



Wills and Succession

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**Hague Conference Sponsored by Government of Bermuda, the
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Remarks

By

The Honourable Mr Justice David Hayton, Judge of the Caribbean Court of Justice,

On the occasion of

The Hague Conference on Private International Law

23 May 2012

**1. Convention on the Conflicts of Laws relating to the Form of Testamentary Dispositions
1961.**

This Convention that is designed to make it much easier for a testator's will to be formally valid is in force by ratification or accession in the following States:

Hague Conference Members

Australia, Austria, Belgium, Bosnia and Herzegovina, Croatia, Denmark, Estonia, Finland, France, Germany, Greece, Hong Kong (part of China after UK), Ireland, Israel, Japan, Luxemburg, Macedonia, Mauritius, Montenegro, Netherlands, Norway, Panama, Peru, Philippines, Poland, Serbia, Slovenia, South Africa, Spain, Sweden, Switzerland, Turkey, UK.

Non-members

Antigua and Barbuda, Armenia, Botswana, Brunei, Fiji, Grenada, Lesotho, Moldova, Swaziland, Tonga.

UK extensions:

Bermuda, British Honduras (Belize), British Virgin Islands, Cayman Islands, Falklands, Gibraltar, Isle of Man, Montserrat, St. Helena, Turks and Caicos Islands.

Query:

The UK had extended the Convention to Barbados, British Guyana, St. Lucia and St. Vincent but since those countries attained independence no declaration has been made to The Hague Conference on the continuation in force of the Convention. Nevertheless, ss86-91 of the Barbados Succession Act Cap 249, ss2-7 of the St Lucia Wills (Formal Validity of) Act Cap 4.10 and ss2-8 of the St Vincent & the Grenadines Wills Act Cap 495 implement the Convention

A. The justification for the Convention

Because a testator can do nothing about it after he has died, when a testator intends to dispose of property in a formally valid will the law should seek to give effect to such intention and not frustrate it so that he dies intestate. This aim of the law is crucial in those cases where a testator's reasonable expectation of having made a formally valid will could be frustrated by a move from one country to another after the making of a will.

This could happen because under the common law a will of real property had to comply with the formalities prescribed by the *lex situs* while a will of personal property had to comply with the formalities prescribed by the testator's domicile at the date of death. Thus, if a British testator domiciled and habitually resident in England, made a formally valid English will before

moving into a house purchased in Spain where he died three years later domiciled in Spain, the will could turn out to be invalid for not complying with the special formalities required by Spanish law: cp *Bremer v Freeman* (1857) 10 Moo PC 306. In civil law States that did not apply one law to the whole of a deceased's patrimony the distinction was between immovables and movables.

If, however, the private international law of a testator's last domicile e.g. Italy referred the issue to the law of that testator's nationality at death, the English courts were prepared to accept the renvoi back to the domestic (or internal) law of a current or former part of the UK: *In bonis Lacroix* (1877) 2 PD 94, *Re O'Keefe* [1940] Ch 124.

Similar problems existed for civil law jurisdictions, where a few, like France and Belgium, had one law, the *lex situs*, for immovables and one for movables, but most applied one law to a testator's patrimony. This law – or the law for movables - for some jurisdictions was the law of the testator's habitual residence at death, but for other jurisdictions was the law of the testator's nationality at death. But would not the time of executing the will be more practical than the time of the testator's death?

To deal with these issues, Member States of The Hague Conference entered into a private international law Convention to be applicable universally (as provided in Article 6) since courts in states that implemented the Convention would need to deal with testators' wills that were governed as to formalities by the laws of other states.

B. Eight possible validating laws: Article 1

By Article 1 a testamentary disposition is to be formally valid if it complies with the internal (or domestic) law of

- (i) the place where the testator, T, made the disposition; or
- (ii) “a nationality” of T when he made the disposition; or
- (iii) “a nationality” of T at death; or
- (iv) T’s domicile when he made the disposition; or
- (v) T’s domicile at death; or
- (vi) T’s habitual residence when he made the disposition; or
- (vii) T’s habitual residence at death; or
- (viii) the *lex situs* of immovables so far as concerns immovables.

Theoretically, a will and seven codicils could each derive formal validity from a different system.

The use of “a nationality” indicates that if T has more than one nationality he can choose any one of them, so as to increase the laws permitted to validate a testamentary disposition.

What, however, of a State like the United Kingdom or Spain that has several territorial units with differing laws so that a person having British nationality, for example, could be connected with Bermuda or Cayman or Scotland or Jersey or Guernsey or the Isle of Man?

By paragraph 2 of Article 1 the law to be applied to formal validity is to be determined by rules in force throughout the composite State, or, in default of such rules, by the most real connections which the testator had with one of the units within such State.

I do not know of a State which has such rules and it will be incredibly exceptional if a British citizen's executor has to fall back on the default position because T's will was not formally valid by one of five possible laws, namely, the law of the place where he made it, or the law either of his domicile or habitual residence, whether at the date of the will or of the death. If these five connecting factors are inapplicable, with which jurisdictions can T be regarded as having the most real connection, especially if most of his property was located where he was domiciled or habitually resident? The nationality possibilities thus work best for citizens of unitary countries like France and Germany.

Oddly, Article 1 concludes with a third paragraph "The determination of whether or not the testator had his domicile in a particular place shall be governed by the law of that place".

But Art 9 provides "Each Contracting State may reserve the right, in derogation of the third paragraph of Article 1, to determine in accordance with the *lex fori* the place where the testator had his domicile."

Because the UK understands the concept of 'domicile' with the inter-relationship of domiciles of origin, of dependency and of choice (as contrasted with 'habitual residence') better than civil law countries, it has made the reservation for itself and for territories to which it has extended the Convention.

This leaves open the possibility that the English forum having jurisdiction may take a different view from a “Civilopian” forum having jurisdiction. Such a conflict of jurisdiction falls outside the Convention and, indeed, as will be seen later, was only addressed for the first time in the proposed EU Regulation on Succession given its first reading in the EU Parliament on 13 March 2012.

C. Revocation: Article 2

An express clause in a testamentary disposition that revokes an earlier testamentary disposition is valid if in accordance with any of the validating laws for either disposition: Article 2.

Implied revocation due to destruction of a will or a subsequent marriage is outside the Convention. Under English law whether a will has been so revoked depends on the law of the testator’s domicile at the date of the alleged revocation: Dicey, Morris and Collins, *The Conflict of Laws* 14th ed., Rule 150, page 1263.

Implied revocation by inconsistent provisions in two or more testamentary dispositions is governed in English law as a matter of construction by the law of the testator’s domicile at the time he made the later or latest disposition: *Perdoni v Curati* [2011] EWHC 3442 (Ch).

D. Matters deemed to be matters of formal validity: Article 5

By Article 5 any provision of the applicable law which limits the permitted forms of testamentary dispositions by reference to the age, nationality or other personal conditions of

the testator or the qualifications of necessary witnesses shall be deemed to pertain to matters of form.

Thus, if a 17 year old German national, domiciled and resident in Germany made a holograph (handwritten) will in Germany, instead of one in the required notarial form for 16 and 17 year olds, this will would not be formally valid – and would not be admitted to probate in England. If this German had executed the will in France it would have been valid.

E. Wills Act 1963

The Wills Act 1963 implemented the 1961 Convention for England, Scotland and Northern Ireland, but went a little further so as to cover a will executed on board a vessel or aircraft, to deal with the special position of powers of appointment and to make clear that the construction of a will cannot be altered by reason of any change in the testator's domicile after the execution of the will.

It also dealt with alterations of an applicable domestic law on formalities.

While regard must be had to the formal requirements of that law at the time of execution, this is not to “prevent account being taken of an alteration of law affecting wills executed at that time if the alteration enables the will to be properly executed.”

F. Provisional Conclusion

Because it makes sense to try to uphold wills or codicils that a testator intended to be effective before his death made him incapable of rectifying matters, States should implement the Convention along the lines of the Wills Act 1963.

2. Convention on the Law Applicable to Succession to the Estates of Deceased Persons 1989

A. The Justification for the Convention

Different social, economic and cultural considerations justify States having differing domestic laws governing testate and intestate succession and which provide mandatory protection for a deceased's family.

Why, however, should States have such a wide range of private international law ("PIL") rules as to the appropriate connecting factor to determine the applicable domestic law governing succession matters ("*lex successionis*")? The force of this question has become stronger and stronger over the last 40 years, during which increasing amounts of wealth have been generated by persons whose patrimonies or estates have increasingly developed an international dimension.

Where there is a multinational dimension, the courts of three or four States may be involved, as no treaty yet establishes which State's courts should have exclusive jurisdiction, and each State's PIL rules may lead to the application of an even greater number of different *leges successionis* if the *lex successionis* for immovables is different from that applicable to movables.

Leaving aside the possibility of a *lex situs* applying to immovables, the differing PIL rules of different States that could have jurisdiction over succession matters may lead to different *leges successionis* applying to differently located assets of the deceased, “D”.

The possible applicable laws appear to be:

- (1) the law of D’s nationality at death;
- (2) the law of D’s habitual residence at death;
- (3) the law of D’s domicile at death, whether in the original technical common law sense (with domiciles of origin, of dependency and of choice, with a fall-back to the domicile of origin when a domicile of choice is not replaced by a new domicile of choice) or as modified by statute in some common law States;
- (4) the law of D’s nationality when he made his will choosing that law to be the *lex successionis*;
- (5) the law of D’s habitual residence when he made his will choosing that law to be the *lex successionis*;
- (6) the law of D’s domicile when he made his will choosing that law to be the *lex successionis*;
- (7) the law of D’s matrimonial property regime when he made his will choosing that law to be his *lex successionis*.

It is also possible that two States may have different views as to where D was habitually resident or domiciled. It follows that the administration of some deceaseds’ estates or patrimonies

can be immensely complex, costly and lengthy. It would be a vast improvement with tremendous efficiency gains if States could get together and agree on the one connecting factor with which to determine the one applicable domestic *lex successionis*. Indeed, this could then lead to there being one particular State's courts having sole exclusive jurisdiction over D's estate or patrimony, except in particular unusual cases. This is already the position for other civil disputes within the Brussels Convention on Jurisdiction and Recognition and Enforcement of Judgments, now replaced by the Brussels I Regulation No. 44/2001.

B. The Crucial Issues as to the Convention's scope and the applicable law

There are fundamental differences in succession law between the common law and the civil law. These include (1) the distinction between "administration of estates" and "succession, (2) differing levels of freedom of testation, (3) differing emphasis on subjective intentions and objective facts in determining the connecting factor, (4) schismatic versus unitary PIL rules.

First, Common law States make a distinction between "administration of estates" and "succession to estates". It is D's "personal representatives" ("PRs") appointed in D's will (when known as executors) or, in the case of intestacy, appointed pursuant to an administrative process under the supervision of the court (when known as administrators), who administer D's estate. This involves gathering in D's assets, paying taxes due on D's death and paying D's debts in order to ascertain D's net estate. The PRs then apply the law of succession to distribute the net estate to the persons entitled to it. In stark contrast, in civil law States D's patrimony (with its assets and liabilities) automatically passes to D's heir or heirs, who can then gather in D's assets as their assets and pay

taxes and D's debts which are now their debts, and give effect to any legacies that he made. Second, the common law allows freedom of testation subject to the English court having a discretion under the Inheritance (Provision for Family and Dependents) Act 1975 where D died domiciled in England to order reasonable provision to be made out of D's estate in favour of a spouse, civil partner, child or dependant if D had not made such provision by virtue of his will or intestacy and lifetime gifts (e.g. to trustees for his family). Most exceptionally, if D made gifts within six years of his death with intent to defeat a claim under the 1975 Act, the court can order the donee to provide an amount of money up to the value he received. This amount will be the amount that it considers necessary to help make reasonable provision for the claimant. In the case, however, of such a gift to a trustee on trusts the trustee cannot be liable beyond the value of the gift or its traceable substitute still in his hands.

The civil law does not allow freedom of testation. Instead, there is a system of forced inheritance so that children and sometimes a spouse receive a specific share of D's estate. For these purposes, however, one adds back to D's estate all gifts made by him within his lifetime or 30 or 10 or another particular period of years before his death. Any claim, however, to reduce or eliminate the gift is brought within a specific period after death e.g. two or five years. These claims are normally personal claims rather than proprietary claims, so that it is better to call these claims "add-back" claims rather than "claw-back" claims.

Thus D could die, a widower, leaving three children entitled to forced shares in respect of three quarters of D's estate. D's actual estate at death is worth £12 million, having made earlier gifts of £30 million to trustees on discretionary trusts for

D's descendants and their spouses, followed by a gift of £5 million to a charity and a gift of a flat worth £1 million to his mistress, M. Adding back these gifts valued at the time of the gifts (though some States take the value as at D's death) D's estate is notionally worth £48 million. D's children are thus entitled to have £36 million and so can sue the donees for £24 million since D's actual estate is only worth £12 million.

The donees are sued in the order of the closeness of their gifts to D's death. Thus, M is sued first for £1 million and on obtaining a judgment debt against her a charging order can be obtained against the flat. Then the charity has to pay up £5 million and the family trustees £18 million. Under some foreign laws it seems that a claim may even be brought against a donee from the original donee eg if M had sold her flat and given £200,000 out of the proceeds to her adult son for him to buy a flat for himself.

The courts of a common law State, however, currently reject these claims because they characterise the gifts as inter vivos gifts wholly governed as to their validity by the *lex situs* and such gifts form no part of D's estate at death: the *lex successonis* only applies to what is actually comprised in D's estate at his death. It is thus immaterial that the courts of a civil law State regard such gifts as subject to the *lex successonis*.

For common law States in the Caribbean, as for the UK, it is crucial that a foreign *lex successonis* cannot undermine gifts that were unimpeachably valid years before the donor's death: otherwise, donees will need in economically inefficient fashion to retain their gifts against the eventuality of a forced heirship claim or insure against it. Such States must therefore ensure

that any Convention does not alter the current position. If such a claim could be a proprietary claim, it would create problems on selling the gifted property.

Third, in determining the appropriate connecting factor to determine the relevant *lex successionis*, common law States have put more emphasis on D's subjective intentions in the context of "domicile" than civil law States concerned more objectively with habitual residence or, a fortiori, nationality. Nevertheless, reliance upon 'domicile' can lead to unsatisfactory artificial results. An example would be where D left a domicile of choice without having yet acquired a new domicile of choice, so that on her death her domicile is her Indian domicile of origin based on her father's domicile in India at the time of her birth in England – and she had never even visited India. Reliance upon nationality can be equally unsatisfactory as where a person had left his nationality State at the age of two or had fled from it as an adult to establish a new life. Habitual residence at death therefore seems the most appropriate connecting factor, so long as one can ascertain what "habitual residence" entails. Nationality is, of course much clearer as a concept, which makes it attractive if a very limited choice of law is to be made possible, though questions remain to be resolved where D has more than one nationality. Should he only be able to choose the dominant nationality eg the nationality state with which he has the closest connection?

Special provision also needs to be made where a State has several territorial units within it, like the UK or Spain, so that the *lex successionis* of one of those units can apply where no express choice was made if a choice is permitted, or an ineffective choice of British or Spanish law was made. Presumably, a UK national should not have an unrestricted choice of any unit of the UK: someone who had been resident throughout in Jersey should not be able to choose English law or Northern Irish law.

There is clear justification for allowing a restricted choice of a law determined at the date of making a will. After all, when making his will D will often be engaged in an estate planning exercise involving *inter vivos* arrangements with trusts or private foundations being made at that time or being contemplated at a future time. For that purpose, D needs to be sure how those arrangements will interact with what happens under his will when he dies, hopefully, many years later.

Fourth and finally, common law countries like the UK have “schismatic” rather than “unitary” private international law rules so that the law of the *lex situs* applies to succession to real property but the law of the deceased’s last domicile applies to succession to personal property. This can create unsatisfactory effects as in *Re Collens* [1986] Ch 505 that cannot happen in a system where one law is applicable to succession to the whole estate of the deceased. Thus, there was little opposition to accepting unitary rules as provided in Article 1 even though some civil law countries eg Belgium, Luxembourg and France, have schismatic rules based on the distinction between movables and immovables.

C. The Scope of “Succession” in the Convention

Article 1 states

1. This Convention determines the law applicable to succession to the estates of deceased persons.
2. The Convention does not apply to

- (a) the form of dispositions of property upon death;
- (b) capacity to dispose of property upon death;
- (c) issues pertaining to matrimonial property;
- (d) property rights, interests or assets created or transferred otherwise than by succession, such as in joint ownership with right of survival, pension plans, insurance contracts, or arrangements of a similar nature.

It is noticeable that “succession” is not defined anywhere, but property rights created “otherwise than by succession” would appear to include inter vivos trusts so that they are not covered by the Convention though, of course, testamentary trusts are. This position was accepted in the official Waters’ Explanatory Report on the Convention, para 46. Thus interests under inter vivos trusts should not be affected by the rest of the provisions in the Convention.

One would thus imagine that Article 7.2 and 7.3 cannot alter this. Paragraph 2, however, states that the applicable *lex successionis* governs

- (a) the determination of the heirs, devisees and legatees, the respective shares of those persons and the obligations imposed upon them by the deceased, as well as other succession rights arising by reason of death, including provision by a court or other authority out of the estate of the deceased in favour of persons close to the deceased;
- (b) disinheritance and disqualification by conduct;
- (c) any obligation to restore or account for gifts, advancements or legacies when determining the shares of heirs, devisees or legatees;

(d) the disposable part of the estate, indefeasible interests and other restrictions on dispositions of property upon death;

(e) the material validity of testamentary dispositions.

Significantly, paragraph 3 states that “paragraph 2 does not preclude the application in a Contracting State of the law applicable under this Convention to other matters which are considered *by that State* to be governed by the law of succession”, thereby conceding that States characterise what are or are not succession matters in different fashion.

Since civil law States have a broader view of succession than common law States (which differentiate administration of estates) the purpose of paragraph 3 was to enable civil law States to go further than common law States were prepared to go eg in respect of add-back claims concerning property situated in a civil law State. Is it the case, however, that such claims that cannot exist in respect of inter vivos gifts of property situated in common law states can be regarded as covered by paragraph 2? A common lawyer would deny this. Paragraph 3 and paragraph 2(c) can be understood as covering the common law rules as to hotchpot and double portions, while incorporating in para (a) “other succession rights” begs the question. Upsetting fundamental common law rules as to inter vivos gifts so as to introduce a novel retrospective impeachability would need to be much clearer, especially in the light of Article 1(2)(d).

It is left to Contracting States in enacting domestic legislation to implement an international Convention to clarify any ambiguity in the relationship between Article 1 and Article 7 as accepted in the Waters’ Report at para 74.. Common law States if implementing the Convention would surely have clarified the Convention as not extending to valid inter vivos gifts of property situated

in a common law State. Such States, however, were not prepared to implement the Convention fearing that the very flexible rules for the applicable *lex successionis* could lead to uncertainties and so to extra time, trouble and costs.

D. The applicable *lex successionis*

In the period 1986-1988, in order to harmonise States' PIL rules, the Convention on Succession was prepared in a series of meetings of experts at which I headed the UK delegation. The Convention was signed by four countries, Argentina, Luxembourg, The Netherlands and Switzerland but has only been ratified by The Netherlands, although Belgium, Finland and Switzerland have taken significant account of it in legislative reforms.

Thus, the Convention has failed to gain general acceptance. Prepared twenty-five years ago, the Convention was to some extent ahead of its time though having to make concessions to some ingrained attitudes as to the force of nationality law. This led to a cascade of possibilities in determining the *lex successionis* which many Governments must have regarded as too lengthy and flexible.

Article 5 of the Convention boldly permitted D to designate as the *lex successionis* for the whole of his estate either the law of his nationality or the law of his habitual residence at the *date of his will*. In default of such choice, by Article 3 the *lex successionis* was:

- (1) the law of D's State of habitual residence at death if also the law of his nationality;
or, in default,

- (2) the law of the State where D at death had been habitually resident for the five preceding years, unless, in exceptional circumstances, he had at death been manifestly more closely connected with his nationality State, when that State's law would apply; or, in default,
- (3) the law of D's nationality State at death unless D was then more closely connected with another State, when that State's law would apply.

Article 6 of the Convention even allowed a testator to designate the law of another State or States to govern succession to particular assets, but such a designation could not oust the mandatory family protection rules of the applicable *lex successionis* under Articles 3 and 5.

In The Hague Conference meetings there were such difficulties in trying to reach an agreement as to a definition of "habitual residence" that it was agreed to have no definition. It was hoped that this would not matter too much when the first default rule required habitual residence at death coupled with the nationality of such residence, and the second required five years residence preceding death unless, exceptionally, the deceased at death was manifestly more closely connected with his nationality State when the law of such State would apply eg if the State X deceased had taken up temporary employment in State Y which had continued for over five years.

It would appear, however, that many States feared to ratify the Convention because it permitted an express designation of the law of a testator's "habitual residence" at the time of the designation and there could be doubts as to when his residence had become "habitual", especially if he died decades after making his will, which, perhaps, could have been made when he was

working in London and so enabling him to avoid forced heirship problems that would otherwise arise.

Article 17 ousts the doctrine of *renvoi* which, otherwise would have enabled a reference from the courts of State X to the law of State Y to be regarded as a reference to State Y's PIL rules, which might then have referred the matter back to State X law or on to the law of State Z. Article 17 requires references to the applicable law of a State to be to its domestic or internal law, except where the applicable law under the default rules in Article 3 is the law of a non-Contracting State. If the private international law rules of that State referred to the law of another non-Contracting State which would apply its own domestic law, then such law should apply under Article 4 (even if a schismatic as opposed to a unitary jurisdiction). This is replicated in Art 26 of the proposed EU Regulation discussed below.

Where there could be differing *commorientes* rules applying to persons, like spouses or parents and children, in circumstances where it was uncertain in what order their deaths occurred, it was provided that none of the deceased should have any succession rights to the others. This is replicated in Art 23 of the proposed EU Regulation.

A special provision was inserted to deal with a person dying leaving no individuals capable of inheriting the estate. In such circumstances the laws of some States make the State owner of the deceased's assets as his ultimate heir. The laws of other States treat the deceased's assets as ownerless *bona vacantia* so that the State acquires the assets in its capacity as the State, not as heir. Territorial might prevails. The Convention's applicable *lex successionis* is not to preclude a State or an entity appointed by the State (eg the Duchy of Cornwall) from appropriating the

deceased's assets that are situated in its territory: This position is replicated in Art 24 of the proposed EU Regulation..

Where a State like the UK or Spain has territorial units with their own system of law covering succession, the rules of that State would apply to ascertain the relevant unit. Otherwise, a Convention reference to or a testator's express designation of such State referring to the law of the State of habitual residence at death or the date of the designation means the law of that unit of the State in which the deceased had his habitual residence at the relevant time. The same applies to a reference or designation of a nationality, but, in the absence of an habitual residence in a territorial unit at the relevant time, one falls back on the law of the unit with which the deceased had the closest connection.

Where a testator designates the law of a territorial unit of a State of which he was a national that designation is only valid if at some time he had an habitual residence in, or, in the absence of such an habitual residence, a close connection with that unit. Where he designates as the law of his habitual residence the law of a unit of a State of which he was not a national, the designation is only valid if he then was an habitual resident of that unit or, otherwise, was habitually resident in that State and had had an habitual residence in that unit at some time.

For the purposes of having five years' residence to become habitually resident for the application of the second default *lex successionis* within Article 3(2), residence in different units of a composite State for five years suffices to establish habitual residence in that State. The *lex successionis* will be that of the unit where he had his habitual residence at death. If, however, at the deceased's death he had no such habitual residence, the applicable law will be the law of the

unit in which he last resided unless he then had a closer connection with another unit, in which case its law will apply.

Nevertheless, for EU States the Succession Convention is to be superseded by an EU Regulation.

3. The EU Regulation on Succession: common rules for the applicable law and jurisdiction and the recognition and enforcement of foreign judgments

Back in November 2000 the European Commission and the Council decided that the principle of a Regulation for jurisdiction and recognition and enforcement of judgments in civil matters should extend to succession. They commissioned “A Comparative Law Study on the rules governing Conflicts of Jurisdiction and Conflicts of Law on Wills and Succession in the EU”, produced by the German Notaries’ Institute under Professors Dörner and Lagarde which considered the problematic issues – particularly the prerequisite of common rules for the applicable *lex successionis* - and made recommendations. These did not receive the hoped-for acclamation at a two-day Conference held in Brussels in May 2004. A consultation paper was then issued in March 2005. In the light of national Government’s responses, an international committee of experts prepared a draft Regulation which was put forward by the EU Commission on 14 October 2009. On 30 June 2010 a Council Working Party on Civil Law Matters (Succession) prepared a revised consolidated text. On 23 February 2011 the European Parliament Committee on Legal Affairs produced a draft Report on the proposed Regulation. On 6 March 2012 it reported back to the European Parliament with a draft Regulation which was adopted by Parliament at a

first reading on 13 March. The full title is a Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession.

The UK Government (like Ireland and Denmark) has elected not to opt in to the Regulation for reasons that will become clear later.

A. The applicable law

It seems clearly practical to make the Regulation of universal application, regardless of whether the resulting applicable law is that of a Member State. It is also clear that the applicable law needs to govern the whole of succession to a person's estate, without any distinction between movables and immovables. One then needs to consider what is to be the factor that is to determine the applicable *lex successionis* before one can examine what ought to be the appropriate scope of that law.

(i) The applicable law in default of a choice of nationality law

The system of rules laid down by the Regulation for determining the applicable law is as follows. Unless D took the Article 17 opportunity to choose the law of his nationality, by Article 16:-

(1) The *lex successionis* is "the law of the State in which D had his habitual residence at the time of his death", but (2), "where, by way of exception, if it is clear that, at the time of death, D was manifestly more closely connected with a State other than the State whose law would be applicable under paragraph 1, the law applicable shall be the law of that

other State”. Paragraph 2 presupposes that one has first established what would have been D’s habitual residence under paragraph 1.

Nowadays, when so many nationals are increasingly leaving their nations and settling in other States, and when use of “domicile” in its technical common law sense can lead to artificial results, it makes obvious good sense for D’s *lex successionis* to be the law of the State in which he had his habitual residence at the time of his death. The difficulty then lies in trying to define ‘habitual residence’, especially when a habitual residence has to be found for everyone. If it were left undefined, common lawyers are fearful that the vast preponderance of civil law judges in the European Court of Justice and the vast numbers of notaries involved in succession matters could well regard D as habitually resident in a civil law State due to concentrating on recent objective facts rather than on D’s intentions, even though such intentions reveal D as more closely connected with a common law State.

The particular area of anxiety is where D moved from State A to State B to take up a job, but intending to retire back to State A. He then dies of a heart attack or in a car crash. Will he be regarded as habitually resident at death in State B or State A?

Guidance is, for the first time, usefully provided in recitals (12) and (12a) to the Regulation for there to be “an overall assessment of the circumstances of the life of the deceased during the years preceding his death”. Recital 12 expressly requires that overall assessment to take into account “the duration and regularity of the deceased’s presence” in the relevant State and “the conditions and reasons for that presence.” This now enables account to be taken both of objective factors and of subjective factors eg taking up a five year job assignment abroad but intending to

return to one's home State, living abroad to care for a parent with permanent illness or disability problems, retaining a flat or house in a preceding State of residence, renting or buying a flat in a new State, retaining club membership as a non-resident or overseas member.

There may be complex cases. According to recital (12a), "Such a case may arise where the deceased for professional or economic reasons had gone to live abroad to work there, sometimes for a long time, but had maintained a close and stable connection with his State of origin. In such a case 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 his social life was located. Other complex cases may arise where the deceased lived in several States alternately or travelled from one State to another without settling permanently in any of them. If the deceased was a national of one of those States or had all his main assets in one of the States, the nationality or the location of the assets could be a special factor in the overall assessment."

Such guidance provides in my view as good a guide as possible to a somewhat messy concept like habitual residence for which no neat definition is possible. The guidance ought to satisfy common lawyers, whose anxieties are further addressed by Article 16(2). If, having ascertained D's habitual residence under Art 16(1), "it is clear from all the circumstances of the case, that, at the time of death, the deceased was more manifestly closely connected with a State other than the State [of habitual residence] the law applicable shall be the law of that other State."

This covers the case where D moved from State A to State B and, for various reasons, State B very narrowly qualifies as D's final habitual residence, but at D's death he was manifestly more closely connected with a State other than State B. That more closely connected State will

normally be State A but in a very unusual case indeed, it could be State X where D resided before a temporary move to State

A. The guidance in recital (12b) provides that this enables the relevant authority “in exceptional cases - where, for instance, the deceased had moved to the State of his habitual residence fairly recently before his death and all the circumstances indicate that he was manifestly more closely connected with another State – to arrive at the conclusion that the law applicable... should not be the law of the State of habitual residence...but rather the law of the State with which the deceased was manifestly more closely connected. That manifestly closest connection should, however, not be resorted to as a subsidiary connecting factor whenever the determination of the habitual residence proves complex.”

There is not time to consider differing scenarios for the application of this exceptional provision. Suffice it to say that I think that this provides adequate flexibility for the most unusual cases. Some may say that it creates too much uncertain flexibility. To my mind it most usefully provides for a nuanced approach to prevent inequitable results in very exceptional cases. “The tail is not allowed to wag the dog”, but the existence of a tiny tail is at least recognised!

One example may suffice. The only son and heir of a vineyard owner in Western Australia, lives and works at the vineyard that his family has owned for 100 years. To gain extra experience before taking over from his father, as agreed when his father retires or dies, he works at an English vineyard under a two year fixed contract. He then moves to work at a French vineyard under a five year contract, but making annual six weekly visits to stay at the Australian vineyard in a large bedroom which has been his since he was twelve years old. Two years later he

marries a French woman, moving into a house bought for them by her parents. Two years later he is promoted and given a three year contract terminable on two months' notice. Two years later his father dies by will leaving the vineyard to his son. Thus after six years' residence of the son in France, he and his wife put their French house up for sale so that they can move into the Australian vineyard. The son cannot attend his father's funeral in Australia and see him buried in the family vault because he needs to be with his wife for a difficult childbirth. The baby is born safely. The son decides that in a week he will fly to Australia to live at the vineyard and manage it, with his wife to follow in three months with their baby. Sadly he died in a car crash the day before the flight to Australia. Should not the law of Western Australia be the *lex successionis* rather than French law?

(ii) Choice of nationality law

Article 17 permits D in his will to choose as his *lex successionis* "the law of the State whose nationality he possesses at the time of making the choice or at the time of death." Circumstances would, however, be very rare in which D, in making his will, would chose a nationality law that he hoped to have at the time of his death rather than his nationality law at the time of making his will.

It also provides that "a person possessing multiple nationalities may choose the law of any of the States whose nationality he possesses at the time of making the choice." One wonders whether there should have been a restriction to the dominant nationality or the nationality with which D had the closest connection at the time of making his will. After all, by investing money or buying a house of a certain value it is possible to acquire nationalities, one of which could

provide family members with much less protection than D's main nationality law or the law of his habitual residence. It may well be, however, that recital (12c) would help a court to prevent this": "Nothing in this Regulation should prevent a court from applying mechanisms designed to tackle the evasion of the law, such as *fraude a la loi* in the context of private international law." Such a mechanism has been employed by French courts to prevent a Californian D (with a Californian *lex successionis*) converting a French villa (having a French *lex successionis*) into Californian movables (with a Californian *lex successionis*) by having it owned by a Californian company in which D had a controlling shareholding.

Earlier in the preparation of a draft Regulation there had been pencilled in the possibility of an express choice of a testator's habitual residence at the date of his will, particularly for those who had deliberately turned their back on their State of nationality, perhaps hating all it stood for, and who had moved by force of circumstances to another State. After all, the justification for a choice in a will is so that each and every person can properly organise his affairs by knowing in advance what will be his *lex successionis*, especially if making *inter vivos* estate planning measures at the time of his will.

It would seem that habitual residence was not permitted because it was not as clear a concept as nationality and because civil law States were worried that their nationals might too easily acquire habitual residence in a common law State and so choose its law as the *lex successionis* to avoid the family protection forced inheritance rules of civil law States. But what is so deficient with the discretionary mandatory family protection rules of the common law? One strongly suspects that if all the negotiating parties had been civil law States with forced inheritance

rules, choice of the deceased's habitual residence at the date of his will would have been given more serious consideration and might well have been permitted.

Indeed, focusing upon the fact that civil law States, unlike a common law State like England, have matrimonial property regimes, it is, at first sight, a little surprising that a deceased was not permitted in his will to choose as his *lex successionis* the law of his matrimonial property regime at the time of his will, so that the two laws within the same system would work harmoniously together at his death. It may, however, be possible that the matrimonial property regime could change after the making of the will and that the regime at death might not fit so well with a *lex successionis* of the regime at the date of the will. Thus such choice of law was rejected.

Returning, however, to rejection of a choice of habitual residence at the time of making the will, one has to concede that there are some practical problems over proof of habitual residence since D might well die many years after making his will.

To avoid these problems, D could, when making his will, leave in the envelope containing it some good evidence that he was then habitually resident in the State whose law he had chosen to be his *lex successionis*. Indeed, there could be a presumption that D was habitually resident in the State whose law he chose to be his *lex successionis* unless any disgruntled person with *locus standi* proved the contrary. There could be a stronger presumption that if a civil law notary or a common law solicitor certified that at the date D made his will D was habitually resident in the State where the notary or solicitor practised, this would be presumed conclusive unless a disgruntled person proved that such notary or solicitor was a party to a fraud.

B. The scope of the applicable law

(i) The add-back rules for inter vivos gifts

There is no problem with giving effect to forced inheritance shares of D's children or other close family members out of D's *actual* estate at his death.

The problem, as already seen, arises when a *lex successionis* requires that there be added back to D's estate earlier gifts made in his lifetime or in his last 10 or 5 or 2 years, as the case may be in different States, so as to enlarge the forced shares and entitle the forced shareholders to bring an action against donees so as to make up the value of the forced shares to their proper value. Such actions need to be brought within periods varying from one to five years, as the case may be, for different States. Further discrepancies arise between States as to whether the gift is valued at death or the earlier time of the gift and the extent to which actions may be brought against successors in title to the donee.

Currently, under the common law the *lex situs* governs *inter vivos* transfers of property. If there is a valid unimpeachable transfer of property located in England, then by English law that is conclusive. The relevant property is no longer part of the transferor's property and so cannot be part of his estate at his death to be subject to the *lex successionis* that applies only to such estate. Thus foreign *lex successionis* add-back claims in respect of such English property are not recognised or enforced. Such property, however, can be subject to a statutory claim under the Inheritance (Provision for Family & Dependents) Act 1975 if the transferor had died domiciled in England and had given the property away within six years of his death with the intent to defeat a family protection claim under that Act. Such claims are very rare indeed.

If effect were to be given generally to claims of forced heirs against *inter vivos* donees of D's English property this would have unacceptably wide-ranging adverse effects that have already been examined.

It follows that the scope of the Regulation on 'succession' should not extend beyond the property comprised in D's estate at death, unless the property that he gave away in his lifetime is situated in a State which has add-back rules in favour of forced heirship shares and which rules the donees could be expected to know. One appreciates that this affords scope for the rare "rogue" to try to avoid his family responsibilities by gifting assets in common law States to non-family persons, though it also enables a good *paterfamilias* to deal with his family responsibilities in new ways e.g. by *inter vivos* gifts to trustees of discretionary trusts for generations of his family. If it is considered that there are serious grounds for believing that civil law testators will significantly exploit this suggested restriction upon the Regulation's scope, then England, as a *quid pro quo* for the restriction, could extend its Inheritance (Provision for Family & Dependents) Act 1975 so as to make it available where a person's *lex successionis* confers add-back rights on his forced heirs and that person within six years of death transferred English assets to another with intent to deprive those heirs of such rights.

(ii) The administration part of "succession"

As a matter of practicality and logic, it seems to me that one should concede that the common law preliminary administration of estates part of succession to D's estate, that is usually carried out by the civil law heirs, needs to be dealt with in a Regulation covering applicable law

and jurisdiction on ‘succession’ matters. Nevertheless, common law arrangements (and, of course, civil law arrangements) for ensuring payment of taxes due in respect of D’s death must fall outside the Regulation. Article 1, supported by recital 8(a), duly ensures this.

Article 21 of the Regulation recognises that in common law States like England it is mandatory to require an administrator to be appointed to deal with English assets disposed of by a will or intestacy governed by a foreign *lex successiois*. The administrator or administrators appointed by the English court, however, must under Article 21 be the person or persons entitled to deal with D’s estate under the foreign law, whether or not they would be entitled to be appointed administrators under English law. Exceptionally, the English court can, on English law principles, appoint a third party to be administrator where there are conflicts of interests, a disagreement between the beneficiaries on administration of the estate or a complex estate to administer due to the nature of the assets.

The resulting administrator then exercises all the powers conferred by the *lex successiois*,. Nevertheless, where these powers are inadequate to preserve the assets or to protect the rights of creditors, the appointing court may authorise the exercise of powers conferred by its own law. The administrators, however, must respect the *lex successiois* as to whom to transfer ownership of succession property, the liability for debts, the rights of beneficiaries and, where applicable, the powers of the executor of D’s will.

(iii) Strange rights in rem

Civil law States with their *numerus clausus* of proprietary rights are, no doubt, more fearful of common law States' rights *in rem* than *vice versa*. For the English, the most obvious strange foreign proprietary right is the usufruct, though one can regard it as creating the equivalent of an equitable life interest. A new Article 22a of the Regulation provides for an adaptation of rights *in rem*: the foreign right "shall, if necessary and to the extent possible, be adapted to the closest equivalent right *in rem* under the [local law] taking into account the aims and interests pursued by the specific right *in rem* and the effects attached to it." This seems satisfactory.

(iv) Express exclusions from the scope of the Regulation.

Article 1 excludes from the scope of the Regulation

- (a) the status of natural persons, as well as family relationships deemed by the law applicable to such relationships to have comparable effects;
- (b) the legal capacity of natural persons, without prejudice to Article 19(2)(c) [capacity to inherit] and to Article 19c [capacity to make dispositions of property upon death];
- (c) questions relation to the disappearance, the absence or the presumed death of a natural person;
- (d) questions relating to matrimonial property regimes and property regimes of relationships deemed by the law applicable to such relationships to have comparable effects to marriage;
- (e) maintenance obligations other than those arising by reason of death;

- (ea) the formal validity of dispositions of property upon death made orally;
- (f) property rights, interests and assets created or transferred otherwise than by succession, by way of for instance gifts, joint ownership with a right of survivorship, pension plans, insurance contracts and arrangements of a similar nature, without prejudice to Article 19(2)(j) (“any obligation to restore or account for gifts [viz the add-back rules], advancements or legacies when determining the shares of the different beneficiaries”);
- (g) questions governed by the law of companies and other bodies, corporate or unincorporated, such as clauses in the memoranda of association and articles of association of companies and other bodies, corporate or unincorporated which determine what will happen to the shares upon the death of the members;
- (h) the dissolution, extinction and merger of companies and other bodies, corporate or unincorporated;
- (i) the creation, administration and dissolution of trusts;
- (j) the nature of rights *in rem*, and
- (ja) any recording in a register of rights in immovable or movable property, including the legal requirements for such recording, and the effects of recording or failing to record such rights in a register.”

These exclusions seem acceptable apart from not extending to the add-back rules. Time does not permit discussing these matters further, nor any other matters covered by the Regulation.

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C. Provisional Conclusion

Those involved in the preparation of Chapter III of the Regulation have performed their task very well indeed. It seems to me that common law States can accept the proposed rules as to the applicable law, *so long as* donees of inter vivos gifts of assets located in common law States are protected from add-back claims. In my view, it is disappointing that the Regulation did not go further by permitting a choice of the law of the deceased’s habitual residence at the date of making his will. Indeed, where the deceased had validly chosen as his *lex successionis* his nationality law at the date he made his will, why could the Regulation not also allow him to make an express choice of the courts of that nationality law to have jurisdiction over his estate? Under Chapter II of the draft Regulation courts of the law of the deceased’s habitual residence at his death automatically have jurisdiction unless they decline jurisdiction in restricted circumstances. But this raises wider issues to be discussed elsewhere as does the Certificate of Inheritance provided for in the Regulation.

Once the EU Regulation has been finalised and become law in EU States other than the UK, Ireland and Denmark, I expect the UK to enact some legislation so as partly to give effect to the Regulation eg to permit an express choice of nationality law (or a dominant nationality law if more than one) and to extend the 1975 Act protection to estates governed by English law even

though the deceased was not domiciled in England. Caribbean States should then consider similar legislation.