EU Regulation 650-2012 – To Inherit or Not To Inherit? That Is the Question

The EU Succession Regulation (EU/650/2012) ("the Regulation") came into force on 17th August 2015. The purpose of the Regulation is to harmonise the way in which member States resolve conflict of laws issues when dealing with succession and inheritance matters. The Regulation will apply to Estates where the deceased died on or after 17th August 2015. Although the UK has opted out of the Regulation, it is still vitally important that practitioners and clients alike have regard to it when dealing with an Estate where a person has connections with a country governed by the Regulation. It also hints at a change in the way that habitual residence is to be rationalised.

Case Study

James is an English national domiciled in England. His job involves frequent travel, and over the last seven years he has lived and worked for, on average five months each year in each of France and Spain. He also spends two months visiting friends and family in England. He wants to return to England after he retires, and will then sell the chalet that he owns in France. He rents a small flat in England and a small villa in Spain. The bulk of his moveable property is kept in his Spanish villa. In his English Will, he chose to disinherit his eldest son and split his Estate equally between his two daughters and the National Trust.

James died on 18th September 2015, having recently been posted to Greece for a work assignment. He had just moved into rented accommodation.

The Problems

Each of the four countries in which James has lived have different regimes for dealing with intestate succession. The differences include:

Law Applied to the Estate

The English Law position is that immovable property is governed by the law of the country in which the property is situated. However, under the Regulation the default position is that immovable property will be governed by the law in which James is ***habitually resident***.

The effect of this is that, under English Law, the French Law of succession will be applied to the French property. Spain, France and Greece, however, will apply the law of the country of James' habitual residence to that property, irrespective of the fact that the property is in France.

Under English Law, James' movable property is governed by the law of the country of James' domicile; England. Under the Regulation, the default position is that movable property will again be governed by the law in which James is habitually resident.

Forced Heirship

France, Spain and Greece all have systems of forced heirship, whereby a portion of the Estate governed by that country's law is ringfenced for the heirs of the deceased. This would mean that James' son may inherit a portion of the Estate even though he was disinherited in the Will.

English Law has no system of compulsory heirship and therefore the Will should be applied prima facie to the Estate governed by English Law. However, there is the possibility of an application under Section 1 of the Inheritance (Provision for Family and Dependants) Act 1975 by the son.

Whereas the compulsory portion for the heir is fixed in many countries, where an application is made under Section 1 there is no guarantee that it will succeed. Even if it does succeed, there is little certainty with regard to the quantum of any maintenance awarded under the Act.

Taxation

Different countries have different levels of tax depending on, for example, the type of property and value of that property. Countries also differ with regard to the people who are required to pay that tax (for example, whether it is paid by the beneficiaries or out of the Estate).

Some Things to Consider

Habitual Residence

James' habitual residence is not a straightforward matter. Various factors to consider are:

- James has spent more time in each of France and Spain than he has in England or Greece.
- James has spent a significant amount of time in the country of his nationality.
- James owns a significant asset in France.
- James keeps the majority of his movable assets in Spain.
- James's family and friends are primarily in England.
- James has remained domiciled in England.
- James has lived in Greece, France and Spain primarily for work.
- James intends to return to England when he retires.
- James chose to write an English Will, and no other Will.
- At his time of death, James was living and working in Greece.

Departures from the Default Position

Even if James is found to be habitually resident in one country, this default position may be departed from in two ways:

1. James has a ***materially closer connection*** to a different country.
2. James has ***chosen the law of his nationality*** to govern his Estate.

In each case, despite the fact that James died whilst habitually resident in one country, the law of another country will apply to his Estate.

Materially Closer Connection

James died whilst living in Greece. An argument may therefore be made that he is habitually resident in Greece. However, the fact that he has only recently moved to Greece means that he may have a materially closer connection to either France, Spain or England.

It must be noted that this exception is not to be relied upon merely because the question of "habitual residence" is difficult to answer.

Choice of Law

James has not explicitly stated in his Will that he wishes to choose English Law to govern his Estate. However, the fact that he has chosen to write an English Will may result in James being treated as having chosen English Law to govern his Estate.

There is, however, a considerable potential for uncertainty. Suppose an English national died whilst habitually resident in France having previously executed an English Will declaring that they were domiciled in Switzerland.

Under English Law, assuming that the national had lived in Switzerland for a period of time, the declaration of domicile would be strong evidence that the deceased died domiciled in Switzerland. Swiss Law would therefore likely apply to the Estate.

However, under the Regulation there is a potential difficulty. Should a French Court apply English Law to the Estate, because of the implied choice of English Law – by executing an English Will the deceased intends to apply English Law to the Estate, which would ultimately result in Swiss Law applying to the Estate?

Or should the French Court apply French Law to the Estate, because of the implicit non-choice of English Law – by declaring Swiss domicile, the underlying intention is clearly to ensure that Swiss Law, and not English Law, ultimately applies to the Estate? Under the regulation, an English national cannot choose Swiss Law to govern their Estate. Therefore the only other option is the law of the state of habitual residence (in this case, France).

In a world becoming increasing sceptical about elaborate tax avoidance schemes, it is not unthinkable that a Court may choose to scrutinise a person's choice of law to determine whether that choice is genuine, or whether it is merely a means to an end. The Regulation could enable a Court, should it so wish, to draw back the curtains and assess what is actually intended by the deceased.

Avoiding Uncertainty

There are three main ways in which James could have reduced the uncertainty in disposing of his Estate.

1. If James wanted his Estate to be governed by English Law, he could have made an explicit statement in his Will to that effect. The result of this is that Spain, France and Greece will each apply English Law to James' worldwide Estate.
2. If James wanted his Estate to be governed by French, Spanish or Greek Law, he could have:
    a. Ensured that he habitually resided in the country of his choice for a period of time; and
    b. Ensured that his Will was drafted in a manner that conformed to the succession rules of the country of his choice.

Whilst the second method provides no guarantees of success (it does not resolve the uncertainty of 1) how to determine a person's habitual residence in borderline cases and 2) the situation where a person's habitual residence changes following the date of execution of the Will), it is nevertheless a stop-gap solution in situations where a conflict may potentially arise.

Future Development of the Law?

In spite of the above, it is possible that the law may develop to resolve this uncertainty. Indeed, the solution may well be found close to home.

The way in which the Regulation has been drafted is notable. The inclusion of the "materially closer connection" exception suggests that the Regulation clearly envisages situations where a person is habitually resident in a country even though they have not physically resided there for a long time.

This may be indicative of a change in the way that habitual residence is rationalised. In particular, this could suggest a shift away from an approach based on physical presence and towards an intention based analysis.

There are already faint hints of this shift in caselaw. For example, when considering the habitual residence of the parties in Winrow v Hemphill and another [2014] EWHC 3164 (QB), Slade J referred to a number of factors including the reasons why the party was in the country, where medical treatment was obtained and where property was owned and/or registered. The length of time spent in the country was a factor, but by no means conclusive.

Similarly, the introductory notes to the Regulation stress that the purpose of the Regulation is to "*ensure that a genuine connecting factor exists between the succession and the Member State in which jurisdiction is exercised*". Later, it is suggested that factors to be considered include "*the conditions and reasons for that [person's] presence [in the country]*". It is also stated that "*where the deceased [resides in a country] for professional or economic reasons…the deceased could…be considered still to have his habitual residence in his State of origin in which the centre of interests of his family and social life was located*".

It would be going too far, at this stage, to suggest that the Court is looking for an intention to permanently reside in a particular country. Certainly, there is nothing explicitly stated to that effect. However, if it is possible for a person to be habitually resident in a country even though they have only recently moved there, it is difficult to look beyond such an intention as the underlying reason for that.

If the law was to shift in this direction, then a third possibility opens up for James:

3. If James wanted his Estate to be governed by French, Spanish or Greek Law, he could have:
    a. Ensured that he physically resided in the country of his choice for a period of time;
    b. Made a declaration in his Will that he was domiciled in his country of choice; and
    c. Declared in his Will that his country of choice to be his habitual residence, or that it is his permanent centre of his interests.

This method may not be bulletproof. For example, a person's intention may change between the time that the Will is executed and the time of death. This means that the declaration of habitual residence in the Will would no longer be an accurate reflection of that person's intention.

In spite of this, it has long been established that English Wills ought to include a domicile clause irrespective of the fact that a person may change their domicile following the execution of the Will. Such a clause is strongly indicative of a person's domicile at the time of death, as the burden of showing a change of intended domicile is often a difficult one to bear.

As such, should a shift towards intention to permanently reside take place in respect of "habitual residence", there is no reason why a similar approach could not be taken in drafting as is currently taken in respect of domicile. A Court may take note of a person's declared habitual residence, particularly in borderline cases where habitual residence is unclear, so long as the person has physically resided for a period of time in the country so declared.

Conclusion

The Regulation ought to be welcomed as a necessary unifying measure in multi-jurisdictional succession matters. Practitioners must take note of it when advising clients and drafting Wills if they are to avoid running the risks of claims being brought against them or against the Estate.

Nevertheless, the lack of jurisprudence and firm guidelines with regard to determining "habitual residence" pose a difficult problem for practitioners. We no longer live in a world where people settle in one place for the duration of their lives. In a world where commerce and business is increasingly global, and where people may have multiple residences throughout the world that they frequently move between, something more than physical presence is necessary if the concept of "habitual residence" is to be something other than a smokescreen for judicial discretion.

A businessman may be posted to a branch of the Firm in Stockholm for one year, then Lisbon for the next, before returning to England, where they may spend the next year travelling to and from France for a particular project. Determining habitual residence based on physical presence and duration of time in

a country would be incredibly difficult, with no certainty that two different Courts would arrive at the same conclusion.

It may well be that to effectively consider the question of "habitual residence", a shift away from looking at physical residence in a country and towards an intention to permanently reside in that country is inevitable. If the element of an intention to permanently reside in a country becomes stronger, comparisons between "habitual residence" and "domicile" are irresistible.

After all, can there be any greater connection between a person and a country, than where a person calls that country "home"?

The solicitor's duty when drafting a Will must be to remove as much uncertainty as he can at the time of drafting the Will. As for what happens afterwards; he or she can have little, if any, control of.

24th August 2015