

Basic Conflict of Laws Principles

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I. Introduction

This chapter provides an overview of some of the conflict of laws issues and attendant considerations that may arise in working with multinational clients.¹ It addresses opportunities available to the international investor under the laws of certain states of the United States. Specifically, it sets forth the extent to which courts of the United States enforce legal rights, obligations, or claims affecting a nonresident alien's assets located within the United States when such rights, obligations, or claims arise under the laws of foreign jurisdictions, which often are civil law jurisdictions.

Generally, the principles of conflict of laws provide guidelines to determine whether a court of the forum jurisdiction will apply its law or the laws of another interested jurisdiction to a dispute. This inquiry often requires a court to make a choice that may be affected by public policy considerations of the forum jurisdiction. Conflict of laws principles, moreover, may extend to many aspects of a case, such as judicial jurisdiction,

1. This chapter is adapted from ROBERT C. LAWRENCE, III, *INTERNATIONAL TAX AND ESTATE PLANNING* ch. 1 (3d ed. 1999), which contains a detailed discussion of conflict of laws issues in the context of international estate planning.

characterization of property, choice of law, and the recognition and enforcement of foreign judgments.

II. Conflict of Laws Issues

A. Determining Affiliation

1. Introduction

The traditional ordering process for determining choice of law issues in common law jurisdictions is that the law of the jurisdiction of domicile governs the disposition of personal property (often referred to as movables), and the law of the situs governs the disposition of real property (often referred to as immovables).² Civil law jurisdictions, however, often refer to nationality for determining choice of law issues. These three principles are described below.

2. Domicile

The determination of a client's domicile is the threshold question in determining many of the rights and obligations of the parties, the characterization of property, the validity and construction of a will, the place of probate, and other planning issues. Domicile is a legal construct that describes the relationship between an individual and a particular locality or country. While there is no uniform definition of domicile, under the laws of most common law jurisdictions, domicile consists of two elements that must exist concurrently: (1) physical presence in the jurisdiction and (2) the intent to remain indefinitely.³ This common law definition has been codified in one form or another in both federal and state laws. For example, under New York law, "domicile" is defined as "a fixed, permanent and principal home to which a person wherever temporarily located always intends to return."⁴

There are certain legal presumptions that are helpful to determine a person's domicile. Domicile may be examined in terms of the following categories: domicile of origin, domicile by operation of law, and domicile of choice. Some common law jurisdictions recognize the concept of "domicile of origin." Domicile of origin is the domicile the law assigns to each person at birth—generally, the domicile of the father in the case of a legitimate child and of the mother in the case of an illegitimate child.⁵ Domicile may also be assigned by operation of law. For example, at common law, a married woman was presumed to have the same domicile as her husband.⁶ However, this rule has evolved, and today, in most common law jurisdictions, a husband and wife may have different domiciles even if they are not

2. Hereafter, the term "movable" is used in this chapter interchangeably with the term "personal property," and the term "immovable" is used interchangeably with "real property."

3. 25 AM. JUR. 2d *Domicil* § 1 (2012); 28 C.J.S. *Domicile* § 1 (2004).

4. N.Y. Surr. Ct. Proc. Act § 103[15] (Lexis Nexis 2012).

5. RESTATEMENT (SECOND) CONFLICT OF LAWS § 14 (1971).

6. LAWRENCE, INTERNATIONAL TAX AND ESTATE PLANNING, *supra* note 1, § 1:3.1[B]

living apart from one another. A third type of domicile is “domicile of choice.” One who is legally capable of changing his or her domicile may acquire a domicile of choice by being physically present in a new jurisdiction and possessing the intent to remain there indefinitely.⁷

With domicile of choice, both elements must exist concurrently—neither physical presence in the jurisdiction nor intention to remain alone is sufficient to effectuate a change in domicile.⁸ In determining whether the individual has the requisite intent, courts generally focus on factors such as the individual’s social and business contacts, type of home, church membership, voting registration, place of driver’s license and car registration, and other similar elements that demonstrate that the individual has a close and settled relationship with a particular locality. Declarations of domicile—whether formal declarations, such as in a will or trust instrument, or informal statements—are also admissible as evidence but are given less weight because of the self-serving nature of such statements.⁹

Determining one’s domicile may be difficult, in part because the concept of domicile resembles and is often confused with the concept of “residence.” Residence does not, however, generally involve the requisite attitude of mind and requires only physical presence in a particular locality or an actual place of abode there.¹⁰ Therefore, it is commonly said that a person can have several residences but only one domicile.¹¹ Further confusing matters, the terms “residence” and “domicile” are often used interchangeably but with differing meanings in various types of statutes.¹² In particular, tax statutes often cause confusion by using the principles of residence and domicile for imposing taxes. A good example is the U.S. federal estate and gift tax scheme. The Internal Revenue Code adopts residence as the basis of taxation, but the Treasury Regulations indicate that the term residence is to be interpreted to mean domicile.¹³

7. 25 AM. JUR. 2d *Domicil* § 6; RESTATEMENT (SECOND) CONFLICT OF LAWS § 15.

8. 25 AM. JUR. 2d *Domicil* § 14.

9. RESTATEMENT (SECOND) CONFLICT OF LAWS ch. 2, Special Note on Evidence for Establishment of a Domicil of Choice; see also *Kjarstad v. State*, 703 P.2d 1167 (Alaska 1985); *In re Esser’s Will*, 239 N.Y.S.2d 585 (Sur. Ct. 1963); *Meltzer v. Commonwealth Unemployment Compensation Bd. of Review*, 471 A.2d 157 (Pa. Commw. Ct. 1984).

10. See *Stacher v. United States*, 258 F.2d 112 (9th Cir.), cert. denied, 358 U.S. 907 (1958); *Weible v. United States*, 244 F.2d 158 (9th Cir. 1957). See also RESTATEMENT (SECOND) CONFLICT OF LAWS § 30—factors include amount of time spent in the locality, the nature of the abode (fixed or temporary), attitude of mind, and activities in the locality.

11. 25 AM JUR. 2d *Domicil* § 1 (2012). *Farmers Mut. Ins. Co. v. Tucker*, 576 S.E.2d 261 (W. Va. 2002).

12. RESTATEMENT (SECOND) CONFLICT OF LAWS § 11, cmt. k notes that, as used in various U.S. statutes, the term “residence” may be interpreted (1) as the equivalent of domicile, (2) as a domicil where one actually dwells, or (3) as the place where one dwells without regard to domicile.

13. I.R.C. § 2001. Treas. Reg. § 20.0-1(b)(1) defines a “resident” decedent as “a decedent who, at the time of his death, had his domicile in the United States. . . . A person acquires a domicile in a place by living there, for even a brief period of time, with no definite present intention of later removing therefrom. Residence without the requisite intention to remain indefinitely will not suffice to constitute domicile, nor will intention to change domicile effect such a change unless

3. Nationality

While domicile is the criterion used in common law jurisdictions to determine certain conflict of laws issues, the estate planner should be aware that other jurisdictions employ the concept of nationality.¹⁴ In such jurisdictions, the determination of one's nationality may be conditioned on one's political allegiance, parentage, place of birth, or naturalization.¹⁵ Thus, a person may be domiciled in one country, yet may be a national of another country. As with domicile, different jurisdictions may apply different standards in determining an individual's nationality. Thus, two or more countries may claim an individual as its national. Furthermore, some jurisdictions, such as Switzerland, employ a mixed system of domicile and nationality, whereby the domiciliary rule is applied to both foreigners living within the jurisdiction and its nationals living abroad.¹⁶ Although generally nationality does not play a significant role in conflict of laws analyses by U.S. courts, it is an area of law with which a multinational estate planner should be familiar.

4. Situs

Conflict of laws questions relating to immovables are generally decided in accordance with the law of the jurisdiction in which such property is situated.¹⁷ The situs rule is based upon the rationale that the situs jurisdiction has the greatest interest in controlling the administration of property located within its borders.

B. Bases of Jurisdiction of a U.S. Court

An important initial consideration is the selection of the court and thereby the jurisdiction in which to probate or establish a decedent's will. The general rule of probate or establishment is that a will should be probated or established in the first instance at the testator's domicile.¹⁸ However, because each jurisdiction has the power to administer and dispose of property located there, a will may frequently be probated in a jurisdiction where the testator left property.¹⁹ A

accompanied by actual removal." Conversely, a "nonresident" decedent is defined as "a decedent who, at the time of his death, had his domicile outside the United States." Treas. Reg. § 20.0-1(b)(2). See also LAWRENCE, INTERNATIONAL TAX AND ESTATE PLANNING, *supra* note 1, § 1:3.1.

14. Jurisdictions that employ a nationality standard include many Western European countries, most of Eastern Europe, the Middle East, and Latin America, as well as Japan. For a general discussion of nationality issues in multinational estate planning, see CHARLES STEVENSON ET AL., INTERNATIONAL ESTATE PLANNING ch. 2 (1992).

15. See *id.* § 2.05; 1 JEFFREY A. SCHOENBLUM, MULTISTATE AND MULTINATIONAL ESTATE PLANNING § 12.02[c] (2D ED. 1999).

16. STEVENSON ET AL., *supra* note 14, § 2.05[2].

17. RESTATEMENT (SECOND) CONFLICT OF LAWS § 239 (1971).

18. D.E. Evins, *Annotation, Probate, in State Where Assets Are Found, of Will of Nonresident Which Has Not Been Admitted to Probate in State of Domicile*, 20 A.L.R.3d 1033 (1968). N.Y. Surr. Ct. Proc. Act § 205(a) provides in pertinent part: "The surrogate's court of any county has jurisdiction over the estate of a decedent who was a domiciliary of the state at the time of his death, disappearance or internment."

19. See N.Y. Surr. Ct. Proc. Act § 1605(1); *Pullman's Palace Car v. Pennsylvania*, 141 U.S. 18 (1891); *In re Estrem's Estate*, 107 P.2d 36 (Cal. 1940).

number of states have statutes that authorize the court to exercise original jurisdiction over the will of a nonresident decedent,²⁰ and it is not unusual for a non-U.S. domiciliary to direct probate of his or her will under the laws of a particular state. Thus, in *Montgomery v. National Savings & Trust*, the Court of Appeals for the District of Columbia Circuit affirmed the decision of the United States District Court for the District of Columbia, which admitted to probate an “American will” of a decedent domiciled in Italy that disposed of stocks, bonds, and cash located in the District.²¹ Similarly, a New York surrogate’s court exercised jurisdiction over the will of a testator, domiciled in Peru, who directed New York as a place of probate, left assets in New York, and named a New York beneficiary and executor.²² Likewise, jurisdiction over the will of a Swiss domiciliary in New York was deemed proper where the decedent left 90 percent of his assets in New York and the will requested that New York law apply to its probate.²³ Many courts, however, have said that they are not required to grant original probate, even though authorized by statute. Thus, a court will grant original probate in the exercise of sound discretion, depending on the facts and circumstances of each case and considerations of comity. A court, for example, may wish to await the action of a court in the decedent’s domicile and may deny original probate if most of the major contacts are in another jurisdiction.²⁴

Original probate of a will of a nonresident may be denied if the will has already been admitted to probate at the testator’s domicile.²⁵ In such case, the

20. Several states have express statutes authorizing the exercise of original probate over the will of a nondomiciliary who has left property in the state. *See, e.g.*, N.Y. Surr. Ct. Proc. Act § 1605(1); R.I. Gen. Laws § 33-7-25; Tex. Prob. Code § 103; Wis. Stat. § 868.01.

21. *Montgomery v. Nat’l Sav. & Trust*, 356 F.2d 806 (D.C. Cir. 1966); *see also In re Cates*, N.Y.L.J., June 25, 1980, at 11, col. 2, *aff’d*, 80 A.D.2d 1003 (Sur. Ct. 1981) (New York County Surrogate exercised jurisdiction to probate will executed in Haiti by decedent who had an apartment and other property in New York, but who was assumed by court to have been domiciled in Haiti for purposes of decision); *In re Goldstein’s Will*, 310 N.Y.S.2d 602 (App. Div. 1970) (abuse of discretion to refuse jurisdiction to probate will drafted by New York lawyer, which had New York attesting witnesses, where all assets were located in New York, most of witnesses preferred New York probate, and fiduciaries named under will were disqualified under law of descendant’s Florida domicile); *In re Estate of Nelson*, 475 N.Y.S.2d 194 (Sur. Ct. 1984) (court exercised jurisdiction over estate even though assets were brought into jurisdiction after testator’s death).

22. *In re Estate of Chopitea*, 228 N.Y.S.2d 104 (Sur. Ct. 1962).

23. *In re Estate of Vischer*, 280 N.Y.S.2d 49 (Sur. Ct. 1967). Jurisdiction was upheld even though the Swiss-U.S. Treaty had been interpreted to provide that all controversies between successors to property be decided by the laws of decedent’s domicile in *In re Estate of Rougeron*, 217 N.E.2d 639 (N.Y.), *cert. denied*, 385 U.S. 899 (1966).

24. For example, in *In re Estate of Brunner*, 339 N.Y.S.2d 506 (Sur. Ct. 1973), a New York surrogate’s court declined jurisdiction over a will executed in New York despite a clause requesting that New York law apply. The testator died a domiciliary of France. The decedent’s only New York asset was a single small bank account. Most of the decedent’s other assets were located in France, and the decedent did not own a New York residence. The court held that the bank account was an insufficient basis for jurisdiction and emphasized both the need to rely on French law to administer the will and the fact that any witnesses necessary to testify as to the capacity of the testator would also be in France.

25. *In re Estate of Wachman*, 238 N.Y.S.2d 112 (Sur. Ct. 1963); N.Y. Surr. Ct. Proc. Act § 1605.

nondomiciliary jurisdiction is generally limited to the exercise of ancillary jurisdiction. However, this rule is subject to certain exceptions. For example, under New York law,²⁶ a court may exercise original probate jurisdiction over the will of a nondomiciliary if (1) ancillary probate would be unduly inconvenient, expensive, or impossible under the circumstances,²⁷ (2) the laws of the decedent's domicile discriminate against New York domiciliaries,²⁸ or (3) the will expressly directs probate in New York.²⁹ As a planning matter, if a nondomiciliary testator wishes for probate and administration in a particular state, the planner would be well advised to have his or her client establish as much of a nexus with that state as possible. At the least, the client should maintain substantial assets within the jurisdiction, appoint an executor who is present therein, and direct that probate be therein.

26. N.Y. SURR. CT. PROC. ACT § 1605(2).

27. *In re Estate of Turton*, 15 N.Y.S.2d 131 (Sur. Ct. 1961), a New York surrogate's court refused to dismiss a petition for original probate of the will of a testator, allegedly domiciled in British Honduras, even though proceedings for probate were still pending in British Honduras. The court based its decision on three factors: (1) the amount of time that had elapsed since the will was offered for original probate in British Honduras, (2) the question of domicile remained unresolved and (3) substantial expense had already been incurred in handling the estate in New York.

28. *In re Estate of Siegel*, 373 N.Y.S.2d 812 (Sur. Ct. 1975), the court concluded that because Florida law discriminated against the appointment of the nominated trustee, the Marine Midland Bank, a New York domiciliary, it would admit the will of a Florida domiciliary to original probate even though the will had been admitted to probate in Florida. *See also In re Estate of Brown*, 436 N.Y.S.2d 132 (Sur. Ct. 1981) (upholding exercise of jurisdiction by New York court where Florida, the decedent's domicile, discriminated against the petitioner by prohibiting him from being appointed executor in Florida because he was a nonresident).

29. *In re Estate of Renard (Renard I)*, 417 N.Y.S.2d 155 (Sur. Ct.), *aff'd*, 418 N.Y.S.2d 553 (1979), involving a domiciliary of France whose New York will requested probate in New York (there was a later French will dealing with French property), the court retained jurisdiction. The court stated that the fact that the New York will had already been admitted to probate in France was entitled to careful consideration, but noted that (1) substantial assets were located in New York, (2) nominated executors were New York residents, (3) opposing the forced heirship claim of the decedent's son in France would prove burdensome for the interested legatees, and (4) the proceedings were brought in good faith and without the intent to thwart French law.

Some of these factors were originally applied in *In re Will of Heller-Baghero*, 258 N.E.2d 717 (N.Y. 1970), although that case did not involve the same statutory provision because a 1962 will, rather than the 1964 will offered for probate in New York, had been established (the equivalent of admission to probate) at the testator's domicile, Austria. Thus, unlike *Renard I*, no statute governed the question. Upon appeal, the New York Court of Appeals held that the surrogate properly exercised jurisdiction to probate the 1964 will. The court reasoned that jurisdiction was proper because (1) the issue of the validity of the 1964 will had not been foreclosed in Austria, (2) 90 percent of the assets were located in New York, (3) the executor and two legatees were New York residents, and (4) the proceedings were brought in New York in good faith, with no suggestion of an attempt to thwart Austrian laws. Although the objectants relied on case law denying original probate of the will of a nonresident, the court maintained that it was a rule of ad hoc discretion, and that the facts of this case were strong enough to justify the assumption of jurisdiction. The case demonstrates the wide discretion given to the court to entertain probate. *See also In re Will of Nelson*, 475 N.Y.S.2d 194 (Sur. Ct. 1984). Factors the court considered in this case in accepting jurisdiction were the wishes of the testator, the convenience of fiduciaries and beneficiaries, and pending litigation in New York relating to the estate.

C. Choice of Law

1. Overview

Once a court accepts jurisdiction, it must determine what law to apply to a given issue, such as the construction, validity, or interpretation of a will (or trust instrument). Each planner has to analyze the facts and circumstances and plan the result of this determination. The analysis is a two-step process: characterizing the property interest and choosing the appropriate law to be applied.

2. Classification of Property

As an initial matter, the court determines under its local law whether the property involved is immovable or movable. The distinction between immovables and movables is basic to conflict of laws analysis and estate planning, yet the laws governing such classifications vary. For example, some jurisdictions may classify a partnership interest in a partnership that owns real estate as intangible personal property; others may classify it as an interest in real property.³⁰ Similar issues may also arise with respect to leasehold interests in real property. For example, under New York law, leaseholds are generally characterized as real property and thus are governed by the law of the situs.³¹ It should be of some comfort, however, that often two interested jurisdictions will characterize a property interest in the same way.

3. Choice of Law Approaches

Once a determination has been made as to whether the property is immovable or movable, the second step in the choice of law analysis is to determine whether the court will apply the law of its own jurisdiction or the law of another jurisdiction to govern the distribution and administration of an estate or certain of its components. Many issues that arise in the administration of an estate are procedural rather than substantive and are uniformly decided by the local law of the forum, regardless of the nature of the dispute or identity of the parties.

The procedural-substantive distinction is purely one of convenience. Procedural matters are concerned with the management of litigation in the courts of a particular jurisdiction. Procedural matters include the form of action, timing for filing or responding to pleadings or motions, evidentiary questions, methods of service, means of enforcing a judgment, and similar rules concerned with administration that presumably do not affect the substantive outcome of the case, and, as to them, the forum is considered to have the most significant relationship.³² In contrast, matters of substance pertain to the legal relations or rights of the

30. See Note, *Problematic Definitions of Property in Multistate Death Taxation*, 90 HARV. L. REV. 1656 (1977). See also *SOUTHEAST BANK, N.A. v. LAWRENCE*, 489 N.E.2d 744 (N.Y. 1985). The court determined that the right of publicity is personal property, thus Florida, not New York law, would apply to a question of whether a theater owner could use the name of a famous deceased playwright.

31. *In re Hadelman's Estate*, 143 N.Y.S.2d 396 (Sur. Ct. 1955).

32. See, e.g., EUGENE SCOLES & PETER HAY, *CONFLICT OF LAWS* 57-67 (2d ed. 1992); *RESTATEMENT (SECOND) CONFLICT OF LAWS* § 122 (1971).

parties. As such, they are determinative of the outcome of the dispute and are generally decided in accordance with the law of the jurisdiction having the most significant relationship to the dispute or particular issue.³³

As pointed out, it is sometimes difficult to determine which law a court will apply to the facts of a particular case. In some areas of the law, courts have changed from the traditional approach of applying the law of the situs to immovables and the law of the domicile to movables to a modern approach based on the purposes and policies of the particular jurisdiction. The goal of the modern approach is to determine, from the facts of each case, which jurisdiction has the most significant relationship to the given situation.³⁴ The *Restatement (Second) of Conflict of Laws* has listed the important factors to be considered as:

- the needs of the interstate and international system;
- relevant policies of the forum;
- relevant policies of the interested states or countries and the relative interests of those places in the particular issue;
- protection of justified expectations;
- basic policies underlying the particular field of law;
- predictability and uniformity of result; and
- ease in the application and determination of the law.³⁵

As noted, however, choice of law analysis in property succession is, to a large extent, governed by the traditional rules, which are applied with great consistency. Moreover, many jurisdictions, such as New York, have adopted comprehensive statutes to direct the courts' choice of law.³⁶ This does not, however, conflict with the current trend in many areas of the law to identify the jurisdiction with the most significant relationship to the issue. On the contrary, the durability of the doctrinal rules in the area of property succession is explicable by applying the above-listed factors to a given situation. In most cases, such an application will lead to the same predictable result as an application of the traditional rules, although some recent decisions reflect a deviation by some courts from these rules when the balancing of the relevant policies of the different jurisdictions indicates a certain decision should be reached.³⁷

4. *Renvoi*

The approach of a jurisdiction to choice of law issues, particularly to *renvoi*, is crucial in determining the law applicable to each part of an estate plan. The doctrine of *renvoi* provides that a forum apply not only the substantive law of the

33. SCOLES & HAY *supra* NOTE 32, AT 57–67.

34. See, e.g., *Babcock v. Jackson*, 191 N.E.2d 279 (N.Y. 1963); Willis L.M. Reese, *Choice of Law: Rules or Approach*, 57 CORNELL L. REV. 315 (1972).

35. RESTATEMENT (SECOND) CONFLICT OF LAWS § 6 (1971).

36. N.Y. EST. POWERS & TRUSTS LAW § 3-5.1.

37. See, e.g., *In re Estate of Clark*, 281 N.Y.S.2d 180 (1967), *aff'd*, 236 N.E.2d 152 (N.Y. 1968). Cf. *Rudow v. Fogel*, 426 N.E.2d 155 (Mass. App. Ct. 1981).

state of reference but also its conflicts rules: in other words, its whole law. Simply stated, if *renvoi* is applied, the forum essentially sits as a foreign court in order to reach a result consistent with the “whole” law—choice of law and local law—of the other jurisdiction.³⁸ Of course, the choice of law rule of the foreign jurisdiction may then direct the application of its own local law, that of the original forum, or even the law of a third jurisdiction.

Renvoi is often applied to the validity and effect of transfers of both immovable and movable property. It is especially important in planning for the succession of immovable property because the local laws of the various jurisdictions may differ significantly.³⁹

There are essentially three approaches to *renvoi*. First, some countries reject it outright and, when directed by their own choice of law rule to apply the law of another jurisdiction, apply only the substantive (local) law of that jurisdiction. The second and more common approach is “single-reference” *renvoi* whereby a forum looks to the choice of law rule of the foreign jurisdiction to which it is directed by its own conflicts rule as well as the foreign jurisdiction’s substantive (local) law.⁴⁰ Under the third approach, some jurisdictions may, in certain cases, apply “double-reference” *renvoi*. Like “single-reference” *renvoi*, the forum first looks to the conflicts rule of the foreign jurisdiction, Country X, to which it is directed by its own choice of law. However, the forum will determine whether Country X would also apply *renvoi* to the issue had it been initially brought in a court there.

38. See generally RESTATEMENT (SECOND) CONFLICT OF LAWS § 8 (1971); Erwin Griswold, *Renvoi Revisited*, 51 HARV. L. REV. 1165 (1938). The comments to the Restatement go on to explain that “[w]hen a court is directed by its choice-of-law rules to determine a particular issue in accordance with its own law, the word ‘law’ means the local law of the forum. If, in this context, ‘law’ were to be interpreted as meaning the entire law of the forum, the court would be referred back to its own choice-of-law rules and would be back at the place where it began.” RESTATEMENT (SECOND) CONFLICT OF LAWS § 8, cmt. c.

39. For example, many civil law jurisdictions apply a single or unitary law to all assets (whether immovable or movable) of a decedent. Depending upon the jurisdiction, this unitary law is the law of the decedent’s nationality or last domicile. In contrast, common law countries differentiate the law to be applied according to whether the assets are characterized as immovables or movables. If a court in County A, a unitary law jurisdiction that accepts *renvoi*, assumes jurisdiction over the administration of a will of an English national, it would look to the law of England, including its choice of laws rules. This follows because Country A’s own choice of law rule is to apply the “law” of the nationality; because Country A accepts *renvoi*, “law” refers to choice of law as well as local law. Because English choice of law would apply the law of the last domicile to movables and the law of the situs to immovables, the court in County A will do the same. In contrast, a court in County B, a unitary law jurisdiction that does not accept *renvoi*, administering the will of the same English national, would simply apply the substantive law of England. For further discussion, see LAWRENCE, *supra* note 1, § 1:5.5; Eugene Scoles & Max Rheinstein, *Conflict Avoidance in Succession Planning*, 21 L. & CONTEMP. PROBS. 499, 499–501 (1956).

40. For example, in *In re Schneider’s Estate (Schneider)*, 96 N.Y.S.2d 652 (Sur. Ct. 1950), *aff’d on reh’g*, 100 N.Y.S.2d 371 (Sur. Ct. 1950), a New York court was required to determine the validity of a testamentary disposition of real property in Switzerland by a New York domiciliary. The forum looked to Swiss choice of law and concluded that under the Swiss unity-of-succession principle, the Swiss courts would apply the law of the testator’s domicile to all of his real and personal property. Accordingly, the court employed “single-reference” *renvoi* and applied New York local law to uphold the disposition of the real property.

If it would, the forum will then apply the choice of law, rather than the local law, of the jurisdiction it is then directed to by the conflicts rule of Country X.⁴¹ The “perpetual loop” or “Ping-Pong” effect frequently mentioned in connection with “double-reference” *renvoi* creates more of a problem in theory than in practice.⁴²

5. Special Considerations with Respect to Wills

Many choice of law issues arise with regard to wills. Before discussing these issues, it should be noted that at least under the common law system, the intent of the testator has paramount importance, and if the testator specifically designates the applicable law, a court will generally honor it. For the sake of simplicity, the following discussion assumes that the forum is a common law jurisdiction.

The two main choice of law principles in a testamentary context are (1) that the law of the situs of real property governs the validity and effect of its disposition⁴³ and (2) that the law of the testator’s last domicile governs the validity and effect of the disposition of personal property, tangible and intangible, wherever situated.⁴⁴ The rationale is simple. As to real property, it is assumed that the situs jurisdiction has the greatest interest in who holds title to the property and that only a court of that jurisdiction can issue an enforceable decree affecting title. Therefore, it is likely that a foreign judgment that does not respect the laws of the situs will be denied enforcement by the situs jurisdiction.⁴⁵ As to personal property, the courts are more interested in the intent of the testator in disposing of his or her property. It is presumed that the testator is most familiar with the laws of his or her domicile, that the will has been prepared accordingly, and that the jurisdiction of domicile has the greatest relationship to the testator and the estate with regard to such personal property.

41. Thus, if the New York court in *Schneider* had employed “double-reference” *renvoi*, and assuming it determined that Switzerland would also apply *renvoi* to the issue, the court would ultimately have applied the local law of Switzerland to the realty, in conformance with New York choice of law. See, e.g., *In re Annesley*, [1926] 1 Ch. 692 (Eng.). The essential difference in the two approaches is that the single-reference *renvoi* assumes that the country to which the forum is directed by the forum’s choice of law does not accept *renvoi*. The double-reference approach, by contrast, takes into account the foreign country’s actual approach to *renvoi*. This approach is also known as “sitting and judging.”

42. In theory, a perpetual loop can only occur if the forum and the jurisdiction to which the forum looks both practice the double-reference approach, and their respective conflicts rules point to each other for the applicable law. In reality, such an occurrence is extremely rare and would ultimately be resolved by resorting to the local policy of the forum toward the substantive issue.

43. RESTATEMENT (SECOND) CONFLICT OF LAWS § 239 (1971); see, e.g., *In re Barrie’s Estate*, 35 N.W.2d 658 (Iowa), cert. denied sub nom. *Hodge v. First Presbyterian Church*, 338 U.S. 815, reh’g denied, 338 U.S. 881 (1949). But see *In re Estate of Janney*, 446 A.2d 1265 (Pa. 1982). In *Janney*, the Pennsylvania court would not give effect to New Jersey law, which had subsequently been superseded, notwithstanding the fact that the controversy centered upon proceeds from the sale of real property in New Jersey when the law was in effect. See also RESTATEMENT (SECOND) CONFLICT OF LAWS § 239 cmt. c (1971).

44. RESTATEMENT (SECOND) CONFLICT OF LAWS § 263 (1971); SCOLES & HAY, *supra* note 32, at 812.

45. See, e.g., *Schneider*, 96 N.Y.S.2d 652, *supra* note 40.

In applying the law of the situs or domicile to the disposition of property, an estate planner must always consider the possibility of *renvoi*.⁴⁶ Unless another jurisdiction is considered to have a more dominant interest in the particular issue, however, the general presumption is that a court in the jurisdiction of situs will apply its local law to the disposition of real property and a court in the jurisdiction of domicile will apply its local law to the disposition of personal property.⁴⁷

(a) Formal Validity, Revocation, and Testamentary Capacity. Questions concerning statutory formalities, revocation, and capacity are decided by the normal application of the laws of the situs or domicile.⁴⁸ The situs jurisdiction, for example, is under no obligation to give effect to a disposition of real property if the will does not comply with its local requirements, even if the will has been executed in accordance with all formalities of the testator's domicile. Similarly, a forum may test the formal validity of a will disposing of personal property by the law of the testator's domicile.⁴⁹

To mitigate the harsh results that might follow from the strict application of these rules, many jurisdictions have expanded the test of formal validity. Thus, many courts will uphold a will or testamentary instrument if it complies with the requirements of any jurisdiction that is significantly related to the will. This includes the testator's domicile at the time of execution, the situs of the assets, or the forum.⁵⁰ Statutes in more than thirty states provide for alternative places of reference with respect to questions of proper execution of a testamentary instrument.⁵¹

The courts in the jurisdictions of situs (as to real property) and domicile (as to personal property) normally apply their own local laws to the issue of the validity of the revocation of a testamentary instrument, either by physical act or by operation of law.⁵² Some states have extended the effect of their statutes to uphold revocations that are valid in the jurisdiction where the act occurs.⁵³ In civil law

46. See *supra* text accompanying notes 40–42; *Schneider*, 96 N.Y.S.2d 652.

47. RESTATEMENT (SECOND) CONFLICT OF LAWS §§ 239(2), 263(2) (1971). Of course, the result is different if these courts do not subscribe to situs/domicile principles of succession. In that case, the reference may be back to the forum or a third jurisdiction.

48. See *generally* GEORGE STUMBERG, CONFLICT OF LAWS 375–78 (3d ed. 1968); *In re Estate of Georg*, 298 F. Supp. 741 (D.VI. 1969).

49. See, e.g., *Moultrie v. Hunt*, 23 N.Y. 394 (1861).

50. See John B. Rees, Jr., *American Will Statutes: II*, 46 VA. L. REV. 856, 905–06 (1960).

51. *Id.*; see, e.g., N.Y. EST. POWERS & TRUSTS LAW § 3-5.1; ILL. COMP. STAT. ANN. ch. 755, § 5/7-1. See *generally* Alice M. Bright, *Permitting a Non-Resident to Choose a Place of Probate*, 85 TR. & EST. 865 (1956). ENGLAND HAS ALSO ADOPTED A VERY LIBERAL PROVISION FOR PROVIDING ALTERNATIVE PLACES OF REFERENCE. See ENGLAND WILLS ACT 1967, H & 12 ELIZ. 2, CH. 044.

52. See MARTIN WOLFF, PRIVATE INTERNATIONAL LAW 206–09 (2D ED. 1950); *STERNBERG V. ST. LOUIS UNION TRUST CO.*, 163 F.2D 714 (8TH CIR.), *cert. denied*, 332 U.S. 843 (1947).

53. See RESTATEMENT (SECOND) CONFLICT OF LAWS §§ 239–43 (1971); *In re Barrie's Estate*, 73 N.E.2d 654 (Ill. 1947).

countries, an intentional act of revocation is generally effective if it complies with the formalities of the place where it occurs.⁵⁴

In response to the need for uniform international regulation, the Hague Conference on Private International Law met in 1960 to draft certain conflicts rules relating to the form of testamentary dispositions.⁵⁵ Nineteen countries participated and a multireference rule for recognizing the validity of the execution of wills was adopted.⁵⁶ Under article 1 of the Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions, a testamentary disposition is formally valid if it complies with the internal law of (1) the place of execution, (2) the nationality of the testator either at the time of execution or of death,⁵⁷ (3) the place where the testator had a habitual residence either at the time of the disposition (execution) or of death, and (4) the situs if the assets are real property. These same places of reference are also applied to the formal validity of a revocation.

On questions of capacity, of either the testator or the beneficiary, the courts in the jurisdictions of situs (as to real property) or domicile (as to personal property) generally apply their local law unless it is clear that another jurisdiction has the stronger interest. The situs jurisdiction may impose various restrictions, for example, as to the capacity of aliens or foreign corporations to hold title to real property.⁵⁸ Because of the obvious interest of the situs jurisdiction as to who holds title to real property within its jurisdiction, courts can be expected to apply their own local law regardless of the law of other interested jurisdictions.

Statutes providing alternative places of reference on issues of formal validity should also be considered with respect to capacity. If a will is admitted to probate

54. See Scoles & Rheinstein, *supra* note 39, at 499, 505.

55. See generally Kurt Nadelmann, *The Hague Conference on Private International Law, Ninth Session*, 9 AM. J. COMP. LAW 583 (1960).

56. The Ninth Session of the Hague Conference was comprised of representatives of the governments of eighteen member states—Austria, Belgium, Denmark, Finland, France, West Germany, Greece, Italy, Japan, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, the United Kingdom, and Yugoslavia. The United States sent an observer delegation. To date, the Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions has been entered into force by forty-one contracting states including the following member states: Australia, Austria, Belgium, China, Croatia, Denmark, Estonia, Finland, the former Yugoslav Republic of Macedonia, France, Germany, Greece, Ireland, Israel, Japan, Luxembourg, the Netherlands, Norway, Poland, Slovenia, Spain, Sweden, Switzerland, Turkey, and the United Kingdom. The Convention has also been entered into force by a number of nonmember states, including Antigua and Barbuda, Botswana, Fiji, Grenada and Mauritius. For a full status report, see Hague Conference on Private International Law, Full Status Report Convention #11, http://www.hcch.net/index_en.php?act=conventions.status&cid=40 (last visited Oct. 12, 2012).

57. Whether the testator had his or her domicile in a particular place under article I is to be determined by the law of that place. Article 9, however, allows contracting states to reserve the right to determine where the testator was domiciled according to foreign law.

58. See, e.g., *Carpenter v. Bell*, 34 S.W. 209 (Tenn. 1896). This issue is discussed in detail in LAWRENCE, *supra* note 1, Chapter 3.

because it was properly executed in another jurisdiction, the forum may also refer questions of capacity to the local law of that jurisdiction.⁵⁹

(b) Interpretation and Construction. Interpretation and construction are distinct processes to help the courts determine the meaning and effect of words contained in a testamentary instrument.

Interpretation, the more common practice, is the attempt to discover the actual meaning and intent of the testator. It is therefore a question of fact and does not give rise to choice of law problems. Instead, a court looks at such factors as who drafted the instrument, the context in which the words were used, and the circumstances under which the instrument was drafted. In considering these factors a court is bound only by the evidentiary rules of the forum.⁶⁰

If the intent of the testator or the draftsman cannot be ascertained from the document or the evidence considered in its interpretation, the court will assign a legal meaning to the language in accordance with the rules of construction of the applicable legal system. These rules vary significantly among jurisdictions and important choice of law issues may arise. Typical examples are the legal significance of terms, such as “heirs” and “issue,” or whether a certain phrase effected an equitable conversion of property.⁶¹

In practice, with respect to real property, the courts of the jurisdictions of situs are divided on whether to apply their own local law or the law of the domicile at execution.⁶² The latter law is clearly more relevant if the goal of construction is to carry out the presumed intention of the testator. Interestingly, the English rule presumes that the law of the domicile at execution will govern construction of the entire instrument in the absence of contrary evidence as to the testator’s intent.⁶³

Similar confusion exists with respect to the disposition of personal property. Usually the courts apply the law in the jurisdiction of the testator’s last domicile.⁶⁴ Sometimes, however, the courts in the jurisdiction of domicile may apply the law of the testator’s domicile at the time of execution of the will.⁶⁵

59. See, e.g., *Wilcoxon v. United States*, 310 F. Supp. 1006 (W.D. Kan. 1969); *In re Estate of Taylor*, 391 A.2d 991 (Pa. 1978). However, not all states follow this general rule. New York provides that the formal validity of a will of a decedent not domiciled in New York at his or her death may be tested under the laws of New York, the jurisdiction in which the will was executed (at the time of execution), and the jurisdiction in which the decedent was domiciled (either at death or at execution). N.Y. EST. POWERS & TRUSTS LAW § 3-5.1(c). However, questions as to such decedent’s general capacity will be examined under New York law. *Id.* § 3-5.1(h).

60. See WILLIS L.M. REESE & MAURICE ROSENBERG, *CASES AND MATERIALS ON CONFLICT OF LAWS* 798 (8th ed. 1984).

61. *Id.* at 800; see *Clarke v. Clarke*, 178 U.S. 186 (1900).

62. See REESE & ROSENBERG, *supra* note 61, at 789.

63. See P.M. NORTH & J.J. FAWCETT, *PRIVATE INTERNATIONAL LAW* 851–53 (11th ed. 1987).

64. See RESTATEMENT (SECOND) CONFLICT OF LAWS § 264 (1971); SCOLES & HAY, *supra* note 32, at 818.

65. See, e.g., *Hamilton Nat’l Bank v. Hutcheson*, 357 F. Supp. 114 (E.D. Tenn. 1973), *aff’d*, 492 F.2d 1243 (6th Cir. 1974); SCOLES & HAY, *supra* note 32, at 819.

Fortunately for the estate planner, the goal of construction is primarily to carry out the presumed intent of the testator, and the courts are disposed to give effect to an explicit direction that the will be construed according to the laws of a particular jurisdiction.⁶⁶ Generally, the courts construe such a direction to refer to the local law, rather than the choice of law, of the designated jurisdiction. The planner should, therefore, consider the inclusion of such a provision in a will disposing of multinational assets.

(c) Substantive Validity. The intrinsic or substantive validity of a testamentary plan or specific disposition presents the most fertile ground for choice of law problems and potentially the most severe pitfalls for the planner. Again, the general conflict of laws rule concerning the effect and validity of a testamentary disposition is also that the law of the situs governs as to real property⁶⁷ and that the law of the decedent's last domicile governs as to all personal property, tangible and intangible.⁶⁸ Although courts in the jurisdictions of situs (as to real property) and domicile (as to personal property) will usually apply their own local law, the possible application of the doctrine of *renvoi* must not be overlooked.

For example, in *Schneider*, where a New York domiciliary died leaving real property in Switzerland, the New York court looked to Swiss conflicts law with regard to the disposition of the real property and held that under Swiss unity of succession principles the Swiss courts would apply the law of the testator's last domicile to all assets of the deceased, even real property.⁶⁹ Accordingly, the court applied New York local law to uphold a disposition of real property that was invalid under the law of the situs.⁷⁰

Despite the deference of courts to the traditional choice of law principles on dispositions of real and personal property, the U.S. Supreme Court recognized early on that the intent of the testator should govern. If the testator clearly intends the law of a jurisdiction other than that which would normally apply to control the disposition of the testator's assets, that intent should be controlling.⁷¹ Several states, including New York, Illinois, Florida, New Jersey, and Connecticut, have statutes that permit a nondomiciliary testator to elect to have the laws of that jurisdiction govern the effect of testamentary dispositions of personal

66. See RESTATEMENT (SECOND) CONFLICT OF LAWS §§ 224, 240, 264 (1971); *Second Bank-State St. Trust Co. v. Weston*, 174 N.E.2d 763 (Mass. 1961).

67. RESTATEMENT (SECOND) CONFLICT OF LAWS § 239 (1971).

68. *Id.* § 263; *In re Weiss' Will*, 64 N.Y.S.2d 331 (Sur. Ct. 1946).

69. See *Schneider*, *supra* note 40 and accompanying text.

70. Significantly, the realty had been liquidated prior to probate, and the funds representing the realty had been remitted to New York for disposition. It should be clear at this point that if the issue had been the disposition of the realty itself and the New York court had incorrectly construed Swiss law, the Swiss courts would probably have denied enforcement of the New York decree.

71. *Harrison v. Nixon*, 34 U.S. 483 (1835).

property having a situs therein;⁷² other jurisdictions have reached the same result by judicial decision.⁷³

(d) 1989 Hague Convention on Succession. In 1989, the Hague Convention on the Law Applicable to Succession to the Estate of Deceased Persons (1989 Convention) approved a draft of conflict rules to regulate matters concerning the devolution of property.⁷⁴ To date the proposal has not been ratified by the United States, and only Argentina, Luxembourg, the Netherlands, and Switzerland have signed the Convention.⁷⁵

Very generally, the 1989 Convention provides conflict rules for countries that are parties, absent a specific designation of applicable law by the testator. It abandons the traditional distinctions between immovable and movable property and abolishes concepts of domicile and situs, substituting the concepts of “habitual residence” and “nationality” and applying these concepts to both immovable and movable property.

The 1989 Convention sets forth the testator’s right to designate the law that will govern succession to the “whole of [the] estate.” The testator may choose either the law of habitual residence or nationality at the time the testator makes his or her will, or the law of habitual residence or nationality at the time of his or her death. Moreover, the testator may incorporate by reference into the will the substantive law of any legal system to govern particular assets within his or her estate. However, a testator may not designate a law applicable to particular assets that would contravene the succession principles of the law governing the whole estate.⁷⁶

6. Special Considerations with Respect to Trusts

Many civil law jurisdictions do not recognize the concept of a trust. In 1984, the Hague Conference on Private International Law adopted a Convention on the Law Applicable to Trusts and Their Recognition (the 1984 Convention).⁷⁷ One

72. N.Y. EST. POWERS & TRUSTS LAW § 3-5.1(h); 755 ILL. COMP. STAT. ANN. 5/7-6; FLA. STAT. ANN. § 731.106; N.J. STAT. ANN. § 3B:3-33; CONN. GEN. STAT. § 45A-287(c).

73. See *Lanius v. Fletcher*, 101 S.W. 1076 (Tex. 1907); *In re Chappell's Estate*, 213 P. 684 (Wash. 1923).

74. See Convention on the Law Applicable to Succession to the Estates of Deceased Persons, Aug. 1, 1989, 28 I.L.M. 150 (1989), *reprinted in* 2 Proceedings of the Sixteenth Session of the Hague Conference on Private International Law 515 (1990). As of October 12, 2012, the 1989 Convention on Succession was not in force. See http://www.hcch.net/index_en.php?act=conventions.status&cid=62 (last visited Oct. 12, 2012).

75. HENRY CHRISTENSEN, INTERNATIONAL ESTATE PLANNING § 5.06[4] (2d. ED. 1999). A FULL STATUS REPORT OF THE 1989 CONVENTION IS AVAILABLE AT http://www.hcch.net/index_en.php?act=conventions.status&cid=62 (last visited May 31, 2012).

76. For further discussion of the 1989 Convention, see LAWRENCE, *supra* note 1, § 1.5.11.

77. Hague Convention on the Law Applicable to Trusts and their Recognition, Hague Conference on Private International Law, 15th Sess., Final Act (concluded July 1, 1985), *reprinted in* 23 I.L.M. 1388 (1984) (full text also available at http://www.hcch.net/index_en.php?act=conventions.text&cid=59 (last visited Oct. 12, 2012)). On May 8, 1987, the U.S. Secretary of State’s Advisory Committee on

of the main purposes of the 1984 Convention was to assist civil law countries in interpreting trust instruments.⁷⁸ Pursuant to the choice of law provisions of the 1984 Convention, a trust should be governed by the law chosen by the settlor as evidenced by the written trust instrument. If no applicable law is designated, then the trust should be governed by the law of the jurisdiction with which the trust is most closely connected.⁷⁹ However, the 1984 Convention also recognizes that certain severable aspects of the trust might be governed by different laws.⁸⁰

The settlor's right to choose the governing law of a trust is subject, however, to certain limitations. Very generally, the 1984 Convention provides that its provisions will not prevent the application of certain mandatory laws, such as the rights of minors, marital rights, succession rights, transfer of title, creditors' rights, the protection of third parties acting in good faith, and economic regulations, such as exchange or export controls.⁸¹ Moreover, the 1984 Convention does not require civil law jurisdictions to adopt the concept of the trust; therefore, to the extent that the most significant elements of the trust are closely connected with a country that does not have such an institution, the country will not be required to recognize the trust.⁸²

III. Summary

This chapter is designed to provide the multinational estate planner with an overview of how choice of law principles are utilized in determining which law will apply, as well as how the courts in the United States and certain common law jurisdictions determine rights, obligations, or claims to a nonresident alien's property arising under foreign law.⁸³ As an initial matter, an estate planner should be familiar with the conflict of laws issues that may arise if a non-U.S. resident has investments or other property situated in the United States and develop a plan that provides as much predictability as possible. This may involve not only choice of law issues but also selection of a favorable jurisdiction.

Private International Law unanimously approved the Trusts Convention. However, the United States has not yet ratified the Trusts Convention. To date, the Trusts Convention is in force in Australia, Canada, Hong Kong, Luxembourg, Malta, Monaco, Switzerland, the United Kingdom, Italy, and the Netherlands. See http://www.hcch.net/index_en.php?act=conventions.status&cid=59 for a full status report on the Trusts Convention. For a general discussion of the Trusts Convention, see David J. Hayton, *Developing The Hague Trusts Convention within Mainland Europe*, 3 CHASE J., No. 1 (1999).

78. 23 I.L.M at 1388–89 (introductory note).

79. *Id.* at 1389–90.

80. *Id.* at 1390.

81. *Id.* at 1390–91.

82. *Id.* at 1390.

83. When dealing with multinational situations, local counsel should always be consulted when developing an estate plan for any non-U.S. resident with investments in the United States.