Some problems in the application of South African private international law*

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Reference to foreign law in matrimonial matters

By established case law, the proprietary consequences of a marriage are governed by the law of the husband's domicile at the time of the marriage, with respect both to movable and immovable property, whenever acquired. The original domicile remains the connecting factor, even if the spouses subsequently acquire a new domicile, for instance by immigrating to South Africa. This is known as the principle of immutability. Moreover – and this is of great practical importance – the reference to the law of the husband's domicile at the time of the marriage includes a reference to that country's transitional law, and generally to the lex causae. Although it may seem odd to the parties concerned that they are subjected to the changes in the law of a country from which they may long since permanently have departed – changes of which they may never even have heard – it is clear that South African case law, in accordance with the law of most other systems, will not freeze the law of the husband's domicile as it was at the time of marriage. Even though the spouses may not be aware of changes in the foreign law affecting them, "the balance of justice and convenience" makes it preferable to apply the principle that a reference to a foreign lex causae includes its transitional law.

The South African law of conflicts will not accept what is known as renvoi; that is, our reference to the foreign law is understood as a reference to that foreign law's intrinsic provisions only, and not to its conflicts law

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1 Frankel's Estate and Another v The Master and Another 1950 1 SA 200 (A); Sperling v Sperling 1975 3 SA 707 (A).
2 Chiwell v Carlyon (1897) 14 SC 61.
3 Brown v Brown 1921 AD 478 at 482; Anderson v The Master and Others 1949 4 SA 660 (E); Black v Black's Executors (1884) 3 SC 200.
4 Sperling supra at 721.
5 Per Corbett J in Sperling at 724; the examples given by the judge at 721 are very persuasive.
as well. This facilitates the choice of the applicable foreign law. Were we to include the foreign conflict rules in our reference to the foreign law, we would have to deal with some rather complicated situations. For instance, in the case of West Germany, the statutory conflict rule would be that not the matrimonial domicile, but the nationality of the husband determines the applicable law. However, one would also have to take into consideration that the German Supreme Court and the Federal Constitutional Court have most recently held this provision unconstitutional and void by virtue of the German constitution’s guarantee of equality of the sexes. By excluding the foreign conflict rules from our reference to the foreign law, we are apart from several other inconveniences, for the time being safe from such emancipatory confusion in our private international law.

The creation of lacunae by a reference to the foreign law

In Libya and in Egypt, as in most other Moslem countries, the relevant principles of private law do not regulate personal and family law, but instead refer these matters to the religious law of the persons concerned. In Egypt this principle derives from the edict of the Sultan of 856 and, more recently, from article 6 of Act 462 of 1955:

“Sentences in matters of personal status (ie family law and succession) of non-moslem Egyptians belonging to the same religion and rite . . . must be made in accordance with the religious law of the parties, unless it is inconsistent with the ordre public”.

If the parties are not of the same religion, Moslem law will apply. However, if they belong to one of the numerous religious minorities in Egypt – be it Greek-Orthodox, reformed Christian, seven different Catholic congregations, and the Jewish – our courts will have to accept this reference contained in the foreign law. It is not a case of renvoi, which we would not accept, but merely a reference within the jurisdiction of the chosen foreign legal system. Technically speaking it is the same type of further reference one finds in cases where the law of the United States applies and where marriage matters are regulated by the individual states’ legislations. This is also the case inter alia in the Soviet Union, Yugoslavia and Canada. As in Moslem countries, many black African countries will accept references to tribal law and custom. In a case reported from Ghana,

Frankel, Sperling and Anderson cases, supra.

See: Beschluss des Bundesverfassungsgerichts (BVerfG) of 22.2.1983, Juristenzzeitung (JZ) 1983 386, and the earlier sentence of the Supreme Court - Urteil des Bundesgerichtshofs of 8.12.1982, Neue Juristische Wochenschrift (NJW) 1983 1259. The first Appellate Court decision to invalidate art 15 Einführungsgesetz zum Bürgerlichen Gesetzbuch (EGBGB) providing for the connecting factor of the husband’s matrimonial nationality for the laws of matrimonial property, was the sentence of the Kammergericht (Berlin) of 19.4.1979, NJW 1979 1786. Until the passing of new legislation to replace art 15, the choice-of-law will be made primarily by the common nationality of spouses, or their last common nationality, and in the absence of both, by their last common place of residence. The same rules apply to the choice-of-law for divorce, as the relevant provisions in art 17 EGBGB were also invalidated (BGH, supra). The new bill on the reform of German private international law which will bring the German position closer to the connecting factor of domicile, in the terms outlined by the above case law, was introduced in parliament on 20 May 1983 (Bundesrats-Drucksache 222187).

Smith v Smith 1970 1 SA 146 (R).
for instance, the high Court had to request an opinion from the Regional House of Chiefs on the nature of a special engagement procedure not amounting to a promise of marriage, the Akotogyan, performed by presenting a bottle of spirits to the parents of a girl. In Nigeria section 13 of the Mid-Western State High Court Law 9 of 1964 provides:

“(1) The High Court shall observe and enforce the observance of every customary law which is applicable and is not repugnant to natural justice, equity and good conscience, nor incompatible either directly or by implication with any written law for the time being in force, and nothing in this law shall deprive any person of the benefit of any such customary law.

(2) Any such customary law shall be deemed applicable in causes and matters where the parties thereto are Nigerians . . .”

There are obvious difficulties in determining the relevant legal provisions in the circumstances of such references to remote laws. Our rules governing the burden of proof will provide for a practical solution in most cases, as will the doctrine of the application of the lex fori as the only law before the court, or, as it is called, the presumption that the (unknown) foreign law is the same as South African law. There is little to be added to the existing and comprehensive studies on this point. I should only like to emphasise that Kahn is entirely correct in referring to the latter presumption as a “fiction”. Certainly it would be naïve to believe that our lex fori would have the quality of a universal law, justifying such a presumption.

It is my view, however, that with regard to Moslem countries which make reference to religious law the questions cannot be decided in terms of a failure to prove or to discover the relevant applicable provisions. If a country’s law refers marriage matters to religious law, and if the religious law is Greek-Orthodox or Catholic or Christian Reformed, the fact is that there will be no provision to be proved or discovered. The Greek-Orthodox, the Catholic and the Christian Reformed ecclesiastical laws do not regulate the matter, but instead refer it back to the state’s jurisdiction. In Egypt and in similar countries this results in a lacuna in the law. If such lacuna is proved, then it is no longer consistent with the general principles governing the application and construction of any law to deal with the matter in terms of burden of proof principles or in terms of a fiction designed exclusively to resolve a case where an existing, but undiscovered, legal provision is referred to.

The correct answer is that such a lacuna must be dealt with as any other lacuna in the law would be. The court will have to make its own applicable law by way of analogy and by drawing conclusions from those general principles which appear relevant in terms of their relation to and identity with the facts. Such an approach is inherent in the ratio of private international law in general, that is that greater justice will be done by applying the law which is most closely related to the persons concerned, at

9Badu v Boakye 1975 1GLR 263.
10See E Kahn "What happens in a Conflicts Case when the Governing Foreign Law is not Proved?" (1970) 87 SALJ 145 et seq with all further references.
11Supra at 146.
least in matters of their personal and family relations. The principles of
devoted rights and comitae, as the basis of our private international law, will
certainly support the suggested approach to lacunae. In the United States
the "better law" doctrine clearly shows that the courts still have the power
to develop conflict of law principles. In West Germany where, given the
civil law tradition, one would expect judges to be reluctant to make their
own law, one finds that the "nearest law" approach has become common-
place in cases similar to the one discussed above. The Bavarian High
Appellate Court, for instance, has recently announced that it is a "general
principle to refer to the coinciding rules of several other related legal
systems, if the meaning of a foreign law cannot be clearly established.
The term coined by scholars for this method is "Annäherungsmethode". The
Reichsgericht has on occasion referred to Danish and Norwegian law in
order to determine the laws of Iceland and the Supreme Federal Court
has referred to French law in order to determine the laws of Syria. How-
ever, in a more recent case in 1978, the same Federal Supreme Court
decided in favour of the German lex fori by reasoning that this was
preferable and more practical, provided it would not result in avoidable
injustice to the parties. Nevertheless, the judgment did not in any way
decry the "nearest law" approach as invalid, and it should be noted that
these German cases have all dealt with the problem of an existing foreign
law which proved difficult to determine, and not with a lacuna in the
foreign law. I have referred to these cases merely as examples of the
application of the "nearest law" method in circumstances which do not
necessarily call for techniques other than the rules of burden of proof or
the fiction of an identity of the foreign law and the lex fori.

How would the "nearest law" approach operate in the Egyptian
cases? If the couple were Greek-Orthodox, one would look for Greek-
Orthodox churches elsewhere, and find that the laws of the Greek-Ortho-
dox Church of Cyprus contain provisions on the matrimonial proprietary
regime of spouses which provide for separation of property which provide for separation of property in the absence
of a contract. If this is the statutory expression of what is felt adequate by
the Greek-Orthodox religion, then it should be preferred to an application
of our lexi fori which would force community of property upon this
Egyptian couple of Greek-Orthodox faith. If the Egyptian couple were
Catholic, one could look at the coinciding principles on matrimonial
proprietary regimes in states which have or had adopted Catholicism as a
state religion, and develop an analogy on that basis.

In exceptional cases an alternative approach could be to abandon the
connecting factor of domicile, and to substitute for it the concept of
nationality. In his judgment in the English case of \textit{Indyka v Indyka} \textsuperscript{19}
Lord Reid held:

"So far as I have any knowledge of the matter the position appears to be that most
European countries attach more importance to nationality or sometimes residence,
and in the United States most if not all the states, by permitting the wife to have a
separate domicile for this purpose, do not regard the court of the husband's domicile as
the only court which has jurisdiction. But I would find it surprising if their Lordships
really thought that they were keeping in line with other countries. It is just possible
that they were actuated by the hope, common in Victorian times, that if England
showed the way others would see the light and follow: If so, any such hope has been
grievously disappointed."

Therefore, if in special cases, one is prepared to abandon, the doctrine of
domicile for the purposes of jurisdiction, why should one not be prepared
to follow new principles in dealing with a \textit{lacuna} in the foreign law? In
\textit{Indyka v Indyka} the court also looked at what the foreign court would
possibly have accepted as grounds for a decision in the matter. The
"foreign court" doctrine may draw our attention to the "nearest law"
method in cases of a \textit{lacuna} in the foreign law. Certainly the competent
Egyptian courts, when trying to determine the matrimonial property
regime of a Greek Orthodox couple married under Egyptian law, would
not apply South African law – as we would do if that couple happened to
come before a South African court – but would follow the principles
familiar to that religion.

In the case of a Jewish couple married in Egypt while domiciled there,
the same problem arises on a slightly different level of reasoning. The
Egyptian reference to the religious law leads us to discover that under
ancient Jewish law the proprietary regime was one of separation of prop­
erty with special dowry rights of the wife laid down in the "ketubah", and
certain other property of the wife being exempted from the full powers of
administration of the husband. \textsuperscript{20} However, Jewish case law has developed
a general presumption in favour of co-ownership by the spouses, and in
1973 the new Israeli Spouses (Property Relations) Law 5733 laid down a
proprietary regime of deferred community of property. While the appli­
cation of this act to the Jewish couple married under the laws of Egypt is
excluded, since it is not a Jewish religious law (as becomes clear from the
fact that it applies to all marriages concluded in Israel, whether Jewish or
not), the same does not hold true for the Jewish case law developed in
Israel. \textsuperscript{21} Should one refuse to apply that case law, i.e the presumption of co-

\textsuperscript{19}1967 2 All ER 689 at 700(D).
\textsuperscript{20}LOoukhan-Landau "Husband and Wife as Co-owners of Immovable Property" (1971) 6
Israel Law Review 4 487 et seq; Friedmann "Matrimonial Property in Israel" (1977) 41 Rabels
Z 112 et seq; both with further references.
\textsuperscript{21}LOoukhan-Landau supra; EE Schefelowitz \textit{Das religiöse Eherecht im Staat 1970} (Köln) 37 et
seq; DW Amram \textit{Jewish Law of Divorce According to Bible and Talmud} 2ed (1968) 111–127; FH
Strauss \textit{Israel} in Ferid-Firsching \textit{Internationales Erbrecht} vol 3 (1980) 140/34 par 52.
ownership, merely because its existence in Jewish rabbinical instances in Egypt cannot be proved? I do not think so, and in fact at least one South African authority, Erwin Spiro, has pronounced himself in favour of the "nearest law" approach in dealing with a lacuna resulting from a reference to a foreign law.22

Anomalies in the application of South African characterisation rules

Characterisation may be decided either in terms of the lex fori, or in terms of the foreign lex causae, either as far as it is relevant, or as a whole. The general view is that the characterisation issue must be decided in terms of the lex fori. One of the traditional arguments in favour is the following as summarised most recently by Kahn:

"If the court were to allow some other legal system to decide on the meaning of a connecting factor, it would be jettisoning its choice-of-law rule. Just as the lex fori selects the lex causae, so it defines it." 23

This reasoning has much to commend it as far as the characterisation of primary connecting factors - such as the concept of marriage itself - is concerned. If a foreign country considers some de facto or tribal union a "marriage" by applying to it the laws of husband and wife, this should not compel the South African legal system to expand its concept of marriage to a similar extent.

(a) Primary characterisation

The concept of "proprietary consequences of the marriage" is one of the primary connecting factors resulting from our application of the foreign law of the matrimonial domicile. What is the situation if, by our local characterisation we do not include in these concepts matters which are included in that concept in the foreign law? The German matrimonial proprietary regime of community of accrued gains (Zugewinngemeinschaft) provides some examples. Upon divorce, a regime which has basically been one of separation of property with certain reciprocal marital powers for both spouses while the marriage subsists, is transformed into a system of balancing of accrued gains. Any assets not listed in an inventory as assets acquired by one of the spouses prior to the marriage, or whose prior acquisition is not proved otherwise, become the accrued gains of either one of the spouses. If the accrued gains of one of the spouses exceed the accrued gains of the other, the less privileged spouse is entitled to take half of that excess.24

In addition to the equalisation of accrued gains, under the new concept of Versorgungsausgleich, the law reform of 1977 introduced with retro-

22Conflict of Laws 1973 42 et seq.
active effect, a similar equalisation procedure upon divorce with regard to pension and similar benefits. If the capitalised value of any kind of future pension rights of one spouse exceeds those of the other, they will be equalised by splitting the excess value in half and transferring that half to the pension fund of the less privileged spouse. If such a splitting of the pension benefits is not possible, the privileged spouse will have to establish (for the benefit of the less privileged spouse) a pension fund corresponding to the value owed, by making the necessary cash payment into such a fund.25 The various procedures and methods for valuation are complicated, and their application in Germany depends on details laid down in several related ordinances. The equalisation of benefits does not replace maintenance or even affect the spouses’ right to claim it from each other. In terms of section 1587o of the Civil Code the equalisation of benefits applies retroactively to all marriages, even if the matrimonial property regime of accrued gains was excluded in a marriage contract providing for a different regime, for instance for separation of property. The only way to exclude the application of the equalisation of benefits is to conclude a particular and explicit marriage contract, (either ante- or post-nuptial), to this effect in accordance with section 1408(2) of the Civil Code.

As explained earlier, the matrimonial property regime of a couple domiciled in South Africa but married while the husband was still domiciled somewhere in Germany, will be affected by the retroactive introduction of equalisation of benefits in German law, as the South African lex fori would characterise the German equalisation of pension benefits as being inseparably linked to the matrimonial property regime. Nevertheless, South African law would not allow this couple to exclude the operation of an equalisation of benefits in their marriage by the conclusion of a post-nuptial contract, as provided in the German law.

In Union Government (Minister of Finance) v Larkan and subsequently in Ex parte Marce and Ex parte Evans,26 it was held that it is not permissible to alter the matrimonial property regime by post-nuptial contract once the parties have assumed a South African domicile, even if such alteration would have been permissible under the foreign law of the matrimonial domicile. This view is generally supported by our leading authorities.27 Consequently, the rather frustrating result is that a German couple domiciled in South Africa is subjected to the new scheme of sharing of pension benefits, introduced retroactively in 1977 in Germany, and is denied the possibility of excluding its application to their marriage accorded German couples living in Germany. If they were to spend a holiday in Germany, or merely visit the German consulate in South Africa, they could validly exclude the application of the new scheme under German jurisdiction, but this would be of no force and effect under the jurisdiction of their South African domicile.

261916 AD 212; 1936 CPD 499; 1943 OPD 7 respectively.
However, even if they were not domiciled in South Africa according to our characterisation of “domicile”, for example by virtue of being merely “temporary residents” in South Africa, difficulties would still arise. If not domiciled in South Africa, they could enter into the post-nuptial contract provided for under German law. Because of the difficulties of ascertaining German law in South Africa, they would probably decide to conclude the contract either in Germany itself or before the German consulate. If they wished to make the contract effective as against third parties both under South African and German law, they would be required to have the contract registered with the competent authorities, either in Germany or in South Africa. A registration in Germany would not be possible as section 1578 of the Civil Code demands that the registration be made at the place of “residence”. Under the German concept of “residence”, which differs considerably from the South African notion of “domicile”, they would not possess such a place of “residence” in Germany as upon their departure to South Africa they would have been required to cancel their German residence with the competent “registration office” (Einwohnermeldeamt) in Germany.

Being unable to register the ante-nuptial contract in Germany, the German couple would try to register it in South Africa. However, they would discover that it is uncertain whether section 87(2) of the Deeds Registries Act 1937, which allows the registration of ante-nuptial contracts concluded outside the Republic, may be applied to persons not domiciled in South Africa. As our law stands, it is uncertain whether they would be successful in obtaining a court order compelling the Deeds Office to register such a contract.

Considering the aim of private international law, viz to provide for reasonable solutions, this result is unsatisfactory. The solution within the South African jurisdiction would be to abandon the obstructing primary characterisation of the matrimonial property regime, on the one hand, and of the capacity of the spouses inter se to conclude marriage contracts, on the other. If we were to include the latter in the regime of the matrimonial property and not subject it to the lex fori, couples married under a foreign law would not be denied their rights in personal matters under that foreign law simply by having come to live (temporarily) in South Africa.

(b) Secondary characterisation

“Secondary characterisation” owes its name to the fact that the
process takes places as the second step, after the characterisation of our conflict rules has established the applicable foreign law.

By saying that the proprietary relations of spouses must be decided in terms of the law of the husband's domicile at the time of the marriage, South African law fails to determine according to which law certain rights and principles of the foreign law can be regarded as matters of matrimonial property, or, for instance, of divorce or succession. This difference is important, as our conflict rules relating to divorce and succession differ considerably from those regulating matrimonial property. Divorce matters, including maintenance and custody, are governed by South African law, while in matters of succession it is the *lex ultimi domicilii* of the deceased that will determine the law with respect to movable property, and the *lex situs* with respect to fixed property. 32

The difficulties in characterising a right as a matrimonial property right for the purpose of our conflict rules arises from the fact that the straightforward and simple distinction between property in or out of community, as it still operates in the Republic, has become the exception on a global scale. Most countries have adopted mixed systems of community of acquests, deferred community of property, or community of accrued gains, and these systems operate on concepts unknown to our law.

West-Germany again provides two illustrative examples.

First, the abovementioned equalisation of pension benefits causes problems of secondary characterisation. A secondary characterisation according to our *lex fori* would presumably subject the matter to the choice-of-law rule governing matrimonial property. However, this is not the position of the German *lex causae*.

After an initial controversy in case law and amongst scholars it has been firmly established by the supreme court (*Bundesgerichtshof*) that the equalisation of pension benefits must be characterised as a consequence of divorce *sui generis*, and being related, in its effects, more to maintenance than to matrimonial property, it falls under the conflict rule determining the grounds and consequences of divorce. 33 Obviously, this is an example which makes a characterisation according to the *lex causae* most tempting. According to the German *lex causae* the equalisation of pension benefits would no longer from part of the matrimonial property regime, and the South African judiciary would be relieved of the legal nightmare of splitting pension benefits in South Africa, which under the existing South African pension laws appears virtually impossible.

The second example deals with the borderlines between matrimonial property and succession rights.

32E Kahn *op cit* at 634 et seq with further references.  
33BGHZ 75 247 at 251 et seq; BGH *NJW* 1982 520; *NJW* 1982 1940; *NJW* 1983 1259; "Scheidungsstatut" according to art 17 EGBGB, which in tum is unconstitutional and void — see *supra* note 7.
In a case of the termination of the marriage by the death of one of the spouses the dissolution of the German Zugewinngemeinschaft differs from the procedure explained above in the case of divorce. The surviving spouse is entitled to choose between what is called the “matrimonial property solution” (giiterrechtliche Lösung) and the “successory solution” (erbrechtliche Lösung), the latter being the normal case, that is, the case which comes into operation if the surviving spouse fails to take certain steps. The relevant legal provision, section 1371 of the Civil Code, reads as follows:

“§ 1371. [Equalisation of accrued gains on death]

(1) If the matrimonial regime is ended by reason of the death of one of the spouses, the equalisation of accrued gains is achieved by increasing the statutory share in the estate of the surviving spouse by one quarter of the estate; in this regard it is irrelevant whether the spouses made a gain in any individual case.

(2) If the surviving spouse is neither the heir nor the recipient of a legacy, then he is entitled to demand the equalisation of accrued gains according to the provisions of § 1373 to 1383; 1390; the compulsory portion of the surviving spouse or of another person entitled to a compulsory portion is in this case determined according to the statutory share the estate of the spouse without taking into account the increase.

(3) If the surviving spouse disclaims the inheritance, he is entitled to demand, in addition to equalisation of accrued gains, the compulsory portion even although according to the provisions of succession law it would not be due to him; this does not apply when he has waived his right to his statutory share in the estate or his compulsory portion by contract with his spouse.

(4) If the deceased spouse has descendants entitled to inherit, who are not descendants of the marriage which was dissolved by reason of the death of such spouse, or if there exist descendants entitled to substitutional rights in the estate, the surviving spouse is obliged to grant these descendants the means for appropriate education, if and to the extent they are in need thereof, from the additional quarter granted under (1).”

It is therefore stipulated that the surviving spouse’s share in accrued gains shall be satisfied

“by increasing the statutory share in the estate by one quarter of the estate.”

“Statutory share” in this context means the statutory share on intestacy, which amounts to one quarter, if the deceased has left children, and to one half in the absence of children.

Thus the normal determination of the surviving spouse’s marital property is made by a lump sum increase of an intestacy share in the estate. Both the characterisation by the German lex causae and by our lex fori classify the additional share on intestacy which the wife could claim in Germany as a succession right, which is not applicable under our different choice-of-law rules for succession referred to above. This result will frustrate the intention of the German legislator who certainly did not intend to discriminate against the widow by limiting his or her claim upon the termination of marriage by death to a mere one quarter, while upon

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43See Rheinstein/Glendon supra 109 et seq for further details.
44Translation quoted from Forrestor/GorenlIlgen The German Civil Code – Translation 1975.
45See s 1931 BGB.
divorce, as explained above, the balancing of accrued gains would normally result in a claim of one half. However, there is no solution to this anomaly under the given circumstances of the German "güt errechtliche Lösung" and within our private international law framework. The only answer is to look for an application of the alternative provisions found in section 1371 of the German Civil Code. Section 1371 also stipulates in sub-section (2) that if a will excludes the surviving spouse from claiming her statutory share on intestacy, her share in the matrimonial property will be determined by way of an actual balancing of accruals, as in the case of divorce, but with the exception of the balancing of pension benefits. In addition to that balance, she is owed what the German law knows as Pfl ichtteil, a compulsory portion amounting to one half of the statutory share on intestacy. 37 Again the application of this latter provision to the compulsory portion is excluded in our law because it must be characterised as a succession right both under the lex causae and under the lex fori. Besides, if a German couple domiciled in South Africa wish to bring the actual balancing of accruals in terms of sub-section (2) into operation, they would in a joint will have to establish the exclusion of each of them from any succession, with the ensuing, obvious disadvantages.

However, section 1371 provides in sub-section (3) for a third alternative, applicable to all cases of testate and intestate succession.

If the surviving spouse is not satisfied with the lump sum settlement of her claims to the matrimonial property or with the dispositions of a will, she may elect to renounce the succession entirely. Such a disclaimer will entitle the surviving spouse to claim the actual balancing of accruals and, in addition,

"to take ... the compulsory portion even though, according to the provisions of succession law, it would not be due to him . . ."

In this case, it is no longer clear that the applicable compulsory portion must be characterised as a right of succession. The German legislator has enforced the compulsory portion contrary to the law of succession and has included this exception in the Civil Code's Book on Family Law and not its Book on Succession. How should our conflict of laws characterisation deal with this case?

First, the characterisation of the spouse's right of election by the South African lex fori would result in denying the exercise of that right in South Africa. By the wording of the Civil Code's provision, the surviving spouse can effect the actual balance of accruals only by disclaiming the inheritance. The South African lex fori will simply read "disclaimer of inheritance", and conclude that the matter is one of succession, excluding the operation of this disclaimer. It will not take cognisance of the primarily matrimonial consequences of the disclaimer of inheritance, of the fact that the disclaimer is an incident of the law of matrimonial property rather than of the law of succession, or of its function to provide for a special method of determining the share in matrimonial property.

37See s 2303 BGB.
Second, the "compulsory portion in the estate" which the spouse takes contrary to German law of succession in a case of balancing of accruals upon the death of the other spouse, would again, in terms of the South African lex fori, be disconnected from its meaning and context in the German law and be characterised as a right related to succession and therefore not enforceable in the Republic.

Consequently, the characterisation by our lex fori in its strict and traditional meaning would result in an application of the German law in a way in which it would never be applied in Germany. This reveals the shortcomings of such a traditional application of the lex fori in cases of secondary characterisation. Whenever the foreign law has developed a concept or an institution which is unknown to the lex fori, it will, in the absence of the necessary legal instruments, simply not be possible to characterise it in terms of that lex fori. If one insists on doing so, the result will not be a characterisation, but an arbitrary qualification. This was first pointed out by M Wolff in the thirties. It is in fact odd to reflect on institutions of a foreign law in terms of the lex fori, when the result is that they will be given a meaning contrary to the one they clearly have in the lex causae.

The application of a foreign lex causae in private international law does not incorporate that lex causae in the national legal system. The lex causae remains foreign law and may therefore not be distorted by looking at it from the perspective and within the concepts of the lex fori.

It should not be difficult to adopt the compromise view which most civil law countries have chosen. It means redefining the doctrine of characterisation according to the lex fori, in the sense that the lex fori includes the principle that the applicable concepts of the foreign law must be construed and understood in the terms of that foreign law. This is in fact what our case law has already done by implication. One should not minimise the importance of this implied approach in our case law, nor declare it merely an isolated exception. Spiro has summarised the appropriate position as follows:

"But the lex fori must not be applied narrowly; it must be applied in a conflict of law sense, so to speak sub specie orbis, not on the basis of purely domestic law, but by taking into account the accepted rules and institutions of foreign legal systems or, to use Kahn-Freund, in an enlightened manner. That should yield just results in the majority of cases."
(c) Characterisation in determining the legal capacity of spouses

If in litigation it becomes necessary to determine whether a wife married under a foreign law could acquire fixed property without the husband’s consent, and if one looks at our textbooks, one finds as a first declaration of principle that the legal capacity of the spouses should be part of the matrimonial property regime governing the marriage, at least in some instances. However, there is little evidence to support this idea in our case law.

In Kent v Salmon Smith J ruled that –

"there are strong grounds for holding that in the case of ordinary commercial contracts . . . the contractual capacity of the person entering into them is to be decided not by the law of the domicile, but by that of the place where the contract is made".

For any contracts other than ordinary commercial contracts, the old common law rule continues to hold that the personal consequences of the marriage are not determined by the matrimonial domicile but by the actual domicile of the husband, as it may alter from time to time.

With respect to fixed property preference has been given to the lex situs.

The relations of spouses inter se are always governed by the actual lex domicilii. However unreasonable it may appear, especially in view of the above example of the post-nuptial contract required for the exclusion of a sharing of pension benefits under German law, this is the position in our law.

Challenging the exclusion of the legal capacities from the foreign law of the matrimonial domicile, Kahn has de lege ferenda suggested a compromise view. The idea is that one should seek guidance from the reasonable purpose of the regulation concerned. The purpose being the protection of third parties who cannot be expected to have knowledge of the foreign law, our law should operate in such a way as to allow for the assumption by third parties that a married woman has at least the legal capacity which is enjoyed in our law by a woman who is married to her husband at common law. It has recently been pointed out that this suggestion is of little practical value, as women married in South Africa under common law — that is in community of property — have less capacity than married women in most other civilised countries. Moreover, the fact is ignored that most modern matrimonial property regimes provide for reciprocal

42HR Hahlo op cit 623; CF Forsyth op cit 243.
43Kent v Salmon 1910 TPD 637 at 639.
44J Voet Commentarius 51 101; Roguin Régime Matrimonial 8; Kaden Rechtsvergleichendes Handwörterbuch vol 2 704.
45Bank of Africa Limited v Cohen 1909 2 Ch 129.
46Powell v Powell 1953 4 SA 380 (W); Van Rooyen Kontrak in die SA Internasionale Privaatreëg 123–126; H Silberberg “The determination of matrimonial property rights and the doctrine of immutability in the conflict of laws” (1973) 6 CILSA 323 at 326–329.
47In HR Hahlo op cit 624.
48C Dillon “Capacity to contract and foreign matrimonial proprietary regimes” Modern Business Law 1982 45 at 47.
marital powers. Under these regimes, designed in the light of the equality of the sexes, the husband’s legal capacity is just as restricted as the wife’s.

Since under our law the marital powers of the husband are only excluded by way of an ante-nuptial contract, in practice any woman married under a foreign law without an ante-nuptial contract is subjected to marital powers in South Africa, once the husband has established a domicile here. The husband in turn becomes free of his original restrictions on legal capacity.

The exclusion of legal capacity from the regime of matrimonial property again demonstrates the operation of the lex fori. The reference to the lex loci contractus, to the lex situs and to the law of the actual domicile of the husband, as the case may be, will include the conflict rules of that law. If that law is South African law, the narrow definition of the connecting factor of “matrimonial property regime” according to the South African lex fori, will not permit including in the reference to the foreign law the capacity of spouses to contract, not even in their relations inter se. The decision of the foreign legislator to include matters of the legal capacity of spouses in the matrimonial property regime is thus disregarded. It is possible that such circumstance will seriously distort the operation of a foreign matrimonial property regime, as the modern and combined systems often rely on specific principles with respect to the legal capacities of spouses, which alone will prevent manipulations of such regimes in fraudem legis. However, aspects of practicability – mainly the protection of third parties – make it difficult to accept such foreign marital powers in the South African lex fori, unless their effects can be made known publicly. In some cases practical relief could be provided, if couples married under a foreign law which allows post-nuptial contracts were permitted to conclude and register such contracts in South Africa. If this policy were adopted, it would benefit both South African legal practice and the spouses concerned by allowing simpler rules and less uncertainty in the law.

However, the general conclusion is that the problems created by the application of our conflict rules to the legal capacity of spouses result from the fact that the marriage laws of most nations have moved too far from our own common law marriage.

From this, a final conclusion may also be drawn. Not only the private international law of a country, but also its intrinsic law is affected by the contrasting and conflicting changes in the law abroad. Living in the twentieth century makes national isolation a more and more impossible objective, be it in the field of private international law or in any other field.

49 See for Germany: Rheinstein/Glendon supra 106 et seq.