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The new frontiers of succession planning

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The world is a smaller place than it once was and the law with respect to international succession has struggled to keep up. It is no longer unusual for a family to be made up of members of differing nationalities with assets all over the world. Faced with conflicting (private international) laws, this has meant uncertainty for many during both the planning stage and following a death. Many assume that they carry their 'personal' law around with them and that everything will pass on death in accordance with the laws of their nationality – which is not necessarily the case. The challenge, therefore, is working out which country's succession laws apply and the extent to which they override the provisions set out in any will, as well as confirming who has authority to deal with the assets.

These questions, if left unanswered, pose the risk that that the intended heirs will not inherit because the succession laws applicable in a particular country will override the provisions of any will - creating conflict within the family and depleting the value of the estate as a result of professional and administrative costs. Additionally, if the estate does not pass as intended, a higher level of inheritance or estate tax might be payable. Individuals who think that they have (tax efficient) estate planning in place may therefore be caught out, and the potential for family disharmony is often an unfortunate consequence.

With one fell swoop, the European Succession Regulation (EU) No 650/2012 ('**Brussels IV**') aims to ameliorate such complexities. And it partially does, across the Participating States (all EU Member States other than Denmark, Ireland and the United Kingdom). In general terms, Brussels IV, which will be applied from 17 August 2015, is set to provide individuals with a tool to ensure that a single forum (rather than a multitude) has jurisdiction to deal with the succession of their estate, thus maximising certainty and minimising the risk of family upset.

Brussels IV marks a major change in cross-border succession law and its effects will be felt beyond the EU's borders; however there are some areas of uncertainty and subtle nuances in applying the rules.

What does Brussels IV say?

The scope of Brussels IV is broad: it covers jurisdiction, applicable law, recognition and enforcement of foreign judgments in succession matters, as well as acceptance and enforcement of authentic instruments and the creation of a European Certificate of Successions (the '**ECS**').

Its main purpose is to ensure that succession to a given estate is treated coherently. The aim is to ensure that the court of a *single* jurisdiction will apply a *single* law to the *entire* estate. Generally speaking, the courts and governing law will be the jurisdiction of habitual residence (unless there is a jurisdiction to which the deceased was more closely connected; or unless the deceased elected for the law of their nationality to apply).

Brussels IV adopts the principle of unity of succession. As a result, the law applicable to the succession will govern the succession as a whole, regardless of the nature of the assets (movables or immovables). This will be of interest to any individual with assets located in a Participating State.

Brussels IV - sprouting traps and pitfalls for the unwary?

There are still a number of questions which are yet to be answered, which leaves the door ajar to potential conflict and perhaps avoidable costs.

1. The meaning of 'habitual residence'

Brussels IV is devised to ensure that the forum (e.g. national court) dealing with the succession will, in most situations, apply its own law. Unless an election to the contrary is made or there is a jurisdiction to which the deceased was more closely connected, the forum and the law that governs succession will usually be the country of habitual residence. The meaning of 'habitual residence' is therefore key to Brussels IV, however (in similar fashion to other EU Regulations) a definition does not feature in the legislation itself and various countries may ultimately interpret the concept differently. Determining habitual residence for some peripatetic family members may become a complex question of fact, to be decided according to all the circumstances.

2. What about choice-of-court and applicable law elections?

To provide greater certainty, certain elections can be made: choice-of-forum (Article 5) and choice-of-law (nationality) to govern succession (an '**Article 22 election**'). However, the prorogation of the competent forum is limited to the case where the deceased had chosen the law of a 'Member State' (that is the court of the nationality of the deceased elected pursuant to an Article 22 election) to govern succession. For example, under Brussels IV, Maria (a German resident Italian British national) can ensure that the courts of Italy have jurisdiction over and apply Italian law to succession to her German bank account. Therefore, there may be advantages for some internationally mobile family members in making an Article 22 election.

3. A Member State vs third State?

The UK, Ireland and Denmark are not subject to Brussels IV but are EU Member States. Clearly residents and nationals of each of these states with assets within a Participating State will be affected: for example, Matt (a Dutch resident British national with a closer connection to England) can ensure that English law applies to his Dutch bank account by making an Article 22 election. But what is a 'Member State', what is a 'third State' and where do the UK, Ireland and Denmark fit in? It is unfortunate that

Brussels IV does not include a definition of ‘Member State’ for the purposes of the regulation. Yet even in the absence of definitions, it is difficult to see how the UK, Ireland or Denmark could qualify as ‘Member States’ for the purposes of Brussels IV.

4. The disapplication of renvoi?

Things become more complicated when we consider the qualified disapplication of renvoi. Broadly, renvoi is reference back to the law of another state, sometimes including that other state’s private international law rules and sometimes not. The general position is that renvoi is excluded when an Article 22 election is made. Express elections should therefore be considered. But, of course, things are never that straightforward.

Renvoi will remain relevant where the law which applies to a deceased's estate is that of a third State. This opens up the possibility of territorial scission should the law of the third State, such as in England or Wales, be the law of a legal system that devises the law applicable to succession based upon the nature of the assets (movables or immovables). While this is not a new problem, it remains unhelpfully complex.

5. Application of the ECS

Parties interested in an estate will be able (but are not obliged) to apply in a Participating State for an ECS. The ECS is a standard form certificate designed to enable heirs, legatees, executors or administrators to prove their legal status and/or rights in all Participating States. The ECS should make the post-death process more certain, efficient and less costly. The persons designated in the ECS are presumed to dispose of the legal entitlement and their transactions are to be considered valid unless the other party knows that the statement in the ECS is inaccurate.

Questions remain as to the extent to which the ECS will work in practice. The use of the ECS is optional and is no substitute for any existing national certificates. Moreover, evidentiary effects of the ECS do not extend to elements that are not governed by Brussels IV, such as questions of affiliation (e.g. is a surrogate-born child an heir?) or the question whether a particular asset belonged to the deceased. All of this creates uncertainty and, until the CJEU has clarified these and other issues, could lead to challenges from disgruntled heirs.

Where does this leave us?

Now is the time to start reviewing wills and estate planning and to consider what impact Brussels IV is going to have; in some circumstances, the impact may be unwelcome and planning should be considered before 17 August 2015. Being acutely aware family relationships are at stake, all advisors should take this responsibility seriously.