An international will or a will in each jurisdiction?

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By Christine Smyth and Katerina Peiros

Snapshot

- The international wills regime is intended to harmonise and simplify the proof of formalities of wills executed in signatory countries.
- While the regime appears new and exciting, upon closer examination it can raise more issues than it resolves.
- Careful consideration should be given to advising willmakers to continue to have a local will in each foreign jurisdiction in which they have assets.

The regime of international wills appears new and exciting, but upon closer examination it can raise more issues than it resolves. The *Uniform Law on the Form of an International Will* contained in the *UNIDROIT Convention* ('**the *Convention***') was ratified by the Commonwealth Government on 10 September 2014 and the *Convention* entered into force in Australia on 10 March 2015. Each Australian state and territory has enacted its own enabling legislation. Sections 50A-50E of the *Succession Act 2006* (NSW) ('**the Act**') give force and effect to the enabling legislation in New South Wales.

Purpose of introducing international wills

The international will regime is intended to harmonise and simplify the proof of formalities of wills executed in signatory countries. This means that by making an international will, Australians will now find it easier to prove the will in another jurisdiction that has also adopted the *Convention*. The *Convention* essentially creates a new form of a will which is recognised as valid in those states which are party to the *Convention*.

The *Convention* intended to overcome the problem that whenever there were cross border issues, in order to ascertain whether a will was valid, the court had to find that the will was properly executed in one of the following jurisdictions (s 48):

- where it was executed; or
- the willmaker's domicile or residence at the time of execution; or
- the willmaker's domicile or residence at the time of death; or
- of which the willmaker was a citizen.

The process to determine validity, therefore, involved the court having to examine laws of other jurisdictions (see *Application of Perpetual Trustee Company Ltd; Re: Estate of the late Evelyn Mary Dempsey* [2016] NSWSC 159).

The court also had to distinguish between the formal validity of the will with respect to movables (or chattels) which is determined by the law of the domicile of the willmaker at the date of death (*In the Will of Lambe* [1972] 2 NSWLR 273) and the formal validity of a will with respect to immovables (land etc) which is determined by the law where the land is situated, irrespective of where the willmaker resided or died (*Pepin v Bruyere* [1902] 1 Ch 24). The courts were often faced with having to determine the very complex issue of the domicile of the willmaker set out in *Domicile Act 1979* (NSW).

To assist the court in determining these issues, the will's propounder had to file affidavits from solicitors practising in foreign jurisdictions setting out the relevant local law, as well as affidavits from family and friends about facts of domicile. This examination is expensive, time consuming for the clients and the courts, and causes estate administration to be delayed.

The form of an international will

An international will is a will that complies with the formalities set out in the *Convention*. A compliant will enables a Grant of Probate in member states. This saves the propounder the expense of the court examining where the will was executed, considering the internal law of that jurisdiction and whether that law corresponds with the jurisdiction where the Grant is sought, or where the willmaker resided, was domiciled, died or had citizenship or where the willmaker's assets are situated.

Section 6 of *Succession Act 2006* (NSW) sets out the formal requirements of an international will – it differs from a standard will in that:

- there should be three witnesses;
- one of the witnesses must be a registered legal practitioner or a notary public;
- every page must be signed and numbered;
- the willmaker may declare where the will should be held and this should be recorded in the certificate; and
- the will must contain a certificate (in the prescribed form) that the will is an international will and the certificate must be attached to the will. The certificate is conclusive evidence of the will's validity, but its absence does not invalidate the will. This presumption of validity is rebuttable.

The will may be in any language, and the usual process about translation of wills applies.

What is not covered by the *Convention*

The *Convention* (and the *Succession Act*) only provide uniformity on the formal requirements for a will in the strictest sense and compliance with the requirements for an international will does not preclude arguments about the will's essential validity such as testamentary capacity, knowledge and approval, undue influence, construction or interpretation of a will. These remain in the realm of the law of domicile at the date of death of the willmaker.

The international will regime also does not address the laws which apply to presumption of death; where probate can or should be taken, or who can apply for it; inheritance and intestacy rules (who can inherit and what they can inherit); family provision applications (who can make a claim and in which jurisdiction); revocation; tax; and estate administration. These matters continue to be governed by the jurisdiction where the willmaker makes the will, where the willmaker dies or was domiciled, where probate is granted and where the immovable assets are situated.

> **[T]he willmaker benefits from having a will in each jurisdiction where the willmaker holds assets, as the willmaker can be educated about the differences between the legal systems**

Accordingly, the international will does not simplify nor circumvent the conflicts of laws which follow the death of a willmaker who had assets in various jurisdictions. The commonly seen issues surrounding forced heirship, death duties, an acceptable legal representative to obtain a grant etc remain alive for the willmaker.

Acceptance of international wills

International wills are only recognised by the member states who have ratified the Convention and enacted it internally. Apart from Australia, there are 62 member states (UNIDROIT, *Membership ETATS MEMBRES* (2015) www.unidroit.org/about-unidroit/membership), not all of whom have enacted the Convention internally. This means the scope and operation of the international will is again limited to the jurisdictions which have enacted the Convention internally.

Consequences for practitioners

Practitioners taking instructions from clients for an international will still need to obtain detailed information about the willmaker's assets and their location, willmaker's family needs and responsibilities. Practitioners should not lose sight of giving comprehensive and appropriate advice about the local law on wills, probate, tax and family provision.

The practitioner should keenly turn their mind to whether, even if an international will is possible, whether it is, in fact, the preferred route. By preparing an international will, instead of preparing a local will in addition to advising the client to obtain another will in the other jurisdiction where the assets are located, the practitioner may be depriving the unknowing client of an opportunity to obtain comprehensive advice in the other jurisdiction about making a will and its effect. This is particularly the case with respect to the impact of taxation laws applying to inheritances.

Advantages of local wills

In the authors' experience, more often than not, the willmaker benefits from having a will in each jurisdiction where the willmaker holds assets, as the willmaker can be educated about the differences between the legal systems and take advantage of the particular laws of the jurisdiction, including probate, inheritance, tax, insolvency, family law and administration laws, and can give proper consideration in each jurisdiction to issues relating to the appointment of executors and practical aspects of administration. Receiving this advice early would allow the willmaker to plan ahead, if they needed to do so. This may involve shifting assets to another jurisdiction to avoid triggering death duties on their assets in that jurisdiction, or on their assets worldwide, or by avoiding or invoking forced heirship rules (where a portion of the estate is by law reserved for a member of the family and there is no testamentary freedom over that portion. It exists in Islamic countries and in France and Italy).

In the probate stage, local wills can significantly simplify the administrative process for the family and executors, not just because the will does not need to be translated, additional affidavits filed and judicial interpretation of a foreign document applied for, but also because the executors have a local legal advisor who is able to guide them through the process and the cultural differences. Executors in different jurisdictions may also apply for probate at the same time and independently of each other. If there is only one will, probate must be obtained in one jurisdiction and then re-sealed or re-applied for in the next, which can cause delay.

Another advantage of a local will and local executors and/or local beneficiaries is that the willmaker may reduce the tax liability for their estate in that jurisdiction. For example, in Australia, a gift of a CGT asset to a non-resident beneficiary may result in the estate having to pay CGT. Conversely, CGT may be payable if a resident beneficiary inherits a foreign asset. If considered planning is undertaken this may be avoided if the assets are sold early on or gifted to a local beneficiary. Another Australian tax that a foreign lawyer advising a client about an international will may not know about is the tax on superannuation death benefits. This illustrates that planning opportunities may be missed if local advice is not obtained.

Practitioners would be in treacherous territory if they attempted to advise about foreign jurisdiction laws or structures. If a client is having wills prepared in more than one jurisdiction, practitioners would be wise to liaise with each other to ensure the wills (and any ancillary paperwork) are not inconsistent and in fact complement each other. Care must be taken that the will executed later does not inadvertently revoke the will signed earlier in a different jurisdiction.

An international will may still however be in order where a client has the majority of their assets in Australia but has a bank account or some other modest asset in a signatory jurisdiction, where their will is likely to require probate.

Conclusion

Careful consideration should be given to advising willmakers to continue to have a local will in each foreign jurisdictions in which they have assets. There is no substitute for a well drafted and carefully considered local will. **LSJ**