EU Succession Regulation 650/2012 – Brussels IV – post Brexit

By Gill Steel Posted June 8, 2017 In Tax, Wills

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Background

In the 18 months or so since the coming into effect of Brussels IV, what has been practitioners' experience of dealing with cross border estate administration? Three firms contribute to LawSkills' website: Legal4Spain; Furley Page (an English law firm specialising in French law) and Legal4Italy. I turned to them for insight and thank them for their help. The purpose of this article is to share how the Regulation is being interpreted.

The Regulation

The Regulation unifies the application of succession law around the law of the member state of the deceased's last habitual residence and applies its succession laws to the deceased's worldwide assets – Article 21.

However, recognising that a person may change their habitual residence over time and not be clear which is their habitual residence on death, it provides, for certainty's sake, the ability for a person to choose to apply the law of any nationality which he has at the time of making the choice or at the time of his death – Article 22.

Remember though that **Article 83 (4)** implies that if a client has made a Will in accordance with the law of his nationality before 17 August 2015 that is to be regarded as an explicit choice. Yet, in a case referred to me by Furley Page, a Scottish Will predating that date, with no declaration of law applicable, failed to be treated by the Notaire as applying Scottish succession law to French property included in the deceased's estate. French law was applied to the French property.

Is the UK a third state?

The *Treaty on the Functioning of the European Union* indicates that a third country is one that is not a member state, while the expression 'member state, includes all member states that are parties to the EU treaties.

This does beg the question – is the UK (and Denmark & Ireland) a 'member state' for the purposes of the Regulation? Most commentators agree that the UK is a 'third state' and feedback from Furley Page suggests that there is agreement amongst Notaires in France that the UK is a third state for the purposes of the Regulation. **Grazia Antoci** of Legal4Italy advises that from an Italian perspective the UK would be regarded as a third state. In Spain, Andrew Eastwood is more cautious advising that he and other UK/Spanish advisers share this view; but cannot confirm a general consensus on the point between Spanish lawyers/Notaries. Once the UK actually leaves the EU then it will definitely be a 'third state' under the Regulation.

Renvoi

Article 34(1) says:

> "The application of the law of any third State specified by this Regulation shall mean the application of the rules of law in force in that State, including its rules of private international law in so far as those rules make a *renvoi*:
>
> (a) to the law of a Member State; or
>
> (b) to the law of another third State which would apply its own law."

Article 34(2) says:

> "No *renvoi* shall apply with respect to the laws referred to in Article 21(2), Article 22, Article 27, point (b) of Article 28 and Article 30."

This Article and its interpretation is the source of potential jurisdictional conflict as it would seem to apply in all circumstances; which means a choice of law under Article 22 will be a choice of the internal law of a country with **no *renvoi***.

From an Italian perspective, if a British national chooses English law to govern succession it should be considered valid and will exclude *renvoi*, even if English law would not allow any choice of law.

Uncertainties become clear?

The problem for English lawyers is that the way we understand the use of the term *renvoi* (as above) does not seem to be the way the Regulation uses the term. The Regulation only uses the term to cover the initial referral which a third state may make to the law of a member state or another third state i.e. the way English law would refer the succession to immovable property to the law of the jurisdiction in which the immovable property was located.

Thus:

1. Where the applicable law is that of a person's habitual residence and that is a third state such as England, and it refers immovable property located in a member state to the law of that state then the member state can accept the *renvoi* and apply its domestic law to the succession of that property. This will be the case if no election is made by a UK national who is habitually resident in England but with immovable property located in a member state.
2. Where the applicable law is the law of a third state by virtue of it being the state with the closest connection to the deceased or the state chosen as the one where the person was a national, then Article 34(2) says **no renvoi shall apply**e. the law will be the domestic law of that third state with no private international law rules. This will be the case if an election is made by a UK national for national law to apply with immovable property located in a member state.

Furley Page's experience with pre 17 August 2015 Wills is that French Notaires are seemingly ignoring the *implied* choice of law provided for in Article 83(4) in favour of strictly interpreting Article 34(2) in old Wills with no choice of law included; concluding that the full PIL rules of renvoi applied, which resulted in French succession law permitting clawback of assets by the daughters to achieve their reserved share of the estate.

Fortunately, with a post 17 August 2015 Will containing a choice of English law all three firms dealing with French, Spanish and Italian connections have found that local lawyers are bound by the Article 22 choice made by the deceased and have applied English domestic succession law to the locally sited property.

However, even if a particular counterpart in another jurisdiction accepts the English practitioner's interpretation of the Regulation it will be difficult to see how a foreign lawyer will interpret English law and an English Will to deal with the transmission of the title to immovable property in their jurisdiction in more complex cases, such as those Wills containing a trust.

Problems will also arise where there is an intestacy. **Andrew Eastwood** has a case of a deceased British ex pat resident and domiciled in Spain at the time of his death. No Grant can be obtained in the UK as there are no UK assets. In the absence of a Will Spanish law will have to apply so the estranged children from his first marriage will take priority over his second wife.

Many practitioners will have advised clients in the past to make two Wills – one to deal with their worldwide assets in the country of their domicile i.e. England and one to deal with immovable property located in a particular country, such as France. As clients die without changing these Wills it is likely that as France, in particular, observes a schematic approach similar to the UK, Notaires will apply the rules of renvoi in Article 34(1) so that French succession law (with its forced heirship rules) will apply to French immovable property in the estate.

Conclusions

Is it wise to still recommend making two separate Wills? Certainly, where the schematic approach applies and the foreign jurisdiction does not recognise trusts. Please ensure that both Wills contain the same choice of law if the client wants any foreign property to be dealt with under English succession law. The advantage of preparing a local Will in such a case would be that it might conform to local requirements and ease the transfer of the property.

The message to clients should still be – making an election should help. Where there is no express election and Article 83(4) has to be relied upon, the jury still appears to be out as to how a particular lawyer will address this. Certainly dying intestate will only add to the problems!

Examples

1. *Janine, a UK national, domiciled, living & working in England, owns a holiday home, furniture and a bank account in France as well as moveables and immovables in England. If she wants English law to apply to her French property, can the Regulation help?*

Janine is habitually resident in England with predominantly English assets, which are clearly going to be dealt with under English domestic succession law. The only foreign assets are the assets located in a member state – France.

The Regulation is supposed to help Janine, and others in a similar situation, wishing to ensure all their estate will be dealt with under a single set of succession laws.

Even though a citizen of a third state, Janine can make a choice of applicable law in her Will. If she does so, then by virtue of her choice of law, English law will apply to her whole estate.

The English lawyer dealing with her estate will need to ensure that any French Notaire should interpret Article 34 as meaning that although the lawyer in France may deal with the succession to the French property he must apply English law to that succession with the result that 'forced heirship' will not apply. Janine may bequeath her French assets to whoever she likes.

It will not mean that French taxes are avoided nor does it mean that there will be a European Certificate of Succession which is appropriate, as the necessary rules for the Certificate are not part of English law. The Certificate would be issued by the member state whose courts have jurisdiction. As the UK has opted out it is not in a position to issue a Certificate of Succession.

In advising Janine you would need to establish how she owns the French property – she may own it jointly with her partner or spouse. If so, it could have been purchased *en tontine* (similar to a joint tenancy) or *en indivision* (similar to tenants in common). The former would mean that the Regulation would not apply to the transmission of the ownership of the property.

If she is married, she and her husband may have been advised when they purchased the property to change their matrimonial property regime. Again, the Regulation does not affect matrimonial property regimes and this might be one way to avoid problems of transmission to the ownership of the property if it is desired the surviving spouse should own the house outright on the death of the first spouse.

2. *Brian, a British national, works for Amazon. He is currently resident in Paris but because of his work he previously lived in Luxembourg. As a result, he had a Bank Account in Luxembourg and other investments. Could Brian ensure English succession law applies to his investments and bank account in Luxembourg?*

Brian appears to be habitually resident in France but this may need to be checked if he has not spent many years living in Paris. It is also possible that the country to which he has the closest connection is Luxembourg, particularly as it is where his bank account and other investments are located. Although he is currently living in Paris we do not know if he owns immovable property there or even in England, although he is a British national.

Explore the full details of his estate before he makes a choice of applicable law for the whole of succession to his estate. Consider the tax implications of death since if he is domiciled in England it will be necessary to have some indication of the overall value of his estate; in particular, any assets which may be subject to double taxation.

Under the Regulation, the law applicable to his succession is the law of his habitual residence which appears to be France, a member state; unless it declines jurisdiction because it considers the courts of Luxembourg are more appropriate (as he had his former habitual residence there within the past five years – Article 10 – or because the assets are located there). If he does not wish French law to apply to the whole of his assets located in the EU (i.e. including his assets in Luxembourg) or does not want uncertainty as to whether the laws of France or Luxembourg might apply, then he must make a choice of law.

Under the Regulation, he can only choose his law of nationality – so he would need to choose English law. Under the Regulation, English law would be the law of a third state and it is the domestic law of England that will apply, without any interference from its private international law treatment of *renvoi*.

As Luxembourg is bound by the Regulation it must accept this; however, the Luxembourg Bank may look to the English lawyer administering the estate for a local document or European Certificate of Succession in order to uplift the balance in the accounts. Similarly, a broker in Luxembourg may need evidence of title other than an English Grant of Probate. So local lawyers may still have to be involved in producing local documents.

3. *Jorge works for Deutsche Bank, sometimes in London and sometimes in Hamburg. He owns a flat in London but he is a German national and spends most of his time in Hamburg where his family live. Will the Regulation enable him to apply German law to his English flat on death?*

A discussion with Jorge may well determine that the centre of his life is in fact Hamburg rather than London, despite owning a flat there. Assuming he is habitually resident in Germany that country would apply German law to the whole of his estate.

Factors which are relevant to determining habitual residence include:

- Time spent 'living' in a particular country
- The reason for residing in the country – e.g. was it for employment or where the family lived
- Work commitments
- Location of the family
- Location of the assets

However, as regards the flat in London, English law will still require a grant of representation in order to complete the title to it and authorise someone to sell or transfer it.

Jorge could make a German Will, but **not** make a choice of law, since German law will apply to the whole of his succession as the law of the place of his habitual residence. He could also make an English Will limited to his flat in London. It will not prevent a conflict of law issue, as even though the English courts would seek to apply English law to the assets gifted under it, German law, as the law of his habitual residence would apply to ALL his estate, but it might ease administration.

The UK will still apply IHT to his London flat but not to Jorge's worldwide estate unless by the time he dies he becomes deemed domiciled in the UK.

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