NYS 763; *Weston v Stuckert* 329 F.2d 681; *Bendean v Moody* (1938) 5 NYS (2d) 94. The United States has signed but not ratified the Hague Trusts Convention.

156 Above, n 100, p 717, para 2812. Cf *Damberg v Damberg* [2001] NSWCA 87; 52 NSWLR 492; 2001 WL 588080. Australia has not taken up the opportunity to extend the provisions of the Hague Trusts Convention to trusts declared by judicial decisions; see the Trusts (Hague Convention) Act 1991, Commonwealth of Australia 50/1991.

157 'The Trust in Private International Law' in JJ Fawcett (ed) *Reform and Development of Private International Law: Essays in Honour of Sir Peter North* (OUP Oxford 2002) 212 (emphasis in original).

property rights are obviously one of the most stalwart type of rights that could be asserted. In addition, it is still unclear how the event which triggers the imposition of a constructive or resulting trust should be characterized, so a choice of law rule based on the indeterminate cause of action would hardly make for clear law. It is submitted that the divergence from usual conflict of law principles and characterizing the consequences of an event instead of the event itself in order to determine the most appropriate choice of law rule is not only justifiable, but necessary in this instance, if one is to achieve a measure of certainty in this area of the law. Focusing on the end result would alleviate the problem of characterization.

In addition, one should be careful not to exaggerate the unorthodoxy of the recommended approach. The justifications given for the application of the *lex situs* in property law are very result-oriented; practicality is the main feature. Reasons of enforceability and protecting party expectations apply equally to a claim concerning an outright transfer of legal title and to a trusts claim.

(b) Two different laws determine whether a personal or proprietary claim exists

Let us say that A transfers land to B pursuant to a void contract that is governed by the law of Ruritania. The land is located in Utopia. A has three options: (i) A could pursue an unjust enrichment claim whereby B is personally liable to account for the value of the property transferred; (ii) A could argue that B holds the property on trust for him; or (iii) A could demand the property back on the basis that legal title never left his hands, or if it did, that legal title should revest in him. The first option would involve application of the unjust enrichment choice of law rule. Application of *Dicey and Morris'*s Rule 200(2)(a) would point towards the putative governing law of the contract, that is, Ruritanian law. The last two options involve property issues, and should be governed by the property choice of law rules.[158] Since the disputed property is land, this points towards application of the *lex situs*, that is, Utopian law.

There are two problems. First, in relation to the same causative event, one law determines whether a personal claim exists, and another law determines whether a proprietary claim exists. Secondly, it could be that Ruritanian law allows a personal or a proprietary claim, but Utopian law only allows a personal claim. If B is bankrupt, a different result would ensue depending on whether Ruritanian or Utopian law is applied. A would have no practical remedy under Utopian law.[159]

It is conceded that these are downsides if trusts claims are governed by property choice of law rules. However, it is submitted that the alternative

[158] Option (iii) is not within the scope of this paper; however, the arguments set out here in favour of treating trusts claims as part of the law of property obviously apply *a fortiori* for claims for legal title.

[159] A would only be an unsecured creditor in the eyes of Utopian law.

options, that is, treating trusts as part of the law of obligations, and treating trusts as a hybrid of the law of property and the law of obligations, would lead to much less satisfactory results. These two alternative choice of law routes have already been examined in detail above and it has been shown that they are ill-suited for application to trusts claims and are not jurisprudentially sound. In contrast, application of the property choice of law rules to trusts claims recognizes the fundamental proprietary nature of such claims, offers many advantages and is backed by some authority. This option is not flawless, but it will rarely be the case that a choice of law rule is able to cater for every eventuality that may arise. In the vast majority of cases, the application of the property choice of law rules would lead to the most satisfying result in that the decision reached will reflect the essential proprietary nature of trusts.

(c) Assets located in more than one jurisdiction

Millett LJ has rejected the application of the *lex situs* rule in the context of a presumed resulting trust where A provided money to B to buy land in his name.[160] His Lordship argued that application of the *lex situs* would lead to 'bizarre results' if the assets involved land in more than one jurisdiction as 'the consequences of the same arrangement might then be different in relation to the different properties acquired'.[161]

Let us say that A transfers land located in different jurisdictions to B pursuant to a failed contract. A then alleges that the properties are held on trust for him. Here, the importance of paying heed to the *lex situs* makes the splitting up of the consequential resulting or constructive trust not so much 'bizarre' as necessary. The issue as to whether A has a beneficial right in each parcel of land ultimately has to be decided in conformity with the *lex situs* of each state respectively.

This imperative is admittedly less when the assets concerned are moveables. However, as a matter of principle, since questions of title are proprietary in nature, it is suggested that the respective property choice of law rules should be applied when the assets, moveables or immoveables, or a mixture of both, are located in different jurisdictions. This position is consistent with the general property choice of law rules. The justifications for application of the *lex situs* when a proprietary issue is at stake should not be overlooked merely for the convenience of having the same law govern questions of title to different assets in different jurisdictions.

[160] *Lightning v Lightning Electrical Contractors Ltd*, unreported 23 Apr 1998.

[161] See also *Webb v Webb (Case No C-294/92)* [1994] I ECR 1717; [1994] QB 696, Opinion of Adv Gen Darmon, para 61.

V. CONCLUSION

The common law choice of law rules for resulting and constructive trusts represent an area which has garnered too little attention from private international law lawyers. The common law is very relevant as the choice of law rules set out in the Hague Trusts Convention are inappropriate for resulting and constructive trusts and the Recognition of Trusts Act 1987 fails to extend the Convention's scope to foreign resulting and constructive trusts.

It has been argued that trusts claims involve a proprietary issue at heart; this is so even for civil law trusts and analogues which prima facie may appear to reject the concept of the 'beneficiary' having a proprietary entitlement to the trust property. It has been submitted that one should characterize trusts claims in accordance with their underlying proprietary nature and hence apply the property choice of law rules. It has been demonstrated that such a choice of law rule is practical, jurisprudentially sound, and represents the best option available.

This conclusion has particular repercussions for proprietary restitution in private international law. Claims for proprietary restitution are almost all in equity[162] and will therefore involve trusts claims. As discussed earlier, some have asserted that the unjust enrichment choice of law rules should apply as it is argued that resulting and constructive trusts are imposed to reverse unjust enrichment.[163] Others would instead argue that proprietary restitution forms a separate category which is independent of unjust enrichment.[164] However, the choice of law rules for proprietary restitution are not clear.[165] In view of all this uncertainty, debates as to the correct cause of action for such claims or taxonomy of the law of restitution should be marginalized when determining the applicable choice of law rules. At the heart of trusts claims is the issue of whether property is impressed with a trust, that is, whether someone has absolute title over property. This is an essentially proprietary issue and should be categorized as such for choice of law purposes. It may well be that upon the application of the property choice of law rules, the *lex situs* will thereon dictate that unjust enrichment has to be established before a trust arises; but this is an issue to be determined by the *lex situs* as the *lex causae*, and should not be an issue at the choice of law stage. The approach suggested here, that is, choosing to characterize the response, has the added advantage of side-stepping the problems caused by the state of flux within the law of restitution.

[162] Panagopoulous (n 28), p 67.
[163] ibid 66–76.
[164] Virgo (n 32), ch 20.
[165] This category has been ignored in *Dicey and Morris's* Rule 200, para 34R-001, 1485, and Art 9 of the proposed Rome II Regulation, COM (2003) 427. Both formulations seem to be based on the idea of the law of restitution as comprising solely of personal obligations to make restitution in order to reverse the defendant's unjust enrichment. Although Rule 200(2)(b) offers a role for the *lex situs* with respect to a restitutionary obligation arising in connection with a transaction concerning land, it is clear from the explanatory text that this is aimed at a personal obligation arising from ownership of land and not questions of title over the land: para 34-028, 1497.