Crossing the line

As multi-jurisdictional disputes continue to grow in number, lawyers should not underestimate the impact of Brussels IV, says *Alison Regan*

People born in the 1960s and 1970s will be less well off than the so-called baby boomers born post-war, according to a recent report from the Institute of Fiscal Studies. Fewer will have their own homes, decent pensions or significant savings.

But what they will have are expectations of a healthy inheritance from the baby boomers. Added to higher property prices, complex family structures and an increasingly litigious society, it's a recipe for probate litigation.

This becomes all the more complex when parties are faced with assets in different jurisdictions or where the testator has connections to at least two countries. Which law or succession rules apply to solve issues or disputes concerning succession in a cross-border estate?

Private international law (PIL) will point to the applicable law, but the PIL rules themselves differ between nations, which can give rise to even more complexities. In some countries, it is the law of the individual's nationality that applies; in others, it is the law of the residence or domicile.

Even the concept of 'domicile' can differ between jurisdictions. England and Wales, and France both apply the law of the deceased's domicile in relation to moveable assets. But the concept in France is much more transient and akin to the concept of habitual residence, whereas in England and Wales the concept has a more 'sticky' nature.

English PIL could allow the law of two different nations to determine the succession of one estate, moveable property being subject to the law of the owner's domicile and immoveable property being subject to the law of the location of the property. This can obviously lead to estates being tied up for years where one part may have been administered according to the law of, say, England, but another is subject to the law of a different country.

Italy v England

The battle over Lord Lambton's estate is a classic example of cross-border disputed succession. It hit the papers recently because of the scandal that led to his self-imposed exile in Italy 30 years ago – a combination of sex, drugs and aristocracy – but it highlights a type of dispute that's on the rise.

Lord Lambton left his entire estate to his son, Edward Lambton. His three daughters challenged this, saying that the dispute should be settled in Italy where their father spent the last 30 years of his life and where Italian law

stipulates that only a certain proportion can be freely gifted. Therefore, they would claim a share of the estate regardless of the will.

The daughters are also claiming a share of assets gifted during Lord Lambton's lifetime. Clawback provisions in countries such as France and Italy state that lifetime gifts can be pulled back into the estate for calculating the portion to be distributed to reserved heirs, which is an unknown concept in England and Wales.

So, there is a dispute on foot with regard to which assets are governed by which law as well as a battle between

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English law and its freedom of testation (subject only to the Inheritance (Provision for Family & Dependants) Act 1975) and Italian law, which preserves a share for the family.

Even though Lord Lambton had apparently made a statutory declaration that Italy was his domicile of choice, as domicile is based on the facts and not just an expressed intention, it is open to his son to argue domicile in England.

It's been estimated that an Italian court case could rumble on for 15 to 20 years. Of course, this is not permitted in England and Wales following the civil litigation reforms introduced by Lord Justice Jackson, and costs are strictly controlled.

For Lord Lambton's case, Lord Justice Etherton ordered a costs payment of £750,000 (and only interim costs as the matter moves on) saying that only the lawyers were benefitting á la *Jarndyce v Jarndyce*. It does seem that there are huge advantages to litigating in the UK because of the (relative) speed of the process and the costs control.

Border control

These matters are not necessarily unusual but Brussels IV is coming to the rescue. Regulation (EU) 650/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession is set to clarify the position on succession in such cross-border estates.

The intention is to remove obstacles to the free movement of persons across Europe, to provide one criterion for determining both the jurisdiction where a matter should be decided and the law that is to be applied, and to allow EU citizens to arrange details of succession in advance.

Brussels IV came into force on 17 August 2012 and will apply to the estates of individuals dying on or after 17 August 2015. It will be binding in all 27 EU member states except for the UK, Ireland and Denmark, although the UK and Ireland can still opt in if they want to in the future.

The UK has not yet joined for three reasons: the differing definitions of the concept of "habitual residence", the role of personal representatives (trust structures not generally being recognised in many EU member states) and, perhaps most significantly, the impact of clawback provisions. As stated, many EU nations apply clawback to succession but the UK was concerned this would lead to uncertainty in relation to lifetime gifts.

Brussels IV also provides for the court decisions of member states to be recognised as well as authentic instruments, subject only to public policy exceptions. It stipulates that the deceased's habitual place of residence will determine jurisdiction and the law applicable, unless the deceased has made an election to apply the law of his nationality.

Failing this, the courts of any Brussels IV state would have jurisdiction to rule on the whole succession if assets were located within that jurisdiction and the deceased either had nationality of that state, or was habitually resident in that state within five years of death.

If neither nationality nor habitual residence applied, the Brussels IV state would only have jurisdiction to rule in respect of the assets within its borders. This should provide much-needed clarity, in many cases allowing one law to govern an entire estate and decisions in one member state to be recognised in others. Brussels IV will also provide for a European Certificate of Succession, which authorises beneficiaries or representatives to deal with estates across borders.

Brussels IV will be relevant to anyone with assets in a member state or anyone who had been habitually resident in such a state at the time of their death, regardless of the location of their assets. Its impact should not be underestimated as anyone with a cross-border interest in Europe will be affected. Individuals will need to carefully consider whether the law of their habitual residence, which may sometimes include existing PIL rules, is appropriate or whether they should choose the internal succession law of their nationality.

The rule should hopefully allow for successions in many cases to be treated under one single law by one single authority. Individuals will be able to choose whether the applicable law should be that of their habitual residence or their nationality. There will be, at least within members, a mutual recognition of decisions relating to succession.

In addition, the European Certificate of Succession will allow a person to have authority across borders without further formalities. This can only lead to simplifying succession in cross-border estates, although no doubt there will be further teething problems. ■

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