THE EU SUCCESSION REGULATION
No 650/2012

The Succession Regulation and existing and future Private International Law issues

Thursday 17th March 2016

Richard Frimston
Solicitor and Notary Public
England & Wales

www.russell-cooke.co.uk
The United Kingdom

The United Kingdoms, Principality and Province:
  Scotland
  Northern Ireland
  England & Wales

Not:
  Ireland
  Channel Islands
    Jersey
    Guernsey
    Alderney and Sark
  Isle of Man
UK Nationals

- British Citizens
- British Overseas Territories Citizens
- British Overseas Citizens
- British Nationals (Overseas)
- British Subjects or
- British Protected Persons
Succession Conflicts of Law

World Map: Conflict of Laws in Successions – Mappemonde du rattachement en matière successorale

- 
- 
-
Conflicts of Law / PIL Analysis

- Jurisdiction
- Applicable Law (choice of law)
- Recognition and Enforcement of judgments
- Acceptance and Enforcement of documents
European Union

- Not a Federation?
- Treaties – TEU and TFEU (Protocols 21 and 22)
- Regulations – directly applicable EU Law
- Directives – EU Law that requires Member State enactment
Why didn’t other MS as well as Denmark, the United Kingdom and Ireland opt out?

- **Protocol 21 - UK & Ireland**
  - Opt in within 3 months, otherwise they do not take part in the voting and the legislation does not apply
  - However, can opt in at a later stage if they wish

- **Protocol 22 – Denmark**
  - Do not have the right to choose whether to opt in to an individual piece of legislation
  - 2015 referendum, electorate decided against opting out of Protocol 22

- No other EU MS has any opt in or other rights under the EU Treaties
Some European Union Regulations

- Brussels I (recast), BI bis
- Brussels II bis [to be further recast, applies to, but not within UK]
- Rome I
- Rome II
- Rome III [enhanced co-operation, not Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, Ireland, Netherlands, Poland, Slovakia, Sweden or UK]
- Rome IV [Ex Brussels III, not adopted, but to be subject to enhanced co-operation. Not Croatia, Cyprus, Denmark, Estonia, Hungary, Ireland, Latvia, Lithuania, Poland, Slovakia or UK]
- Maintenance Obligations Regulation [does apply within UK] and 2007 Hague Protocol [Ireland but not UK]
- Succession Regulation (ex Brussels IV) [not Denmark, UK or Ireland]
Some European Union Regulations

- Brussels I (recast), BI bis
- Brussels II bis [to be further recast, applies to, but not within UK]
- Rome I
- Rome II
- Rome III [enhanced co-operation, not Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, Ireland, Netherlands, Poland, Slovakia, Sweden or UK]
- Rome IV [Ex Brussels III, not adopted, but to be subject to enhanced co-operation. Not Croatia, Cyprus, Denmark, Estonia, Hungary, Ireland, Latvia, Lithuania, Poland, Slovakia or UK]
- Maintenance Obligations Regulation [does apply within UK] and 2007 Hague Protocol [Ireland but not UK]
- Succession Regulation (ex Brussels IV) [not Denmark, UK or Ireland]
UK Succession Rights

• Deceased dying domiciled in England & Wales, spouse or civil partner and dependants including co-habitants, children can make a claim under Inheritance (Provision for Family and Dependants) Act 1975

• Deceased dying domiciled in Scotland, movables are subject to prior rights for spouse and legal rights for children (subject to possible review?)

• Deceased dying domiciled in Northern Ireland, spouse or civil partner and dependants including co-habitants, children can make a claim under Inheritance (Provision for Family and Dependants) Order 1979
• Succession only relates to the assets of the Deceased at date of death and property passing through the estate.

• Succession does not apply to:
  • property gifted before death
  • assets held outside the ownership of the deceased, such as life insurance, death in service benefits and pension rights which are normally held in trust
  • property passing by survivorship such as joint accounts and immovable property held as joint tenants or with a right of survivorship.
Private International Law
Formal Validity of Wills

- Hague 11, Convention of 1961

- The marriage or registered partnership of a person domiciled in England & Wales or Northern Ireland at the date of marriage or CiP, does revoke that person’s Will, but not if domiciled in Scotland
  - Earlier foreign same sex marriage?
  - Conversion to same sex marriage?
  - Invalid same sex marriages?

- The Scottish doctrine of *conditio si testator sine liberis decesserit* does not apply in England & Wales or NI
Applicable Law - *Renvoi*

For Succession Law, UK uses total renvoi or foreign court theory.

- UK accepts multiple renvoi and applies the law applied by the foreign court under its private international law rules:
  - of the *lex rei sitae* for immovables
  - of the *lex domicilii* for movables
EU Succession Regulation

When and Where in force?

• EU Regulation (EU) No. 650/2012
• In Force since 17 August 2012 but only fully effective since 17 August 2015

• SR does not apply in Ireland, UK or Denmark; MS not bound

• Are Ireland, UK or Denmark, Member States or third States?
• Does it matter?
European SR Zone
Succession Regulation doesn’t apply in the UK?

- SR is of universal application, and any law specified is applied whether or not it is that of a MS or not.

- Two other ways in which third States are affected.
  - PIL of third States link a client or asset back to the EU, then the Succession Regulation is likely to apply. Ownership of property inside the EU or the possession of nationality, domicile or residence inside the EU may link the client back and within the Succession Regulation. Such reference back, or renvoi, to the law of a MS is accepted under the Succession Regulation.
  - If there are assets, of whatever value and with no de minimis rule, within the EU, under the Succession Regulation the courts of a MS will have worldwide jurisdiction to deal with an estate if the deceased was a national of that MS or had been habitually resident in that MS within the previous 5 years.
EU Succession Regulation

Scope

- Scope of the Regulation (Art. 1)
- Constructive ambiguity (Art. 1.1)
  - This Regulation shall apply to succession to the estates of deceased persons.
  - Le présent règlement s’applique aux successions à cause de mort.
  - Diese Verordnung ist auf die Rechtsnachfolge von Todes wegen anzuwenden
- Scope of the Applicable Law (Art. 23)
EU Succession Regulation

Jurisdiction

• The universal European connecting factor for succession for jurisdiction (and applicable law) to be the deceased’s last habitual residence (Art. 4)

• Worldwide Jurisdiction in MS of habitual residence, but if none and if assets in a SR zone state (Art. 10)
  • Nationality of that SR zone state
  • Ceased to be resident in that SR zone state within 5 years

• Otherwise, assets in SR zone state subject to limited jurisdiction of that state
EU Succession Regulation
Choice of Jurisdiction

• “Parties concerned” can elect for jurisdiction of the Member State of nationality of deceased, if it has been validly chosen by the deceased (Art.5)

• Are creditors, “parties concerned”? 
EU Succession Regulation

Applicable Law

• The universal European connecting factor for the applicable law for the succession as a whole is to be the deceased’s last habitual residence (Art.21)
• Movables and immovables – usually subject to the same law. Unitarian. But some renvoi
• Hotchpot if other jurisdictions distribute the estate differently?
**EU Succession Regulation**

**Applicable Law / Choice of Law**

- *Professio Juris* of the internal succession law of *Nationality* (Art. 22)

- What is internal law and what is PIL?
  - Domicile limitation in English 1975 Act?
  - Domicile limitation for Scottish prior and legal rights?
  - Limitation to Scotland or England & Wales of PRs?

- Within the UK, Canada and USA this would be the Law District of most close connection (not necessarily domicile) (Art. 36)
EU Succession Regulation

Applicable Law / Choice of Law

- Choice of the law of nationality as the applicable succession law is still valid under the Regulation even though the chosen law does not itself provide for such a choice (Recital 40)

- Only law of nationality can be chosen, not habitual residence.

- Sensible to make it clear if no such choice is being made and that the default law of the habitual residence at the time of death is to apply?

- In some cases, a choice of national law might indicate a change of domicile
EU Succession Regulation
Applicable Law - Renvoi

• Does Art.34 abolish *renvoi*?
• If so – **internal law only**, but
  if the applicable law is that of a third State, the private
  international law rules of that third State are included in so far
  as they make a *renvoi* back to
   • the law of a Member State or
   • the law of another third State which would apply its own
     law

  Is the use of the singular limiting?
• How does Art. 34 apply to Denmark, Ireland and UK?
• No *renvoi* for Art.22 *professio juris* or Art 21.2 closest
  connection (and some other matters)
EU Succession Regulation

Applicable Law - Clawback

• Art.1.2 (g) SR Scope excludes property rights, interests and assets created or transferred otherwise by succession, for instance by way of gifts, joint ownership with a right of survivorship, pension plans, insurance contracts an arrangements of a similar nature, without prejudice to point (i) of Art.23.2

• Art.23.2 (i) applicable law scope includes any obligation to restore or account for gifts, advancements or legacies when determining the shares of the different beneficiaries
EU Succession Regulation

Existing Treaties (Art.75)

• Hague 11 - Wills Convention

• Nordic Convention 1934
  - Denmark, Finland, Iceland, Norway and Sweden
  - Limited application between Finland & Sweden

• Other Succession Treaties
  - Germany with Iran (1929), the CIS and other ex USSR states (1958) and Turkey (1929)
  - Austria with Iran (1959), the CIS and other ex USSR states (1958), Balkan states (1954), Tunisia (1977) and Turkey (1989)
  - Italy with Turkey (1929), Switzerland (1868) and Peru (1874)
  - Estonia, Latvia and Lithuania with CIS (1993) and Ukraine (1995) and others
  - France with Denmark (1742), Dominican Republic (1882), Iran (1885), Cambodia (1949), Tunisia (1957), Algeria (1962) and Togo (1963)
  - Greece with Switzerland (1927)
EU Succession Regulation
DoPuDs (Arts.24-27)

• Form of Wills, but subject to reservations of the Hague Wills Conventions

• Inheritance Contracts and Succession Agreements.
  • Admissibility and substantial validity
  • Formal validity – an increasing problem?

  • Donation entre époux
  • Joint Wills
  • Mutual Wills
  • Proprietary estoppel

• Not made orally
• What if made orally but evidenced in writing?
EU Succession Regulation

Administration

• Uniform European Certificate of Succession – **ECS** (Chap.VI)

• Roles of Personal Representatives recognised but how? (Art.23.2(f))

• How is a succession in France to be administered under English administration law?

• What tax effects might it have?
Succession Law and Choice of Law

A pre 17/08/2015 Will may be a *professio juris* (Art.83.4)

*Professio juris* before 17/08/2015 valid and also if valid in accordance with PIL rules of habitual residence or nationality at time of choice (Art.83.2)

- Netherlands – ex Hague 32 – nationality or habitual residence
- Finland – nationality or habitual residence or MPR law
- Germany – German law
- Denmark – Danish law
- Italy – habitual residence, but protection for Italians
- Switzerland – nationality
- Poland – nationality or habitual residence
- Czech Republic – nationality

As between Art.83.2 and Art.83.4 which takes precedence?
Making a Choice of Law

Is it possible to make one choice of law for the whole of one’s succession under Art.22 in multiple Wills?

1. Revocation
   I revoke all former testamentary dispositions so far as they relate to my property of every kind wherever situate except that in France. I declare this to be my last Will in relation to my property of every kind wherever situate except my property in France save that the following Clause 2 shall apply to the whole of my succession including my property in France

2. Choice of Law
   I am a citizen of the United Kingdom, habitually resident and domiciled in and most closely connected with England and in accordance with the provisions of Article 22 and all other Articles of the European Union Succession Regulation (EU) No 650/2012 or any subsequent or amended Regulation I choose the internal law of England to govern all of my dispositions of property upon death and the whole of my succession
Donatella in Shenfield

- Donatella, an Italian citizen, is habitually resident in Shenfield, Essex

- Italy, as the state of nationality will have universal jurisdiction under Art.10 if there are any assets whatsoever in Italy

- If there are none, but assets in other EU MS then those MS will only have jurisdiction in relation to those assets rather than a worldwide jurisdiction.

Picture by David Shankbone
If UK is a third State, SR will apply the law that the PIL of UK applies (Art.34)

If Donatella is still domiciled in Italy under law of England & Wales then
- Italian succession law will apply to her movables and
- law of the situs to her immovables
- Italian immovables subject to Italian law
- English immovables to the law of England & Wales

Under SR the only choice available to Donatella is that of Italian law.
Donatella in Shenfield - 3

- No choice of law under internal law of England & Wales

- If Donatella took UK citizenship and therefore was a UK citizen at the time of her death, a choice of law of England & Wales (provided that this is the part of the UK with which she is most closely connected) in her Will or other DoPuD should be valid and respected under SR
Donatella in Shenfield - 4

- Pre 17/08/2015 English Will?
  - Might be an automatic choice of law of England & Wales for the purposes of Italian 1995 PIL?
  - Valid against rights of Italian nationals not resident in Italy?

- Pre 17/08/2015 Italian Will with a specific choice of law of England & Wales for the purposes of Italian 1995 PIL?
  - Deemed choice of Italian law under Art. 83.4?
However, if Italian courts have worldwide jurisdiction under Art.10 perspective of that court is likely to be heavily influenced by an Italian view

The rights of children or parents under internal Italian succession law, likely to be given significant weight

If there are any other assets in other EU MS, the orders of the Italian courts will be directly recognised and enforceable in those other EU MS
Conclusions

- Any cross border connection such as nationality, residence, domicile or *situs* of assets may bring SR into play
- Many testators have already made a deemed *professio juris*. The tax, administration and succession effects of that choice should be carefully considered.
- Pre-existing choices may no longer be available; inadvertent revocation disastrous?
- Sometimes, a *professio juris* may be best avoided?
- SR Zone state with worldwide jurisdiction recognised in all other SR Zone states not to be underestimated
The EU Succession Regulation
published in English and German by Sellier and
in French by Dalloz
by
Bergquist, Damascelli, Frimston, Lagarde,
Odersky and Reinhartz