

Private International Law B

LAWS 3457

Semester 2 2015

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Topic 2. Personal Connecting Factor

2.1. Concept of domicile

2.1.1. Overview

- a) Domicile is the relation which the law creates between an individual and a particular locality or country [*Bell v Kennedy* (1868)]
- b) There are 3 categories of domicile:
 - Domicile of origin;
 - Domicile of choice; and
 - Domicile of dependency.
- c) Until the age of 18, a person has a dependent domicile. At the age of 18, a person has an individual domicile.
- d) Every individual has a legal system that constitutes that person's home for the purposes of private international law at all points of their life.
- e) Domicile is a connection/relationship between a person and a legal system (geographical area with a system of private law).
 - In systems such as Australia's or UK, a person may have multiple domiciles due to the federation structure (State law and Federal law).

2.1.2. Role of domicile in jurisdiction and choice of law

- a) Originating process of the Supreme Court of NSW may be served outside Australia if the defendant is domiciled, or ordinarily resident, in NSW [*UCPR* r 11.2 and Schedule 6(g)]
- b) Domicile in Australia as basis of jurisdiction of the Family Court of Australia in proceedings for dissolution of marriage [*Family Law Act 1975* (Cth) s 39(3)(b)]
- c) Succession to movable property governed by law of the deceased person's domicile
- d) Dominant role of domicile in relation to the essential validity of marriage under the common law rules of private international law

2.1.3. Statutory reform

- a) Around 1982, there was an Australia wide reform of domicile through the *Domicile Act 1982* (Cth) and *Domicile Act 1979* (NSW) s 4(1), (2).
 - **NB:** for the purpose of this course, we will be citing the *Domicile Act 1979* (NSW).
 - The domicile of a person before 1 July 1982 is to be determined as if the *Domicile Act* had not been enacted. [s 4(1) *DA*; *Parnell Schoneveld v Repatriation Commission* [2003] FCA 153]
 - However, if we are determining where a person is domiciled after 1 July 1982 with reference to past events such as births etc, we are to determine the domicile as if the *Domicile Act* had been enacted. [s 4(2) *DA*]
- b) The *Domicile Act* only excludes the common law where expressly stated. Accordingly, most of the principles that determine domicile are common law principles.

2.1.4. Domicile in a union or federation

- a) Where a person is domiciled in a part of a country (i.e. South Australia, NSW etc), the person is deemed to be domiciled in the country forming part of that union (i.e. Australia) [*Domicile Act 1979* (NSW) s 10]
- b) Response to *Re Benko* [1968] situation where the plaintiff intended to make South Australia his home but this was not sufficient to make Australia his domicile.

Case Name	Re Benko [1968] SASR 243
Facts	<ul style="list-style-type: none"> • Benko acquired domicile of origin (according to birth) in <u>Hungary</u>. • Benko came to Australia as a displaced person after WWII in 1950 and <u>wished to make Australia his home</u> <ul style="list-style-type: none"> ○ Initially settles in Victoria then moves to SA • Benko dies in 1964 – no doubt that he <u>intended to make his home in SA</u> • However, the law of Hungary declared him to be dead on 5 August 1950
Issue	<ul style="list-style-type: none"> • Where was Benko domiciled on 5 August 1950.
Held	<ul style="list-style-type: none"> • Benko domiciled in Hungary on 5 August 1950 and is declared dead at that time.
Reasoning	<ul style="list-style-type: none"> • <u>The common law (now amended by s 10 DA) did not recognise ‘domicile in Australia’ and required ‘domicile in a state or territory’.</u> • Evidence insufficient to show that he had obtained a domicile of choice in Australia by 5 August 1950. <ul style="list-style-type: none"> ○ Merely needs to be lawfully present in the domicile with an intention to make it his domicile indefinitely ○ However, could not be domiciled in Australia (as Australia was not regarded as a country of domicile at that time – <u>need to refer to domiciled state e.g. South Australia</u>) ○ Further, there was no evidence he intended to make SA his home indefinitely at that point. • Person cannot abandon domicile of origin – <u>may displace domicile of origin via domicile of choice</u>
NB	<ul style="list-style-type: none"> • Section 10 <i>Domicile Act 1979</i> (NSW) enacted to remedy the <i>Re Benko</i> issue

2.1.5. Domicile of corporations

- a) Domicile of a corporation is the place of incorporation.
- b) The lex domicilii determines:
 - Matters related to the status of corporations i.e. amalgamation with another corporation or dissolution of the corporation [*National Bank of Greece and Athens v Metliss*]
 - The contractual capacity of a corporation [*Carse v Coppen*]
- c) However, if a corporation is a party to a contractual obligation, then the proper law of the contract determines whether the contract has been performed, varied, novated or discharged [*Adams v National Bank of Greece* [1961]]

Case Name	National Bank of Greece and Athens v Metliss [1958] AC 509
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Facts	<ul style="list-style-type: none"> • In 1927, the National <u>Mortgage</u> Bank of Greece issued sterling mortgage bonds (\$29,000) to Metliss • Repayment of the sterling bonds was guaranteed by another bank (National Bank of Greece) • Guarantee expressed to be English law • In 1953, a statute was enacted by Greek government amalgamating two banks (resulting in the National Bank of Greece and Athens) such that it adopted all the guarantees • Metliss claimed against the amalgamated bank for guarantee from its predecessor bank
Issue	<ul style="list-style-type: none"> • Whether the foreign statute is to be recognised in England to place on the amalgamated bank the liability of the predecessor bank under the guarantee
Held	<ul style="list-style-type: none"> • Recognised in England
Reasoning	<ul style="list-style-type: none"> • The statute purports to substitute the amalgamated bank for the predecessor bank under the guarantee (<u>novation</u>) <ul style="list-style-type: none"> ◦ Novation is governed by the law of the contract (i.e. <u>the law of England</u>) • Alternatively, the <u>statute could be characterised by the law of the status of corporations instead of novation</u> <ul style="list-style-type: none"> ◦ Law of the status of the corporation is governed by the lex domicilii of the bank (i.e. <u>the law of Greece</u>) • <u>English law would recognise the amalgamated bank as the universal successor according to the Greek statute</u> <ul style="list-style-type: none"> ◦ Considerations of justice, convenience, comity and respect

Case Name	Adams v National Bank of Greece [1961] AC 255
Facts	<ul style="list-style-type: none"> • Same as in <i>National Bank of Greece and Athens</i> except the statute was <u>amended to exclude the liability under sterling mortgage bonds specifically</u> • This was to have <u>retrospective effect</u>
Issue	<ul style="list-style-type: none"> • Whether the amalgamated bank was liable for repayment under the mortgage bond given the amendment to the statute.
Held	<ul style="list-style-type: none"> • The Greek amendment did not retrospectively remove liability under contracts governed by English law
Reasoning	<ul style="list-style-type: none"> • The amendment could not retrospectively remove liability as the liability arose under English law. • <u>Characterised as a law relating to the discharge of contractual obligations instead of the status of corporations</u> • Considerations of justice, convenience, comity and respect <u>did not require recognition of a retrospective law</u> • The amendment removing liability would be applicable if the lex causae was Greek law, not under English law.

2.2. Domicile of Origin

2.2.1. Concept of domicile of origin

- a) The domicile acquired by every person at birth by operation of birth
- b) In applying Australian law, it is necessary to use the concept of domicile even if the foreign country does not know of the concept of domicile

2.2.2. Nuptial and ex-nuptial children

- a) Nuptial child is conceived within marriage; ex-nuptial is conceived outside of marriage
- b) A nuptial child takes as its domicile of origin the domicile of the father at the date of the child's birth (not necessarily the father's domicile of origin)
- c) Ex-nuptial child takes as its domicile of origin the domicile of the mother at the date of the child's birth
- d) However, following the Status of Children Act 1996 (NSW) applying to a person born in NSW or elsewhere before or after the commencement of the legislation.
 - Ex-nuptial child is now treated as a nuptial child (takes domicile of the father)

2.2.3. Doctrine of revival and its abolition

- a) Doctrine of revival – Abandonment of domicile of choice simply by physically leaving the country and no longer having an intention to make that country home indefinitely.
 - However, if the domicile of choice is abandoned, and has not yet adopted a domicile of choice in another country, in that transitory period – domicile of origin applies.
- b) For domicile of choice to be adopted, must have (i) lawful presence in the country and (ii) intention to make that country home indefinitely.
 - Does not matter how fleeting the presence was.
 - Therefore, if somebody was leaving the country of domicile of choice for another country and dies en route, then the domicile will be the domicile of origin
- c) This doctrine of revival has since been abandoned and replaced with:
 - The domicile of choice for a person cannot be abandoned until a new domicile of choice has been acquired. [s 6 DA]
 - This was the position in the US [*In Re Jones' Estate*]

Case Name	In Re Jones' Estate 182 NW 227 (1921) (Supreme Court of Iowa)
Facts	<ul style="list-style-type: none">• Jones seeking to avoid maintenance obligations and emigrates from Wales to Iowa• During the voyage, Jones meets and marries another woman• Jones was <u>lawfully present in Iowa and intended to make Iowa his home</u>• In 1914, Jones' wife dies leading Jones to return to Wales 'to live the rest of his days'• Jones purchases a ticket from New York but <u>his ship is torpedoed and he drowned en route</u>.<ul style="list-style-type: none">○ Died without will and most of his assets was monetary and left in Iowa
Issue	<ul style="list-style-type: none">• Where Jones was <u>domiciled at the time of his death</u> for the purpose of

	<p>determining the applicable system of law:</p> <ul style="list-style-type: none"> ○ If Iowa, then the money goes to his ex-nuptial child in Wales; ○ If Wales (domicile of origin), then the money would go to his brothers and sisters
Held	<ul style="list-style-type: none"> ● Iowa was the governing system of law.
Reasoning	<ul style="list-style-type: none"> ● Under US common law, <u>a person's domicile cannot be abandoned until the person adopts a new domicile.</u>
NB	<ul style="list-style-type: none"> ● Although Australian common law previously applied the doctrine of revival such that the domicile of origin would be revived, statutory change via the <i>Domicile Act 1979</i> (NSW) section 6 resulted in the <i>Re Jones</i> position to apply in Australia.

2.2.4. Loss by abandonment?

- a) At common law, a domicile of choice can be abandoned.
 - However, not abandon-able under s 6 *Domicile Act 1979* (NSW)
- b) Domicile of origin cannot be abandoned although it can be displaced by a domicile of choice [*Bell v Kennedy* (1868)]

Case Name	Bell v Kennedy (1868) LR 1 Sc & Div 307
Facts	<ul style="list-style-type: none"> ● Bell was born in Jamaica; Bell's father was domiciled by choice in Jamaica ● In 1937, slavery was abolished in Jamaica ● Bell believed there was no future for him in Jamaica: "left Jamaica for good" ● Bell moved to Scotland but not sure where to live permanently; <u>wife died at this point</u>
Issue	<ul style="list-style-type: none"> ● Wife's domicile depended on Bell's domicile – at the point of death, it was the domicile of origin, being Jamaica.
Held	<ul style="list-style-type: none"> ● Domicile of origin cannot be abandoned – although it can be displaced by a domicile of choice.

2.3. Domicile of Choice

2.3.1. Elements of acquisition of domicile of choice

- a) Acquired by voluntary act requiring:
 - Lawful physical presence in a country (no matter how fleeting); and
 - With the present intention to make that country home indefinitely at that time [s 9 *DA*]
- b) A person must have capacity to acquire a domicile of choice according to the lex fori [*Re Annesley* [1926]; *In the marriage of JD and AM Hannema* (1981) 7 Fam LR 542]
 - Person who is mentally capable acquires the capacity for an independent domicile at the age of 18 years [s 7(1) *DA*]