Speak, friend, and enter

FOUR RIDDLES, PUZZLES AND CONUNDRUMS CONNECTED WITH THE EU SUCCESSION REGULATION

By Richard Frimston

ABSTRACT

- *Regulation (EU) No.650/2012* (the Succession Regulation)[1] will become fully effective from 17 August 2015 and change private international law (PIL) for estates and administration throughout most of the EU.
- Although the Succession Regulation will not apply in Denmark, Ireland or the UK, its effects over property in the remainder of the EU and for persons domiciled there will be far-reaching.
- While the Succession Regulation is becoming more widely understood, there are a number of issues that are not yet clear and that have uncertain effects. Four of those issues are considered here.

1. *Regulation (EU) No.650/2012 of the European Parliament and of the Council of 4 July 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.* The text is available in English at: bit.ly/succession_regulation_english and in French at bit.ly/succession_regulation_french

IN RELATION TO deaths occurring on or after 17 August 2015, the Succession Regulation will govern questions of jurisdiction, applicable law and recognition and enforcement, as well as matters relating to the various forms of validity of testamentary dispositions and succession agreements, the acceptance and enforcement of notarial authentic instruments and the introduction of a European Certificate of Succession. Broadly, the member state of the deceased's last habitual residence will have jurisdiction, and the succession law of the state of last residence will apply to worldwide assets of any kind. A testator may, however, instead choose a law of nationality as the applicable succession law. What individual issues impinge on this broad picture?

ARE THE FRENCH AND ENGLISH VERSIONS THE SAME, AND IS CLAWBACK ACTUALLY INCLUDED?

Article 1 defines the scope of the Succession Regulation. If the Succession Regulation does not apply, none of the other articles apply. Thus none of the Succession Regulation applies to property passing by survivorship, since that is property passing otherwise than by succession.

It is here that linguistic issues are particularly acute. Article 1.1 in the English version states: 'This Regulation shall apply to succession to the estates of deceased persons.'

The French and German versions, however, do not refer to 'an estate', but state: '*Le présent règlement s'applique aux successions à cause de mort*' and '*Diese Verordnung ist auf die Rechtsnachfolge von Todes wegen anzuwenden*'.

The differences are mirrored in the *Convention of 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons* (Hague 32). Donovan Waters' explanatory report to Hague 32 was clear in stating that 'the estate of a deceased person, in the English text, means all the property owned by the deceased or in which he has a proprietary interest at the date of his death'.

Article 1.1 also sets out that the Succession Regulation is not to apply to revenue, customs or administrative matters. Article 1.2 defines further exclusions.

Of particular note is Article 1.2(g), which 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 Article 23.2'. This is based on Article 1(2)(d) of Hague 32, which, however, lacks the final phrase 'without prejudice to point (i) of Article 23.2' (there is no equivalent in Hague 32).

The Waters report again clearly states: 'Of course, Article 1(2)(d) [of Hague 32] having a very broad scope covering all *inter vivos* dispositions including gifts, such gifts may give rise to an obligation to restore or account when determining the shares of beneficiaries under the law applicable under Article 7(2)(c). But even so the Convention does not in any way determine the validity of those gifts nor their effect or the extinction of those effects.'

While it is clear that the aim of the French version of the Succession Regulation and the intention of the EU legislators were to include any rights of clawback that may exist under the applicable succession law, it is by no means clear that the English version has achieved this. How to resolve this linguistic diversity in favour of a single meaning is uncertain.

The fact that Article 1.2(g) is expressed to be without prejudice to point (i) of Article 23.2 cannot, of itself, bring matters within the scope of the Succession Regulation if not included in Article 1.1. It can be argued that the exclusion enumerated in Article 1.2 should be construed narrowly and strictly, but, conversely, it is not easy to see how the words of Article 1.1 can be read more broadly.

It is clear that the intention of the EU Commission was that clawback should be included. If so, this would mean that gifts and trusts validly created in say England and Wales by a person, T, domiciled and habitually resident there, should be brought back into account if T dies habitually resident in say France or Italy without having made a valid choice of the law of England and Wales as the applicable law. Such clawback would not be enforceable in the UK, but could be enforced against assets in member states participating in the Succession Regulation.

The Succession Regulation deals with succession. It seems perfectly reasonable to argue that the single meaning of the Succession Regulation is that it does not in any way determine the validity of any *inter vivos* gifts nor their effect or the extinction of those effects. The judges of the Court of Justice of the European Union (CJEU) can be heard sharpening their pencils in readiness.

ARE DENMARK, IRELAND AND THE UK 'MEMBER STATES' AND DOES IT MATTER?

The *Treaty on the Functioning of the European Union* (TFEU) indicates that a third country is one that is not a member state,[1] while the expression 'member state' includes all member states that are parties to the EU treaties.

As set out in recitals 82 and 83, Denmark, Ireland and the UK are not bound by or subject to the application of the Succession Regulation. In those recitals, they are referred to as member states, but there is no specific definition of 'member state' or 'third state' in the Succession Regulation.

1. See for example Article 63 TFEU

The final line of the Succession Regulation can certainly be interpreted as including these three states as member states: 'This Regulation shall be binding in its entirety and directly applicable on the Member States in accordance with the Treaties'.

By virtue of protocols 21 and 22 to the EU treaties, the three member states will not be bound by or subject to the application of the Succession Regulation, but other member states do not have the benefit of equivalent protocols to protocols 21 or 22 and, therefore, the regulation will bind all of those member states.

If the aim had been to exclude the three states from the definition of 'member state', it would have been perfectly feasible to do so.

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The original form of the draft Succession Regulation, as proposed by the Commission in COM (2009) 154, included a provision at Article 1.2 stating: 'In this Regulation "Member State" means all the Member States with the exception of Denmark[, the United Kingdom and Ireland].' This provision has not survived the legislative process and does not appear in the Succession Regulation. In many EU regulations, such a definition is included, restricting the definition of a 'member state' to those that are bound by the specific regulation. In the Brussels I regulation, for example, Article 1.3 (now amended in Brussels I *bis*) defined 'the term "Member State" as meaning Member States with the exception of Denmark'. Similarly, in the Rome I regulation, Article 1.4 states: 'In this Regulation, the term "Member State" shall mean Member States to which this Regulation applies. However, in Article 3(4) and Article 7, the term shall mean all the Member States'. *Regulation (EC) No.4/2009* (the Maintenance Regulation) of 18 December 2008 specifically stipulates in Article 1.2: 'In this Regulation, the term "Member State" shall mean Member States to which this Regulation applies.'

The most similar equivalent example to the Succession Regulation is perhaps that of *Regulation (EC) No.1346/2000* (the Insolvency Regulation), which applies to all member states other than Denmark. In that regulation there is also no definition excluding Denmark from the definition of 'member state'. External evaluation of the Insolvency Regulation JUST/2011/JCIV/PR/0049/A4 refers in passing to Denmark as being a third state without any authority for such a reference. The CJEU decision in *Seagon* v *Deko Marty* C-339/07 related to issues involving Germany and Belgium, and the Swedish Supreme Court decision in *Siv Ing Benum AS* v *Kinovox-Benum AB* to issues involving Sweden and Norway,[2] and the application of the *Nordic Bankruptcy Convention of 7 November 1933*, but these do not directly address the issue. It would seem that the Swedish Supreme Court was indicating that Denmark may not be a third state.

It may, therefore, be argued that, even though Denmark, Ireland and the UK are not bound by or subject to provisions of the Succession Regulation, the definition of 'member state' in the Succession Regulation does still include Denmark, Ireland and the UK, and that, therefore, the definition of a third state also excludes Denmark, Ireland and the UK.

Expert opinions are divided as to whether each of Denmark, Ireland and the UK are

2.Ö 743-11 of 31 January 2013

within the definition of a 'member state' in the Succession Regulation.

It has been argued that including all member states within the definition would create an unfair position as between member states. It can, however, also be argued that it could be a matter of European policy that the succession law of member states should be recognised and enforced throughout the EU, whether or not individual member states are bound by the Succession Regulation. For most purposes, there is no particular confusion, since Denmark, Ireland and the UK are not bound by the Succession 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 member states not bound by the Succession Regulation and that there is to be no *renvoi* from Denmark, Ireland or the UK to other member states, but the point is not clear. Article 34.2 would seem to apply in all circumstances, so that a choice of law under Article 22 will certainly be a choice of the internal law with no *renvoi*.

If a French-domiciled person dies habitually resident in England and Wales, it could be argued that *renvoi* under UK PIL back to France does not apply under Article 34 and that, therefore, France should apply the internal law of England and Wales and none of its PIL.

Similarly, if a UK citizen dies habitually resident in the UK, but with immovable property in France, is *renvoi* under UK PIL back to French law accepted under Article 34 or not? It may be that the French courts will accept such *renvoi* on the basis that the UK is not a member state but a third state, while the courts of the UK may argue that such an interpretation of Article 34 is incorrect and apply the law of England and Wales. Such differences will only be resolved by a reference to, and a decision of, the EUCJ.

In order to avoid uncertainty, however, individuals with connections to Denmark, Ireland or the UK, and whose successions might be subject to *renvoi* back to member states subject to the Succession Regulation, should consider making a choice of applicable law under Article 22, where available. Any reference to a 'member state' or to a 'third state' should be considered carefully, and the distinctions between participating and non-participating member states also fully thought through.

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WHAT CHOICES OF LAW OR *PROFESSIO JURIS* ARE AVAILABLE AND WHAT ARE THE EFFECTS?

Two separate choices are available, one of them having two different effects.

Article 22 provides that a person may choose, or determine, the law of their nationality as the law to govern the succession as a whole: a *professio juris*. Such a choice may be explicit or implicit. Thus, a will made using law terms from the law of England and Wales may be an implicit choice of that law. The transitional provisions in Articles 83.2 and 83.4 must be fully understood.

In particular, the existence of a will, made under the national law, triggers the automatic choice under Article 83.4, whether or not it is one of many. The only way to override the Article 83.4 choice, before 17 August 2015, is to revoke existing national wills and make a new will specifically not under the national law. After that date, it will be

possible in a national will to state that no choice is made and that the applicable law is to be that of the habitual residence. Ensuring an effective choice and an unwanted choice is not simple. Many testators and practitioners will be caught out and surprised both that a choice has been made and by the widespread effects, which are by no means obvious.

A choice of the law of England and Wales (whether explicit, implicit or automatic) brings with it the whole of that law. This is likely to include the whole of the law of administration, even though not understood in the member state involved. Claims under the *Inheritance (Provision for Family and Dependants) Act 1975* are also likely to be included, even though the deceased died domiciled outside England and Wales, since this restriction is likely to be categorised as a matter of PIL rather than internal law. A choice of law can also bring property within the reach of UK IHT under one of the old UK estate tax double-tax agreements, such as those with France, India or Pakistan.

The substantive validity of the act whereby the *professio juris* is made is to be governed by the chosen, or determined, national law (Article 22.3). It is not clear how this provision meshes with Articles 24 and 25.

This Article 22 *professio juris* is completely separate from the choice that can be made in relation to the admissibility and substantive validity of a disposition of property upon death (DoPuDs: broadly, a will or a succession agreement) and the binding effects of a succession agreement under Articles 24 and 25. It would seem that the choice of a particular nationality for one does not preclude the choice of a different nationality for the other.

However, it is only an Article 22 *professio juris* in favour of another member state that will enable the 'parties concerned' to choose that member state for the purposes of jurisdiction under Article 5.

RENVOI

Article 34 by implication abolishes *renvoi* but, if the applicable law is that of a third state (however that is to be defined), the PIL of that third state is included, in so far as it makes a *renvoi* to the law of a member state or to the law of another third state that would apply its own law.

No *renvoi* is to apply to the laws referred to in Article 21(2) (closely connected escape clause), Article 22 (*professio juris*), Article 27 (formal validity of DoPuDs), Article 28(b) (declaration of acceptance of a succession) and Article 30 (special succession regimes).

Thus, the *professio juris* of national law by, for example, a US citizen living in Spain would be of the relevant internal state law and would not include its conflicts/PIL rules relating to movables and immovables.

Which matters are to be classified as internal law rules, and which matters of PIL, will be a matter for the forum. Article 24 does not include such issues as being necessarily defined within the scope of the applicable law. It may well be, therefore, that such questions would be regarded as being matters to be decided autonomously. Local restrictions, such as those in the law of England and Wales, in, for example, the *Inheritance (Provision for Family and Dependants) Act 1975* or the *Administration of Estates Act 1925*, limiting them to English and Welsh domicile or assets, may be classified as PIL rules to be disapplied under Article 34.2.

However, there is now considerable uncertainty as to the position of, say, a French domiciliary habitually resident in London. If it is correct that the UK is not a third state for the purposes of the Succession Regulation, then it is not clear as to whether the succession would be subject to the internal succession law of England and Wales, so that French internal succession law would not apply to their movables, or to the succession law of England and Wales, including its own existing PIL, so that French internal succession law would continue apply to their movables.

Immovable property in, for example, France will remain subject to French succession law for persons habitually resident in third states, such as the US or Canada, with PIL rules that direct that the law of the *situs* applies to immovables, unless such a person makes

a valid *professio juris* of the law of their nationality under Article 22.

It is not clear as to whether the use of the singular in the reference of 'a *renvoi*' to the law of a member state or to the law of another third state is to be interpreted as meaning that such *renvoi* is not accepted by the law of two different member states. Such would be the case where a person is habitually resident in the US with immovable property in both Germany and France. It is presumed that the use of the singular is not meaningful, and that *renvoi* would be accepted in such a case.

The inherent conflict between Article 34 – that partial *renvoi* can be valid – and Article 21.1 – that the law determined will govern the succession as a whole – has not been clarified. It is presumed that the words 'unless otherwise provided for in this Regulation' mean that the *renvoi* of part will override the unitarian principle.

However, will participating member states require assets outside those states not passing under the Succession Regulation *professio juris*, whether by virtue of partial *renvoi* or otherwise, to be brought into account in the sharing out of the assets in member states subject to the Succession Regulation? It is presumed that, if a participating member state has general or subsidiary jurisdiction, it will require such assets to be brought into account.

CONCLUSION

Many clients and practitioners may not be aware that an implied or automatic choice of applicable succession law may already have been made, by virtue of an existing will. Even more may not be aware of the full effects of such a choice. While a choice of the law of England and Wales or another home jurisdiction may sound sensible, the importation of such law into civil law and tax systems may cause as many problems as it solves.

The effects of the Succession Regulation are by no means straightforward. How the different meanings of the different language versions are to be resolved and unified will be a conundrum for the CJEU to solve in due course. In the meantime, we must puzzle it out on our own as best we can.

RICHARD FRIMSTON TEP IS A PARTNER AND HEAD OF THE PRIVATE CLIENT TEAM AT RUSSELL-COOKE LLP, AND CHAIR OF THE STEP EU COMMITTEE