



International - European estate administration

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It is well known that where a person buys real estate abroad, or moves to a foreign country (whether temporarily or permanently), or marries a foreign spouse, private international law issues arise. But these issues pale to insignificance when compared with the issues confronting an estate of such a person which is to be unwound and distributed in other states. A plethora of competing and conflicting laws and principles come into play.

Introduction

Succession law and how it affects all of us is not a matter for the Treaty of Rome, or any Pan-European legislation, at least not yet.

This guide seeks to alert you to the main forces at work and may encourage you to take steps to plan where and how you hold your assets, in what form, and whether you should make one or more wills, or consider structuring your assets through a company, trust or foundation.

These issues apply regardless of the value of your foreign estate. Winding up estate outside your own country can be an expensive and complex matter for your family and heirs and you should think carefully about doing something during your lifetime to ease the burden for those dealing with your foreign assets when you have died.

Here are some (very generalised) comparisons between England and Wales (1) and Continental Europe (2).

The administration of estates

1. The common law system in England and Wales distinguishes between “administration” and the “estate”. Your estate vests in personal representatives (who can be given the power to charge for their role) who collect in assets, pay debts, and distribute the remaining assets to the beneficiaries.

Personal representatives have full legal title so they can transmit that title to the beneficiaries or purchasers.

2. In civil law countries, there is no distinction between “administration” and the “estate”. The assets transmit automatically and directly to the heirs although they can reject their entitlement if they choose. If “executors” are named, civil law may have difficulty recognising what title (if any) such people have and may not recognise their right to charge for their role.

Domicile / habitual residence

1. Common law gives domicile a technical meaning which distinguishes it from habitual residence. No person can be without a domicile nor can a person have more than one domicile. Domicile is very relevant in the UK in determining whether a person is subject to or will escape certain types of taxation on death. It also determines which succession law will

apply to determine how an estate asset will devolve.

2. Civil law systems favour habitual residence as a determining factor for applicable succession law (but see below). Confusingly, the French word domicile (which extends to Belgium and Switzerland) means habitual residence in English. It does not necessarily mean domicile in the technical English sense. A person who is habitually resident in such a country may find that country has jurisdiction to determine how assets anywhere else in the world will devolve.

Nationality / domicile / habitual residence / *situs*

To determine which succession law applies, one country may apply the law of a person's nationality, another the law of domicile in a common law sense, another the law of habitual residence, and another the law of *situs* (particularly so where immovables are involved). To complicate further, the legal system of one country may then refer the succession to the law of one or other of these connecting factors.

Matrimonial property

1. In England and Wales, there is no recognised marriage "regime" as such. Property may be jointly or severally owned but marriage does not reorganise property rights of the parties to it. A divorce judge may decide to rearrange property rights but that is another matter.
2. In civil law Europe, a marriage regime exists (whether by law or by contract) and it is impossible to consider succession law in isolation from matrimonial property law.

A surviving spouse may find he/she, in moving from one state to another, either gains a double protection (retaining marital rights and gaining succession law rights) or gains neither (having no matrimonial property rights at the outset and moving to a state which grants no succession law rights).

Mandatory protection

1. In England and Wales (indeed in most common law systems) there is some protection for a family on the

death of a breadwinner but this relies on claims being made by those who feel the need, on application to the court.

2. In civil law Europe, mandatory shares fixed by law over the deceased's entire estate (including gifts made during his/her lifetime) are given to family and, with some exceptions, reserved heirs cannot be deprived of their rights or be forced to renounce them. This extends to descendants, ascendants and occasionally a spouse. As much as $\frac{3}{4}$ of an estate may be required to pass absolutely and immediately to reserved heirs regardless of the terms of the testator's will.

Applicable law

Any of the four connecting factors (nationality/domicile/habitual residence/*situs*) may have a role in deciding which law applies. Immovables tend to pass strictly in accordance with the law of the country in which they are situated, even if some countries (e.g. Spain) then apply a person's national domestic law in determining how it will devolve. Inevitably, an Englishman buying a house in his own name in France will find domestic French law applies to it restricting how it can pass under a will. But movables create more confusion. There is no universal rule on which law will apply: imagine a person being a citizen of a country A, habitually resident in country B, domiciled in country C, with assets in countries D, E and F. It is not so uncommon! The permutations and potential for confusion are enormous. If D is Italy, the law of A will apply. If E is England, the law of C will apply. If F is France, the law of B will apply. It then becomes important to establish whether that "law" is domestic or the law of one or the other countries to which the problem is referred under *renvoi* principles.

Conventions

A 1989 Hague Convention on the Law Applicable to Succession to Estates of Deceased Persons seeks to eliminate some of these problems by allowing a choice exercised by a testator at the time of making his/her will to govern succession to the estate regardless of changes in nationality or residence.

A 1978 Hague Convention on the Law Applicable to Matrimonial Property Regimes enables spouses to submit their

matrimonial property regime to the law governing succession to their estates.

A 1973 Hague Convention on the International Administration of Estates of Deceased Persons exists but the UK has concluded, with others, that it is complex, impractical, and un-worthwhile.

A 1985 Hague Convention on the Law Applicable to Trusts and on their Recognition is gaining ground (indeed Monaco has adhered to it).

All this to say, these Hague Conventions have been signed by only a handful of countries and ratified by less. Proof enough that this subject is not resolved and problems abound.

Some ideas on how to reduce and avoid estate problems:

- Consider a local foreign lawyer drawing up a will in the foreign language of a state where assets are held.
- Do not unwittingly revoke one will by making a separate foreign will or wills.
- Consider local principles of administration (or lack of them). Do not impose one set of administrative principles that are unknown or uncomfortable in a foreign state (eg an executor in France).
- Check the law which will apply to movables and immovables in each country where assets are situated.
- If a foreign law applies, does it contain mandatory rules protecting family?
- Will the law of any or all of states of nationality, domicile, residence or *situs* affect or conflict with what is expected?
- Have there been any changes of nationality, domicile or residence? Is there more than one nationality? Which prevails?
- What matrimonial regime (contractual or imposed by law) will restrict or hamper a testator's ability to deal with his/her assets?
- What different laws govern different parts of the estate? Will those differences correspond with the testator's will or wills?

- Is there scope for altering the way an asset is held (e.g. changing from personal direct ownership to ownership through a company)?
- Is there scope for setting up a trust or foundation whether inter-vivos or by will?
- Beware tax implications. Estate duty may be due because of any one or more of the deceased's nationality, domicile, or habitual residence, or the *situs* of the assets in the estate. But tax principles may follow lines very different to those which determine how assets will devolve.

How can we help?

Our office has existed in the Principality since 1979. We are the only English based international law firm in the Principality. Between our Monaco, Dubai, Moscow and London offices we have the strength and depth to offer a full legal service to both local and international clients. We aim to advise our clients in an efficient and cost effective manner and with a particular emphasis on commerciality and confidentiality.

We speak a number of languages including English, French and Icelandic. We have a client base which includes entrepreneurs, entertainers, financial or banking services companies, fund managers, trust companies, sporting personalities and international families from many jurisdictions.

Beyond its London, Dubai, Moscow and Monaco offices LG has strong relationships with law firms throughout the US, Asia and around the world. These relationships enable us to advise comprehensively on any matters with an international dimension.

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