The European succession regulation “Brussels IV”

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Pre-ESR succession conflicts of law/P.I.L. rules
Conflicts of law/P.I.L. issues

- jurisdiction
- applicable law (choice of law) vs. forum
- recognition and enforcement of judgments
- acceptance and enforcement of documents
Conflicts of law / P.I.L.\(^{(1)}\) tools

- classification
- renvoi

- connecting factors
  - nationality
  - habitual residence
  - situs
  - domicile

- unity / division (a.k.a. schism): one law for all vs. domicile/situs split analysis
European Union

Legal framework

- Treaties – TEU and TFEU (Protocol 21)

- Regulations – directly applicable EU Law and mandatory
  (but re ESR see Art. 35 re limited public policy escape clause)

(Contrast Directives (e.g. 4AMLD) – EU Law that requires Member State enactment locally, leaving greater room for interpretation)
Some EU Regulations

- **Brussels II bis** – (EC) N° 2201/2003
- **Rome III** – (EU) N° 1259/2010
- **Maintenance Obligations Regulation and 2007 Hague Protocol** [ratified but not in force]
- **Succession Regulation (ex Brussels IV)** – (EU) N° 650/2012
- **Matrimonial Property Régime Regulation** – (EU) N° 2016/1103
Brussels IV member countries
ESR

Key data

- EU Regulation (EU) No. 650/2012, colloquially known as Brussels IV
- in force since 17 August 2012
- fully effective from 17 August 2015
- UK, Ireland and Denmark are not signatories
- recitals: crucial to interpretation? [unusual in English world]
- are UK, Ireland or Denmark, Member States or Third States? (1)
- does it matter? Assume: for UK, clarified once Brexit happens
- not applicable to tax or administrative matters BUT do they have a retroactive impact on the plan?

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Scope (1)

- aim of the Regulation: harmonisation of conflicts intra-EU and between EU states & non-signatories and between EU states & Third States

- scope of the Regulation – Art.1 (Footnote 1)

- constructive ambiguity – Art.1.1
  - This Regulation shall apply to succession to the estates of deceased persons.
  - Il presente regolamento si applica alle successioni a causa di morte.
  - Diese Verordnung ist auf die Rechtsnachfolge von Todes wegen anzuwenden.

'If I'd meant that, I'd have said it,' said Humpty Dumpty.
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Scope (2)

• compare text of Hague Convention 32, Art. 1 (Footnote 1)

• note what is excluded from scope
  - status
  - capacity
  - deemed death
  - trusts
  - matrimonial property questions
  - maintenance
  - gift transfers, survivorship rights, pension death benefits etc.
  - transfer rules in Memorandum & Articles

• scope of the Applicable Law – ESR Art. 23 (Footnote 2)
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Jurisdiction

- **Base case**: the universal European connecting factor for succession for jurisdiction (and applicable law) to be the deceased’s last habitual residence (Art. 4 & Art. 21) (Footnote 1)

- worldwide jurisdiction in MS of habitual residence, but (if none) subsidiary jurisdiction for a MS as follows:
  - MS of nationality at death;
  - MS in which used to be resident within 5 years; failing which
  - courts of MS of situs. “Courts” includes quasi-judicial office holders, e.g. notaries.

- parties concerned can elect for jurisdiction of nationality of deceased, if it has been validly chosen by the dec’d (Art. 5)

- note *forum conveniens* variation possible under Art. 6 *et seq*
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Applicable law – new connecting factor

- The universal European connecting factor for the applicable law for the succession is to be the deceased’s last habitual residence (Art. 21).
  - Note Art. 20: doesn’t need to be MS law.
  - Note also Art. 21(2): if greater connection to another state, that will trump HR.
  - HR trumps situs;
  - NB HR barely understood in England.

- Movables and immovables – usually subject to the same law (Art. 21 again: “the succession as a whole” (see also Art. 23.1).
  - Unitarian view now trumps schismatic view.
  - But some renvoi.
  - HR trumps nature of assets.

- ‘Hotchpot’ if other jurisdictions distribute the estate differently?
ESR: applicable law

Limited right to elect

To influence primary applicable law result: *professio juris* of the internal succession law of Nationality (Art. 22), to trump the primary connecting factor (or affect the renvoi)

- nationality when electing *or* at death
- choice to be express *or* implicit – if made out, overrides HR
- substantive validity to be covered by the chosen law: ditto for amendments
- what does applicable law extend to? Read Art. 23.2 (Footnote 1)
- multiple nationalities: you have the choice (but bear in mind renvoi effect)
- within the UK and USA this would be the law district of domicile or of most close connection (Art. 36.1)
ESR: applicable law

Renvoi (1)

- **Does Art. 34 abolish renvoi? It’s a curate’s egg…**

  - If so – internal law only, **but** if the applicable law is that of a third State, the P.I.L. 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 *(Footnote 1)*.
  
  - Is the use of the singular limiting? Assume not.
  
  - 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).**
ESR: applicable law

Renvoi (2)

- application of the SR may be refused if manifestly incompatible with the public policy of the forum, Art. 35

- on “public policy”, see recital 15 (*numerus clausus* of property rights), recital 54 and recital 58

- *bona vacantia*: see recital 56

- if using *professio juris*, remember to try to verify tax result

- in terms of advice critical path, citizenship now has a much higher profile: should we advise clients to have UK (or Irish or Danish or 3rd country) passport available? Timing? Is this a can of worms?
ESR: applicable law

What escapes and what doesn’t

- **Art. 1.2 (g) ESR 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 and 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
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Public policy override

• note Art. 35 (and Recital 58)

• it is thought that this means
  • EU public policy
  • NOT local public policy

• i.e. Italy can’t reject an English law will for breach of forced heirship

• otherwise Italy could reject (say) German forced heirship as being different to theirs, thereby negating the whole point of the ESR.
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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 USSR succession states (1958) and Turkey (1929)
  - Austria with Iran (1966) and the CIS and other USSR succession states (1958)
  - Italy with Turkey (1929)
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DoPuDs

- Form of Wills, but subject to reservations of the Hague Wills Convention
- Inheritance Contracts and Succession Agreements
  - admissibility and substantial validity (see Art. 27)
  - formal validity – an increasing problem?
    - joint wills
    - mutual wills
    - proprietary estoppel
- Not made orally
- What if made orally but evidenced in writing?
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Administration

• Uniform European Certificate of Succession – ECS – Arts. 62 & 63 (and see Art. 69)

• ECS register

• ECS doesn’t replace jurisdiction-specific probate procedures because of subsidiarity principle.

• Roles of Personal Representatives recognised but only within SR Zone?
Effect of ESR

What does it mean in practice?

• Difficulty of prediction of result where election made: is upside of potential uniformity across jurisdictions outweighed by hidden traps?

• What traps?

  • potential issues over scope of law imported if elect for law of nationality, e.g. escape forced heirship by calling on English law but bring in claims against estate under our 1975 legislation

  • differences over executorship/trustee role

  • alternatively importing into a common law system the idea of community of heirs, acceptance, renunciation and liability for debts……

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Succession law and choice of law

Existing will may be *professio juris* (Art. 83.4)

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

?take care over new wills or even codicils

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