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TRANSLATING OVERSEAS TRUSTS INTO THE AUSTRALIAN LEGAL SYSTEM*

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[169] How is an Australian lawyer to analyse how Australian law (say, of succession, or property, or taxation) applies to a foreign trust or trust-like structure?

The Australian legal system needs to deal with documents, witnesses and legislation in a foreign language, and many of the problems are familiar. One difficulty arises in the assessment of credibility of a witness who gives evidence through a translator (see *Tonari v R* [2013] NSWCCA 232 at [194] and *Goodrich Aerospace Pty Ltd v Arsic* (2006) 66 NSWLR 186 at [21]-[22]). Another occurs where it is demonstrated that a translation is inaccurate (see the recent consideration in *SZRMQ v Minister for Immigration and Border Protection* [2013] FCAFC 142). Another is where Australia enters into a treaty in a foreign language (such as the Warsaw Convention: see *Agtrack (NT) Pty Ltd v Hatfield* (2005) 223 CLR 251 at [48]-[49] as to the meaning of déchéance). There are many other difficulties when a question of foreign law arises in an Australian proceeding.[1]

When it comes to foreign trusts and trust-like structures and their interaction with the Australian legal system, it is important to bear in mind two distinct issues. The first is one of language and its limitations. Neither the verbal similarity of a foreign term to a familiar Australian legal term, nor the translator's choice to use that term, can be determinative of its legal meaning, and may indeed be dangerously deceptive. The second issue, which is determinative, is whether the characteristics of the foreign trust or trust-like structure sufficiently resemble a trust so as to be regarded as a trust for the purposes of the particular Australian law in question. That has nothing to do with language.

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1 See McComish, "Pleading and Proving Foreign Law in Australia" (2007) 31 *MULR* 400.

It is best to give an example. A German "Stiftung" may make payments to a "Begünstigter". The fact that Begünstigter may be (conventionally) *translated* as "beneficiary" does not mean that a Begünstigter *is* a beneficiary for the purposes of Australian trust law. A moment's thought shows that to be self-evident. Not every *Australian* "beneficiary" is a beneficiary of a trust: consider for example a beneficiary named in a letter of credit, or an insurance policy, or a will. Still less does the fact that Stiftung may be (loosely) translated as "trust" mean that there is a trust for the purposes of Australian law. Part of the problem is purely linguistic – there is simply no one-to-one correspondence between foreign and English words. If there were any doubt about this, consider the converse problem: how would an Australian statute or prospectus or will referring to a "trust" be translated into French or German? Professor Curran captures part of the problem, by asking how to translate something as fundamental as a French procès?

> One need only consider that if the French 'procès' is not a trial, it is in part because the French 'juge' also is not a 'judge', or at least that, if she is a 'judge', she only is so in some ways, but not in others. Further, if the French 'juge' is not entirely a "judge", it is in part because the relevant 'cour' or 'tribunal' is not exactly a 'court' and so on and so forth ...[2]

Often it may be better to undertake the legal analysis using the untranslated term, as Justice Douglas has observed in a recent and useful paper which complements this note.[3] Sometimes "lawyers must learn not to translate".[4] Even left untranslated, a foreign legal term may be deceptive because it *looks like*, or is *cognate with,* a technical English legal term (an example is the French *fiducie* introduced in 2007 by Art 2011 of the French *Code Civil*). This is not greatly different from the problems which can [170] arise when a foreign legal system uses English. For example, Brennan CJ said in *Breen v Williams* (1995) 186 CLR 71 at 83 that "the notion of fiduciary duty in Canada does not accord with the notion in the United Kingdom. Nor, in my opinion, does the Canadian notion accord with the law of fiduciary duty as understood in this country" (see also at 95 (Dawson and Toohey JJ), 112-113 (Gaudron and McHugh JJ) and 137 (Gummow J)). We are accustomed in such circumstances to refer to "the Canadian law of fiduciary obligations" to emphasise that what "fiduciary" entails within the Canadian legal system diverges from what the same word means in Australia.

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2 V Curran, "Comparative Law and Language", *Oxford Handbook of Comparative Law* (2006), p 678.

3 Douglas, "Trusts and their Equivalent in Civil Law Systems" (2013) 13 *QUTLJ* 19.

4 See B Pozzo, "Comparative law and language" in M Bassani and U Mattei, *Cambridge Companion to Comparative Law* (2012), p 101 (which chapter provides a very clear introduction to these questions).

If the distractions introduced by the problems of translation are put to one side, attention may be focussed on the determinative issue, which is whether the foreign thing is sufficiently similar to an Australian trust that it should be regarded as such by the Australian legal system for the particular purpose in question. Under Australian law, it is basic that a trust can neither sue nor be sued, despite this being widely misunderstood: see *P&M Quality Smallgoods Pty Ltd v Leap Seng* [2013] NSWCA 167 at [6] and *Lewis v Condon* [2013] NSWCA 204 at [79]. A trust is not a legal person. That is why a plaintiff has, as Jessel MR put it, "a personal right to sue [the trustee] and to get judgment and make him a bankrupt": *Re Johnson* (1880) 15 Ch D 548 at 552. In *Auzora Pty Ltd v Commissioner of the Office of Business and Consumer Affairs* (2009) 105 SASR 378, Kourakis J (as he then was) stated with the agreement of Doyle CJ at [103] that:

> It is an essential element of a trust that the trustee is under a personal obligation to deal with trust property for the benefit of the beneficiary, an obligation giving rise to co-relative rights in the beneficiary. The obligation attaches to the trustee in personam, but it is also annexed to the property, so that the equitable interest resembles a right in rem.

Australian statute may, in a particular case, modify these principles: consider for example the "statutory trust" for public purposes in local government legislation considered in *Bathurst City Council v PWC Properties Pty Ltd* (1998) 195 CLR 566.

The Hague Convention on the Law of Trusts, which has the force of law in Australia, proceeds on the basis that the trust is a relationship, and not a legal person: see Article 2 ("the term 'trust' refers to the legal relationships created …").[5] The key characteristics specified in the Convention are that the trust assets constitute a separate fund not part of the trustee's own estate, that title to them stands in the name of another person, and that the trustee has the power and duty to manage, employ or dispose of the assets in accordance with the terms of the trust and special duties imposed by law. Professor Harris has described as the preferred approach as follows:

> A court should determine, according to the applicable law, the characteristics of the legal relationship and consider whether it shares sufficient characteristics with the common law trust structure: see J Harris, *The Hague Trusts Convention* (Hart Publishing, 2002), 118-119.

The Convention thereby reinforces the basal notions that trusts within the Australian legal system

5 See also Russell, "The recognition, administration and enforcement of foreign trusts" (2013) 87 *ALJ* 699.

are *relationships* whose essence is that they have *both* proprietary and personal aspects. It will therefore come as no great surprise that trust-like structures in civil law systems lack many of the essential features of the trust in equity, that there is no obvious way to translate "trust" into French or German, and that what is essential to an Australian trust is quite alien in many civil law systems. As Professor Waters puts it (*Law of Trusts in Canada* (4th ed 2012), p 1415):

> The civil law possesses a much more crisp distinction between property and obligation than in the common law tradition.

Or, as Justice Douglas observed in the paper noted above:

> [Civilian law systems] struggle to come to grips with the concept that there can be separate legal and equitable interests in property. They have been brought up in a system divided conceptually into the law of persons, the law of obligations, the law of property and actions - their Roman law inheritance.

For those reasons, something like a Stiftung which is treated by an overseas legal system as having legal personality is unlikely itself to be a trust for the purposes of Australian law. That has generally been the approach in Australia: see for example *Re Carl Zeiss Pty Ltd's Application* (1969) 122 CLR 1 at 8 (a trade mark case determined by Kitto J), and *Kavalee v Burbidge* (1998) 43 NSWLR [171] 422, where Mason P treated a Stiftung as a corporation, although regarding the founder's ongoing power of control over the assets such that they were part of his notional estate for family provision purposes.

A useful illustration of an Australian court grappling with the translation of an Austrian Stiftung appointed in a will, which was translated as "foundation/trust", is *Kobras v Lutheran Church of Australia Incorporated* [2005] NSWSC 817, where Young CJ in Eq said at [11]-[12]:

> When one goes, however, to the German text it seems to me a lot of the problems are overcome. I am quite sure that the professional translator who provided the translation in the probate did his best to get the sense of the will. However, I have been assisted by the solicitor for the plaintiff, who speaks fluent German. When one has a lawyer look at the words, a different flavour comes through. ...
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> In the original German the word "trust" is not used at all, as one would expect with a will which

> appears to have been written in Austria by a person familiar with European law. The word that appears as the last word in the will is “Stiftung”, a word which denotes the European concept of a foundation. A Stiftung is not a trust. Although it is difficult to define simply what it is, essentially a Stiftung is a private corporation without members, but with a Board of Directors and a constitution, which confines its activities to designated (charitable) purposes.

That resembles the approach of Lord Wilberforce in *James Buchanan & Co Ltd v Babco Forwarding & Shipping (UK) Ltd* [1978] AC 141 at 152-154, who likewise went straight to the original foreign text, overruling the appellants’ objections that it was wrong to do so in the absence of expert evidence.

Accordingly, although a Stiftung is most unlikely itself to be a trust for the purposes of Australian law, the relationships between it, its founder and other persons and the property it owns may be regarded as sufficiently similar to the relationship of trust for it to be regarded as a trustee. Whether that is so will turn on the particular facts of the case. The more general point is that the analysis does not turn upon the correctness of a translation, but instead upon first determining the rights, privileges, powers and immunities created by the foreign legal system, and then asking whether there are sufficient similarities for the foreign thing to answer the Australian description of a trust in the particular context of interest.