The EU Succession Regulation, No. 650/2012

FREQUENTLY ASKED QUESTIONS AND FREQUENT MISUNDERSTANDINGS

I thought that it was called Brussels IV?

EU Regulations, such as Brussels I and II, deal with the private international law (PIL) issues of jurisdiction, and recognition and enforcement of court judgments. Those, such as Rome I, II or III, deal with questions of applicable law. When in its draft stage the Succession Regulation was for a long time called Brussels IV but is a much wider piece of EU legislation, dealing not only with issues of jurisdiction, recognition and enforcement of court judgments and applicable law, but also the acceptance of notarial deeds, the formal validity, substantive validity and admissibility of testamentary and other dispositions including a broad range of succession agreements and the introduction of the European Certificate of Succession (ECS). It is therefore generally now referred to as the EU Succession Regulation.

I practice outside the EU so that it doesn’t apply to me and I don’t need to know about it?

Although it is only EU Member States (MS) that are bound by the Succession Regulation, it is expressed to be of universal application, and any law specified is applied whether or not it is that of a MS or not. There are two other ways in which third States (as non-MS are known in the EU) are affected.

Firstly, while the Succession Regulation has fundamentally changed the PIL of the EU it has not changed the PIL of third States, which continue to apply their historic PIL rules. If the connecting factors of continuing PIL rules of the country in which you practice link a client or asset back to the EU, then the Succession Regulation is likely to apply. Thus the 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.

Secondly, provided that 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.

Therefore unless all your clients have no connections with the EU whatsoever, you will need to understand when the Succession Regulation applies and its broad effects.

Denmark, the United Kingdom and Ireland opted out, didn’t they? Why didn’t other EU MS also do so?

The EU Treaties govern the legislative process. Under the treaties, family law legislation require unanimity, while other matters are subject to qualified majority voting. In order for the treaties to be ratified, Ireland and the UK were each granted specific rights in relation to judicial cooperation issues. Under Protocol 21 to the EU Treaties, in relation to any individual piece of legislation in this area, these two MS must separately decide to opt in within three months, otherwise they do not take part in the voting and the legislation does not apply. However, they can opt in at a later stage if they wish. Neither the UK nor Ireland decided to opt in to the Succession Regulation and therefore neither of them are bound by it nor does it directly affect them.

The position of Denmark is slightly different, since under Protocol 22, no judicial cooperation matter applies to Denmark. However, they do not have the right to choose whether to opt in
to an individual piece of legislation. Denmark has the right to withdraw from Protocol 22 and for all such legislation to apply, but in 2015 in a referendum, the electorate decided against this and therefore Denmark is currently retaining its separate position under Protocol 22.

No other EU MS has any opt in or other rights under the EU Treaties. Therefore, the Succession Regulation, having passed its legislative hurdles, has been directly applicable in all of the other 25 MS of the EU and fully effective there since 17 August 2015.

One of the unfortunate side effects of these Protocols is that the Danish, Irish and UK governments consider that since the Succession Regulation does not bind them, and they are not taking part in EU initiatives as to its implementation, they don’t have to think about it. In these countries, the Succession Regulation is having a huge impact but with no government support.

So are Denmark, Ireland and the UK Member States or aren’t they? Why can’t the EU get its act together on this?

In EU legislation such as the Succession and other Regulations, terms such as Member State or third State have the meanings defined in the EU Treaties. For these purposes, Denmark, Ireland and the UK are most certainly Member States, while it is non-EU countries that are third States.

According to every person that I have spoken to connected with the legislative process, whether in the EU Commission, the EU Parliament or from Ministries of Justice of individual MS, it was intended that a MS, such as Denmark, Ireland or the UK, not bound by the Succession Regulation should be treated as a third State and not a Member State. However, it is also clear that during the course of finalisation of the Succession Regulation, its language was changed. It is probable that the intention was that this was to remove superfluous clauses and to enable the Regulation to apply to Ireland or the UK, without further amendment if they decided to opt in to the Regulation in the future.

However, any decision on the question will be subject to review by the Court of Justice of the EU (CJEU) and may depend upon the political climate at that time. In the meantime, practitioners should be aware that the courts of most Member States are likely to regard Denmark, Ireland and the UK as third States for the purposes of the Succession Regulation.

It has been argued that including all MS within the definition would create an unfair position as between them. It can, however, also be argued that it could be a matter of EU policy, that the succession law of MS should be recognised and enforced throughout the EU whether or not individual MS are bound by the Regulation.

Finalisation of any EU legislation can be exhausting and time consuming. Whilst EU Regulations are generally subject to review every five years, no participant in the legislative process wishes to or is able to make rapid amendments.

For most purposes, there is no particular confusion since Denmark, Ireland and the United Kingdom are not bound by the Regulation or subject to its application.

The main point of uncertainty relates to the question of renvoi. Article 34.1 only applies to third States. The implication, therefore, is that it does not apply to MS not bound by the Regulation and that therefore is to be no renvoi from Denmark, Ireland or the United Kingdom to other MS, but the point is not clear. Article 34.2 would seem to apply in all circumstances, so that a choice of law under Art.22 will certainly be a choice of the internal law with no renvoi.

If a French-domiciled person dies habitually resident in England & Wales, it could be argued that renvoi under UK PIL back to France does not apply under Art.34 and that therefore France should apply the internal law of England & Wales and none of its PIL.
In order to avoid uncertainty, however, individuals with connections with Denmark, Ireland or the United Kingdom and whose successions might be subject to *renvoi* back to Member States subject to the Regulation, should consider making a choice of applicable law under Art.22, where available, in order to avoid such uncertainty.

All EU legislation is a pragmatic compromise. In order for it to work, an element of uncertainty is inevitable for it to be broad enough to apply across 25/28 different legal systems. The Succession Regulation is unusual in being so far reaching, ambitious and of such a broad scope. The boundaries between succession rights and property rights are often in different places under different systems. Each MS will therefore always have its own individual perspective on the Succession Regulation. Although, as the years pass and CJEU issues more decisions, the differences in the ways different MS treat the Succession Regulation will diminish, they will never completely disappear.

Spain will continue to question that *renvoi* should apply; Italy whether a choice of national law is valid if not valid under that law; Germany that the ECS should not directly affect property rights; notaries that the Regulation doesn’t apply to them; and the UK that it is a Member State.

In the past, skilled practitioners developed expertise in understanding the ways in which the different succession systems in individual MS interacted. Those skills have not been made obsolete by the Regulation. Being able to help clients understand the ways that different MS will use and interpret the Regulation will add considerable value.

**Surely it can’t be possible to choose the law of nationality, if that law doesn’t recognise such a choice? Is it possible to choose the law of current habitual residence? Will a choice of national law demonstrate a change of domicile?**

Recital 40 is helpful in making it absolutely clear that a 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. It is however, only the national law that can be chosen. In some cases it may be sensible to make it clear that no such choice is being made and that the default law of the habitual residence at the time of death is to apply instead. The concept of common-law domicile varies from state to state. Generally, the nationality of the testator is only one of many factual links that can demonstrate a change of domicile. In some cases, a choice of national law might indicate a change of domicile.

**Can there be an effective choice of law clause if a testator leaves more than one will governing different assets?**

Under Art.22, ‘A person may choose as the law to govern his succession as a whole the law of the State whose nationality he possesses at the time of making the choice or at the time of death. A person possessing multiple nationalities may choose the law of any of the States whose nationality he possesses at the time of making the choice or at the time of death. The choice shall be made expressly in a declaration in the form of a disposition of property upon death or shall be demonstrated by the terms of such a disposition.’

The concept of having different wills dealing with assets in different jurisdictions is one that is generally unique to those jurisdictions that are schismatic; as a result it is often seen as odd in many EU MS.

**When is a choice of law under the Regulation, valid and when is it not?**

A choice made that clearly was expressed only to deal with assets in the EU and not those outside, would be invalid, since it was not a choice to govern the succession as a whole.
If the effect of the same choice in different multiple wills was that the choices were the same in relation to the succession as a whole, would the EU courts with jurisdiction regard it as valid? Possibly. But if one Will was then revoked so that part of the estate became not subject to the choice of law, would that then invalidate the choice for the remainder of the estate? Probably. If so, was the original choice valid in the first place?

Rather than give a claimant the sniff of an argument, it is probably safer for the choice of law to be made in one universal will or at the very least for that choice to be clearly expressed to be effective in relation to the whole of the worldwide estate.

One exception to this position is a historic deemed choice under Art. 84.4. This states that ‘If a disposition of property upon death was made prior to 17 August 2015 in accordance with the law which the deceased could have chosen in accordance with this Regulation, that law shall be deemed to have been chosen as the law applicable to the succession.’ This would indicate that a separate will made in accordance with the law of nationality before 17 August 2015 would be a valid deemed choice, even though there might well be other separate wills dealing with other assets in other jurisdictions. Therefore such pre-17 August 2015 wills should only be revoked after very careful consideration and after the client has specifically considered the alternatives. A codicil amending such pre-17 August 2015 wills would preserve the existing position.

Can’t you draw me a simple flow chart so that I can understand when I need to think about the Succession Regulation or not?

I hope that some of these remarks explain why the post Succession Regulation world remains a complex one. The Regulation has solved some issues – for instance in the example below, Zbig’s daughters now have the opportunity of dealing with his estate under two separate processes rather five. However, it cannot solve all and inevitably the Regulation has created some new uncertainties. We are on the beginning of a new journey rather than having arrived at a final destination.

I would suggest that STEP might consider issuing a prize for the best flow chart. Summarising the position of every country in the world and how it is affected in a meaningful manner is not straightforward.

A COUPLE OF EXAMPLES

My Italian client, Donatella, is habitually resident in New York. She hates Italian forced heirship. Can she now choose NY succession law instead?

Questions such as these require some unpicking. A good starting point is to work out where the client’s main assets are and which country will consider that its courts will have jurisdiction.

Under the Succession Regulation, even though Donatella is habitually resident in NY, since this is a third State, 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.

Even though worldwide jurisdiction will not be recognised outside the EU, it will be significant throughout the EU.

The Succession Regulation will apply the law that the PIL of NY applies. If Donatella is now domiciled in NY, then NY succession law will apply to her movables and the law of the situs
to her immovables. Italian immovables would be subject to Italian law while English immovables to the law of England & Wales. Under the Regulation it is possible to choose the law of nationality. It is not possible to choose the law of habitual residence at the time of choice. Therefore, under the Regulation, the only choice available to Donatella is that of Italian law.

My understanding is that NY PIL has always permitted a choice of NY succession law in relation to NY assets. This choice, if made, should be respected by the Regulation.

If Donatella took US citizenship and therefore was a US citizen at the time of her death, a choice of NY law (provided that this is the State of the USA with which she is most closely connected) in her will or other similar disposition should be valid and respected under the Regulation.

It should be borne in mind, however, that if the Italian courts have worldwide jurisdiction under Art.10, the 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 is 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.

This will be a risk if Donatella was entitled to Italian citizenship at her death and has any assets left there.

Zbig was Polish but worked for a UK company all his life. Although a UK citizen he was non-dom and intended to retire to Italy. He had assets in the UK, Cyprus, Poland, Italy and Switzerland. His one worldwide will made a specific choice of English succession law, appointed executors in the UK and left everything to his two daughters and nothing to his Thai girlfriend, Minnie. Sadly he died in a road accident in France in December 2015. Where should his executors start?

Under the Regulation, the choice of English law can be valid as that of nationality at death or the time of choice. From a UK perspective, UK PIL will apply the law of situs to immovable and that of domicile to movables. It is not clear as to Zbig’s domicile (for UK purposes) and whether he had yet established a domicile of choice in Italy, or retained a domicile of choice in England or whether his domicile of origin of Poland (assuming that the facts support this) might never have been lost or had been revived.

It is not clear as to where Zbig might be habitually resident. Given the fact that he was also a UK citizen and had UK assets and a UK will, it might well be that the UK was sufficiently the centre of his interests to have become his habitual residence.

Since there are assets in Poland and Zbig has Polish nationality, Poland will have worldwide jurisdiction under Art.10 of the Regulation. That jurisdiction will not be recognised in the UK or Switzerland. Switzerland would accept a grant of representation from the state of domicile (for Swiss purposes, often similar to that of habitual residence) and accept the succession law as applying under the PIL rules of that state of habitual residence.

Since Poland will have jurisdiction and will be able to issue a European Certificate of Succession (ECS), getting the right advisors on board in Poland as soon as possible would be a good start.

Since a choice of English law has been made, obtaining a grant in England first would also be helpful. In view of the cross-border complications, the executors might sensibly be advised to renounce and allow the two daughters to obtain a grant of letters of administration with will annexed. The coincidence of roles of administrators and of heirs may simplify matters in Poland, Italy and Cyprus.
The grant might well declare that Zbig died domiciled in Poland. Under the English Non Contentious Probate Rule 30, an affidavit from a Polish lawyer as to the validity of the choice of English law under the Succession Regulation would be needed.

The grant may also well be effective in Switzerland.

With the English grant, the Polish lawyers should then be able to obtain the Polish ECS to be used there and in Cyprus and Italy. Dealing with the administration of the worldwide estate under Polish jurisdiction, but under English law, will be a new experience for the Polish court and is bound to throw up some complications, including that of the position of the Thai girlfriend, Minnie. While from a UK perspective, if Zbig died domiciled outside England & Wales, the rights of a dependent under the Inheritance (Provision for Family and Dependents) Act 1975 are not available, the Polish court may have a different view. Most EU experts in this field would regard the choice of English law as including the whole of English law, including the 1975 Act. The s1 restriction by domicile could be seen as a matter of UK PIL that is excluded under Art.34.2 of the Regulation. A claim by Minnie in the UK might well fail, but a claim by Minnie in Poland might well succeed.

In all the circumstances, it might have been preferable for Zbig’s daughters if the choice of law clause in the will was not effective and if Zbig had died domiciled in Poland without such a choice.

Any valid pre-17 August 2015 English will might have had the effect of a valid deemed choice under Art.83.4 and therefore Zbig might have been well advised to revoke any such will and make a post-16 August 2015 Polish will instead.

This guidance has been prepared by Richard Frimston TEP, Partner at Russell-Cooke and Chair of STEP’s EU Committee