

CHARACTERIZATION OF FAMILY NAME UPON MARRIAGE IN PRIVATE INTERNATIONAL LAW

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- abstract-

This article is an examination of the issues characterization in private international law. It provides a comparative overview of the current situation in the EU Private International Law and in the Macedonian Private International Law. The fundamental importance of characterization in private international law is derived from the postulate that characterization controls the solution of the conflict of laws. When a court has to determine the law applicable to a factual situation, it must first place the specific action into its correct legal category before selecting the applicable law.

I. Introduction

Characterization refers to the allocation question raised by factual situation before the court to its correct legal category and its object is to reveal the relevant rule or rules for the choice of law. It deals with the process of assigning a factual situation to a proper legal category. In those cases where a different result would be achieved depending on which of several possibly relevant laws is applied, characterization reveals the relevant rule for the choice of law.

The problem of characterization must be distinguished from a similar problem which is the incidental or preliminary question,³ where in a case involving private international law, there is not only one main question before the court, but also a number of subsidiary issues. After the law governing the primary legal question has been selected by applying the relevant conflict rule, a second choice-of-law rule may be required in order to answer subsidiary questions affecting the main issue.¹

The issue of personal names is a sensitive one, as a name often represents a person's relation to his or her background; sometimes it is even a sort of heirloom passed from one generation to another within one family, and often by hearing the name it is possible to determine the origin of its bearer. Moreover, as states, "a personal name has various functions; it symbolizes the uniqueness of an individual, as well as represents its social relations". As a person is a social being, personal names often show that a person belongs to a particular community; sometimes even their social status may be evident merely from their name. Names differ across cultures,

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¹ Veronique Allarousse, A Comparative Approach to the Conflict of Characterization in Private International Law, 23 Case W. Res. J. Int'l L. 479 (1991).

and even within one culture personal names have undergone serious changes directly related to changes in the culture per se.²

In comparative law, theories on the cultural origin of law warn the comparative lawyer that even when legal rules share the same wording it is necessary to look at different factors – or formants, in the terminology developed by Sacco – to have a realistic look at the functioning of a legal system.³ For example, in Spanish-speaking countries, newborn receive the first surname from the father and the second surname is the first surname of the mother:

- *Juan García Fernández + Marta López González => Martín García López*

On the other hand, in Portuguese speaking countries, newborn receive the first surname from the mother and the second surname is the first surname of the father:⁴

- *Juan García Fernández + Marta López González => Martín López García*

The sense of personal identity and uniqueness that a name gives us is at the heart of why names interest us and why they are important to us as individuals and to our society as a whole. Thus, it may be pointed out that personal names are part of an individual's rights, including the right to private life or privacy.

II. Family names – Internal Considerations

Personal names perform various functions; they are means of identification of a person among other individuals, as well in personal documents issued to the individual. The name a person acquires immediately after birth becomes a very important part of their life, thus becoming an essential part of their rights. Nevertheless, personal names are language units as well, they are to be included in various documents, such as diplomas and certificates; therefore, they are bound to occur in sentences, either written or spoken, thus becoming part of the language they are used in.⁵

Under national substantive law, typical components of a name are given **name + family name**. A name serves as important symbolic representations of individual identity and as a crucial tool for documentation of persons residing within state borders. In particular, substantive laws governing names have function as a form of social control - the personal name cannot offend the public morality. Thus, it is very important for a state to strike a balance between the individual right of a name, the cultural heritage of the individual and the public moral and interest.

III. Family names – International Considerations

Harmonization and unification regarding personal names is a process that is evolving step by step, not only at European, but also at international level. In the context of European law, despite

² See Feldman, Harold, *The Problem of Personal Names as a Universal Element in Culture*, American Imago 16 (1959): 237-250.

³ Guido Comparato, *Nationalism and Private Law in Europe*, Oxford, 2014, p. 191.

⁴ For a comparative view, see : A GUIDE TO NAMES AND NAMING PRACTICES, available at: https://www.fbiic.gov/public/2008/nov/Naming_practice_guide_UK_2006.pdf.

⁵ Karina Naumova, Legal aspects of transcription of personal names in the Latvian language, RGSL RESEARCH PAPERS NO. 11, Riga, 2014, p. 1-2.

increasing acceptance of the plural character of law, European private law remains largely organised around ideas of unity and related hierarchical structures, even in its post-national shape.⁶ Hence, the European Union (EU) has a limited role in family law matters and matters regarding personal status.⁷

On international level, the Commission d'état civil – CIEC is the most important international organisation that deals with the civil status of the individuals. CIEC is an intergovernmental organisation whose aim is to facilitate international co-operation in civil-status matters and to improve the operation of national civil-status departments.⁸ Until today, CIEC has 10 Member States⁹ and 9 Observer States.¹⁰

Since its creation the CUEC has adopted 34 multilateral Conventions, which are legally binding instruments. The depositary of the Conventions, of which 28 are currently in force, is the Swiss Federal Council. The object of the Conventions is either to harmonise the substantive law of the member States in civilstatus matters or to facilitate the functioning of civil status across frontiers, notably by means of normalised multilingual documents, thereby simplifying formalities for persons living abroad. Being confronted with the problem of the increasing number of languages to be used in the multilingual forms, the CUEC drew up Convention No 25, signed at Brussels on 6 September 1995, creating a system of code numbering for the entries appearing in civil-status records and documents. The Conventions adopted since that date include coded appendices (for example, life certificate, certificate of nationality).¹¹

In the field of in the field of personal name, flowing CIEC conventions are the most important:

1. Convention relative aux changements de noms et de prénoms, signée à Istanbul le 04.09.1958 / Convention on changes of surnames and forenames;
2. Convention sur la loi applicable aux noms et prénoms, signée à Munich le 05.09.1980 / Convention on the law applicable to surnames and forenames;
3. Convention relative à la délivrance d'un certificat de diversité de noms de famille, signée à La Haye le 08.09.1982 / Convention on the issue of a certificate of differing surnames;
4. Convention sur la reconnaissance des noms, signée Antalya le 16.09.2005 / Convention on the recognition of surnames.

⁶ Leone Nigia, Prologue: Of Pluralism and European Private Law, published in Pluralism and European Law, Oxford, 2012, p.2.

⁷ For more see: <https://www.gov.uk/guidance/eu-law-and-the-balance-of-competences-a-short-guide-and-glossary>.

⁸See:

http://www.ciec1.org/SiteCIEC/PAGE_Principale/0CsAAPKswjx2VkfSTUVSQ3RpEwA?WD_ACTION_=MENU&ID=A37&_WWREFERER_=http%3A%2F%2Fus.search.yahoo.com%2F&_WWNATION_=5.

⁹ Member States : Belgium, France, Greece, Luxembourg, Mexico, the Netherlands, Poland, Spain, Switzerland and Turkey.

¹⁰ States with observer status: Cyprus, the Holy See, Lithuania, Moldova, Peru, Rumania, the Russian Federation, Slovenia and Sweden.

¹¹See:

http://www.ciec1.org/SiteCIEC/PAGE_Principale/0CsAAPKswjx2VkfSTUVSQ3RpEwA?WD_ACTION_=MENU&ID=A37&_WWREFERER_=http%3A%2F%2Fus.search.yahoo.com%2F&_WWNATION_=5..

Upon succession of former Yugoslavia, Republic of Macedonia is a party to only two conventions:

1. Convention relative à la délivrance de certains extraits d'actes d'état civil destinés à l'étranger, signée à Paris le 27.09.1956 / Convention on the issue of certain extracts from civil status records for use abroad (Convention n.1)
2. Convention relative à la délivrance d'extraits plurilingues d'actes de l'état civil, signée à Vienne le 08.09.1976 / Convention on the issue of multilingual extracts from civil status records (Convention n. 16).

IV. Characterization of Family names – PIL consideration

In the context of PIL, when a given PIL rule leads to the conclusion that a court in a given State (X) is competent to adjudicate a private law dispute with an international element, that decision can usually be traced to the existence of a certain connection – the existence of one or more connecting factors – which serves to provide a legally sufficient link between the forum State (and its courts) on the one hand and the parties and circumstances of the particular case on the other. Similar connecting factors are also at work when a competent court in a given State (X) decides to choose and apply the substantive law of that State or of a different State (Y).¹² Each country has its own conflict of laws rules dealing with these issues, and their rules can differ considerably.¹³

The most remarkable evolution of private international law in the past two decades appears to have been its swift and intense Europeanization. Today, private international law is to a large degree European private international law. The impact of the rule of non-discrimination, of fundamental rights and, especially, mutual recognition even mark a kind of European conflict revolution.¹⁴

Following conflict of law rules can be identified in the area of personal names:

1. Conflict of law rules for personal status (determining the applicable law for personal name);
2. Conflict of law rules for marriage (whose personal name upon marriage);
3. Conflict of law rules for parent-child relationship. Adoption (whose personal name upon birth).

First problem in the process for determining the applicable law for the personal names is the problem of classification/characterisation – which conflict of law rule shall be applied regarding family name upon marriage and birth? The problem of characterisation is one of the most

¹² J. Lookofsky, K. Hertz, *EU-PIL European Union Private International Law in Contract and Tort* (JurisNet, Copenhagen 2009) p. 15.

¹³ M. James, *Litigation with a Foreign Aspect. A Practical Guide* (Oxford University Press, 2010) p. 5.

¹⁴ J. Meeuen 'Instrumentalisation of Private International Law in the European Union: Towards a European Conflict Revolution' 9 *European Journal of Migration and Law* (2007) p. 287.

difficult in the conflict of laws, and it has generated an enormous amount of writing in many languages. It might well be thought that its difficulties and obscurities increase in direct proportion to the amount of juristic discussion of it. There has been considerable difference of opinion as to how the problem should be solved. The courts are usually criticised for solving it the wrong way and nearly all the cases referred to above have been the subject of severe criticism. It is true that the solutions arrived at have caused, or are capable of causing, considerable difficulties. This is so much so that in some areas, legislation has been used to turn the law around.¹⁵

Various solutions to the problem of characterisation have been put forward. In the context of the personal names, the *lex fori* theory is to be applied.

i. Classification/characterisation under the *lex fori* theory

This was proposed by the German and French writers, Kahn and Bartin, who ‘discovered’ the problem in the 1890s. It has been the prevailing theory in continental Europe, and by and large, has been adopted in practice by the English courts. According to this theory the court should characterise the issue in accordance with the categories of its own domestic law, and foreign rules of law in accordance with their nearest analogy in the court’s domestic law.¹⁶ forum or of another country depends upon the nature of a particular legal relationship, the law of the forum must decide what the nature of the relationship is. In a nutshell, a court, when dealing with the question of characterization, must always (subject to certain exceptions) decide the matter on the basis of the concepts of its own domestic law. Bartin would apply the forum law in the case where the legal relationship has no real connection with the forum state, and the foreign country (or countries) with which it is connected, qualifies it in a different manner.¹⁷

Objections raised to the *lex fori* theory are that its application may result in a distortion of the foreign rule and render it inapplicable in cases in which the foreign law would apply it, and vice versa.¹⁸ This interpretation can only be given by the legal order which has enunciated such a rule. This argument has been justified by the existence of a sovereign necessity to limit the ambit of each law. The characterization process by the *lex fori* is an inescapable consequence of the domestic nature of the systems of conflict of laws.

If we apply the *lex fori* theory in the process for determining the applicable law for personal names, we can identify two possible connections: a. Connection per family and b. Connection per person (use of one connecting factor for personal status; use of conflict of law rule for personal names (one rule fits all) and use of conflict of law rule for personal names (Kagel’s ladder)).

a. Connection per family

The use of the contention per family is part of the traditional approach where the personal name is considered to be part of the effects upon marriage and part of parental rights. It means that the court or other authority will use the ***reattachment accessorie mechanism*** (strong influence from

¹⁵ Pippa Rogerson, *Collier’s Conflict of Laws*, Cambridge, 2013, p. 268.

¹⁶ Ibid.

¹⁷ Lorenzen, *The Theory of Qualifications and the Conflict of Laws*, 20 COLUM. L. REV. 246 (1920).

¹⁸ For more see: Gavroska Poliksena, Deskoski Toni, *Меѓународно приватно право*, Скопје, 2011, p. 243-245.

substantive law) in the process for determining the applicable law for personal names. Thus, the use *reattachment accessorie mechanism* for family names upon marriage will result to apply for family name of a person – the rules regulating the effects of marriage in general (personal effect of marriage).

The *reattachment accessorie mechanism* was used in Germany until 1986. In a landmark decision on this issue, the Bundesgerichtshof, the highest German Court in civil matters, came to the conclusion that the change of name as a consequence of marriage falls both under the conflicts norm concerning the status of a person and the rules regulate the effects of marriage in general. The Court held that in principle the law governing the personal status applied, and the wife was entitled to bear at her choice the name accorded to her by the law governing the effects of her marriage in general.¹⁹ Same approach was used in Republic of Macedonia until the adoption of the new PIL Code from 2007. Namely, under article 42 (Personal and statutory property relations of spouses) the applicable law for the personal name upon marriage was determined in accordance with the *reattachment accessorie mechanism*.²⁰ This approach is still in force in Serbian PIL Law (under article 36).

b. Connection per person

Connection per person can be analyzed from 3 different positions:

- use of single connecting factor for personal status;
- use of conflict of law rule for personal names (one rule fits all) and
- use of conflict of law rule for personal names (Kagel's ladder).

b (i). Connection per person - use of single connecting factor for personal status

Connection per person – use of single connecting factor for personal status is a PIL approach where the personal name is considered to be part of the personal status of persons. It means that the issue of a person's right to a name can be classified under the personal status; the applicable law is therefore the law governing a person's legal capacity and capacity to execute acts in law (the *lex causae* of the personal status). For example, Czech²¹ and Swedish²² PIL classified the questions of name as belonging to the law of personal status.

b (ii). Connection per person use of conflict of law rule for personal names (one rule fits all)

¹⁹ Rainer Gildeggen, Jochen Langkeit, *The new conflict of laws code Provisions of the Federal Republic of Germany: introductory comment and Translation*, GA. J. INT'L & ComiP. L., 1986, p. 232.

²⁰ Article 42 (1) Personal relations between the spouses, as well as their statutory patrimonial relations are governed by the law of the state of which both spouses are nationals. (2) If the spouses are nationals of different states, the law of the state in which both of them they have their domicile will apply. (3) If the spouses have neither common nationality nor domicile in the same state, the law of the state will apply in which they both had the last common domicile. (4) If the applicable law cannot be determined according to paragraphs (1), (2) or (3) of this Article, the law of the Republic of Macedonia will apply.

²¹ See: http://ec.europa.eu/civiljustice/applicable_law/applicable_law_cze_en.htm#III.3.

²² See: http://ec.europa.eu/civiljustice/applicable_law/applicable_law_swe_en.htm.

Connection per person use of conflict of law rule for personal names (one rule fits all) is a modern PIL approach. In practice this type of determining the applicable law will lead to the application of specific conflict of law rule irrespective of the classification under the substantive law. Several single connecting factors can be used: *lex nationalis* or *lex domicilii* of the person. It must be pointed out that same conflict of law rule will apply to all name questions (family name upon birth, marriage, adoption). This approach is contained in the Macedonian PIL Act. Under Article 19²³ the questions relating to personal names shall be governed by the law of the State of which the person whose personal name is being designated or altered is a national.

b (iii). *Connection per person - use of conflict of law rule for personal names (Kagel's ladder)*

Connection per person - use of conflict of law rule for personal names (Kagel's ladder) – is a Post Modern PIL approach, under which the question for personal names is classified as autonomous one. It reflects the best practice to deal with personal names as a individual rights. Therefore, in all jurisdictions where this approach is in force, there is also a conflict of law rule for the protection of the personal names. Namely, the protection of personal name is under the conflict of law rules for non-contractual obligations.

Several connecting factors can be used in the cascade conflict of law rule. *Lex nationalis*, *lex domicilii* and *habitual residence* are among the connecting factors that are commonly used.

"Nationality" means the legal bond between a person and a State and does not indicate the person's ethnic origin.²⁴ Nationality also represents a person's political status, whereby he or she owes allegiance to some particular country. Apart from cases of naturalisation, it depends essentially on the place of birth of that person or on his or her parentage.²⁵ In Continental Europe, most civil laws define nationality as a personal quality, providing that the national law of a person governs his family relations and all matters linked – directly or indirectly – to the personal status. It also holds that the national law best responds to the expectation of a person who relies on the law in planning his or her family, even if the conduct takes place wholly within another state's jurisdiction. The concept of nationality as a person-bound quality was first introduced with the Napoleonic civil code.²⁶

We can point out to several factors that have made nationality an important connecting factor in matters relating to personal status such as personal identity. This concerns first of all the stability of nationality as compared to habitual residence (it is habitual residence rather than domicile counterpart of nationality as a connecting factor). The element of stability, in turn, is closely linked to legal certainty and predictability. Use of nationality instead of habitual residence is also

²³ See Article 19 of Macedonian PIL Act.

²⁴ Article 2 (a) of the European Convention on Nationality; also Article 2 of the Law on Nationality of Republic of Macedonia from 2004.

²⁵ <http://www.lawreform.ie/fileupload/consultation%20papers/wpHabitualResidence.htm>, para. 15. (4.7.2015)

²⁶ M.-C. Foblets, *Conflict of Laws in Cross-Cultural Family Disputes. Choice-of-Law in a time of unprecedented mobility* (1997), p. 50.

considered to be more appropriate as it takes into account a person's cultural identity, thereby paying due respect to fundamental human rights.²⁷ International harmony may be ensured at the outset when the PIL rules of the countries in question employ the same connecting factor. Nationality, seen from the point of view of Mancini and his followers, may be regarded as naturally contributing to this goal, since it represents, at least in the field of personal and family law, a connecting factor based on rational grounds.²⁸

On the other side, The ECJ's complex jurisprudence demonstrates that Article 12 EU prohibits any disparate treatment mandated by a Member State's national law if it arises from subjective connecting factors that cannot be justified objectively; however, it does not prohibit any differentiation arising from subjective connecting factors that are objectively justified. In this framework, the doctrine has raised the question of whether the adoption of the nationality connecting factor as part of the neutral rules of conflict is compatible with the Community principle of non-discrimination.²⁹

Since the 1950's, however, domicile became more popular as the connecting factor for personal and family matters. Domicile is a "connecting factor" or link between a person and the legal system or rules that will apply to him in specific contexts, such as the validity of a marriage, matrimonial causes (including jurisdiction in, and recognition of, foreign divorces, legal separations and nullity decrees), legitimacy, succession and taxation. Thus, for example, the law of the country of the domicile of a person will determine the construction and the legal effect of his personal name.

Habitual residence has for some time been used as a connecting factor. It has played a most important role in the Conventions of the Hague Conference on Private International Law, since it is perceived as providing an alternative to nationality and as being free of the difficulties associated with domicile, such as those in regard to intention, origin, dependency and prolepsis.³⁰

The term habitual residence was used for the first time in a number of bilateral treaties on Legal Aid in which the authority of the habitual residence of the applicant was designated as the proper authority competent to issue a certificate of indigence. A similar provision is to be found in the first Hague Convention in Civil procedure of 14 November 1896. Why preference was then given to this term rather than the usual reference to domicile, has not become apparent.

²⁷ W. O. Vonk, *Dual Nationality in the European Union, A Study on Changing Norms in Public and Private International Law and in the Municipal Laws of Four EU Member States*, 2012, p. 117.

²⁸ P. Franzina, 'The Changing Role of Nationality in International Law' in: A. Annoni, S. Forlati eds, *The evolving role of nationality* (New York, 2013) p. 198.

²⁹ B. Ubertaini, 'The Inapplicability of the Connecting Factor of Nationality to the Negotiating Party in International Commerce' *10 Yearbook of Private International Law* (2008), p. 716. According to Ubertaini, p. 719: "I believe that the application of the nationality connecting factor is compatible with Community law when neutrally used to determine the law applicable to capacity, like in the Italian private international law's provision on personal status".

³⁰ <http://www.lawreform.ie/fileupload/consultation%20papers/wpHabitualResidence.htm>, para. 18.

Various authors have attempted to define further what factual situation “habitual residence” is supposed to denote. F.A.Mann does not see any difference of principle between “habitual residence” and domicile.³¹ In fact, the only difference is that in order for one person to obtain “habitual residence” no formal condition regarding administrative registration or obtaining a residence permit. For example, in the new Romanian Private International Law, habitual residence, represents, for natural persons, the synonym for domicile.³² In *Cruse v. Chittum*, an early case which concerned the recognition of an overseas divorce, habitual residence was said to denote “regular physical presence which must endure for some time. In several cases, the courts have said that is a question of fact; this has turned out to be over-optimistic and, unavoidably, legal rules have developed.³³

c. Article 20 of Draft Macedonian PIL Code – at first glance

Connection per person - use of conflict of law rule for personal names (Kagel’s ladder) can be found in article 20 of Draft Macedonian PIL Code. Under this article the name of a person and the change of the said name shall be governed by the national law of the person. The effect of the change of nationality on the name shall be determined by the law of the State whose nationality the person has acquired. Where any such person is stateless, the effect of the change of his or her habitual residence on the name shall be determined by the law of the State in which the said person establishes his or her new habitual residence. The protection of the name shall be governed by the law which is applicable according to the provisions for non-contractual obligations. The name and the change thereof may be governed by Macedonian law, should this be requested by a person who is habitually resident in the Republic of Macedonia.

V. INTERNATIONAL APPROACH REGARDING FAMILY NAMES

i. Applicable law for family names in Germany

Under German private international law, legal questions raised by the personal legal status of a natural person are governed by the law of the state to which the nationality of the person refers. Where a person has more than one nationality, section 5(1), first subparagraph EGBGB stipulates that reference must be made to what is known as the effective nationality, i.e. the nationality of the state with which the multiple national is most closely connected. If, by contrast, a person with multiple nationality also has German nationality, section 5(1) second subparagraph provides that this nationality alone shall apply. The nationality criterion is applicable as regards

³¹ Ibid, p. 428.

³² C. Darisecu, ‘New Romanian Choice-of Law Rules on Marriage Effects’, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1537200, p. 92.

³³ J. G., Collier, *Conflict of Laws*, Cambridge, 2001, p. 55.

the right to bear a name (for details see section 10 EGBGB) and the legal capacity of natural persons.³⁴

ii. Applicable law for family names in Spain

The Munich Convention of 5 September 1980 applies to surname and forenames, under which the surname is determined by the national law.

In conjunction with the above, Article 9 of the Civil Code states that the applicable law is determined by the nationality of the natural persons and it governs capacity and civil status, family rights and obligations and succession. Dual nationality as provided for by Spanish law follows what is laid down in international treaties. If they make no provision, preference is given to the nationality corresponding to the last habitual residence and failing this, the last nationality acquired, unless one of them is Spanish, which takes precedence. For persons of indeterminate nationality (they cannot prove it, hence they are not stateless) the law of the place of habitual residence is applied as the personal status. Article 12 of the New York Convention of 28 September 1954 applies to stateless persons, under which the applicable law is the law of the stateless person's country of domicile or, failing that, the law of his country of residence. Lastly, the personal status of legal persons is determined by their nationality and it governs everything to do with capacity, establishment, representation, operation, transformation, winding-up and closure, although the respective national laws are taken into account in the case of mergers of companies of different nationalities. Companies that have their domicile in Spanish territory have Spanish nationality, irrespective of the place where they were established, although companies whose principal establishment or enterprise is situated in its territory must be domiciled in Spain.³⁵

iii. Applicable law for family names in Italy

Personal status and capacity and the existence and content of personal rights, including the right to a name, are governed by the national law of the interested party, except for the rights that derive from family relationships, to which the referral rules laid down by Act 218 /1995 apply on a case-by-case basis.³⁶

vi. Applicable law for family names in Netherlands

A person's status is in principle governed by his or her national law. For Dutch citizens this is stipulated in Article 6 of the AB; for non-Dutch citizens, his or her status must similarly be deduced from this provision. There are many exceptions from Article 6 of the AB in separate laws.

³⁴ See http://ec.europa.eu/civiljustice/applicable_law/applicable_law_ger_en.htm

³⁵ See: http://ec.europa.eu/civiljustice/applicable_law/applicable_law_spa_en.htm.

³⁶ See: http://ec.europa.eu/civiljustice/applicable_law/applicable_law_ita_en.htm

The provisions of the Names Convention have been incorporated in the Family Names and Given Names (Conflict of Laws) Act. This Act also stipulates additions that are specific to Dutch private international law. Pursuant to Article 1 of the WCN, a person's name is governed by his or her national law, including the provisions of private international law under that law. If a person holds both Dutch and a foreign nationality, Dutch law applies (Article 2 of the WCN). If the person holds more than one nationality, but not Dutch nationality, the law of the nationality with which the person, all circumstances taken into consideration, has the strongest ties (Article 1 paragraph 2 of the WCN) applies. Article 5b of the WCN governs the choice of surname in international cases.³⁷

v. Applicable law for family names in Poland

In general, personal status is governed by the personal law of the persons concerned, as stipulated in the conflict of laws rule in the Portuguese Civil Code. Personal law is the law of the individual's nationality or, in the case of a stateless person, the law of the place of his habitual residence (in the case of a person of full age) or of legal domicile (in the case of a minor or a person with judicial disability). In the case of a person with no habitual residence, personal law will be that of the place of occasional residence, or, where this cannot be determined, the law of the place where the person is located at the time. Personal law for legal persons is that of the State in which their principal and effective head office is located. The transfer of head office from one State to another does not cause loss of legal personality, if the laws of both countries are in agreement on this point. The merger of entities with different personal laws is governed by both personal laws concerned. The personal law of international legal persons is the one indicated in the agreement setting them up, or in their Articles of Association. If no law is indicated, the law of the country in which the principal head office is located will apply.³⁸

vi. Applicable law for family names in Finland

What law to apply to the determination of surnames is prescribed in section 26 of the Names Act. If a person is habitually resident in Finland at the time when grounds for the determination of a surname appear or at the time when an announcement on the surname is made, the surname shall be determined according to Finnish law. If a person is not habitually resident in Finland, the surname shall be determined in accordance with the surname law that a competent authority is to apply in the state where the person habitually resides at the said time.³⁹

vii. Applicable law for family names in Sweden

Swedish private international law regards questions of name as belonging to the law of personal status. This means, for example, that the taking by one spouse of the other spouse's name is not classified as a matter of the legal effects of marriage in the personal sphere. According to

³⁷ See: http://ec.europa.eu/civiljustice/applicable_law/applicable_law_net_en.htm

³⁸ http://ec.europa.eu/civiljustice/applicable_law/applicable_law_pol_en.htm.

³⁹ http://ec.europa.eu/civiljustice/applicable_law/applicable_law_fin_en.htm.

Section 50 of the Personal Names Act (1982:670), the Act does not apply to Swedish nationals who are habitually resident in Denmark, Norway or Finland; it may be concluded *a contrario* that it does apply to Swedish nationals elsewhere. Section 51 states that the Act also applies to foreign nationals who are habitually resident in Sweden.⁴⁰

VI. Conclusion

The problem of qualification is one of the classic problems of conflict of laws and indeed has been characterised by leading scholars as the ‘fundamental’ problem. In short, it is about how a particular legal relation should be conceptualized or, more specifically, whether it should be qualified as a relationship of law and fact or rather as a conflict of laws.

It should be kept in mind that the problem of qualification can arise when different countries use the same conflict rules, and, furthermore, the same concepts. But even the presence of the same rules does not lead to the same choice of the applicable law. Several PIL approaches can be used in the process of determining the applicable law for family names upon marriage. First one is the use of connection per family and the second one is connection per person (use of single connecting factor for personal status, use of conflict of law rule for personal names (one rule fits all) and use of conflict of law rule for personal names (Kagel’s ladder)).

⁴⁰ http://ec.europa.eu/civiljustice/applicable_law/applicable_law_swe_en.htm.