Private international law of succession in South Africa*

JAN L NEELS**

1 *Introduction*

In South Africa there is no general code of private international law; indeed, there are not many statutory provisions that are relevant for private international law. Thus often the common law applies. The common law of South Africa in the field of private international law is based upon Roman-Dutch foundations with significant influence from English law.[1]

This article deals with choice of law pertaining to succession in South African private international law. It can only attempt to be a short introduction to the subject and for detailed information the reader is referred to the standard texts on South African private international law.[2]

Only the specific rules and principles relating to succession will be discussed. The general doctrines of private international law affect all its components.

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** Professor of Private International Law and Director of the Institute for Private International Law in Africa, University of Johannesburg.

[1] See Forsyth *Private International Law. The Modern Roman Dutch Law including the Jurisdiction of the High Courts* (2003) 16 17; Schoeman "South Africa" in Verschraegen (ed) *Private International Law* in Blanpain (gen ed) *International Encyclopaedia of Laws* (loose leaf 2001) par 1 3; Schoeman "The South African conflict rule for proprietary consequences of marriage: learning from the German experience" 2004 *TSAR* 115 117 119. The Roman Dutch conflicts authors, however, had a profound influence on many other legal systems, especially English law. See Forsyth (n 1; 2003) 16 and 43; Forsyth "The provenance and future of private international law in Southern Africa" 2002 *TSAR* 60 62 64. Take note that South Africa is a party to the Hague Convention on the Conflict of Laws Relating to the Form of Testamentary Dispositions (1961) but not to any of the other Hague conventions in the field of succession: Hague Convention Concerning the International Administration of the Estates of Deceased Persons (1973); Hague Convention on the Law Applicable to Trusts and on their Recognition (1985); Hague Convention on the Law Applicable to Succession to the Estates of Deceased Persons (1989). South Africa is also not a party to the UNIDROIT Convention Providing a Uniform Law on the Form of an International Will (Washington) (1973).

[2] The following are the standard texts on South African private international law and they contain full references to case law and other authority: Edwards Kahn "Conflict of laws" in *The Law of South Africa* vol 2 part 2 (2003); Forsyth (n 1; 2003); Schoeman (n 1; 2001). In addition, reference must be made to the following specialised chapters: Kahn "Conflict of laws" in Corbett, Hofmeyr and Kahn *The Law of Succession in South Africa* (2001) 579 and "Jurisdiction and conflict of laws" in Cameron, De Waal, Wunsh, Solomon and Kahn *Honoré's The South African Law of Trusts* (2002) 646. Also see Van der Merwe, Rowland and Cronjé *Die Suid Afrikaanse Erfreg* (1990) 113 114 and 576 584; Schulze "Conflicting laws of conflict in cases of international succession" 2001 *CILSA* 34; Meyerowitz *The Law and Practice of Administration of Estates and Estate Duty* (2004) ch 10; Kahn "Jurisdiction and conflict of laws in the South African law of husband and wife" in Hahlo *The South African Law of Husband and Wife* (1975) 529 674.

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including international succession. The exclusion of foreign law,[3] classification,[4] *renvoi*[5] and the incidental question,[6] however, fall outside the scope of this article.[7]

The methodology used in South African private international law is primarily the orthodox multilateralism based on the theory of the German author von Savigny.[8] The methodology utilises connecting factors to link a certain factual situation to a particular legal system. According to South African private international law, the content of a connecting factor must be established by the *lex fori* (the law of the forum or the court: in a South African court this will always be South African law).[9]

Domicile is an important connecting factor in South African private international law in general and in the South African private international law of succession in particular. A person's domicile as it is today has to be determined according to the provisions of the Domicile Act 3 of 1992.[10] The

[3] See Edwards Kahn (n 2) par 292 295; Forsyth (n 1: 2003) 13 15 and 109 115; Kahn (n 2: 1975) 583 584; Kahn (n 2: 2001) 609 612; Schoeman (n 1: 2001) par 73 75; Malan, Neels, O'Brien and Bosholff "Transnational litigation in South African law" (part 2) 1995 *TSAR* 282 297 299; Neels "Geoorloofdheid van 'n kontrak en openbare beleid in die internasionale privaatreg" 1991 *TSAR* 694.

[4] See Edwards Kahn (n 2) par 284 285; Forsyth (n 1: 2003) 68 81; Kahn (n 2: 1975) 578 580; Kahn (n 2: 2001) 591 599; Schoeman (n 1: 2001) par 58 62; Bennett "Cumulation and gap: are they systemic defects in the conflict of laws?" 1988 *SALJ* 444; Forsyth "Enforcement of arbitral awards, choice of law in contract, characterization and a new attitude to private international law" 1987 *SALJ* 4; Forsyth (n 1: 2002) 64 66; Kahn "Ruminations of a quondam would be South African conflicts lawyer" 2002 *TSAR* 125 126; Malan *et al* (n 3) 291 297; Neels "*Via media* classification in private international law" 1994 *THRHR* 687; Neels "Die voorlopige regsoordeel in die internasionale privaatreg" 1994 *Stell LR* 288; Neels "Classification as an argumentative device in international family law" 2003 *SALJ* 883; Schulze "Formalistic and discretionary approaches to characterization in private international law" 2006 *SALJ* 161; Turpin "Characterization and policy in the conflict of laws" 1959 *Acta Juridica* 222.

[5] See Edwards Kahn (n 2) par 286; Forsyth (n 1: 2003) 81 92; Schoeman (n 1: 2001) par 68 72; Van der Merwe *et al* (n 2) 581 582; Kahn (n 2: 1975) 580; Kahn (n 2: 201) 602 607; Kahn (n 4) 126 127; Neels "Die gedeeltelike uitsluiting van *renvoi* in resente wetgewing" 1992 *TSAR* 739.

[6] See Edwards Kahn (n 2) par 287; Forsyth (n 1: 2003) 92 95; Kahn (n 2: 1975) 580 581; Kahn (n 2: 2001) 607 609; Schoeman (n 1: 2001) par 63 67; Corbett "The Zambian trust: an opinion revisited" 1993 *TSAR* 1 12 14; Neels "Die onegte insidentele vraag in 'n internasionaal erfregtelike geskil" 1993 *TSAR* 760.

[7] See on the administration of estates in an international context: Edwards Kahn (n 2) par 321; Forsyth (n 1: 2003) 253 255 and 382 384; Kahn (n 2: 2001) 588 591; Meyerowitz (n 2) ch 10; *Nusca v Nusca* 1995 4 SA 813 (T). See Cameron *et al* (n 2) 669 673 on the legal system applicable to the administration of a trust. South Africa is not a party to the Hague Convention concerning the International Administration of the Estates of Deceased Persons (1973).

[8] Von Savigny *System des heutigen römischen Rechts* vol 8 (1849). See Forsyth (n 1: 2003) 6 8; Schoeman (n 1: 2001) par 14 24.

[9] *Ex Parte Jones: In re Jones v Jones* 1984 4 SA 725 (W); *Chinatex Oriental Trading Co v Erskine* 1998 4 SA 1087 (C) 1093H; Edwards Kahn (n 2) par 284; Forsyth (n 1: 2003) 10 11 and 125 127; Kahn (n 2: 1975) 580; Kahn (n 2: 2001) 599; Schoeman (n 1: 2001) par 28. But the connecting factor of nationality or citizenship should rather be determined by the law of the country of nationality: Forsyth (n 1: 2003) 11; Schoeman (n 1: 2001) par 26. Also see section 13 (1)(a) of the Divorce Act 70 of 1979.

[10] The most important provisions of the Domicile Act 3 of 1992 are the following: "Every person who is over the age of 18 years, . . . shall be competent to acquire a domicile of choice, regardless of such a person's sex or marital status" (s 1(1)). "A domicile of choice shall be acquired by a person when he is lawfully present at a particular place and has the intention to settle there for an indefinite period" (s 1(2)). A child is "domiciled at the place with which he is most closely connected" (s 2(1)). "If, in the normal course of events, a child has his home with his parents or with one of them, it shall be presumed, unless the contrary is shown, that the parental home concerned is the child's domicile" (s 2(2)). "No person shall lose his domicile until he has acquired another domicile, whether by choice or by operation of law" (s 3(1)). Section 4 excludes *renvoi* when domicile is a connecting factor (also see n 53). Section 5 determines that the acquisition or loss of a person's domicile shall be determined by a court on a balance of probabilities.

act entered into force on 1 August 1992 and does not have retrospective effect.[11] If, for instance, the testator's domicile at the time of execution of her will during 1985 has to be determined, the common-law rules in this regard apply.[12]

2 *Private international law of succession in South Africa*

2.1 Intestate succession

Intestate succession to movables is governed by the law of the country of the deceased's last domicile (the *lex ultimi domicilii*). Intestate succession to immovables is governed by the law of the country where the immovable property is situated (the *lex situs*). These rules apply to complete and to partial intestate succession.[13]

> Example: E died leaving a will in which she bequeathed her car to A. E was domiciled in Kenya when she died. She had a car, furniture and immovable property in South Africa. In terms of which legal system will her furniture and immovable property in South Africa be distributed?
>
> Answer: The furniture in terms of Kenyan law (the *lex ultimi domicilii*) and her immovable property in terms of South African law (the *lex situs*).

2.2 Testate succession

Formal validity of wills in private international law is primarily governed by section 3*bis* of the Wills Act 7 of 1953. The other aspects of private international law of succession are governed by the common law.

2.2.1 Testamentary capacity

Testamentary capacity (for instance the competent age to be able to execute a will) will probably be governed by the *lex domicilii* at the time of execution of the will as far as movables are concerned. The *lex situs* governs in respect of immovables.[14] Requirements for testators of a certain age, nationality or other personal qualifications to observe special formalities in the execution of a will are for purposes of section 3*bis* of the Wills Act 7 of 1953 to be regarded as formal requirements.[15] The (other) provisions of section 3*bis* are therefore applicable to this type of stipulation.

[11] See s 8(2).

[12] For a discussion of the law of domicile (in private international law context), see Edwards Kahn (n 2) par 296 304; Forsyth (n 1: 2003) 118 155; Schoeman (n 1: 2001) par 27 38.

[13] Edwards Kahn (n 2) par 319; Forsyth (n 1: 2003) 366 368; Kahn (n 2: 2001) 614 615; Schoeman (n 1: 2001) par 226 227; Van der Merwe *et al* (n 2) 113 114. Also see Collins (ed) II *Dicey and Morris on the Conflict of Laws* (2000) 1026 1029; North and Fawcett *Cheshire and North's Private International Law* (1999) 985 and 999 1000.

[14] Edwards Kahn (n 2) par 320; Forsyth (n 1: 2003) 374 376; Kahn (n 2: 2001) 615 617; Schoeman (n 1: 2001) par 228; Van der Merwe *et al* (n 2) 582. Also see Cheshire and North (n 13) 986 987 and 1001; Dicey and Morris (n 13) 1029 1030. Cameron *et al* (n 2) 665 add in respect of movables: "though possibly capacity by the [legal system of the country of] domicile at death is also sufficient, given the legal policy of upholding the validity of wills where possible (*favor testamenti*)".

[15] s 3*bis* (2). Also see par 2.2.2.8. Cf a 5 of the Hague Convention on the Conflict of Laws Relating to the Form of Testamentary Dispositions of 1961.

2.2.2 Formal validity of wills

2.2.2.1 Introduction

The law in this regard is primarily found in section *3bis* of the Wills Act 7 of 1953, which is based on the Hague Convention on the Conflict of Laws Relating to the Form of Testamentary Dispositions of 1961.[16]

2.2.2.2 Applicability of section *3bis*

In terms of section *3bis* (4), the (other) rules of section *3bis* are not applicable in two cases: (1) if the deceased was a South African citizen who executed a will not in written form (*eg* an oral will or one on video or DVD);[17] and (2) if the deceased died before 4 December 1970 (the date when section *3bis* entered into force).[18] In both these cases the common law applies.

2.2.2.3 The common-law rules

The common-law rules are the following: The formal validity of a will in respect of movables is governed by the *lex loci actus* (the law of the place where the will was executed) or the *lex domicilii* (the law of domicile of the deceased).[19] It is uncertain whether the *lex domicilii* is to be determined at the time of execution of the will or at the time of death.[20] The modern authors suggest that both would suffice.[21] The formal validity of a will in respect of immovables is governed by the *lex situs* or the *lex loci actus*[22] and possibly the

[16] The text is available at www.hcch.net. The convention entered into force on 5 January 1964. S *3bis* was inserted in the Wills Act 7 of 1953 by s 2 of the Wills Amendment Act 41 of 1965. An international convention becomes law in South Africa only when incorporated in an act of parliament (see s 231 (4) of the Constitution of the Republic of South Africa, 1996). S *3bis* does not literally follow the wording of the convention but it "agrees in major principles and in considerable detail" with the corresponding provisions in the Wills Act, 1963 of the United Kingdom (Kahn "Conflict of laws" 1965 *Annual Survey of South African Law* 475; see for a discussion of the relevant provisions of the English Wills Act: Cheshire and North (n 13) 988 991 and 1001; Dicey and Morris (n 13) 1031 1036). (References to the corresponding provisions in the convention will be given in the footnotes.) A South African court may nevertheless refer to the convention in the interpretation of s *3bis*: see *Tomlinson v Zwirchmayr* 1998 2 SA 840 (T) 847 850. The rules and principles in a 4 (the convention applies to testamentary dispositions made by two or more persons in one document), a 6 (the convention is not based on reciprocity and its application does not depend on whether the relevant person was a national of a contracting state) and a 7 (*ordre public*) of the convention are not expressly found in s *3bis* but are otherwise in conformity with South African private international law (a 7) or follow from the other provisions of s *3bis* (a 4 and 6). South Africa made reservations in terms of a 9, 10 and 12 of the convention.

[17] South Africa made a reservation in terms of a 10 of the convention (but not in terms of a 11). S *3bis* (4), however, refers to a South African citizen whilst a 10 of the convention refers to a national possessing no other nationality.

[18] *Cf* a 8 and 13 of the convention.

[19] Cameron *et al* (n 2) 665; Edwards Kahn (n 2) par 320; Forsyth (n 1: 2003) 369 371; Kahn (n 2: 2001) 618 620; Meyerowitz (n 2) 4 12; Schoeman (n 1: 2001) par 236; Van der Merwe *et al* (n 2) 577.

[20] Edwards Kahn (n 2) par 320; Forsyth (n 1: 2003) 370 371; Kahn (n 2: 2001) 619; Meyerowitz (n 2) 4 12; Van der Merwe *et al* (n 2) 577.

[21] Cameron, De Waal *et al* (n 2) 665; Forsyth (n 1: 2003) 371; Kahn (n 2: 2001) 619; Schoeman (n 1: 2001) par 236. *Cf* Van der Merwe *et al* (n 2) 577.

[22] Edwards Kahn (n 2) par 320; Forsyth (n 1: 2003) 370; Kahn (n 2: 2001) 620; Meyerowitz (n 2) 4 12; Schoeman (n 1: 2001) par 236; Van der Merwe *et al* (n 2) 577.

lex domicilii.[23] In both cases (movables and immovables) the will has to comply with the formalities of only one of the mentioned legal systems to be formally valid in terms of South African (private international) law.

2.2.2.4 The basic statutory rule

In all other cases (that is: where the two circumstances referred to in section 3*bis* (4) are not present) wills have to comply with the formalities of at least one of the following legal systems[24] to be valid in terms of South African (private international) law:[25] the *lex loci actus*; the *lex domicilii* at the time of execution of the will; the *lex ultimi domicilii*; the law of habitual residence[26] at the time of execution of the will; the law of habitual residence at the time of death; the *lex patriae* (the law of nationality or citizenship) at the time of execution of the will;[27] the *lex ultimae patriae* (the law of nationality or citizenship at the time of death).[28]

In respect of immovable property, the *lex situs* must be added to this list.[29] In so far as a will bequeaths immovable property, the formalities of that will have to comply with either one of the systems in the list above *or* the *lex situs*. The *lex situs* is not the sole legal system that is relevant here. This is not immediately clear from the text of section 3*bis* but it has been so interpreted in *Tomlinson v Zwirchmayr*[30] on the basis of the text of the convention[31] and because already in common law the *lex loci actus* was an alternatively applicable legal system.[32]

It should be noted that compliance with the *lex situs* in respect of movables[33] and the law of the place of death of the deceased is not sufficient. In addition, if South African law is not one of the legal systems listed in section 3*bis*, compliance with the prescribed South African formalities for wills is also not sufficient. In principle this should apply to section 2(3) of the South African Wills Act 7 of 1953 as well – this subsection makes provision for the condonation by a court of the non-compliance with the prescribed formalities in spe-

[23] See Van der Merwe *et al* (n 2) 577, Forsyth (n 1: 2003) 370 n 201 and Edwards Kahn (n 2) par 320. It is suggested that both the *lex domicilii* at execution and at death would suffice; *cf* the sources in n 21.

[24] S 3*bis*, as amended by s 6 of the Law of Succession Amendment Act 43 of 1992, refers to the *internal* law of these systems (as does the convention in a 1). S 1 of the Wills Act 7 of 1953 defines "internal law" as "the law of a state or territory, excluding the rules of the international private law of that state or territory". The definition was inserted by s 2(c) of the Law of Succession Amendment Act 43 of 1992. These provisions will often, but not always, exclude the application of *renvoi*; see n 53 and on *renvoi* in general the sources in n 5.

[25] See s 3*bis* (1)(a)(i) (iii). *Cf* a 1 of the convention.

[26] On the concepts of habitual residence, residence *simpliciter* and ordinary residence, see Schoeman (n 1: 2001) par 39 52; Kahn (n 2: 2001) 622.

[27] In the case of dual citizenship, this will probably include both the testator's nationalities; and the same would apply to multi nationality. See Kahn (n 2: 2001) 622; Forsyth (n 1: 2003) 372; Cheshire and North (n 13) 989.

[28] See n 27.

[29] s 3*bis* (1)(b).

[30] 1998 2 SA 840 (T) 847 850.

[31] See a 1.

[32] Also see Forsyth (n 1: 2003) 372 n 211; Kahn (n 2: 2001) 621 622; Schoeman (n 1: 2001) par 233; Van der Merwe *et al* (n 2) 579. *Cf* Cheshire and North (n 13) 1001; Dicey and Morris (n 13) 1036.

[33] Kahn (n 2: 2001) 623.

cified circumstances. The South African Law Commission overlooks this fact when stating that there is no need for the doctrine of *renvoi*[34] in this context in South African private international law due to the existence of section 2(3).[35] It is nevertheless submitted that it is open for a South African court to decide on grounds of policy that the *lex fori* governs condonation.[36]

As has been stated above,[37] the content of the connecting factors domicile and habitual residence must be determined in terms of the *lex fori*, where as nationality must be established in terms of the *lex causae*.[38]

> Example: E died in Switzerland during 2005, while she was domiciled in Germany and habitually resident in Austria. She left a will in which she bequeathed her movable and immovable property in South Africa. The will was executed in Mozambique, while she was domiciled and habitually resident in Botswana. She was a national of France at all relevant times. Which legal system(s) govern(s) the formal validity of her will?
>
> Answer: As the exceptions in section *3bis* (4) are not relevant, the legal systems listed in section *3bis* (1)(a)-(b) of the Wills Act 7 of 1953 are applicable. In respect of E's movables these are: the legal systems of Germany (the *lex ultimi domicilii*); Austria (the law of habitual residence at death); Mozambique (the *lex loci actus*); Botswana (the *lex domicilii* at the time of execution; the law of habitual residence at the time of execution); France (the *lex patriae* at the time of execution; the *lex ultimae patriae*). In respect of E's immovables in South Africa, the law of South Africa as the *lex situs* must be added to this list. The law of Switzerland does not apply, nor South African law to the movables, as the law of the place of death is not listed as a relevant system in section *3bis* and the *lex situs* is applicable to immovables only.

2.2.2.5 Will executed on board of a vessel or aircraft

For particular situations and for specific types of clauses extra legal systems are added to these discussed above. For the situation that a will is executed on board of a vessel or aircraft, these are the *lex libri siti* (the law of the country where the vessel or aircraft was registered) at the time of the execution of the will and the law of the country with which the vehicle otherwise had the closest connection at that time.[39] The ship or aeroplane need not be in motion for the extra systems to be applicable.[40]

[34] See the sources in n 5 on the doctrine of *renvoi*.
[35] South African Law Commission *Verslag oor Herziening van die Erfreg* Project 22 (1991) 54. See Neels (n 5) 742.
[36] *Cf* the *obiter dicta* in *Ex Parte Senekal* 1989 1 SA 38 (T) 39 40 in respect of an application in terms of s 21(1) of the Matrimonial Property Act 88 of 1984 and the commentary by Forsyth (n 1: 2003) 282. Also see Forsyth (n 1: 2003) 14 15 on direct applicability of statutes by implication. See, further, the reference in s 2(3) to the formalities in s 2(1) and the opening phrase of s 2(1): "Subject to the provisions of section *3bis*. . .": Neels (n 5) 742.
[37] See the text at n 9.
[38] The last sentence of a 1 of the convention was not incorporated in s *3bis* (South Africa made a reservation in terms of a 9 of the convention) and therefore the common law rule in the text applies.
[39] s *3bis* (1)(e).
[40] Kahn (n 2: 2001) 624.

Example: During 2001, E executed a will on board of an aeroplane owned by Air France, while it was at the airport in Addis Ababa (Ethiopia). The aeroplane was leased to Kenyan Airways for daily flights between Mombassa (Kenya) and Addis Ababa. Kenyan Airways provided the crew for the flight. E was a national of Namibia but domiciled and habitually resident in South Africa at all relevant times. All his property, movable and immovable, is situated in South Africa. Which legal system(s) govern(s) the formal validity of E's will?

Answer: As the exceptions in section *3bis* (4) are not relevant, the legal systems referred to in section *3bis* (1)(a)-(b) and (e) of the Wills Act 7 of 1953 are applicable. In respect of E's movables these are: the law of France (the *lex libri siti*); Ethiopia (the *lex loci actus*); Kenya (the law of the country with which the aeroplane had the closest connection at the time of execution of the will); Namibia (the *lex patriae* at the time of execution; the *lex ultimae patriae*); South Africa (the *lex domicilii* at the time of execution; the *lex ultimi domicilii*; the law of habitual residence at the time of execution; the law of habitual residence at death). In respect of E's immovables, South African law as the *lex situs* must be added to the list.

What would the answer have been if E executed the will while the aeroplane was flying over Somalia or its territorial waters *en route* to Addis Ababa? The answer would remain the same except that the *lex loci actus* would now be the law of Somalia and not that of Ethiopia.[41]

2.2.2.6 Power of appointment

If a power of appointment is conferred in a will (will 1; the will of A) which is executed in another will (will 2; the will of B),[42] the execution of the power of appointment in will 2 (not the whole of will 2) may, to be accepted as formally valid, in addition to the legal systems listed in paragraph 2.2.2.4 and 2.2.2.5 above as they apply to will 2, comply with the formalities as prescribed by the *lex loci actus* of will 1.[43] It is irrelevant whether will 1 is valid in terms of its *lex loci actus*.

Example 1: Q's will ("will 1") granted the power of appointment of a final beneficiary under a trust to R. R executed this power in his will ("will 2"). The legal systems applicable to the formal validity of will 1 are the law of A, B and C. A is *inter alia* the *lex ultimi domicilii*, B is the *lex ultimae patriae* and C is the *lex loci actus*. Will 1 is formally valid in terms of the law of A but not

[41] See Dicey and Morris (n 13) 1033; Kahn (n 2: 2001) 624.

[42] The intrinsic validity of the exercise of the conferred power of appointment by B should be governed by the *lex ultimi domicilii* of A: see Cameron *et al* (n 2) 666 678 681; Forsyth "Exercise of powers of appointment in foreign wills" 1983 *SALJ* 172; Forsyth (n 1: 2003) 380 381; Kahn (n 2: 2001) 628 630. *Cf* Cheshire and North (n 13) 1011 1012; Dicey and Morris (n 13) 1060 1063. It is submitted that the *lex situs* governs in respect of immovable property: see Cheshire and North (n 13) 1012; Dicey and Morris (n 13) 1062.

[43] See s *3bis* (1)(e). The subsection is indeed formulated wider than in the text above: "so far as therein a power conferred by any instrument is exercised or a duty imposed by any instrument is performed, not to be invalid merely by reason of the form thereof, if such form complies with the internal law of the state or territory in which such instrument was executed". But the scenario in the text is probably the most common.

in terms of the law of B or C. The legal systems applicable to the formal validity of will 2 are the law of D, F and G. Will 2 is formally invalid in terms of the legal systems of C, D, F and G but it is formally valid in terms of the law of A and B. Is the execution of the power of appointment (the appointment of a final beneficiary under the trust founded by Q) formally valid?

Answer: Will 2 is formally invalid as it does not comply with any of the relevant legal systems D, F and G. The execution of the power of appointment in will 2 may be formally valid on its own if it complies with the *lex loci actus* of will 1. Will 2 (including the execution of the power of appointment) is, however, invalid in terms of the *lex loci actus* of will 1 (the law of C) and accordingly the execution of the power of appointment is formally invalid.

Example 2: Q's will ("will 1") granted the power of appointment of a final beneficiary under a *fideicommissum* to R. R executed this power in his will ("will 2"). The legal systems applicable to the formal validity of will 1 are the law of A, B and C. A is *inter alia* the *lex ultimi domicilii*. B is the *lex ultimae patriae* and C is the *lex loci actus*. Will 1 is formally valid in terms of the law of B and C but not in terms of the law of A. The legal systems applicable to the formal validity of will 2 are the law of D, F and G. Will 2 is formally invalid in terms of the legal systems of A, B, D, F and G but it is formally valid in terms of the law of C. Is the execution of the power of appointment (the appointment of a final beneficiary under the *fideicommissum* set up by Q) formally valid?

Answer: Will 2 is formally invalid as it does not comply with any of the relevant legal systems D, F and G. The execution of the power of appointment in will 2 may be formally valid on its own if it complies with the *lex loci actus* of will 1. Will 2 (including the execution of the power of appointment) is indeed valid in terms of the *lex loci actus* of will 1 (the law of C) and accordingly the execution of the power of appointment is formally valid. The remainder of R's will is still invalid.

Example 3: Q's will ("will 1") granted the power of appointment of a final beneficiary under a trust to R. R executed this power in his will ("will 2"). The legal systems applicable to the formal validity of will 1 are the law of A, B and C. A is *inter alia* the *lex ultimi domicilii*. B is the *lex ultimae patriae* and C is the *lex loci actus*. Will 1 is formally valid in terms of the law of A but not in terms of the law of B or C. The legal systems applicable to the formal validity of will 2 are the law of D, F and G. Will 2 is formally invalid in terms of the legal systems of A, B, D, F and G but it is formally valid in terms of the law of C. Is the execution of the power of appointment (the appointment of a final beneficiary under the trust founded by Q) formally valid?

Answer: Will 2 is formally invalid as it does not comply with any of the relevant legal systems D, F and G. The execution of the power of appointment in will 2 may be formally valid on its own if it complies with the *lex loci actus* of will 1. Will 2 (including the execution of the power of appointment) is indeed valid in terms of the *lex loci actus* of will 1 (the law of C) and accordingly the execution of the power of appointment is formally valid. It is of no consequence that the first will is not formally valid in terms of the law

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of C: it is formally valid in terms of the law of A. The remainder of R's will is still invalid.

Example 4: Q's will ("will 1") granted the power of appointment of a final beneficiary under a usufruct to R. R executed this power in his will ("will 2"). The legal systems applicable to the formal validity of will 1 are the law of A, B and C. A is *inter alia* the *lex ultimi domicilii*, B is the *lex ultimae patriae* and C is the *lex loci actus*. Will 1 is formally valid in terms of the law of A but not in terms of the law of B or C. The legal systems applicable to the formal validity of will 2 are the law of D, F and G. Will 2 is formally invalid in terms of the legal systems of C, D and F but it is formally valid in terms of the law of A, B and G. Is the execution of the power of appointment (the appointment of a final beneficiary under the usufruct constituted by Q) formally valid?

Answer: Will 2 is formally valid as it complies with the formalities of the law of G. The execution of the power of appointment will therefore also be formally valid.

2.2.2.7 Revocation of a previous will

A provision in a later will (will 2) that revokes (part of) an earlier will (will 1) of the same testator will not only be valid if it complies with the formalities of one of the legal systems governing formal validity as they apply to will 2,[44] but also if it complies with one of the legal systems mentioned in section 3*bis* (1)(a)-(c) as they apply to will 1 *provided* (the revoked part of) will 1 is valid in terms of that legal system.[45]

It is unclear whether this provision applies to express revocatory provisions only or also to tacit revocations. A tacit revocation *inter alia* takes place when a certain asset is bequeathed to somebody else in a later will without expressly revoking the previous bequest.[46]

Example 1: E left two wills. The first will ("will 1") bequeathed his estate to A. The second will ("will 2") expressly revoked the first will and bequeathed his estate to B. The intestate heirs are C and D. The legal systems applicable to the formal validity of will 1 are K, L, M and N. Will 1 is formally valid in terms of the law of K, L and M but not in terms of the law of N. Will 2 is formally invalid in terms of all the primarily applicable legal systems (the ones listed in par 2.2.2.4-2.2.2.6 above) but it is formally valid in terms of the law of N. Who inherits E's estate?

Answer: As will 2 is formally invalid in terms of all the legal systems primarily applicable to formal validity, the revocatory clause can only be held to be formally valid if it is such in terms of any of the legal systems listed in section 2.2.2.4 and 2.2.2.6 as they apply to will 1, provided that will 1 is valid in terms of that system. The revocatory clause is, however, only valid in

[44] See par 2.2.2.4-6 above.

[45] See s 3*bis* (1)(d). *Cf* a 2 of the convention. S 3*bis* (1)(d) only refers to the legal systems mentioned in s 3*bis* (1)(a)-(c) (see par 2.2.2.4 and 2.2.2.6) and not those mentioned in s 3*bis* (e) (see par 2.2.2.5).

[46] See De Waal and Schoeman-Malan *Inleiding tot die Erfreg* (2003) 95-96.

terms of the law of N. This is indeed one of the systems applicable to the formal validity of will 1 but will 1 is not valid in terms of the law of N and thus cannot save the revocatory clause. The whole of will 2 is therefore invalid. Will 1 applies and A inherits the estate.

Example 2: E left two wills. The first will ("will 1") bequeathed his estate to A. The second will ("will 2") expressly revoked the first will and bequeathed his estate to B. The intestate heirs are C and D. The legal systems applicable to the formal validity of will 1 are K, L, M and N. Will 1 is formally valid in terms of the law of K, L and M but not in terms of the law of N. Will 2 is formally valid in terms of the law of the place where it was executed but not in terms of any of the other systems applicable to its formal validity. In addition, it is valid in terms of the law of N. Is the revocatory clause in will 2 valid?

Answer: Will 2 is formally valid in terms of one of the legal systems applicable to its formal validity, the *lex loci actus*. The will (including the revocatory clause) is therefore formally valid for purposes of South African (private international) law.

Example 3: E left two wills. He was domiciled in South Africa when he executed the wills but he was domiciled in Mauritius at the time of his death. E was the owner of immovable property situated in South Africa. The first will ("will 1") bequeathed the immovable property to A. The second will ("will 2") expressly revoked the first will and bequeathed the immovable property to B. In terms of South African law, the intestate heirs are C and D. In terms of the law of Mauritius, F and G are the intestate heirs. The legal systems applicable to the formal validity of will 1 are K, L, Mauritius, N and South Africa. The law of L is the *lex loci actus* and the law of K is the *lex patriae* at the time of execution. Will 1 is formally valid in terms of the law of K, L and Mauritius but not in terms of the law of N or South Africa. Will 2 is formally invalid in terms of all the primarily applicable legal systems (see par 2.2.2.4-2.2.2.6) but it is formally valid in terms of the law of K. Who inherits E's immovable property in South Africa?

Answer: As will 2 is formally invalid in terms of all the legal systems primarily applicable to formal validity, the revocatory clause can only be held to be formally valid if it is such in terms of any of the legal systems mentioned in section 3*bis*(1)(a)-(c) that are applicable to the formal validity of will 1, provided will 1 is valid in terms of that specific system. Both the first will and the revocatory clause in will 2 are valid in terms of the law of K. The revocatory clause is therefore formally valid but the remainder of will 2 is still invalid. The effect of the revocatory clause in respect of movables is governed by the *lex domicilii* at the time of execution of the will. In respect of immovables, the *lex situs* governs. This is discussed in par 2.2.6. As these legal systems are South African law *in casu*, the revocatory clause has the intended effect to revoke the first will. The intestate heirs will therefore inherit. The *lex situs* governs the intestate succession of immovables (see par 2.1). South African law is therefore applicable and C and D will inherit the immovable property.

2.2.2.8 Requirements for witnesses: extra formalities required for certain testators

Provisions in a legal system that articulate requirements for witnesses (*eg* their minimum age) are for purposes of section *3bis* to be regarded as formal requirements. The same applies to requirements for testators of a certain age, nationality or other personal qualifications to observe special formalities in the execution of a will. The (other) provisions of section *3bis* are therefore applicable to this type of stipulation.[47]

2.2.2.9 Foreign internal conflicts law and absence thereof

If a legal system indicated by section *3bis* has two or more systems of internal law relating to the form of wills, the internal conflict laws of that legal system must be applied to determine which subsystem applies.[48] This will be the position if the foreign law applies different legal rules to adherents of various religions or when the foreign law consists in separate geographical spheres. If no such internal conflict rules exist, the subsystem should be applied with which the deceased was most closely connected. A distinction is made between the law of the closest connection at the time of death (namely, "if the matter is to be determined by reference to the circumstances prevailing at his death") and the law of the closest connection at the time of the execution of the will (namely, "in any other case").[49] It is submitted that this provision should be interpreted as follows: In the case of a reference to a foreign legal system (by virtue of the provisions of section *3bis*) *qua lex ultimi domicilii*, *qua* the legal system of habitual residence at death or *qua lex ultimae patriae*, where the foreign legal system has no relevant internal conflicts provision in force, the law with which the testator was most closely connected at the time of his or her death must be applied. In the case of such a reference *qua* any other legal system mentioned in section *3bis* (the *lex loci actus*, the *lex domicilii* at the time of execution, the law of habitual residence at execution, the *lex patriae* at execution, the *lex situs*, the *lex libri siti* and the law of the country with which the relevant vessel or aircraft had the closest connection at the time of execution of the will), the law with which the testator was most closely connected at the time of the execution of the will must be applied.[50]

2.2.2.10 Common law remains applicable

Finally, section *3bis* states in subsection (5) that a will that would have been valid in terms of the common law[51] remains valid irrespective of the provisions of article *3bis*.[52] *Prima facie* this provision seems to be superfluous as all the

[47] S *3bis* (2). Also see par 2.2.1. *Cf* a 5 of the convention.
[48] See s *3bis* (3). *Cf* a 1 of the convention.
[49] See s *3bis* (3). This distinction is not found in a 1 of the convention.
[50] See already Neels "C F Forsyth *Private International Law* (1990)" 1990 *TSAR* 553 555. *Cf* Cheshire and North (n 13) 989; Dicey and Morris (n 13) 1032 1033; Forsyth (n 1: 2003) 374; Kahn (n 2: 2001) 623; Kahn (n 16) 477.
[51] See par 2.2.2.3.
[52] "The provisions of this section shall not affect the validity of a will which but for such provisions would be valid." *Cf* a 3 of the convention.

common law systems have been integrated in section *3bis*. The provision may, however, play a role in the context of the doctrine of *renvoi*.[53]

2.2.2.11 Changes in foreign legal system

It was decided in *Sperling v Sperling*[54] that changes in a foreign legal system should be applied by a South African court, whether retrospective or not, and irrespective of whether the connecting factor with that legal system has since fallen away. According to the authors, this principle should in the context of the formal validity of wills only apply if the outcome thereof is the validation of the will; if changes lead to invalidation of the will they should not be applied.[55]

2.2.3 Interpretation of wills

A will should be interpreted according to the express or tacit intention of the testator. An express provision could read: "This will must be interpreted in terms of Moroccan law." A tacit intention may be clear from the use of terminology peculiar to a certain legal system, *eg* terminology inherent to English trust law. If no intention is clear, the will should be interpreted in accordance with the *lex domicilii* at the time of execution. This applies to both movables and immovables.[56] The *lex situs* may apply in respect of immovable property "should the *lex domicilii* produce a result which is illegal or impossible to give effect to by the *lex situs*".[57]

2.2.4 Inherent validity and effect of wills

The category of the inherent validity[58] and effect of wills includes, for instance, disinheritance and the existence of a right to a legitimate portion (a *ius*

[53] S *3bis* (5) could also have provided another but more limited ground for the decision in *Tomlinson v Zwirchmayr* 1998 2 SA 840 (T); see Kahn (n 2; 2001) 621 n 266 and Forsyth (n 1; 2003) 372 n 211. Application of the doctrine of *renvoi* implies the acceptance of the reference by the *lex causae* to South African law or a third legal system (see the sources in n 5). In the context of the formal validity of wills, *renvoi* may still be applied in respect of the *lex loci actus* (in respect of both movables and immovables) and the *lex situs* (in respect of immovables only). These are the common law legal systems (see par 2.2.2.3) that are in terms of s *3bis* (5) still applicable, therefore not influenced by the exclusion of *renvoi* on account of s 6 of the Law of Succession Amendment Act 43 of 1992 (see n 24) and are also not touched by the exclusion of *renvoi* in s 4 of the Domicile Act 3 of 1992 (which excludes *renvoi* when domicile is the connecting factor). See on other possibilities for the application of *renvoi* in respect of the formal validity of wills in private international law and the international law of succession in general: Neels (n 5). *Cf* Cheshire and North (n 13) 990; Dicey and Morris (n 13) 1034 and 1036.

[54] 1975 3 SA 707 (A).

[55] Kahn (n 2; 2001) 622; Forsyth (n 1; 2003) 372 n 213. *Cf* Cheshire and North (n 13) 990 991; Dicey and Morris (n 13) 1034. But see Van der Merwe *et al* (n 2) 113.

[56] Cameron *et al* (n 2) 664, 666, 668 and 679; Edwards Kahn (n 2) par 320; Forsyth (n 1; 2003) 378 379; Kahn (n 2; 2001) 625 630; Schoeman (n 1; 2001) par 239; Van der Merwe (n 2) 583; Cheshire and North (n 13) 995 996 and 1002 1004; Dicey and Morris (n 13) 1040 1045. See n 60 on the rectification of wills and n 61 on accrual.

[57] Schoeman (n 1; 2001) par 239. See Edwards Kahn (n 2) par 320; Forsyth (n 1; 2003) 379; Kahn (n 2; 2001) 627 628. *Cf* Van der Merwe *et al* (n 2) 584 (quoted in n 62).

[58] also known as the essential, intrinsic, material or substantive validity.

relictae).[59] the effect of undue influence, duress and mistake, the validity of conditions, rectification,[60] accrual,[61] collation and substitution.[62] In respect of movables the inherent validity and effect of a will is governed by the *lex ultimi domicilii*; in respect of immovables this is governed by the *lex situs*.[63]

2.2.5 Capacity to inherit

The capacity to inherit should, according to Forsyth, be governed by the *lex domicilii* of the *beneficiary* at the time of execution of the will of the deceased; and by the *lex situs* in respect of immovables.[64] Kahn refers to Roman-Dutch authority in favour of the *lex situs* in respect of immovables.[65] The author suggests the following in respect of movables:

> "In the absence of strong authority in our law, the following views are put forward as sound in principle. Where capacity to take is more closely related to the personal law of the testator – for instance, where an heir or legatee has allegedly written out or witnessed the will, or has acted unworthily in relation to the deceased, and therefore should not benefit – the domiciliary law of the testator should govern; and as the decisive moment appears to be the date of death of the testator, the *lex ultimi domicilii*. Where, however, the question is more closely related to the capacity of the beneficiary – for instance, whether an unborn person, an unincorporated association, a corporation or a particular charity can take – the appropriate law appears to be the domiciliary law of the beneficiary at the date of death of the testator."[66]

As far as the time question is concerned, the moment of the deceased's death

[59] An *ius relictae* is a succession claim to a family member's estate irrespective of the provisions of the will. See Forsyth (n 1: 2003) 377; Kahn (n 2: 2001) 631; Schoeman (n 1: 2001) par 230; Schulze (n 2) 39 45.

[60] Forsyth (n 1: 2003) 377 378. See *Evelyn Wright v Pierrepoint* 1987 2 SA 113 (E) 113: rectification in respect of movables is governed by the *lex ultimi domicilii*; this is an *obiter dictum* as the case concerns a jurisdictional issue only. Due to its close link to the intention of the testator, rectification could conceivably also be classified to belong to the interpretation of wills. The *lex domicilii* at the time of execution would then apply, unless a contrary intention is clear from the will: see par 2.2.3.

[61] Forsyth (n 1: 2003) 377; Kahn (n 2: 2001) 631. But in *Wynn and Westminster Bank v Oppenheimer* 1937 TPD 91 it was held that accrual is a question of interpretation (see par 2.2.3 and Cameron *et al* (n 2) 671).

[62] See Cheshire and North (n 13) 1004 1007, Dicey and Morris (n 13) 1045 1049, Forsyth (n 1: 2003) 378 and Kahn (n 2: 2001) 632 on the doctrine of election. See n 68 on rules excluding from succession the writer of and witnesses to a will and the executor of an estate. See n 42 on the inherent validity of the exercise of a power of appointment. On the trust in South African private international law, see Cameron *et al* (n 2) 647 681 and Forsyth (n 1: 2003) 361 365. South Africa is not a party to the Hague Convention on the Law Applicable to Trusts and on their Recognition (1985). See, in general, Van der Merwe *et al* (n 2) 584: "Onder die materiele geldigheid van 'n testament word verstaan dat aan die beskikkings in die testament vervat, regtens uitvoering gegee kan word."

[63] Cameron *et al* (n 2) 661 and 666; Edwards Kahn (n 2) par 320; Forsyth (n 1: 2003) 377 378; Kahn (n 2: 2001) 630 632; Schoeman (n 1: 2001) par 230; Schulze (n 2) 39 45; Van der Merwe *et al* (n 2) 583 584; *Evelyn Wright v Pierrepoint* 1987 2 SA 113 (E) 113 (referred to in n 60); Cheshire and North (n 13) 992 995 and 1001 1002; Dicey and Morris (n 13) 1036 1040.

[64] Forsyth (n 1: 2003) 376 377; *cf* Schoeman (n 1: 2001) par 229

[65] Kahn (n 2: 2001) 618.

[66] Kahn (n 2: 2001) 617 618. *Cf* Cheshire and North (n 13) 987 and 1001; Dicey and Morris (n 13) 1030 1031.

should prevail as this is also the instant that capacity to inherit is usually determined according to internal South African law.[67] To prevent classification disputes,[68] the legal systems to be applied should ideally be identical to that pertaining to essential validity. It is therefore suggested that in all cases the *lex ultimi domicilii* of the testator should govern in respect of movables and the *lex situs* in respect of immovables. This is also the view of Van der Merwe, Rowland and Cronjé.[69]

2.2.6 Revocation of wills

Revocation of a will may take place by a testamentary provision, by destruction or *ex lege*.

The formal validity of a revocatory clause is governed by section 3*bis* of the Wills Act 7 of 1953.[70] The inherent validity and effect of an express revocatory provision in a will should be governed by the *lex domicilii* at the time of the execution of the will as far as movables are concerned and the *lex situs* in the case of immovables.[71] The same should apply in respect of the tacit revocation of a previous will or one or more provisions in such a will.[72]

Revocation by destruction, in respect of its inherent validity and effect as well as, it seems, its formal validity,[73] should be governed by the *lex domicilii* at the time of the alleged revocation in respect of movables and by the *lex situs* in respect of immovables.[74] *Ex lege* revocation by marriage (which is not part of domestic South African law) was held to be governed by the *lex domicilii matrimonii*, both in respect of movables and immovables.[75] The *lex domicilii matrimonii* (the law of matrimonial domicile) governs the proprietary consequences of marriage. This concept was interpreted to indicate the law of the country where the husband was domiciled at the time of marriage.[76] This rule is

[67] Also see Van der Merwe *et al* (n 2) 583: "Trouens, die bevoegdheid om te erf is tog eers ter sake wanneer die testament in werking tree en nie wanneer dit verly word nie." See for the principle in domestic South African law, *eg* De Waal and Schoeman Malan (n 46) 8 9.

[68] Forsyth (n 1: 2003) 376 377 and Schoeman (n 1: 2001) par 230 list the possible disqualification of a witness or writer of a will (one could add: the executor of an estate) under the inherent validity of wills (see par 2.2.4). According to Kahn (n 2: 2001) 617 618 (with n 237), these type of issues should be classified as involving passive testamentary capacity (the capacity to inherit). Kahn (n 2: 2001) 618 n 237 adds: "Anyway, nothing turns on the question, for the *lex ultimi domicilii* of the testator governs whatever the correct characterization be." This, however, does not apply in a case where "the question is more closely related to the capacity of the beneficiary", when according to Kahn (n 2: 2001) 618 the *lex domicilii* of the beneficiary at the date of death of the testator should apply. It should be noted that reference is here made to the correct classification in terms of the *lex fori* only. See the sources in n 4 on classification in private international law.

[69] (n 2) 583.

[70] s 3*bis* in general and s 3*bis* (1)(d) in particular. See par 2.2.2.7 above.

[71] Forsyth (n 1: 2003) 381 382; Kahn (n 2: 2001) 632 634; *cf* Schoeman (n 1: 2001) par 237.

[72] Forsyth (n 1: 2003) 381 382; Kahn (n 2: 2001) 632 634

[73] See, for internal South African law, s 2A of the Wills Act 7 of 1953.

[74] See Forsyth (n 1: 2003) 381 382; Kahn (n 2: 2001) 632 634. *Cf* Cheshire and North (n 13) 997 998 and 1007; Dicey and Morris (n 13) 1049 with n 69.

[75] See *Pithuk v Gavendo* 1955 2 SA 573 (T) and the discussion by Kahn (n 2: 2001) 593 595.

[76] *Frankel's Estate v The Master* 1950 1 SA 220 (A); *Sperling v Sperling* 1975 3 SA 707 (A).

clearly in conflict with the equality principle in the constitution[77] but it is uncertain which legal system(s) will be substituted.[78]

The classification of *ex lege* revocation by marriage as a proprietary consequence of marriage is debatable.[79] This type of revocation could also, probably with more justification, be classified as a succession issue as it primarily pertains to the validity of previous *wills*. A more important consideration, however, is the fact that there are other forms of *ex lege* revocation, not necessarily related to marriage (*eg* birth of a child) and all these should ideally be governed by the same legal system. It is therefore submitted that all forms of *ex lege* revocation should be governed by the *lex domicilii* at the relevant time (*eg* the time of marriage or birth of a child) in respect of movables and the *lex situs* in respect of immovables.[80]

It is further submitted that *ex lege* revocation by divorce and the automatic revival of a testamentary provision at a determined stage failing the execution of a new will after the divorce (internal South African law makes provision for both)[81] should in the case of movables be governed by the *lex domicilii* at the time of the divorce and the *lex domicilii* at the time of the alleged revival respectively. The *lex situs* should govern in respect of immovables.[82]

> Example (issues governed by the common law): E died leaving movable and immovable property in South Africa. She left a will in which she bequeathed her movable property to A. A negligently caused E's death in a motor car accident. E was a passenger in A's car. The will was executed in Amsterdam (the Netherlands), while E was domiciled and habitually resident in the United Kingdom. E was domiciled and habitually resident in Zimbabwe at her death. At all relevant times, E was a citizen of Iran. A was domiciled in Mozambique and habitually resident in Senegal at the time of the execution of E's will. He was domiciled and habitually resident in Japan at the time of E's death. Which legal systems govern (a) E's testamentary capacity; (b) the interpretation of E's will if no intention in this regard is clear from the will; (c) the inherent validity of a condition in E's will; (d) A's capacity to inherit; (e) the intestate succession to E's immovables in South Africa?

[77] s 9 of the Constitution of the Republic of South Africa, 1996. It also does not provide for same sex marriages: see *Fourie v Minister of Home Affairs* 2005 1 All SA 273 (SCA) par 124-125; *Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 3 BCLR 355 (CC) par 29 n 24, also see par 70 n 80.

[78] It is submitted that the proposal by Stoll and Visser "Aspects of the reform of German (and South African) private international family law" 1989 *De Jure* 330 335 be followed: In the absence of an express or tacit choice of law, the proprietary consequences of marriage must be governed by the law of the country of the common domicile of the parties. If they do not have a common domicile, the law of common habitual residence applies. If they do not have a common habitual residence, the law of common nationality governs. If they do not have a common nationality, the law of the state with which both spouses are most closely connected at the time of marriage applies. *Cf* Schoeman "The connecting factor for proprietary consequences of marriage" 2001 *TSAR* 72; Schoeman (n 1: 2004); Schoeman "The South African conflict rule for proprietary consequences of marriages: the need for reform" 2004 *Praxis des Internationalen Privat- und Verfahrensrechts* 65.

[79] See the discussion in Kahn (n 2: 2001) 593-595, who - however - supports the principle deduced from *Pithuk v Gavendo* 1955 2 SA 573 (T). To the same effect are Forsyth (n 1: 2003) 381-382 and Schoeman (n 1: 2001) par 238. Also see Cheshire and North (n 13) 998-999 and 1007-1008.

[80] *Cf* Dicey and Morris (n 13) 1050-1052; Kahn (n 2: 2001) 634.

[81] S 2B of the Wills Act 7 of 1953.

[82] *Cf* Kahn (n 2: 2001) 634.

Answer: (a) Probably the law of the United Kingdom (the *lex domicilii* at the time of execution); (b) probably the law of the United Kingdom (the *lex domicilii* at the time of execution); (c) the law of Zimbabwe (the *lex ultimi domicilii*); (d) according to Forsyth: the law of Mozambique (the *lex domicilii* of A at the time of the execution of E's will) but according to Kahn and Van der Merwe, Rowland and Cronjé: the law of Zimbabwe (the *lex ultimi domicilii* of E); (e) the law of South Africa (the *lex situs*).

SAMEVATTING

DIE INTERNASIONALE ERFREG IN SUID AFRIKA

Hierdie artikel verskaf 'n oorsig (oftewel 'n herbevestiging) van die internasionaal privaatregtelike reels met betrekking tot vererwing wat in Suid Afrika geld. Die outeur bespreek intestate vererwing, testeerbevoegdheid, formele geldigheid van testamente (die aanwendingsgebied van a 3*bis* van die Wet op Testamente 7 of 1953; die gemeenregtelike reels; die basiese statutêre reel; testamente verly op vaartuie en vliegtuie; aanwysingsbevoegdheid; herroeping van 'n vorige testament; vereistes vir getuies en sekere testateurs; buitelandse interne aanwysingsreg en die afwesigheid daarvan; die blywende aanwending van gemeenregtelike reels; wysigings in die tersake buitelandse regstelsel), die uitleg van testamente, die inherente geldigheid en effek van testamente, die bevoegdheid om te erf en die herroeping van testamente in internasionaal privaatregtelike konteks. Voorbeelde word verskaf om die toepassing van die reels te illustreer. Die outeur doen oplossings aan die hand vir sekere probleemgebiede. In hierdie verband kom onder meer die volgende ter sprake: die kondonasie van die nievoldoening aan testamentsformaliteite; die rol van buitelandse interne aanwysingsreg in verband met testamentsformaliteite; die bevoegdheid om te erf; en die herroeping van testamente (in die besonder die *ex lege* herroeping deur middel van huweliksluiting en as gevolg van egskeiding, tesame met die outomatiese herlewing daarvan in laasgenoemde geval).