Précis Paper

Private International Law and Succession

This Precis Paper is based upon a detailed paper by Jennifer D. Beck BA, LLB (Syd) LLM (Syd), MCIArb, NMAS (Barrister, Arbitrator, Mediator) titled: *International Law Aspects of Succession* which is available on her website www.lawasia.com.au

Discussion Includes

- Private International Law v Public International Law
- Choice of Laws
- Connecting Factors
- The Law of Domicile
- Family Provision Cases
- Testamentary Trusts and The Hague Trust Convention
- EU Succession Regulations
- Succession or Prerogative Right

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Private International Law and Succession

1. In this edition of BenchTV, Jennifer Beck and Alexander Kuklik (Barrister) discuss the challenges of navigating succession law through multiple jurisdictions. They identify the choice of law to be applied, how to prove that law, and how to deal with issues arising from testamentary trusts.

Private International law v Public International Law

2. Private International Law (or the conflict of laws) is part of the domestic law of every country and can be subject to change by a countries legislature. It is different from Public International Law, which is a supranational law, reliant on international conventions or the tacit consent of parties. A country cannot legislate to change Public International Law unilaterally.

Choice of laws

3. The choice of law rules and the rules of succession vary markedly between countries and even in a federation like Australia, between states. Determining the correct law to apply to a case has a profound effect on:
    a. the devolution of the property,
    b. who receives the benefit of the estate,
    c. other aspects of succession

4. Australia is a schismatic country. Property is devised as movable property (bank accounts, cars, boats) or immovable property (land, dwellings attached to land). Australian law originates from the common law UK system, but has some differences, mostly in relation to the definition of movable property. In the UK anything attached to land is immovable property, including debts and mortgages, in Australia, debts and mortgages are classified as movable property.

Connecting factors

5. There are four main connecting factors
    a. Nationality
    b. Habitual residence

c. The domicile of the deceased
d. The location of the deceased's property (lex situs)

6. The German courts apply the law of nationality. The French courts apply, in respect of movable property, the law of the state where the deceased was habitually resident at the time of their death. In the UK and in Australia, the connecting factor is the domicile of the deceased in respect of movable property and the location of the property in respect of immovable property.

The Law of Domicile

7. In Australia the *Domicile Act 1982* (Cth) introduced identical legislation in each state and territory.

8. In Australia, the law as it applies to movables is that which the testator intended to apply, in the absence of any countervailing circumstances, which is, the law of the domicile at the time of making the will. If that person then moves, the law attached to the will, will not change. In respect of a person who dies intestate, the law relating to movables will be that which applies to the domicile of the deceased at the time of his/her death.

9. There are three types of domicile:
   a. Domicile of origin,
   b. Domicile of choice,
   c. Domicile of dependence.

10. It is an old-fashioned concept; the textbooks refer to it as the preeminent headquarters. This means that you can have multiple residences, but only one domicile at any point in time.

11. *In the Estate of Milind Bedake* [2015] ACTSC 267 covers all three forms of domicile. The facts of the case were as follows:
   a. A young man died in India. He had been born there and lived the first 25 years of his life there.
   b. In 1998 he came to Australia and was granted permanent residency.
   c. In 2002 he was also involved in a car accident. Due to the accident he developed significant cognitive brain damage and required 24-hour care.
   d. In 2003 he moved back to India with his father to receive medi**c**al care and remained there until his death in 2010.

12. He had an estate of movables worth about $150 000. He died intestate. There was no question that his domicile of origin was India. His domicile of choice ("DOC") was Australia,

where he was granted permanent residency. The question was whether the DOC changed when he went back to India. A domicile of choice requires active intention on behalf of the deceased. He was so cognitively impaired; he was not able to form any intention. Therefore, his DOC remained Australia; the law of the ACT applied and the estate went to his father.

Re Tang [2017] VSCA 171

13. This case concerned an application by the deceased's mother for a grant of letters of administration. This was not a contested application; the mother had the consent of her ex-husband and the deceased's ex-wife.

14. The deceased was an Australian citizen, residing in China at the time of his death. He had an estate of movable property including:
    a. $149,307.77 from two bank accounts in Australia,
    b. $30 000 from a motor car in Australia,
    c. $415 000 from bank accounts in China.

15. The question before the court was whether to grant his mother access to the bank accounts. In 2014, the son was admitted to hospital in Shanghai. The mother flew over to see him. The son wrote a note in Chinese, which the mother then discussed with him. The Note identified:
    a. The Australian bank accounts
    b. The location of the bank books
    c. That the money was for her personal use

The Note was signed and dated by the deceased.

16. The primary judge dismissed the application on the following grounds:
    a. *First*, as no expert evidence had been called to establish the Chinese law she was unable to make any findings on how to apply the content of the Chinese law.
    b. *Secondly*, at the time of his death, the deceased was domiciled in China, so the intestacy laws of China were to apply. The primary judge also found the Note was not a valid will under s9 of the *Wills Act 1997* (Vic).
    c. *Thirdly*, this was a precatory instrument and not testamentary:
        i. The Note was never witnessed by anybody,
        ii. It only disposed of a quarter of the assets,
        iii. It did not mention the deceased's ex-wife or father,
        iv. No evidence was led to the testamentary capacity of the deceased.
    d. *Fourthly*, the applicant had failed to satisfy the Briginshaw principle (*Briginshaw v Briginshaw* (1938) 60 CLR 336) that the deceased had testamentary capacity.

17. The Court of Appeal ("COA") rejected each of the findings made by the primary judge. The COA found that the primary judge erred in not considering s174, *Evidence Act 2008* (Vic), which provides that foreign statutes can be proved without the need for expert evidence.

18. The COA found that s174 of the *Evidence Act 2008* (Vic) is '*plainly intended to be permissive*' and expert evidence is not the only way by which the content of a foreign law may be proved. The primary judge's own research on Chinese succession law, as supplemented by the applicant's submissions, was a reliable source for the purposes of s174 (1)(b) *Evidence Act 2008* (Vic).

19. The COA found the primary judge erred in deciding that the appropriate forum was to be decided solely on the domicile of the deceased. This is a rebuttable presumption. The primary judge should have considered the countervailing factors or circumstances in any particular case. Relevant considerations included:
    a. the wording of the Chinese law,
    b. the degree of complexity of the Chinese succession law,
    c. the location of the assets in Victoria,
    d. the location of the sole beneficiary who resided in Victoria, and
    e. that the note was a will in accordance with s17, *Wills Act 1997* (Vic).

20. The only remaining issue was whether the the Note was in the handwriting of the deceased and whether the signature it bore was that of the deceased. The COA: the primary judge erred in stating there was no evidence in relation to these issues:
    a. the mother knew the son's handwriting and signature,
    b. the mother had discussed the note with the son, and
    c. the note was clearly testamentary.

21. The primary judge should never have raised the Briginshaw principles. The propounder of a will only has to prove the validity of that will on the balance of probabilities; this includes the testamentary capacity of the testator. The COA found there was no basis for any doubt about the deceased's testamentary capacity at the time he wrote the Note.

22. The COA ordered:
    a. That the administration of letters be granted to the mother and she is able to distribute the assets referred to in the Note to herself,
    b. That the remainder of the estate be decided under Chinese intestacy laws.

Family Provision Applications

23. NSW is unique because it is the only state to have a provision like s64, *Succession Act 2006* (NSW), which extends the long arm of NSW to assets and property overseas of a testator who dies domiciled in NSW. The application of S64 has been deemed unconstitutional if the testator dies domiciled outside NSW, as there is no connecting factor to overseas property.

Chen v Lu [2014] NSWSC 1053

24. Facts of the case:
    a. The deceased, Hong Jie Lu was a 41 year old Chinese, Australian national who committed suicide in NSW, leaving a will she had made 8 days earlier. She left a husband and a 9 year old daughter.
    b. The estate comprised $928,561.19 and 3 properties in China valued at $700,000.
    c. The entire estate was left to the deceased's sister in China.
    d. The deceased's husband (living in NSW) made a successful Family Provisions claim.
    e. S64, *Succession Act 2006* (NSW) applied, the three properties in China were part of the estate and taken into account, however only in terms of costs orders.

25. The lesson of the case is that where the deceased dies domiciled in NSW applicants ought press for inclusion as part of the estate, the assets located overseas.

Testamentary Trusts

The Hague Convention on the Law Applicable to Trusts and on their Recognition of 1984 ('The Convention')

26. The Convention was ratified by Australia in the *Trusts (Hague Convention) Act 1991* (Cth), and came into force on 1 August 1992. The purpose of the Convention is to specify the law applicable to trusts and their recognition. If a country does not recognise the institution of a trust, the Convention cannot apply. The Convention—only applies to—voluntary trusts evidenced in writing. Implied, resulting and constructive trusts are outside the Convention. The Convention does not apply as between States and Territories of Australia.

Noel Mockett Brown as executor of the estate of the late Peter Vezmar [2015] NSWSC 1470

27. Facts of the case:
    a. The deceased a dual citizen of Australia and Serbia died domiciled in NSW,
    b. He left property in NSW and in Belgrade, Serbia,
    c. The Serbian property was subject to a trust under the Australian will.

28. At first instance, Brereton J found that the case was to be answered in reference to the NSW rules of Private International Law. The construction of a will is, under NSW law, governed by the law of the domicile of the testator even in respect to immovable property. It is subject to the proviso that the construction so reached must in no way conflict with any law in Serbia. Serbia did not recognise trusts.
29. Brereton J found that Serbia had exclusive jurisdiction and: would not recognise an Australian decree. There was simply no means by which an executor could deal with the Serbian property, and an application to the Serbian court was required.

The uniform rules of Regulation **(EU) No 650/2012 ("the Brussels IV")**

30. The EU Regulations came into effect on 15 August 2015. It is applicable to 25 out of 28 EU Member States. The countries that have opted out are:
    a. Denmark
    b. Ireland
    c. United Kingdom
31. The EU Regulations applies a single national law of succession to a person's moveable and immoveable property upon death and applies to both testate and intestate succession. The applicable law is that of the country of the deceased's habitual residence at the time of death, unless:
    a. The deceased was manifestly more closely associated with another state; or
    b. The deceased elected in their Will for their national law to apply, regardless of whether the state of their nationality is a Regulation State or not.

35. There is now the potential for people with property in an EU Member State to elect in their Wills that the law of their nationality should apply to the succession of their EU property. This may avoid local forced heirship and other rules (such as not recognising de facto partners, and children born out of wedlock) which would otherwise apply.
36. It is possible to elect for Australian law if that is the person's national law, it is also possible to make the election in an Australian Will. Though, in most EU countries it may be easier to draft a simple will in the language where the assets are situated making the election.

Heirs in Foreign jurisdictions

32. Inheritance in foreign jurisdictions depends very closely on the wording of the relevant legislation. For example, the Spanish Constitution talks about the Spanish state being the ultimate heir. In Spain, this is a right of succession, whereas in Japan, it is only a prerogative right without extraterritorial reach.

The Public Trustee of Queensland as Administrator of the estate of KH, deceased, *Re* [2017] QSC ~~0~~48

33. The case concerned how the estate of a Japanese person that died intestate in Japan and domiciled in Japan, should be divided. The deceased had one maternal cousin in Japan. The laws of Japan did not accept cousins as beneficiaries, whereas the laws of Australia did.

34. The Estate comprised:
    a. $1.2 million movable cash in Japan,
    b. $1.5 million movable cash in QLD.

35. A solicitor advised the court that because of the old conflict of law rules, where there is a Japanese citizen, domiciled in Japan, all monies should go to the Japanese treasury.

36. There were however, countervailing circumstances:
    a. The administrator had received orders from the Family Court of Japan that the three bank accounts be excised from the estate
    b. The right to ownerless property is a prerogative right which is territorial and did not extend to property outside of Japan.

37. If the same facts arose in Spain, the estate would have gone to the Spanish treasury. The Spanish system concerning ownerless property manifests as a right to succession, which has extraterritorial reach.

BIOGRAPHY

Jennifer D. Beck

BA, LLB (Syd) LLM (Syd), MCIArb, NMAS
Barrister | Arbitrator | Mediator

Jennifer was admitted as a solicitor in 1996 and called to the Bar in 2008, and completed her national accreditation as a mediator in 2008. In 2010 Jennifer completed her International Commercial Arbitration training with the Chartered Institute of Arbitrators in Malaysia. Jennifer has appeared as a barrister in WA, QLD, and NSW and acts as an arbitrator in both domestic and international commercial arbitrations. Jennifer has advised and acted for the Australian government on a broad range of issues including collapse of a tunnel during construction, the mobile data radio network, and the Australian-US Free Trade Agreement. Jennifer's practice includes corporations, commercial, construction, employment, succession, and both private and public international law. Jennifer has been appointed as an arbitrator to the District and Local Courts, the NSW Bar, and as an Expert Determiner. She has also been appointed as a mediator to the Supreme Court of NSW, and the NSW and Qld Farm Debt mediation panels.

Jennifer has industry experience in defence as a former Flight Lieutenant with the Royal Australian Airforce and has provided lectures in contract, guarantee and indemnity to the Australian Army. She was the first in-house counsel appointed to a hospital in Australia, received the Civil Justice Award while working as in-house counsel at King Edward Memorial Hospital (KEMH) in 2002, featured in the ABC four corners episode on KEMH in 2002, and worked in television at the Australian Broadcasting Corporation in Sydney prior to her life as a lawyer. Jennifer has served as a judge for the past 7 years in the Chinese International Court Competition based upon the International Court of Justice and public international law, 2012 (Beijing), 2013 (Beijing), 2014 (Shanghai), 2015 (Beijing), 2016 (Suzhou), 2017 (Beijing).

Alexander Kuklik

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Admitted to the bar in 2006 after practising as a solicitor in private practice and with a corporate regulator, Alex has established a broad practice in commercial and equity law. He specialises in trusts and succession, property disputes and company and financial services law. In addition to advocacy work, Alex's practice also includes advisory work for both private and government clients. Alex lecturers and tutors at the University of Sydney in the areas of evidence law, contract law, civil and criminal procedure, education law and discrimination, and has presented seminars on a broad range of legal topics.

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Legislation

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Succession Act 2006 (NSW)

Succession Amendment (Family Provision) Act 2008 (NSW)

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