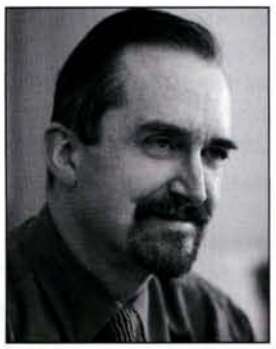
Are we there yet?

Richard Frimston gives an update on the progress of EU regulations affecting cross-border estates



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'There is some uncertainty as to whether England and Wales would recognise separate regimes in relation to movables and immovables, which would be valid under the Hague Convention.'

The European Commission (the Commission) thinks that cross-border inheritance tax issues are a growing concern for EU citizens. The inheritance tax rules in EU member states concerning cross-border estates can hinder EU citizens in fully benefiting from their right to move and operate freely across borders within the internal market. These rules may also create difficulties for the transfer of small businesses following the death of owners.

The Commission is currently working on several different fronts to obtain more evidence of the extent of cross-border inheritance tax problems within the EU, and in order to find solutions to any problems identified, launched a public consultation to obtain views on the extent of the problem and ideas on possible solutions. The consultation closed on 22 October 2010.

Common Frame of Reference and Draft Common Frame of Reference

A project leading to the preparation of a CFR in the field of contract law has been under way since the publication of an Action Plan by the Commission in 2003. The first stage was a research project of comparative law building on work started in the 1990s by academic lawyers and others. That stage has now concluded, with the presentation of the draft Common Frame of Reference (DCFR) to the Commission by the Study Group on a European Civil Code and the Research Group on Existing EC Private Law (Acquis Group) in December 2008.

An interim outline edition of the DCFR was first presented to the Commission in December 2007 and was published in early 2008. A final version, containing additional material promised by the interim edition and with subsequent revisions, was published in February 2009. An edition including explanatory and extensive comparative law material gathered in the course of the work is also due to be published.

The DCFR is a very broad project and does not deal solely with contract law. It contains model rules for European private law, and the final version includes Book IV on loan contracts and contracts for donation; Books VIII and IX on acquisition and loss of ownership of goods, and on proprietary security rights in movable assets; and Book X on trusts.

The future development of the CFR and the extent to which it will include all or some of the DCFR is unknown. The House of Lords EU sub-committee E report 'European Contract Law: the Draft Common Frame of Reference' (HL Paper 95 of May 2009) is worth reading. Paragraph 21 of this report suggests that 'a European law of trusts might well be of considerable interest to common law eyes.' I hope that the majority of readers would agree.

Trust law and the DCFR

Book X of the DCFR entitled 'Trusts' is a detailed and prescriptive study, which raises issues that require careful consideration, though I have yet to read an in depth analysis of it, or compare it to the Hague Trusts Convention.

EU law comes in the form of 'hard' law such as regulations and directives, but it also comes as 'soft' law, in sets of principles.

The Commission originally invented the idea of a 'toolbox' for the CFR, which may have meant a text to help Commission civil servants improve the internal coherence between directives on consumer protection in contract law.

It would seem that the CFR may now be thought of as becoming an 'optional

instrument', ie an independent regime of European private law, additional to the member states' own legal systems, to which parties to a cross-border transaction can opt in if they so wish.

It might be that the CFR will be limited to business to business (B2B) transactions, but equally it could impact on business to consumer (B2C) transactions, which would include relationships between trustees and beneficiaries. However, if a serious European private law is available, why should it not also be available for C2C – ie private, non-commercial activities?

The CFR may end up as a semi-official 'soft' law of some form: a toolbox. However, in 2009, responsibility for the CFR moved from the EU Health and Consumer Affairs Council to what is now the EU Justice Directorate. The EU Justice Directorate is currently carrying out a consultation exercise that closes on 31 January 2011. Readers are encouraged to respond.

Rome III

The Commission published Green Paper COM(2005) 82 on 14 March 2005 proposing a regulation amending Regulation (EC) No 2201/2003 (Brussels II bis) with regard to jurisdiction, as well as introducing rules concerning applicable law in matters of divorce and legal separation. It was doubtful whether the regulation would ever be ratified due to considerable concern in Sweden and the Netherlands as to the impact of Maltese law.

However, Austria, Belgium, Bulgaria, France, Germany, Hungary, Italy, Latvia, Luxembourg, Malta, Portugal, Romania, Slovenia and Spain have now teamed up in order to ask the Commission to launch the so-called enhanced co-operation mechanism, which allows a group of countries to move ahead in one particular area, even though other states are opposed. Rome III may be agreed by December 2010.

Rome IV (previously referred to as Brussels III)

Proposed EU Matrimonial/ Cohabitation Property Regulation

England and Wales has recognised a matrimonial property regime (for succession purposes, even if not for divorce purposes) if valid in accordance with the law of the spouses' matrimonial domicile. The case law supported the contention that there could only be one regime in relation to the spouses' entire matrimonial property, both movable and immovable.

There is however some uncertainty as to whether England and Wales would recognise separate regimes in relation to movables and immovables, which would be valid under the Hague Convention.

It is also uncertain under Anglo-Welsh law as to whether a subsequent change in the spouses' matrimonial domicile will have an effect on their matrimonial property regime – whether it is immutable or mutable, and whether it might be mutable only in relation to movables.

The Supreme Court's judgment in the case of *Radmacher v Granatino* [2010] has added some clarity to the private international law position of England and Wales and the confusions between nuptial agreements and choices of matrimonial property regimes, but some uncertainty still remains. Paragraph 107 of the judgment makes it clear that the exercise of the court's powers under the Matrimonial Causes Act 1973 does not relate to a matrimonial property regime. Although Karin Radmacher was domiciled and a national of Germany, and Nicolas Granatino was domiciled and a national of France, the issues in the case were governed solely by Anglo-Welsh law. The relevance of German law and the German choice of law clause in their notarial agreement was that they clearly demonstrated the parties' intention that the agreement should, if possible, be binding on them. The agreement recited that the parties intended to establish their first matrimonial residence in London and that the law of England and Wales might come to apply to their legal relationships.

Lady Hale in her dissenting judgment points out on p184 that the particular agreement in this case did more than provide for what was to happen should the couple separate or divorce. Among other matters, each party waived the right to a compulsory portion of the estate of the first to die.

Scottish law will now recognise a matrimonial property regime in accordance with joint domicile of the parties for movables, and in accordance with the lex situs *for immovables.*

The Scottish Parliament's legislation of 2006 means that Scottish law will now recognise a matrimonial property regime in accordance with joint domicile of the parties for movables, and in accordance with the *lex situs* for immovables: see s39 Family Law (Scotland) Act 2006.

Private client practitioners are, however, left with considerable uncertainties as to the private international law of England and Wales:

STEP has established a new EU Committee reporting to Council, its governing body.

It is envisaged that the prime focus of the committee's work will be assisting in the drafting of STEP responses to EU consultations on legal, tax and other relevant issues. The committee will also be asked, from time to time, to assist in building STEP's network of policy contacts across the EU member states. The remit and the strategic aims of the new committee are:

- To give STEP branches and members across the EU member states greater input into STEP policy formation.
- To assist STEP in representing the views of STEP branches and members across the EU member states in its policy work with EU Commission, European Parliament and others.

Its starting agenda includes the proposed Savings Tax Directive, consulting on inheritance tax, the Common Frame of Reference (CFR), Brussels IV (the Succession Regulation) and Rome IV.

- Is the applicable law that governs the effect of marriage on property rights the internal law of the country of domicile of the parties?
- If the parties have different domiciles, is the law applicable to that of the jurisdiction with which the marriage is most closely connected?
- Is immovable property governed by the same rules, or by the law of the place of the immovable property?

It is 110 years since the leading cases of *De Nicols v Curlier* [1900] and *Re De Nicols (No 2)* [1900] Will we have to wait for another 110 years before the Supreme Court rules on these matters for England and Wales?

In the meantime the EU has long been considering its own action in this area. The EU Commission Directorate-General for Justice and Home Affairs commissioned studies on matrimonial property regimes and the property of unmarried couples in both private international law and the internal law of the state.

A subsequent green paper was published in 2006 and a summary of the responses to that green paper published in 2008. A public hearing was held in September 2009 and the Commission's proposed draft regulation, which was due to be produced in 2010, is now likely to forthcoming in the first half of 2011.

Brussels IV

Succession (and wills) regulation

The draft regulation, which had been due to be published on 6 April 2009, was produced on 14 October 2009.

The UK (and Ireland) is not currently opting in to the regulation, but the Ministry of Justice has stated that it strongly supports the need for a regulation and is taking a full part in the negotiations. The UK has the ability to opt in when the final form of the regulation is eventually agreed in 2011/2012.

The Commission's proposed regulation set out that:

- The state of 'habitual residence' (in the EU/ECJ sense) is to be the jurisdiction for dealing with all questions of succession.

The testamentary choice of law is likely to be retrospective: practitioners should give careful thought when inserting a choice of law provisions in to a relevant will now.

- Habitual residence is to be the connecting factor for both movables and immovables (and that these rules should also apply to both non-Brussels IV states and non-EU citizens).
- Renvoi would be abolished and all references to the law of another jurisdiction would be to the internal law of that state.
- Distinctions between movables and immovables would be ended, and the same law would apply to both.
- Testators would be able to designate the law of their nationality (no other choice would be available) as applying to the whole of their estate. Within the UK this would be the law of the domicile ie, either that of England and Wales, Northern Ireland or Scotland.
- There should be a European Certificate of Succession, which would be recognised across the EU to enable heirs to deal more simply with cross-border succession.
- Inheritance contracts and succession agreements would not only be valid under the above rules, but also in relation to the law of the habitual residence at the time of creation.
- The role of personal representatives would be recognised.

Current negotiation issues:

- Whether a provision on the formal validity of wills should be included.
- Whether capacity issues should be included.
- The recognition of 'authentic instruments' between jurisdictions and what such recognition means.
- Whether there should be a specific definition of habitual residence for the purposes of this regulation.
- Whether renvoi be abolished in all circumstances Residual jurisdiction and how to deal with it.

Whether the form of a regulation will be agreed in 2011 or 2012 is uncertain. It is unlikely that the regulation would come into force until at least two years after the date it has been agreed.

Although in 2009 the UK decided not to opt in, it may still do so before the regulation comes into force. Careful thought needs to be given to the consequences if the UK does or does not opt in.

The testamentary choice of law is likely to be retrospective: practitioners should give careful thought when inserting a choice of law provisions in to a relevant will now. It would be prudent to make sure that the form of such a will is valid in accordance with the internal law of the state.

Similarly, inheritance contracts (whether combined with a matrimonial contract or not) are likely to have a favoured position, and, in circumstances where such an agreement might be possible, thought should be given to their use.

Brussels and the EU

Whatever one's views on the politics of Europe and the strengths and weaknesses of the EU, Brussels is having an ever-increasing effect on the legal, tax and financial environment in which we operate. The need to influence the thinking of both the Commission and the Parliament at the formative stages of legislation becomes ever more important. Similarly, there may be some new EU solutions for clients' existing problems. ■

De Nicols v Curlier
[1900] AC 21
Re De Nicols (No 2)
[1900] 2 Ch 410
Radmacher v Granatino
[2010] UKSC 42