

# Succession

## SLALOM



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**Most of the 'Brussels IV' Regulation on Succession Law will not apply until August 2015. It is relevant now, however, for making wills that could come into effect after that. Aileen Keogan tackles the black slopes of succession planning**

**A**s Irish solicitors, we can advise on Irish succession law while being conscious that the law of succession and the method of administering estates can be significantly different in other jurisdictions.

Does this matter to us? It does if a deceased has cross-border connections, whether he had personal connections abroad or had assets abroad.

When cross-border issues arise in determining succession law, private international law (PIL) rules for each country are applied. These are known as conflict-of-law rules. Unfortunately, PIL rules differ between jurisdictions. Some, like Ireland, use the concept of domicile as the basis of determining which jurisdiction's succession law applies. Others use the concept of habitual residence, or the deceased's residence, or the deceased's nationality.

Some, like Ireland, distinguish between moveables and immoveables – others do not. Even if a state recognises the law of another state, it may only recognise the internal and not the PIL of that state. The courts in one state might not recognise a decision made by the court of another state, or might consider the other court to be more appropriate, yet the other court might refuse to take jurisdiction.

The EU *Regulation on Succession Law* (no 650/2012), also known as 'Brussels IV', seeks to resolve the concern that, to date, different member states of the European

Union apply different PIL conflict-of-law rules for succession purposes. Unfortunately though, it has created ambiguities of its own.

#### **Moveable feast**

The regulation seeks to apply a uniform system of recognition of succession laws broadly based on the habitual residence of the deceased, and with no distinction between moveables and immoveables. The regulation will govern the PIL for succession (testate and intestate) in the participating member states. All assets should, therefore, pass based on the succession laws of the member state in which the deceased was habitually resident.

Ireland, Britain and Denmark, however, have opted out of the regulation, somewhat frustrating its purpose. Nevertheless, the regulation is still very relevant for Irish practitioners because a testator can elect to choose the law of his nationality to apply to the succession of his assets, even if that state is not a participating state.

Therefore, it is possible for an Irish national to elect to apply Irish law for the succession of his assets, which will be binding on the EU signatory members of the regulation.

While the regulation came into force on 17 August 2012, most of it will not apply until 17 August 2015. Notwithstanding this delay, the regulation is relevant for practitioners now, as clients have the opportunity to

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## FAST FACTS

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- > The EU *Regulation on Succession Law* seeks to resolve the concern that to date different member states apply different PIL conflict of law rules for succession purposes
- > When dealing with cross-border estates, care will need to be taken to account for the *Succession Regulation*, as it will affect Irish practitioners in succession planning

Slippery slope...

## POSSIBLE EFFECTS ON IRISH PRIVATE INTERNATIONAL LAW

**SCENARIO 1**

Deceased dies habitually resident in Ireland holding a French domicile and nationality and holding French assets, both moveable and immovable. No choice of law. Ireland applies Irish PIL so that the *lex domicilii* (French) applies to the moveables and the *lex situs* (French) to the immovables.

French law, however, applies Irish law to all assets under the habitual residence rules. If Ireland is a third state under the regulation, France would accept the *renvoi* (see page 25) to it under Irish PIL, and French succession law would apply to all the assets. If Ireland is not a third state under the regulation, the internal (not PIL) laws of Ireland should apply, so that

Irish law would apply to all the assets.

This doubt should be reduced if the deceased elected to apply the internal law of his nationality, where France would then apply its law to the whole estate.

**SCENARIO 2**

Deceased dies an Irish national, habitually resident and domiciled in Germany. Irish law will apply to immovables situate in Ireland, as Ireland is not a party to the regulation.

However, Germany will account for that division in determining the administration of the assets worldwide under German law – that is, the assets will be taken into account in dividing up the remaining estate under German law.

**SCENARIO 3**

Deceased dies domiciled and habitually resident in Ireland, an Irish national holding Spanish immovable property. Without a choice of law under Irish PIL rules, the Irish courts would apply the *lex situs* and seek for Spanish law to apply.

Assuming Ireland is a third state, Spain must accept the PIL of Ireland, as the deceased was habitually resident there – but this is not without doubt. Prior to the regulation applying, Ireland would have considered accepting the *renvoi* from Spain, and so the regulation appears to provide an opposite outcome than before. A choice of Irish law would be helpful here, whereby the choice would be for the Irish internal law to apply to allow Ireland accept jurisdiction over Spanish immovables.

make wills now that could come into effect on a death after 2015.

#### Why are conflicts of law relevant?

The determination of where a deceased's estate passes is relevant in determining:

- If forced heirship provisions are to apply,
- If the matrimonial regime or survivorship provisions under a joint tenancy is to be accounted for, and
- If the clawback provisions for gifts made during a deceased person's lifetime is applicable.

'Forced heirship' is the term used where a state provides that specified persons automatically have rights to the succession of a portion of a deceased's estate, taking precedence over any will of the deceased. We are already familiar with the Irish fixed and discretionary based forced heirship provisions under section 111 of the *Succession Act 1965*, giving a spouse a right to elect to take a legal right share; and under section 117, which provides children with the right to claim for a share.

Succession should not be considered in isolation to matrimonial property regimes. Before applying any inheritance rules to the estate of a deceased, it is first necessary to determine exactly what the estate includes. This process includes consideration of the matrimonial property regime and joint tenancies where the asset may pass outside of the succession under matrimonial contract law or by survivorship.

Clawback provisions often feature in forced heirship regimes. These provide that, where a statutory heir is not able to receive his correct share on the death of the deceased because the assets are eroded, assets given away during the deceased's lifetime can be brought back into account for the purposes of calculating the share of the statutory heir. We are familiar with this in Ireland under section 121 of the *Succession Act 1965*.

The regulation only deals with assets passing under a deceased person's will or intestacy, and so assets passing by survivorship are still dealt with under local law. Nor does the regulation affect the taxation that may arise in any member state on the death of a person (the EU is currently

reviewing harmonisation of inheritance tax, but this is still at an early stage). Nonetheless, the impact of the regulation on where assets are to pass will inevitably impact on the tax payable.

#### Choice of law

When it comes to ascertaining which law should apply to the estate of a deceased, different jurisdictions look to different connecting factors and apply their PIL rules accordingly. The connecting factor for Ireland is the domicile of the deceased. Irish law provides that the *lex domicilii* determines the succession of moveable property; whereas the succession of immovable property is determined by the law of the country where the property is situated (the *lex situs*). In contrast, the regulation provides that, between the participating member states generally, the habitual residence of the deceased will determine the forum that applies the succession law of that deceased.

However, the regulation recognises that a person may wish the law of his nationality to apply, even if the person has acquired a habitual residence in another state. The effect of a choice of law is that the internal law of the nationality applies and not its PIL, and so the national court should accept jurisdiction. Irish practitioners with Irish national clients who have cross-border issues should therefore consider whether to elect to apply Irish law to the entire estate to avoid foreign forced heirship provisions to apply in contrast (or possibly in addition) to Irish forced heirship provisions.

#### Doctrine of *renvoi*

The doctrine of *renvoi* occurs in the process by which a court adopts the rules of a foreign jurisdiction with respect to any conflict of laws that arises. In some instances, the rules of the foreign state might refer the matter back (*'renvoi'*) to the law of the forum where the case is being

heard or on to another jurisdiction.

Where Irish courts have jurisdiction – for example, the deceased died domiciled in Ireland or there are Irish immovable assets – the Irish courts, as the forum court, will apply Irish PIL in determining whether Irish law or foreign law should apply.

When, following the application of the Irish PIL rules, it is decided that a foreign law governs the matter, the decision is made by the Irish court as to whether to apply the law of the foreign country and send the matter to that jurisdiction. However, where the Irish court applies the whole of the law of the foreign country, it also should apply that country's PIL. In such a case, the foreign country's rules of conflict of laws may refer the matter back (*renvoi*) to the law of Ireland. If so, the Irish courts must decide whether to accept the *renvoi* and so apply Irish internal law.

Under the regulation, *renvoi* is abolished between

participating member states. If the applicable law is that of a 'third state', the PIL rules of that third state are included, insofar as they make a *renvoi* to the law of a participating member state or to the law of another third state.

Unfortunately, it is not clear if Ireland, Britain and Denmark are considered to be a 'third state' under this part of the regulation. This leads to uncertainty in relation to the impact of the regulation on Ireland, Britain and Denmark.

#### Succession planning

When dealing with cross-border estates, care will need to be taken to account for the *Succession Regulation*, even though Ireland is not a party to it, as it will affect Irish practitioners in succession planning. With careful planning and the consideration of the use of the choice of law based on nationality, there may be opportunities to minimise complications later. A valid choice of law now will be effective in 2015. 

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