Non-Resident Indian's <u>will</u>

तथा

अनिवासी भारतीयाचे इच्छापत्र

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<u>Executive Summary:</u>

An elixir of immortality is more philosophical than practicable. No one can have eternal life. So, one has to plan about one's exit leaving behind all material gains like movable/immovable property to survivors, kith and kin.

A citizen of India having chosen to stay abroad for an employment or other purposes may have acquired nationality, domicile there, { an NRI status} would need to take extra care to void possible hurdles in transference of wealth on account of complex laws and conflict of jurisdictions involved in the process when estate is scattered in more countries than one.

Given the situation that there is a lack of internationally accepted mode of testamentary & intestate succession for the estate spread over the world, one is advised to traverse on the suggested lines more specifically detailed in the monograph.

A need to have properly crafted <u>will</u> and corresponding declaration, for each Asset separately can hardly be overemphasized. It is desirable in this context to have proper guidance from a well – versed Attorney to avoid pitfalls.

It is preferable if one considers disposal of major estate during one's life-time and the remainder through well-conceived <u>will</u> format recommended by the Hague Conference on Private International Law (HCCH).

If the <u>will</u> is executed in the manner indicated in the Uniform International Wills Act, 1973 (UIWA) and the basic requirements in paragraph 39 below are followed along with guidance from end-Annexure, the essential validity of the testamentary disposition may be somewhat free from challenges.

It is trite saying that most people don't plan to fail, they fail to plan. Kindly remember that planning is bringing the future into the present so *that you can do something about it now.*

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In the recent past, a booklet on the subject: "Your Wealth, Your <u>will</u>" [आपली संपत्ती, आपली इच्छा] written by the Author in Marathi was published in the Maharashtra Times (महाराष्ट्र टाइम्स) during January-March 2015. Later on its English version was published by the New Book Corporation, Mumbai in its taxation Bulletins in January 2016; and thereafter, in February 2016 these versions in Marathi & English had been released in the Book-form. In July 2016, its Hindi version: आपकी संपत्ती, आपका वसीयतनामा was published in a Book-form.

2. The main focus of these Booklets was on the awareness aspect and acquainting readers with fundamentals governing the functional & operational areas concerning the disposition of wealth through testamentary & non-testamentary trajectories, in a non-technical & simple language, without much of legalistic jargon so as to make it easily digestible, palatable to a legendary "common-man" depicted by *Late R. K. Laxman.*

3. The areas involving some complicated aspects where multi-national jurisdictions & laws may come into play were left open for subsequent monograph. Now, it is proposed to take those areas involving conflict of laws and jurisdictions affecting Non-Resident Indians or Persons of Indian Origin (NRIs & PIOs) primarily in relation to the disposition of their estate in India or the country, where they have chosen to reside with intention to stay permanently, a domicile of choice.

What exactly is meant by Conflict of laws?

4. *'Conflict of laws'* is a term used mainly in the United States, Canada, and, increasingly, in the United Kingdom. In most other countries, historically, the term '*private international law*' is used. The latter term derives from the civil-law distinction between 'private' and 'public' law, whereby 'private law' addresses the legal relationships between and among individuals, while 'public law' deals with the law governing State institutions as well as governmental agencies' relationship with private parties.

5. 'Private international law' thus emphasizes the differences between national legal systems, and the term *conflict of laws* refers primarily to rules that are solely national in origin and are explicitly not a part of international law (except insofar as countries have concluded treaties concerning them).

6. A 'conflict' case is a case containing a foreign element. 'Conflict of laws' must address three principal questions:

- First, when a legal problem touches upon more than one country, it must be determined which court has jurisdiction to adjudicate the matter.
- Secondly, once a court has taken/assumed jurisdiction, it must decide which law it should apply to the question before it. The rules governing the court may direct it to apply its own law or call for the application of the law of another country.
- Thirdly, assuming that the court ultimately renders a judgment in favour of the plaintiff, conflict-law must address

the enforcement of the judgment. Where the defendant has insufficient assets locally, enforcement of the judgment must be sought in a country where he holds sufficient assets.

These three questions take the centre stage in this monograph seeking to analyze in detail the jurisdictional and legal systems governing the cases involving foreign element in India and other countries; and efforts made by International bodies like the Hague Conference on Private International Law (*HCCH*), an intergovernmental organization working for the progressive unification of the rules, principles of conflict of laws.

Dissension and Family Arrangement:

7. In the previous booklet: "Your Wealth ,Your will", the emphasis was on avoidance or minimization of litigation by proper planning through the sacred document called will; and the dispute area emerging as a fall out of the defective, deficient wills or disagreement among members of family concerning implementation of a will was deliberately left untouched.

8. Looking to the growing trend of the courts in India and the central government's litigation policy, the dispute resolution out-of-court has had assumed greater importance, weightage and hence it was considered more appropriate to deal with the dispute resolution through "Family Arrangements", which have been upheld by the highest court of Law in India: the supreme court of India. A booklet has already been published with a title: "*Memorandum of Family Arrangements*" dealing with the subject in detail: formation of arrangement/agreement, documentation,

payment of stamp duty, registration & mutation entries relating to the properties, in the Government as also municipal records to give finality to the dispute resolution. The booklet contains a specimen copy of the Memorandum of Family Arrangement to give an idea of the legal requirements.

Present monograph:

9. As adverted to in paragraph 3 (supra), this monograph deals with the disposition of the estate through the will of an NRI and applicability of the domestic law or foreign law in the context of conflict of laws. If need be a reference may be made to the booklet on *"Memorandum of Family Arrangements*", where the dispute concerning the will may have to be resolved "out-of-court".

10. The subject matter of the monograph does involve some kind of technical & legal complexities, but an attempt is made to place it in a simple phraseology for ease in understanding by common readers as well. However, reference to accepted legal & technical definitions and allied settled principles of law is inevitable for the proper understanding of the subject matter, which has multiple facets & complex dimensions conceptually & in practical application.

Non-Resident Indian's will.

11. As the title suggests, the subject concerns a will prepared or to be prepared by a person who is a citizen of India but who is staying in some other country for employment or other purposes, called an NRI, or is a spouse or dependent person on such NRI. As the

NRI is staying for some time in the country other than India, he may, in all probability, have acquired both movable & immovable properties either on purchase/ sale basis or by acquiring interest in immovable properties by way of creating mortgages or in some other permissible manner; and he may also have some movable & immovable properties in India as well. Disposal of the entire estate in India and abroad needs timely and proper planning to avoid costly litigation, and ensure that the assets get transferred to near relatives in a smooth manner. An attempt is made to suggest technique of navigating through the maze of widely varying legal systems in the world dealing with cases involving a 'foreign element'.

12. A question that may arise is: "which law would govern the testamentary or non-testamentary disposition of an NRI"? Well, the answer is neither easy nor simple by any standard. Another question is: "whether the same law would apply equally for the properties in India and abroad"? Certainly not. Yet another question would be: "whether the law applies for the movable and immovable properties alike"? Surely not.

This monograph attempts to examine these vex & complex issues and seeks to suggest some fair to middling solution based on the current understanding of the Conflict of Laws or choice of law as in force or implemented internationally.

13. To begin with one must understand who is an "NRI" and who is a "PIO"? In the context, one must also familiarize with the OCI

Scheme applicable to both: NRIs and PIOs, which, in India, confers partial citizenship status on NRIs.

Non-resident Indian (NRI):

(a) A Non-Resident Indian (NRI) is a citizen of India who holds an Indian passport and has temporarily immigrated to another country for six months or more for employment, residence, education or any other purpose.

Person of Indian Origin (PIO):

(b) Person of Indian Origin (PIO) is a person of Indian ancestry, but who is not a citizen of India and is the citizen of another country. PIO is an identification status given to a person who's any of the ancestors was a permanent Indian resident/citizen, and who is presently holding valid citizenship and passport of another country.

- Other terms with vaguely the same meaning are *overseas Indian* and *expatriate Indian.*
- In common usage, this often includes Indian-born individuals (and also people of other nations with Indian ancestry) who have taken the citizenship of other countries.

Legal definitions: Non-Resident Indian (NRI)

(i) Strictly speaking, the term *non-resident* refers only to the tax status of a person who, as per section 6 of the Income-tax Act, 1961, has not resided in India for a specified period for the purposes of the Income Tax Act. The rates of income tax

are different for persons who are "resident in India" and for “NRIs”.

- According to the Income Tax Act, any Indian citizen who does not meet the criteria as a "resident of India" is a non-resident of India and is treated as an NRI for paying income tax.
- It needs to be mentioned that the Tax Laws in India are fluid and one is advised to check the “current law”.
- Till end of FY 2019-20, NRIs (i.e. Indian citizens and Persons of Indian Origin) included those individuals who visited India for less than 182 days in a financial year. In February 2020, the Budget 2020 proposed to reduce this period to 120 days for all NRIs.

Legal Definition: Person of Indian Origin (PIO)

(ii) The Government of India considers anyone of Indian origin up to four generations removed to be a PIO, with the exception of those who were ever nationals of Afghanistan, Bangladesh, Bhutan, Nepal, Pakistan, or Sri Lanka. The prohibited list periodically includes China and Iran as well.

- The government issues a PIO Card to a PIO after verification of his or her origin or ancestry and this card entitles a PIO to enter India without a visa.
- The spouse of a PIO can also be issued a PIO card though the spouse might not be a PIO. This latter category includes foreign spouses of Indian nationals, regardless of

ethnic origin, as long as they were not born in, or ever nationals of, the aforementioned “prohibited countries”.

- On 9th January 2015, PIO Card scheme was withdrawn, and merged with OCI scheme, as outlined below.

Overseas Citizenship of India (OCI) Scheme, a Partial Citizenship:

(c) Since 2003, the *Pravasi Bharatiya Divas* (Overseas Indians' Day) sponsored by Ministry of Overseas Indian Affairs, is being celebrated on the 9th January, each year, in India, to "mark the contribution of Overseas Indian community in the development of India".

As of January 2006, the Indian government has introduced the "Overseas Citizenship of India (OCI)" scheme to allow a limited form of dual citizenship to Indians, NRIs, and PIOs for the first time since independence in 1947.

Dual Citizenship not allowed in India:

(d) Article 9 of Indian Constitution says that a person who voluntarily acquires citizenship of any other country is no longer an Indian citizen. (About 60 countries: USA, UK, Bangladesh etc. allow dual Citizenship, whereas about 28 countries: India, China, Japan, Nepal, Malaysia, UAE etc. do not allow dual Citizenship)

- The Overseas Citizenship of India (OCI) is an immigration status and removes all barriers to entering, exiting India.

- To apply for and use an OCI document, a holder must be a citizen of and hold a passport of another country, except that of Pakistan or Bangladesh.
- The OCI status amounts to partial citizenship, sans right of voting or participating in governmental decision making.
- In 2015, the PIO card scheme is merged with the OCI scheme.

Jurisdiction & Choice of Law:

14. The conceptual understanding of the term "NRI" is clear that a person who is not a "resident of India", that is, he is not living in India for at least six months (February 2020, four months) in a year, is an NRI. Now, such an NRI staying most of the time abroad (say in UK or USA), may create after say about 3/5 years substantial wealth in that country in the form of movable & immovable properties. Such an NRI may have also retained links in India & may have also some properties in India. Suppose, a person having properties, both movable & immovable in both the countries is desirous of making his/her testamentary disposition, how he may go about it? Which legal system will apply in his/her case & which Court of law will give a definitive decision on disputes, if any, arising from & out of implementation of his/her last will & testament?

One can add further complexness to this array of questions by saying that the NRI married to an English woman and both of them also lived together in France for say 5-6 years and they had two children and all four of them are currently domiciled in

Germany. How to decide whether the legal system of Germany or UK or France or India would apply? Which Court of law would be competent to adjudicate on the execution of the will made in Germany disposing of property in UK, India and Germany?

Foreign Element:

15. Why these questions arise? The reason is that all facts do not happen or co-exist in the boundaries of one political State. Therefore, when the given set of facts have mixed colours involving different nationality, citizenship, domicile and location of assets, choice of law becomes inevitable; e.g. a person may be Indian national, wife a British national, children French nationals & the family is, now, domiciled in "Germany".

Each country has its own legal system, earmarked forum for adjudicatory process & set of Rules including the Rules in relation to conflict of laws with superimposing doctrine of "public policy" for rejecting foreign law as being distasteful to the value system of the domestic forum, that is, local courts of law.

This conflict of laws & jurisdictions have foxed many a jurists, legal luminaries for decades, centuries and many attempts made to devise a uniform system were unsuccessful. However, the recent developments in that direction by the Hague Conference (HCCH) are somewhat encouraging.

Meaning of the Terms:

Nationality, Citizenship & Domicile:

16. Now, in the context of the subject at hand, it is necessary to familiarize with the conceptual parameters of two, three terms

generally used: nationality, citizenship, and domicile as understood world over.

Nationality:

(i) Nationality is the legal relationship between a person and a political State.

(ii) Nationality grants the State jurisdiction over the person and affords the person the protection of the State. Nationality implies certain rights and duties, which vary from State to State.

(iii) By custom and international conventions, it is the right of each State to determine who its nationals are. Such determinations are a part of nationality law.

(iv) In some cases, determinations of nationality are also governed by public international law—for example, by treaties on statelessness, the EU Convention on Nationality.

- {*Statelessness* is an international problem. The international legal definition of a stateless person is "a person who is not considered as a national by any State under the operation of its law".}

(v) Indian nationality law largely follows the *jus sanguinis* (by right of blood) as opposed to the *jus soli* (by right of birth within the territory).

(vi) In most modern countries all nationals are citizens of the State, and full citizens are always nationals of the State.

Citizenship:

(i) Nationality differs technically and legally from citizenship, which is a different legal relationship between a person and a state/country.

(ii) Nationality and citizenship are two terms that are sometimes used interchangeably, as synonyms. But this is not true and they differ in many respects. Similarly the rules governing nationality and citizenship differ from country to country.

Nationality vs. Citizenship

Let us see what nationality means. In simple words, nationality is connected with country where an individual was born. The citizenship is a legal status, which means that an individual has been registered with the government in some country.

(a) The most common distinguishing feature of citizenship is that citizens have the right to participate in the political life of the State, such as by voting or standing for election.

(b) In the comity of nations, a State may have its own rules to recognize who are her citizens.

- In India, there is a Citizenship Act, 1955 which defines the concept of citizenship. Various types of citizenship are: *citizenship by birth; citizenship by descent; citizenship by registration; citizenship by naturalization, Renunciation and termination of Indian citizenship.*

Domicile:

(i) In law, *domicile* is the status or attribution of being a lawful permanent resident in a particular jurisdiction. Indian law

generally follows English common law principles on issues of conflict of laws.

(ii) Domicile usually is determined by the place of birth of individuals; and may be changed subsequently by a conscious act of the individual. Indian law lays down a specific test for "domicile of origin", and domicile of origin may not necessarily be the same as the place of birth. Domicile of origin means the home of an individual's parents. It does not mean the place where the child was born when the parents were on a visit or journey. Thus, domicile of origin is different from accidental place of birth.

(ii) A person can remain domiciled in a jurisdiction even after he has left it, if he has maintained sufficient links with that jurisdiction or has not displayed an intention to leave permanently.

(iii) *A person cannot be without a domicile and cannot have more than one domicile at any one time*; he acquires a *domicile of origin at birth*; the wife follows the domicile of her husband (Uxor sequitur domicilium viri).

(iv) Indian Succession Act, 1925, sections 6 to 18 thereof lay down general principles as to domicile.

Case Law: on Domicile

- In the case of Dr. Pradeep Jain vs. Union of India and others. [1984 AIR 1420] the Larger Bench of the Honourable Supreme

Court has very succinctly set out the concept of “domicile”. Following are excerpts:

QUOTE:

(1) Now there are in our country in almost all States residence requirements for admission to a medical college. Sometimes the requirement is phrased by saying that the applicant must have his domicile in the State. We must protest against the use of the word `domicile' in relation to a state within the union of India.

(2) The word `domicile' is to identify the personal law by which an individual is governed in respect of various matters such as the essential validity of a marriage, the effect of marriage on the proprietary rights of husband and wife, jurisdiction in divorce and nullity of marriage, illegitimacy, legitimation and adoption and testamentary and intestate succession to movables. …….

(3) It is well settled that the domicile of a person is in that country in which he either has or is deemed by law to have his permanent home.

> *"By domicile" said Lord Cranworth in Wicker v. Homes we mean home, ‘the permanent home.' The notion which lies at the root of the concept of domicile is that of permanent home."*

(4) There are two main classes of domicile: domicile of origin that is the domicile of his father or his mother according as he is legitimate or illegitimate and domicile of choice which every person or full age is free to acquire in substitution for that which he presently possesses.

(5) *Now the area of domicile,* whether it be domicile of origin or domicile of choice, *is the country which has the distinctive legal system and not merely the particular place in the country where the individual resides.*

(6) This being the true legal position in regard to domicile, let us proceed to consider whether there can be anything like a domicile in a state forming part of the Union of India. The Constitution of India recognizes *only one domicile namely, domicile in India*.

- Article 5 of the Constitution of India is clear and explicit on this point and it refers only to one domicile, namely, "domicile in the territory of India." When a person who is permanently resident in one state goes to another state with intention to reside there permanently or indefinitely, his domicile does not undergo any change: he does not acquire a new domicile of choice. .....
- We would also, therefore, interpret the word 'domicile' used in the Rules regulating admissions to medical colleges framed by some of the states *in the same loose sense of permanent residence and not in the technical sense in which it is used in private international law.*

17. The broad outline of the three concepts, namely, nationality, citizenship & domicile have material significance in the field of conflict of laws. Nationality has an equation with political denomination, whereas the citizenship confers right of participating in nation's political management; and the domicile surely grants access to a territorial jurisdiction in almost all the States. The domicile plays a vital role and applies to disposition of all movable property in the jurisdiction where the person has his domicile.

The nature of conflict of Laws:

18. Conflict of laws involves number of complexities in its application to many situations like marriage, divorce, inheritance

or ownership concepts of movable and immovable properties. This subject has occupied the attention and talents of some of the most learned jurists, and their labours are comprised in many volumes.

The branch of Indian law, in contradistinction to the ordinary local or domestic law of India, which is concerned with cases having a "foreign element", is known as the *conflict of laws.* A foreign element means a contact with some system of law other than the Indian law.

19. In the preceding paragraph 14 an example was taken. Thus when the given set of facts has mixed colours involving different nationality, citizenship, domicile and location of assets, choice of law becomes inevitable.

Now, the person is domiciled in Germany & wants to file petition for divorce. Which law would apply? Or, suppose he dies intestate, how his estate would be disposed of, both movable & immovable? Answers to these questions would push one to examine the operation of German legal system & the Indian legal system as well.

20. Each country has its own legal system, an earmarked forum for adjudicatory process & set of rules including the Rules in relation to Conflict of laws with superimposing doctrine of "public policy" for rejecting foreign law as being distasteful to the value system of the domestic forum, that is, local courts of law.

Selecting Legal System:

21. Generally speaking many legal systems world over follow some common rules.

(a) A court can apply the law of the forum (*lex fori*)-- which is usually the result, when the question of what law to apply is *procedural*, or

(b) The court can apply the law of the site of the transaction, or occurrence that gave rise to the litigation in the first place (*lex loci*), this is usually the controlling law selected when the matter is *substantive*.

Conflict of Laws: some illustrations:

22. It is better to take some familiar illustration:

- The traditional tests for the validity of a marriage in Canada (which adopted the rules established by the English courts in the nineteenth century) was:

  That a marriage had to be valid

(i) where it was performed, by the *lex loci celebrationis*, and

(ii) by the law of the parties' ante-nuptial domicile, usually referred to as the question of "essential validity".

- With respect to the *lex loci celebrationis*, the ceremony had to comply with the rules of the place where it occurred—the minister had to be licensed, a licence obtained by the parties, etc.
- In the eighteenth century, the English courts recognized as a valid *English* marriage, a marriage performed in

Scotland, notwithstanding that the parties, usually being under 21, could not validly marry in England without parental consent.

- In *Brook v. Brook* (1861), the House of Lords dealt with the question of essential validity and held that the marriage of a man to his deceased wife's sister in Denmark was invalid because such a marriage was within the prohibited degrees of affinity under English law, the law of the parties' ante-nuptial domiciles, though not under Danish law. The problems that the English courts had with marriages like that of Mr. Brook are truly extraordinary. Today's Justices may not toe the line of Brook's case.
- Today, undoubtedly private international law is a national law. There exists an English private international law as distinct from French or German or an Indian.

Doctrine of public policy or public order:

23. In deciding a conflict of laws question, a judge will sometimes say, "The foreign law ordinarily applicable will not be applied in this case because to do so would violate our public policy."

(i) It is commonly perceived that to reject the application of foreign law on public policy grounds is to say that somehow the content of the foreign law, when tested by notions at the forum, is seriously deficient in quality. Thus, in effect, the forum's public policy sits in judgment over the wisdom and fairness of the foreign law.

(ii) A plaintiff in a conflict of laws case does not seek to do something that is against public policy in its local sense. *He is asking the court to give legal effect to acts done elsewhere and in accordance with the law prevailing there.* When a judge rejects the application of a foreign law on public policy grounds, it must appear 'pernicious and detestable' or, 'violate some fundamental principle of justice', some deep-rooted tradition of the community.

(iii) In conflict cases, no court will apply a "foreign" law if the result of its application would be contrary to public policy. This is problematic because excluding the application of foreign laws would defeat the purpose of conflict of laws by giving automatic preference to the forum court's domestic law. Thus, for the most part, courts are slower to invoke public policy in cases involving a foreign element than when a domestic legal issue is involved.

Illustrative application:

24. A concrete perspective of the nature and character of the Conflict law can be perceived where referents are from everyday happening or an oversimplified example of a legal situation calling for the application of rules of conflict law.

- A Dutch sailor employed on an American ship is injured in the course of work by allegedly faulty equipment while the ship is at anchor in a Japanese port.

- He sued for recovery in a Dutch court and sought application of the American law on the subject because it leads to the largest recovery with the smallest burden of proof.
- The American ship-owner, as defendant, contended that the negligence of the seaman was the cause of the accident and argues for the application of Japanese law, presumably it being least generous in awarding compensatory damages.
- Which legal system and what legal rules would be chosen by a Dutch court (the Netherlands) as providing the governing law?
- Would the same governing law be chosen for this kind of case by a court in the United States or Japan?

In a nut-shell, the choice of jurisdiction and the legal system applicable is at the core of the conflict of laws.

Common rules and principles:

25. While it is the prerogative and privilege of each jurisdiction to evolve and apply its own system of conflict of laws, a critical study of various systems, over a period of time, reveals that several jurisdictions follow a few general rules, which can be summarized as below:

(i) Every nation possesses an exclusive sovereignty and jurisdiction within its own territory. The laws of every State, therefore, bind directly all property, whether real or personal, within its territory; and all persons who are residents within it, whether citizens or foreigners; and also all contracts made, performed or done within it. Vide *Lex Loci*;

(ii) It be noted that ambassadors and other public ministers, while in the territory of the State, to which they are delegates, are exempt from the local jurisdiction.

(iii) Possessing exclusive authority, a State may regulate the manner, circumstances under which property shall be held, transmitted or transferred; the condition, capacity, validity of contracts and the remedies and modes of administering justice in all cases.

Legal systems, an overview:

26. Generally considered, there are five legal systems in the world today: (i) civil law, (ii) common law, (iii) customary law, (iv) religious law, and (v) mixed legal systems.

- Legal systems in countries around the world generally fall into one of two main categories:

  (i) common law systems and
  (ii) Civil law systems.

  The main difference between the two systems is:

  (i) in common law countries, case law, in the form of published judicial opinions, is of primary importance,
  (ii) whereas in civil law systems, codified statutes predominate.

- There are roughly 150 countries that have primarily 'civil law systems', whereas there are about 80 'common law countries'.

- But these divisions are not as clear-cut as they might seem. In fact, many countries use a mix of features from common and civil law systems.

India maintains a hybrid legal system with a mixture of civil, common law and customary, Islamic ethics, or religious law within the legal framework inherited from the British colonial era and various legislation introduced by the British are still in vogue.

Common principles:

27. Although no uniform international conflict law rules exist, there are a number of common principles that are recognized to a varying extent throughout the world.

(a) Legal systems have established different criteria for the selection of one country's law over that of another for application to a particular case or problem. There are, however, some widely shared general principles.

- For questions of family law, inheritance, and (in limited types of cases) even liability in tort, legal systems will consider the nationality or, alternatively, domicile or habitual residence of a person.
- For commercial transactions, a transaction's "closest connection" to a legal system may be emphasized over traditional connecting factors such as where the transaction was concluded.

(b) For cases involving legal persons (& corporations), many countries, particularly those of the common-law tradition, prefer the law of the State where the entity is incorporated, but others with dominance of civil-law, prefer the law of the corporate "seat," defined as the place of central management and decision making. Among the EU countries, there is a trend to change to the place-of-incorporation rule.

(c) With respect to commercial transactions (e.g., contracts), modern conflicts law emphasizes flexibility. Most countries allow the *parties to agree to the jurisdiction of a court.* Consent may take the form of an express agreement in the initial business contract. Even where both parties consent to a court's jurisdiction, the courts in a common-law country may decline to hear the case, when neither of the parties nor the controversy has a connection to the country where the court is located.

When the parties have not submitted to the forum, Civil-law countries start from the premise that there is one principal place where a suit can be filed: the *domicile* of an individual or the seat of legal persons such as a Corporation ("general jurisdiction").

(d) In addition to these general bases of jurisdiction, a suit ordinarily may be brought in the courts of the place to which the suit has a special connection: e.g. where a tort was

committed or where its effects were felt, or where the alleged breach of a contract occurred,

(e) If title to real property is involved, where the property is located ("specific jurisdiction").

(f) Increasingly, countries have limited the exercise of jurisdiction for the protection of weaker parties, such as employees and consumers. Such a pattern has emerged, for example, in the *procedural law* of the EU.

(g) Courts in *common-law countries*, particularly the United States, U.K., assert jurisdiction over a defendant if he has been served with the documents commencing the suit in the territory of the state in which the court is located, even if he was there only temporarily or while in transit ("transient jurisdiction").

- Most countries provide some bases of jurisdiction for the benefit of local plaintiffs. French law, for example, grants jurisdiction if the plaintiff possesses French nationality, and German statutory law permits a local plaintiff to sue an absentee defendant on the basis of any property the defendant may have in Germany.

The supreme court of India: conflict of laws:

28. In Y. Narasimha Rao case the Apex Court made some pertinent observations on the Conflict of laws:

QUOTE:

9. The rules of Private International Law in this country are not codified and are scattered in different enactments such as the Civil

Procedure Code, the *Contract Act,* the *Indian Succession Act,* the *Indian Divorce Act,* the *Special Marriage Act* etc. …… In addition, some rules have also been evolved by judicial decisions. In matters of status or legal capacity of natural persons, matrimonial disputes, custody of children, adoption, testamentary and intestate succession etc. the problem in this country is complicated by the fact that there exist different personal laws and no uniform rule can be laid down for all citizens. ……..

Hence, in almost all the countries the jurisdictional procedural and substantive rules which are applied to disputes arising in this area are significantly different from those applied to claims in other areas. That is as it ought to be. ……..

10. We are in the present case concerned only with the matrimonial law *and what we state here will apply strictly to matters arising out of and ancillary to matrimonial disputes.* The Courts in this country have so far tried to follow in these matters the English rules of Private International Law whether common law rules or statutory rules. ……..The Court referred to Section 13 of the Civil Procedure Code, 1908, and held: Under Section 13 of the Code of Civil Procedure 1908 (hereinafter referred to as the ``Code''), a foreign judgment is not conclusive as to any matter thereby directly adjudicated upon between the parties if conditions therein are not fulfilled. ……. UNQUOTE

Thus, relying on above rules, the Court dismissed the application on the ground that the jurisdiction of the forum as well as the ground on which the divorce decree was passed is not in accordance with the Hindu Law under which the parties were married, and the respondent had not submitted to the jurisdiction of the court or consented to its passing, *it cannot be recognized by the courts in this country and was hence held unenforceable.*

Benchmark principles:

29. It is pertinent to mention that the Honourable Supreme Court has handed down about more than 100 judgments ever since January 1950, involving "foreign element" and those are all now a part of the 'private international law of India'. A passing reference is made to a few cases where some legal principles are enunciated:

General:

- R. Viswanathan's case: The main source of conflict of laws is the decisions of the courts. However, certain statutes and juristic writings have also contributed to the development of this aspect of law. Cheshire has rightly pointed out that 'Private International Law as found "is almost entirely the result of judicial decisions."

Immovable property:

- In *Satya v Teja Singh:* The Court relied on Dicey's *Conflict of Laws* to the effect: 'The courts of a foreign country have no jurisdiction to adjudicate upon the title or the right to the possession of any immoveable property not situate in such country.

Meaning of domicile:

- In *Central Bank of India v Ram Narain,* the Court noted that it is not possible to define domicile. The term lends itself to illustration and not a definition. That domicile means permanent home. Explaining the meaning of domicile the court said that domicile denotes the relation between a person and a particular territorial unit possessing its own system of law. The traditional statement, that to establish domicile there must be a present intention of permanent residence, has been affirmed in almost all decisions involving issues on domicile.

Domicile of corporations:

- *Turner Morrison & Co. v Hungeiford, case* was concerned with the residence of a corporation having transnational business dealings. It was held that such a corporation 'resided' in India if it is involved in doing business in India and 'more generally that corporation can have multiple residences and domiciles. According to the English law, place of *incorporation* constitutes the domicile of the corporation, while the country where the central management and control is exercised becomes its residence.

Marriage and divorce:

- In Sarrala Mudgal Case: "Answering the questions posed by us in the beginning of the judgment, we hold that the second marriage of a Hindu-husband after conversion to Islam, without having his first marriage dissolved under law, would be invalid. The second marriage would be void in terms of the provisions of Section 494 IPC and the apostate-husband would be guilty of the offence under Section 494 IPC."

Contracts

- 'The parties to a contract in international trade or commerce may agree in advance on the forum which is to have jurisdiction to determine disputes. This autonomy of the parties to choose the governing law of the contract is part of the proper law of contract practised by almost all countries. The proper law of contract is ascertained by express choice of the parties. The Courts have a residual power to strike down, a choice of law clause, totally unconnected with the contract. The chosen proper law must be the law at the time when the contract was made. There can be no 'floating proper law'.

Arbitration:

- In NTPC: The Tribunal has rightly held that the 'substantive law of the contract is Indian law'; the laws of England govern procedural matters in the arbitration. All substantive rights including that which is contained in the arbitration clause are governed by the laws of India. The jurisdiction exercisable by the English courts in procedural matters must be viewed as concurrent.

Tapering differences:

30. With a view to narrowing down the wide gap in legal systems of different countries, the Hague Conference on Private International Law sought to formulate an international convention on jurisdiction and judgment recognition. The effort was abandoned when the differences proved too large to bridge.

The Hague Conference on Private International Law (HCCH), for *Hague Conference/Conférence de La Haye*) is the pre-eminent organization working in the area of *private international law.*

31. The HCCH was formed in 1893 to "work for the progressive unification of the rules of private international law". It has pursued this goal by creating and assisting in the implementation of *multilateral conventions promoting harmonisation of conflict of laws p*rinciples in diverse subject matters.

32. The Conference has developed thirty-eight (38) International Conventions. A significant number of these Conventions are currently in force and mostly focus on conflict of laws rules, administrative co-operation, jurisdiction and applicable law, e.g. law applicable to matrimonial or inheritance.

33. HCCH Conventions are open for adoption or ratification by non-members of HCCH. As of 2019, *85 countries* are members of the Hague Conference. Besides all member states of the European Union, the European Union is itself also a member. India joined this august body on 13th March 2008.

34. A reference may be made to the Convention on the Form of testamentary disposition, that is the will format: (Excerpts)

Convention on the conflicts of laws:

The Form of Testamentary Dispositions

(Concluded 5 October 1961-Entry in force: 05-01-1964)

The States signatory to the present Convention, Desiring to establish common provisions on the conflicts of laws relating to *the form of testamentary dispositions*,

Have resolved to conclude a Convention to this effect and have agreed upon the following provisions:

Article 1

A testamentary disposition shall be valid *as regards form if its form complies with the internal law:*

a) of the place where the testator made it, or

b) of a nationality possessed by the testator, either at the time when he made the disposition, or at the time of his death, or

c) of a place in which the testator had his domicile either at the time when he made the disposition, or at the time of his death, or

d) of the place in which the testator had his habitual residence either at the time when he made the disposition, or at the time of his death, or

e) so far as immovable are concerned, of the place where they are situated.

- For the purposes of the present Convention, if a national law consists of a non-unified system, the law to be applied shall be determined by the rules in force in that system and, failing any such rules, by the most real connexion which the testator had with any one of the various laws within that system.

The determination of whether or not the testator had his domicile in a particular place shall be governed by the law of that place.

Article 2

Article 1 shall apply to testamentary dispositions revoking an earlier testamentary disposition. ……..

35. *In terms of the Article 11, of the Convention on the Form of Testamentary Disposition, the State <u>where property is situated</u> has "a right of refusal"* by virtue of provisions of its own law relating thereto, *<u>forms of testamentary dispositions made abroad,</u>*

<u>If all four conditions exist:</u>

(i)the testamentary disposition is valid as to form by reason only of a law solely applicable to the place where the testator made his disposition,

(ii) the testator was domiciled in the situs state,

(iii) the testator had his habitual residence in the situs state,

(iv) the testator died not the in situs state, but elsewhere.

- This right to de-recognize the form which is otherwise valid by virtue of non-presence of the testator at the time of death in that place is giving superiority to the forum law, where the property is situated and it may be prejudicial to the testator, who may not be fully aware of that internal law where the property is situate.

36. In this context, reference to one more convention may be made.

1st August 1989

Convention on Law:

Succession to the Estates of Deceased Persons:

The States signatory to this Convention,

Desiring to establish common provisions concerning the law applicable to succession to the estates of deceased persons,
Have resolved to conclude a Convention for this purpose and have agreed upon the following provisions -

CHAPTER I - SCOPE OF THE CONVENTION

Article 1

(1) This Convention determines the law applicable to succession to the estates of deceased persons.

(2) The Convention does not apply to -

a) the *form of dispositions* of property upon death;

b) capacity to dispose of property upon death;

c) issues pertaining to matrimonial property;

d) property rights, interests or assets created or transferred otherwise than by succession, such as in joint ownership with right of survival, pension plans, insurance contracts, or arrangements of a similar nature.

Article 2

The Convention applies even if the applicable law is that of a non-Contracting State.

CHAPTER II - APPLICABLE LAW:

Article 3

(1) *Succession is governed by the law of the State in which the deceased at the time of his death was habitually resident, if he was then a national of that State.*

(2) Succession is also governed by the law of the State in which the deceased at the time of his death was habitually resident if he had been resident there for a period of no less than five years immediately preceding his death.

- However, in exceptional circumstances, if at the time of his death he was manifestly more closely connected with the State of which he was then a national, the law of that State applies.

(3) In other cases succession is governed by the law of the State of which at the time of his death the deceased was a national, unless at that time the deceased was more closely connected with another State, in which case the law of the latter State applies.

Article 4

If the law applicable according to Article 3 is that of a non-Contracting State, and if the choice of law rules of that State designate with respect to the whole or part of the succession, the law of another non-Contracting State which would apply its own law, the law of the latter State applies.

Article 5

(1) A person may designate the law of a particular State to govern the succession to the whole of his estate. The designation will be effective only if at the time of the designation or of his death such person was a national of that State or had his habitual residence there.

(2) *This designation shall be expressed in a statement made in accordance with the formal requirements for dispositions of property upon death. The existence and material validity of the act of designation are governed by the law designated. If under that law the designation is invalid, the law governing the succession is determined under Article 3.*

(3) The revocation of such a designation by its maker shall comply with the rules as to form applicable to the revocation of dispositions of property upon death.

(4) For the purposes of this Article, a designation of the applicable law, in the absence of an express contrary provision by the deceased, is to be construed as governing succession to the whole of the estate of the deceased whether he died intestate or wholly or partially testate.

Article 6

A person may designate the law of one or more States to govern the succession to particular assets in his estate. However, any such designation is without prejudice to the application of the mandatory rules of the law applicable according to Article 3 or Article 5, paragraph 1. xxxx

37. From the 1989 convention on the law applicable to succession to the estate of the deceased person, it appears clear that:

- It excludes matrimonial property, jointly held property.
- Further, it does not concern about the formal validity or even capacity to dispose of property.
- ***As far as merits are concerned,*** Article 3 and 5(1) are mandatory provisions and the declaration will govern the succession to the entire estate provided the declarant at the time of his death or at the time of making declaration was the national of that state or habitual resident in that state.
- Article 6 permits a person to designate one or more state to govern succession to particular assets in his estate, without prejudice to Article 3 & 5(1) which provisions or rules are mandatory.
- Even assuming that it not subscribed by India, the convention on succession to the estate has many trappings and may not be a very useful tool.

The Uniform International Wills Act, 1973:

38. One may refer to the HCCH convention on the Uniform International Wills Act. (UIWA).

The Form of an International Will was drafted and presented to the international community in 1973. The Convention was signed and ratified by a number of countries. The Convention concluded at Washington, USA on 26th October 1973. (It is not known whether India has ratified UIWA)

- The Convention arrived at some acceptable rules & certification procedure to give formal validity to the testamentary disposition, no matter whether the Testator is the national, citizen or domiciled at the place where the will is made, and no matter where the property is situate.
- The UIWA does not, however, apply to "joint wills," meaning those made by two or more persons in one document.
- Invalidity under the UIWA, however, does not affect validity as a will executed in compliance with state law; *a will which is invalid under the UIWA may still be valid under state law.*

Essential features:

(a) The UIWA establishes internationally accepted standards for what constitutes a validly created will.

(b) While states recognize the validity of a will that is executed in accordance with the laws of the jurisdiction in which the will was executed; it is sometimes difficult to convince a probate court judge that a will that was executed internationally was properly executed.

(c) The UIWA is intended to reduce problems associated with proving that a will executed in another country was properly executed, by internationally accepted standards.

(d) Several countries in addition to the United States have adopted the UIWA.

(e) In 1973 the UK, together with a number of other nations, signed up to the "Convention providing a Uniform Law on the Form of an International Will".

(f) The provisions of the convention were introduced into the UK by the passing of the Administration of Justice Act 1982. Annnex, Schedule 2, gives modifications to UIWA. (vide Annexure to this monograph)

Basic requirements: UIWA

39. The *basic* requirements for essential validity of the will are: :

a) The will must be in writing;

a) The will must be witnessed by two individuals *and an authorized person* (an attorney licensed to practice in the jurisdiction where the will is signed, or certain members of the diplomatic and consular services);

b) The person creating the will (the "testator") must sign each page of the will;

c) The witnesses and authorized person must attest the will by signing in the presence of the testator;

d) Each page of the will must be numbered;

e) The authorized person will need to note the date of his or her signature at the end of the will. The date noted will be treated as being the date of the will.

f) Currently there is no requirement in England and Wales (or in India) that a will be stored in a particular place.

This being the case, the authorized person will need to ask the testator whether he or she wishes to make a declaration as to *the safe-keeping of* the will.

g) The authorized person will need to attach to the will a *certificate confirming that the requirements set out above have been met.* If the testator makes a declaration as to the safe-keeping of the will, the place where it shall be stored should be recorded in the certificate.

h) A certificate, the form of which is provided by the Act, must be attached to the will; and the Authorized person must give a copy to the testator & retain one for him.

Ij) An international will may be revoked by the testator.

k) If the testator is unable to sign the will, he or she will have to explain to the authorized person why he or she cannot sign it. In such circumstances the authorized person will have to make a note of this on the will.

l) If the testator cannot sign the will the testator will be able to direct someone to sign the will on his or her behalf.

m) The testator's signature or that of the person signing on his or her behalf will need to be placed at the end of the will and if the will consists of more than one page the testator or person signing on his or her behalf will need to sign each page.

n) The form of Certificate by the Authorized person may be in the format below or near similar to that.

40. The certificate drawn up by the authorized person shall be in the following form or in a substantially similar form:

CERTIFICATE

(Convention of October 26, 1973)

1. I, ... (Name, address and capacity), a person authorized to act in connection with international wills

Certify that on ..... (Date) at ..... (Place)

(Testator)..... (Name, address, date and place of birth) in my presence and that of the witnesses

(a)..... (Name, address, date and place of birth)

(b)..... (Name, address, date and place of birth)

has declared that the attached document is his will and that he knows the contents thereof.

2. I furthermore certify that:

(a) in my presence and in that of the witnesses (1) the testator has signed the will or has acknowledged his signature previously affixed.

*(2) following a declaration of the testator stating that he was unable to sign his will for the following reason ..... I have mentioned this declaration on the will * - the signature has been affixed by .....(name, address)

(b) the witnesses and I have signed the will;

* (c) each page of the will has been signed by ..... and numbered;

(d) I have satisfied myself as to the identity of the testator and of the witnesses as designated above;

(e) the witnesses met the conditions requisite to act as such according to the law under which I am acting;

* (f) the testator has requested me to include the following statement concerning the safekeeping of his will: .....

PLACE ..... DATE SIGNATURE and, if necessary, SEAL

Article 11:

The authorized person shall keep a copy of the certificate and deliver another to the testator.

Article 12

In the absence of evidence to the contrary, the certificate of the authorized person shall be conclusive of the formal validity of the instrument as a will under this Law. .....

- The basic requirements of the UIWA are mostly in line with the law on testamentary disposition as in force in India, and as such it appears that an NRI or PIO can safely adopt the same with minor modifications as per the local needs, as may be advised by the Attorney in the State of domicile or nationality where the will is made.

Options for an NRI:

41. From the aforesaid discussion it is manifestly clear that the two Hague Conventions: one on Form of will or second on succession of estate are not widely endorsed by the International comity of nations; nor is the International Wills Act endorsed & accepted by various nations. It is also not known whether India has ratified, accepted either of the conventions. The question then is: "How should an NRI navigate in the cobweb of conflicting jurisdictions & multiple legal systems and plan his affairs so that the essential validity of the testamentary succession faces no challenges by the local forum on technicality or on the grounds of public policy?"

42. It is submitted that individuals who own assets in different countries, the viable & less bothersome proposition would be to make independent & separate testamentary disposition of the assets in different countries (by giving cross-reference in each separate will) so as to be in line with lex terrae, the law of the land; & lex fori, the law of the forum or court; and qua the immovable property lex loci, the law of the place; and avoid as

far as possible mixing up jurisdictions based on nationality or citizenship or for that matter even domicile.

43. Once the above decision is taken the will may be executed in the manner indicated in the Uniform International Wills Act, (UIWA) although the same is not an "accepted" convention at large; or for that matter India may not have ratified it.

- One can say with certainty that the principles embodied in the International Wills Act appear to be sound and would avoid much of the complications to the formulation of wills.
- Well, the dispute on the contents of the will can hardly be forestalled, except when the person makes up his mind to divest himself most of the property during the lifetime, leaving behind sufficient property for his own sustenance thereafter.

44. While there cannot be any hard and fast rule in dealing with the properties –both movable & immovable—by an individual having an NRI status, one can say that appropriate guidance be taken at the right time so that those who survive him/her face less problems & they get the possession of the properties without facing multiple courts and legal systems.

Epilogue:

45. It can be said that given the conflict of laws and the lack of internationally accepted mode of testamentary & intestate succession, across the world, there is one hope that under the HCCH "Convention providing Uniform Law on the Form of an

International Will", a set of minimum requirement is established for a legally accepted will through the (UIWA).

Even if the aforesaid Washington convention is not endorsed by many countries or for that matter by India, the principles laid down therein are worth adopting in conjunction with the 1st August 1989 Convention "On the Law Applicable to Succession to The Estates of Deceased Persons" to the extent that the declaration could be filed separately for assets in different countries, coupled with an independent will supporting such declaration for Assets in different countries, giving cross–references to all wills in the Format with the Certificate prescribed in the Uniform International Wills Act.

In India, the Advocates are not permitted to 'Certify' or authenticate a document, as the Notaries alone are authorized, an Advocate can make an "attestation" and give the particulars in the Certificate format. That may help clarify that the document was also attested by person unconnected with the will or the Testator or the witnesses or the legatee or a devisee, and in all probability add to the probative value of the will.

If the NRI is well advised to dispose of the major portion of his property during the life-time, retaining bare essential as protective covering for expected life span ahead, the hassels of estate transmission could be minimized.

Hopefully, the above approach may be the best bet in the complex labyrinth of the jurisdictions & forums world over.

BNADRA, EAST **13th July 2020.**

ANNEXURE-I

(UK) Administration of Justice Act 1982:
SCHEDULE 2 --The Annex to the Convention: on International Wills
UNIFORM LAW ON THE FORM OF AN INTERNATIONAL WILL

Article 1

1. A will shall be valid as regards form, irrespective particularly of the place where it is made, of the location of the assets and of the nationality, domicile or residence of the testator, if it is made in the form of an international will complying with the provisions set out in Articles 2 to 5 hereinafter.

2. The invalidity of the will as an international will shall not affect its formal validity as a will of another kind.

Article 2

This law shall not apply to the form of testamentary dispositions made by two or more persons in one instrument.

Article 3

1. The will shall be made in writing.
2. It need not be written by the testator himself.
3. It may be written in any language, by hand or by any other means.

Article 4

1. The testator shall declare in the presence of two witnesses and of a person authorized to act in connection with international wills that the document is his will and that he knows the contents thereof.
2. The testator need not inform the witnesses, or the authorized person, of the contents of the will.

Article 5

1. In the presence of the witnesses and of the authorized person, the testator shall sign the will or, if he has previously signed it, shall acknowledge his signature.

2. When the testator is unable to sign, he shall indicate the reason therefor to the authorized person who shall make note of this on the will. Moreover, the testator may be authorized by the law under which the authorized person was designated to direct another person to sign on his behalf.

3. The witnesses and the authorized person shall there and then attest the will by signing in the presence of the testator.

Article 6

1. The signatures shall be placed at the end of the will.
2. If the will consists of several sheets, each sheet shall be signed by the testator or, if he is unable to sign, by the person signing on his behalf or, if there is no such person, by the authorized person. In addition, each sheet shall be numbered.

Article 7

1. The date of the will shall be the date of its signature by the authorized person. 2. This date shall be noted at the end of the will by the authorized person.

Article 8

In the absence of any mandatory rule pertaining to the safekeeping of the will, the authorized person shall ask the testator whether he wishes to make a declaration concerning the safekeeping of his will. If so and at the express request of the testator the place where he intends to have his will kept shall be mentioned in the certificate provided for in Article 9.

Article 9

The authorized person shall attach to the will a certificate in the form prescribed in Article 10 establishing that the obligations of this law have been complied with.

Article 10

The certificate drawn up by the authorized person shall be in the following form or in a substantially similar form:

CERTIFICATE

1. I, ... (name, address and capacity), a person authorized to act in connection with international wills

2. Certify that on ..... (date) at ..... (place)
3. (testator) ..... (name, address, date and place of birth) in my presence and that of the witnesses 4. (a) ..... (name, address, date and place of birth)
(b) ..... (name, address, date and place of birth) has declared that the attached document is his will and that he knows the contents thereof.
5. I furthermore certify that:
6. (a) in my presence and in that of the witnesses]
(1) the testator has signed the will or has acknowledged his signature previously affixed.
*(2) following a declaration of the testator stating that he was unable to sign his will for the following reason ...
—I have mentioned this declaration on the will
*—the signature has been affixed by ..... (name, address)
7. (b) the witnesses and I have signed the will;
8. *(c) each page of the will has been signed by ..... and numbered:
9. (d) I have satisfied myself as to the identity of the testator and of the witnesses as designated above; 10. (e) the witnesses met the conditions requisite to act as such according to the law under which I am acting;
11. *(f) the testator has requested me to include the following statement concerning the safekeeping of his will: 12. Place 13. Date 14. Signature and, if necessary, Seal *To be completed if appropriate.

Article 11

The authorized person shall keep a copy of the certificate and deliver another to the testator.

Article 12

In the absence of evidence to the contrary, the certificate of the authorized person shall be conclusive of the formal validity of the instrument as a will under this Law.

Article 13

The absence or irregularity of a certificate shall not affect the formal validity of a will under this Law.

Article 14

The international will shall be subject to the ordinary rules of revocation of wills.

Article 15

In interpreting and applying the provisions of this law, regard shall be had as to its international origin and to the need for uniformity in its interpretation.

* * * *