

IBA 20 Wealth Transfer Conference

Brussels IV: is it for real?

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Outline of Panel

- Introduction and recap of where we are now
- Practicalities and implementation in member states that have signed up
- Effect on cross border succession in refusnik and third party countries
- Advice to clients and preparing documents: case studies

Introduction and recap

What is happening and when?

Introduction / recap

- EU wishes to harmonise law/procedures across member states
- Regulation 650/2012 came into force on August 16 2012; it will apply from August 17 2015
- UK and Ireland opted out and Denmark not bound
- The main purpose of Brussels IV is to ensure that only **one law** determines how an estate is dealt with; it does not create a single succession law rather a unified system of resolving conflicts of law over succession
- Courts/legal system of member state in which deceased died habitually resident will have jurisdiction and will apply the law of that state, unless:
 - deceased elected in a testamentary document during his lifetime for courts/legal system of nationality to apply
 - deceased was manifestly more closely connected with another member state, in which case the courts/legal system of that jurisdiction will apply

Introduction / recap

- Basic connecting for all succession conflicts of laws: 'habitual residence' (Art 16) – unfortunately undefined
- Testators will be able to opt for law of nationality to govern their succession (Art 14) – UK has three internal governing laws?
- There is to be unity of succession (i.e. no separate regime for immovable property) (Art 21)
- Art 19(j) provides for clawback of lifetime dispositions – some states have very broad clawback
- Art 25 creates an extra-territorial aspect for estates of deceased with any EU asset and where they residence within the EU in the previous 5 years

Introduction / recap

- Executors / heirs will receive a single European Certificate of Succession from the jurisdiction where the courts are seised of the succession (Chapter VI)
- Decisions of the court / jurisdiction seised of the succession under the Regulation may be ignored / overruled in other member states if contrary to public policy (ordre public) (Arts 35 and 40)
- Renvoi
 - Art 34 (by implication) abolishes where the applicable law is that of a member state
 - Where the applicable law is the law of a non member state (a 'third state'), the renvoi from that law to the law of a member state would be accepted



Practicalities and implementation in member states that have signed up

Will it be respected?

Can it be overridden?

What guidance is out there?



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France

Germany: implementation

- Under the Regulation Germany is a Member State.
- The Regulation applies without the need of transposing into national law, however the German Ministry of Justice has drafted a legislative proposal to achieve the goals of the Regulation.
- The legislative proposal includes inter alia a new procedural act for international succession matters.

Germany: relationships with existing international conventions

- Article 75 (1) states that the EU Succession Regulation shall not affect the application of international conventions to which one or more Member States are party and which concerns matters covered by the EU Succession Regulation.
- Excluded are bilateral conventions which do not conflict or do not contain matters covered by the Regulation.
- The Regulation mentions the Hague Convention of 5 October 1961 on the conflicts of Law Relating to the Form of Testamentary Dispositions which shall apply instead of article 27 of the Regulation.
- Germany is a contracting party to this convention.

Germany: relationships with existing international conventions

- Concerning the situation in Germany, in particular the conventions between Germany and Turkey from 1929, Germany and Iran from 1929/1954, and between Germany and the states of the former USSR from 1958 concern matters covered by the EU Succession Regulation.
- The effect of the convention between Germany and the USSR is not totally clear since the dissolution of the USSR.
- The convention between Germany and USSR still applies to Russia and some other states.
- In regard to the application with Estonia, Latvia, Lithuania and Turkmenistan, there is no clear answer.

Germany: Example

The deceased A is a Turkish national. His habitual residence is Germany. He possesses assets in Germany and in Turkey.

Solution

Article 75 makes it clear that international conventions override this Regulation if they concern the same matters. The law applicable to the succession is governed by international conventions to which one or more Member States are party at the time of adoption of the EU Succession Regulation. Therefore, the applicable law has to be determined in accordance with the international convention between Germany and Turkey from 1929.

Article 75 also overrides article 22. Therefore, it is not possible to choose the law which governs one's succession if Germany has signed international conventions.

Germany: Ordre Public

- Invocation of the *ordre public* must be limited to exceptional circumstances (cf. Recital 58).
- From a purely German perspective, it must be concluded that only the total exclusion of a descendant from the right to a compulsory portion is contrary to the *ordre public*.
- Ordre public could come in if under the applicable law descendants are completely excluded, e.g. Thailand

Netherlands: implementation

- under the Regulation the Netherlands is a Member State
- implementing legislation has passed through Parliament in October 2014 (published on 5 November 2014)
- forced heirship rights under Dutch law consist of a pecuniary claim to the estate equal to half of the child's intestate share
- the forced heirship claim is only claimable after the surviving spouse or partner's death
- no *ordre public* / public policy issues

Netherlands: relationships with existing international conventions

- the Netherlands is a contracting party to the 1961 Hague Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions, which under Article 75 (1) of the Regulation shall continue to apply
- the Netherlands will denounce the 1989 Hague Convention on the Law Applicable to Succession to the Estates of Deceased Persons
- the 1985 Hague Convention on the Law Applicable to Trusts and on their Recognition shall continue to apply in the Netherlands

Netherlands: European Certificate of Succession

- in the Netherlands, Dutch civil-law notaries have been designated as the competent authority for the issuance of the Certificate under Article 64 (b) of the Regulation
- the Certificate is to be used in another Member State to invoke status as an heir, legatee having direct rights in the succession and executor of the will or administrator of the estate and/or to exercise rights as such (Article 63)
- no purpose for assets located in a third State
- Competence to issue the Certificate in the absence of a choice of law:
 - a. last habitual residence in the particular Member State (Article 64 icw Article 4);
 - b. if last habitual residence was in a third State and assets of the deceased are located in the particular Member State (Article 64 icw Article 10);
 - c. forum necessitates (Article 64 icw Article 11).

Netherlands: European Certificate of Succession (II)

- Competence to issue the Certificate in the event of a choice of law:
 - a. if the parties to the proceedings have expressly accepted the jurisdiction of the issuing authority in the State whose law has been chosen (the “**Issuing authority**”) (Article 64 icw Article 7 (c));
 - b. agreement to confer jurisdiction to the Issuing authority (article 64 icw Article 7 (b));
 - c. if the competent foreign authority has declined jurisdiction if it considered that the Issuing authority is better placed (Article 64 icw Articles 7 (a) and 6).

Matrimonial property regimes: Netherlands and generally

- under Article 1 (2) (a) questions relating to matrimonial property regimes are excluded from the scope of the Regulation
- However, Annex III to the Certificate does contain information on the matrimonial property regime
- competent issuing authority for the Certificate will apply its own international matrimonial property law
- jurisdiction of a particular issuing authority may have great impact on the outcome



Effect on cross border succession in refusnik and third party countries

Ireland: SR zone owners of Irish assets

- Ireland not part of SR Zone.
- Irish law will continue to apply *lex domicilii* to movables and *lex situs* to immovables. Effect will be that parties including those within SR Zone holding Irish immovable assets will therefore be subject to Irish succession law principles.
- Cannot overcome position with a choice of law clause as Ireland not a part of SR Zone.



Ireland: citizens of SR zone habitually resident in Ireland

- Subject to Irish PIL rules, Irish immovables subject to Irish succession law principles.
- SR Zone courts potentially retain jurisdiction under Article 10. Choice of law of SR Zone nationality should apply to devolution of assets save Irish immovable assets.

Ireland: Irish nationals habitually resident in SR zone

- Habitually resident in SR Zone
- Jurisdiction of SR Zone applies and will dictate devolution of assets in SR Zone in accordance with applicable law of SR Zone jurisdiction.
- For real property assets outside of SR Zone (in Ireland), then Irish PIL rules shall apply. However note the SR Zone's applicable law is for the worldwide estate, any non SR Zone assets not passing under applicable law are considered as part of the determination, in terms of any prescribed rights.
- Clawback rules of SR Zone also apply whether made within or outside the SR Zone.
- Questionable ability of an election of Irish law from an Irish PIL perspective. However, such an election would appear to work as far as SR Zone is concerned to take assets in SR Zone out of SR applicable law regime for an Irish national. Where Irish law is chosen, it would be the internal succession law of Ireland and not the PIL rules in Ireland.

Ireland: Irish nationals habitually resident in SR zone (II)

- Distinction – It would appear to be the case that a choice of law therefore benefits an Irish person habitually resident in the SR Zone but a choice of law from an EU person not as efficient as regards immovable assets in Ireland.

Ireland: Irish nationals resident in Ireland with assets in SR Zone

- SR Zone courts retain jurisdiction under Article 10. They would apply law of habitual residence per Regulation. This includes PIL and renvoi back to country within SR Zone where Irish person holds immovables. (SR Zone country accepts the renvoi if Ireland considered a Third State and no choice of law clause).
- Is it possible to make a valid choice of law under Irish law? Clearly not an issue for the SR Zone states. Possibly an issue as a matter of Irish PIL as no such distinct power to do so to overcome Irish PIL provisions.
- Choice of law of Ireland accepted by SR Zone States and would be the internal succession law of Ireland.



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Switzerland



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United Kingdom: Resident non-doms from SR Zone

Case studies

- *A citizen and resident of your own country with assets in the SR Zone*
- *A citizen and resident of SR Zone member state with assets in your own country*

Key Points

- What advice do you give?
- When is it worth completing Wills before or after the Regulation comes into force?
- What do you draft into the documents?



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France

Germany: Example 1

The deceased A is a German national with habitual residence in Germany and he possessed immovable assets in France and in Germany. Which law governs the succession?

Solution without EU Succession Regulation

According to German conflict-of-law provisions, the succession is governed by the law of the state whose nationality the deceased possessed (cf. article 25 (1) Introductory Act to the Civil Code). However, pursuant to French and German law, the immovable assets in France are governed by French law.

Solution under EU Succession Regulation

Article 21 states that the law applicable to the succession as a whole shall be the law of the state where the deceased has his habitual residence, this is Germany. Consequently, German law governs the succession. This example shows that the EU Succession Regulation aims to **avoid the fragmentation of succession.**

Germany: Example 2

The deceased A, a Spanish national with habitual residence in Spain, possessed immovable assets in Germany. Which law is applicable?

Solution without EU Succession Regulation

According to German and Spanish conflict-of-law provisions, the succession is governed by the law of the state whose nationality the deceased possessed (art. 25(1) Introductory Act to the Civil Code and art. 9 Nr. 8 Código Civil). This applies to all assets of the deceased, irrespective whether they are moveable or not. However, it is important to note that Autonomous Communities have their own rules on succession.

Solution under EU Succession Regulation

Article 21 states that the law applicable to the succession shall be law of the state where the deceased has his habitual residence, this is Spain. Consequently, Spanish law governs the succession. Additionally, article 36 is relevant because it contains provisions for states with more than one legal system.

Germany: Conclusion

- Even if recitals 23 to 25 provide some guidelines to understand the term “habitual residence”, in practice, it can be difficult to determine the deceased’s habitual residence.
- In order to avoid difficulties, it is recommended to choose the law that shall apply to the succession in accordance with article 22.
- Another problem may arise if the deceased has drawn up his dispositions of property upon death in a will in accordance with article 24.
- Article 24 establishes that the admissibility and substantive validity of dispositions of property upon death are governed by the law which would have been applicable to the succession if the deceased had died on the day on which the disposition was made.
- Therefore, it is recommended to make use of the choice of law or to write down in the testament indications which may facilitate the determination of the habitual residence on the day on which the disposition was made.

Netherlands

- under current Dutch international private law, it is possible to designate the law of the State of the habitual residence as the applicable law of succession
- Article 22 of the Regulation only allows a choice of law based on nationality
- under Article 83 (2) of the Regulation designations validly made under current Dutch international private law (i.e. before 17 August 2015) shall be valid under the Regulation



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United Kingdom: resident non-doms from SR Zone member states



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Final thoughts



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