

Cross-Border Inheritance Issues

Background

English laws of succession may apply to certain types of asset situated in other countries. Foreign laws of succession may apply to certain types of asset situated in England.

The terms of a will may be overridden by the application of English or foreign laws of succession. In many countries freedom of testamentary disposition does not exist or is limited to a small part of the estate.

In some countries legislation exists whereby certain individuals can apply to court to vary the dispositions of the estate that would otherwise apply. Different countries have different procedures for dealing with the administration of the estate with some requiring personal representatives and others which do not, where beneficiaries inherit directly. Some countries do not accept the concept of a trust.

Considerations for a person with foreign assets

Essential considerations include establishing which law (or laws) of succession and administration will apply to the testator's assets and ascertaining whether there are restrictions which limit the testator's freedom to dispose of his assets by his will (or wills). It can then be determined:

- Whether it is sensible to have one will dealing with the worldwide estate or separate wills in each principal jurisdiction where the testator owns assets;
- What special provisions should be made in the English will regarding foreign issues; and
- Which (if any) estate planning techniques are suitable.

Applicable law

To establish which law (or laws) apply to the devolution of assets it is first necessary to establish where they are situated as a matter of law. The applicable law may vary for different groups of assets.

In **common law** jurisdictions (e.g. England & Wales) the domicile of the individual will govern which system of law is applicable to different classes of assets in the estate. If a person dies domiciled in a common law jurisdiction then common law will apply to the succession and administration of the estate as regards **movable property** (assets other than land), wherever situated, but usually only to **immovable property** (land) situated in the jurisdiction.

Where a foreign domiciled person dies owning assets situated in England, English law will govern the succession and administration of immovable property situated in England but the law of his foreign domicile will govern succession issues and the administration of the estate generally. The devolution of immovable property in other jurisdictions will be governed by the law of the jurisdiction in which such property is situated. The application of different legal rules is known as a **schismatic** approach.

Civil law jurisdictions (e.g. Spain and France) usually have a **unitarian** approach which states that the law of succession and administration is the law of the individual's habitual residence or citizenship and that this single law system governs the worldwide estate. The unitarian state assumes its law governs the succession to the worldwide estate but nevertheless accepts the English court will apply English law to the succession of immovable property situated in England.

Under both systems, **lex domicilii** governs succession to movables but *lex domicilii* may mean domicile, citizenship or habitual residence in different jurisdictions. A conflict of laws may arise when a schismatic law system seeks to apply the law of situs to govern succession to immovables.

Some unitarian system countries (e.g. Spain and Portugal and Switzerland on election) allow immovables situated in their own countries to be governed by *lex domicilii* (but may be obliged to concede to the law of situs to govern devolution of immovables situated in other jurisdictions).

Changes from 17 August 2015: EU Succession Regulation No. 650/2012

The EU Succession Regulation ("**the Regulation**") harmonises the conflict of law rules of cross-border successions of most members of the European Union and is by operation of law directly applicable to all deaths on or after 17 August 2015.

Under the Regulation, only one single criterion remains for determining the jurisdiction and the law applicable to cross-border succession: the last habitual residence of the deceased at the time of death will apply to all assets worldwide.

The Regulation does not make any distinction according to the nature (i.e. movable or immovable) or the location of the assets.

Even though the UK, Ireland and Denmark have opted out, it will still affect all EU countries:

UK nationals habitually resident in the Regulation zone

The law of the state of "habitual residence" will apply to assets in the Regulation zone. Due to the UK opt-out, if the expatriate UK national owns English land, this will still pass in accordance with English law.

But, if the state of habitual residence is a Civil Law country, the court there, when determining how the Regulation zone property should pass, may bring “offending” gifts of English land into account and thus enlarge the shares of family members who are given fixed entitlements by the law of that country.

On the other hand, if the UK national elects to apply the domestic succession law of England (being the part of the UK with which he is most closely connected) to assets within the Regulation zone, he will be able to import English law and its principle of freedom of succession

UK nationals habitually resident in England with assets in the Regulation zone

For assets in England, England will apply its own private international law principles – English law would govern land and the law of domicile would govern all other assets located in England.

If the UK national does not elect for English succession law to apply in the Regulation zone, English succession law (including English private international law) would apply and that might result in succession issues being governed by the laws of another jurisdiction, for example, to the law of the country where the land is located.

If the UK national elects for English domestic succession law to apply in the Regulation zone, then the relevant Regulation state should apply that law to determine the destination of property located in that state.

Conflict of Laws and the meaning of domicile

There is a concept known as **renvoi** that determines the law in which jurisdiction will apply to an estate. In essence, each country has to decide whether to apply its own laws or the laws of the country in which the deceased died domiciled to the succession to the assets of the estate.

English law has rules for establishing domicile. **Domicile of origin** is usually the country of the father’s domicile at the time of the birth of the child (or the mother’s if the parents were not married). Until the child reaches age 16 the domicile may change to a **domicile of dependency** if the relevant parent changes domicile. After age 16 a person can acquire a **domicile of choice** by taking up residence in another country with the intention of making that country his permanent or indefinite home.

If a domicile of choice is abandoned without acquiring a new domicile of choice the domicile of origin is revived. If a woman married before 1st January 1974 she acquired the domicile of her husband. If a woman married after 1st January 1974 she can maintain her own domicile.

For English Inheritance Tax (“IHT”) purposes (only) a person is deemed domiciled in the UK if either he has been resident in the UK for 17 out of the last 20 years or resident for three years after losing UK domicile.

In some countries domicile is based on habitual or ordinary residence. It is possible for some countries (e.g. Spain and France) to apply their succession law to the worldwide estate of a person who died while resident there. Other countries apply the law of nationality to govern succession (e.g. an English will of an English national can say who is to inherit assets in Italy or Switzerland). In some countries (e.g. Lebanon) a choice of law is available.

Restrictions on testamentary freedom to dispose of assets

Common law jurisdictions (e.g. England & Wales) generally allow complete freedom as to devolution of assets. Most jurisdictions have laws which provide that dependants for whom no, or insufficient, provision has been made by the testator may (in limited circumstances) apply to court for a share of the estate but relief is at the discretion of the court. Significantly the English legislation in this respect only applies where the deceased died domiciled in England and Wales.

Community of property rules

The effect of the testator’s marriage (or relationship) being subject to **community of property laws** affects whether the testator is the sole owner of the property he seeks to dispose of by will. Community of property rules are imposed on parties to a marriage or relationship (with variations) by civil law jurisdictions in Europe, the USA and parts of Africa.

To determine if a person is subject to community property rules one has to identify the law of **matrimonial domicile** (which may be different to the domicile of either party to the marriage). Matrimonial domicile is that of the jurisdiction in which both were domiciled at or immediately after marriage or otherwise the law of the jurisdiction the parties had the closest connection with.

If community of property rules apply (and are not excluded by pre-nuptial agreement) the testator will not be able to dispose freely of assets subject to those rules.

In **full community** states (e.g. Netherlands and South Africa) all movable property of each spouse (acquired before or during marriage) and all immovable property acquired during marriage are shared. In other states (e.g. France, Spain and some Eastern European countries and some US states), **partial community** applies to all assets acquired during marriage otherwise than by inheritance or gift. **Deferred community** (Germany, Quebec and most countries in Scandinavia) applies where at the end of marriage the spouses are entitled in equal shares to assets acquired during marriage and the increase in value of all other assets. It is often possible for pre-nuptial agreements to exclude or limit the spouse’s claim.

A change of matrimonial domicile may lead to a change in the matrimonial property regime (e.g. USA and Switzerland apply the date of acquisition instead of marriage to determine ownership). In most jurisdictions assets acquired after a change in matrimonial domicile continue to be subject to the community of property rules imposed by the original jurisdiction. Where a couple voluntarily adopt community of property by agreement after a change of matrimonial domicile into a state that has an applicable regime, assets acquired thereafter will be subject to those community of property rules.

Without a pre-nuptial agreement or an agreed change of law, the applicable community regime will apply to all assets worldwide. This may extend to land in a jurisdiction that does not have a community regime. Property subject to community of property rules is usually held on a basis equivalent to a tenancy in common so that it does not pass by survivorship. In some countries (e.g. France) making a pre-nuptial election for separate property allows the spouses to thereafter acquire property as joint tenants which will pass by survivorship. It may be possible for the surviving spouse to elect to take the matrimonial home as part of his or her forced heirship share (e.g. Switzerland) or a usufruct in it (e.g. France) but he or she may have no general right to it.

Forced heirship

Civil law jurisdictions restrict the extent to which a testator may dispose of his assets (i.e. the property which belongs to him after application of the community of property rules) otherwise than to his family, who generally receive fixed shares in his estate. Often there is no power to override the application of these rules. A domiciliary of a common law jurisdiction may find that immovable property he owns in a civil law country is subject to forced heirship laws (although some countries (e.g. Spain, Portugal and Switzerland on election) exempt citizens of other jurisdictions from these rules).

Where forced heirship rules apply the testator may only be able to freely dispose of a small part of his estate and in many cases higher tax rates apply to gifts to non-family members.

The common theme is for children to inherit a fixed share which cannot be overridden. Some jurisdictions favour the surviving spouse more than others.

Assets subject to forced heirship

It is common for the notional estate in which heirs share to include not only the assets owned at death but also assets gifted during the testator's lifetime and this add back may be subject to a time limit or be without limit of time (e.g. France). It is therefore important to establish what lifetime gifts have been made which may be taken into account when calculating what share each heir may take or may be clawed back into the estate. An heir that has received lifetime gifts will have his fixed share reduced and may be obliged to return part of what was received so that other family members benefit.

It is thought that land in England will not be subject to the forced heirship rules that might apply to a foreign domiciliary. A share of land in England held under a joint tenancy will not form part of the forced heirship estate as it passes by survivorship which cannot be overridden.

English immovables may be taken into account in a forced heirship jurisdiction. If the recipient of English immovable property is an heir he may be prevented from claiming a further share of the forced heirship estate unless the English assets are taken into account.

Taxes

In England as a general rule, transfers between UK domiciled spouses (whether made during lifetime or on death) are exempt from IHT. However, if the donor spouse is domiciled in the UK, but the recipient spouse is non-UK domiciled, a limited spouse exemption applies to the value of the nil rate band (currently £325,000). This means that where a UK domiciled individual has a full nil rate and available, he will be able to transfer an amount equal to double the nil rate band (currently £650,000) to his non-UK domiciled spouse free from IHT.

Not all jurisdictions have a spouse exemption. If foreign taxes are payable they can usually be credited against any English IHT due on the same assets. If no tax is payable in England on the foreign assets due to the spouse exemption then no credit is available in respect of the foreign tax. Also the foreign tax may be payable by the heirs instead of the estate which would prevent the foreign tax being set against the English Inheritance tax.

Some jurisdictions do not have an estate tax but impose a capital gains tax on the transfer of assets to beneficiaries. The terms of any relevant estate tax treaty may also prevent double taxation. The terms of the will may be important in determining who is to pay the foreign tax – the beneficiary of the foreign asset or the residuary beneficiaries under the will.

Realising foreign assets

In many civil law countries heirs inherit directly; there being no equivalent of executors. The heirs inherit both assets and liabilities. The procedure usually involves obtaining a certificate of inheritance from the relevant authority which can then be produced to the asset holders.

Local advice will be required on procedure, time limits and taxes. It may be appropriate for the heirs to execute powers of attorney in favour of others.

Probate in England of a foreign will

Where the deceased made a foreign will which applies to the estate in England there are special procedures for obtaining probate of that will in England. This may involve obtaining an affidavit of foreign law and a court sealed copy of the foreign will and foreign probate. In some cases it may simplify matters for the foreign executors to appoint attorneys in England to take out the grant.

There is a simplified procedure for resealing a grant of probate from most former colonies of England. English grants can usually be resealed in former colonies under similar procedures.

Situs of assets

If the testator is domiciled in England and Wales English law on situs applies to determine in which jurisdiction assets are situated. The rules are:

- Land, interests in land, and chattels are situated where they lie;
- Bank accounts are situated at the branch where located;
- Shares are situated where registered (or, where in bearer form, where the certificate is held);
- Bonds are situated where issued;
- Intellectual property rights are situated where they may be sued upon;
- The goodwill of a business is situated in the place where the business is conducted;
- Interests in trusts are situated where the trust property is (unless discretionary, when it is where an action may be brought); and
- Interests in other estates are situated where the executors are.

Situs of debts

Under English law, generally debts are situated where the debtor resides unless due under a deed, or if it is a specialty debt. A specialty debt is:

- a debt made by deed, or
- a deed which records or creates obligations, or
- a debt incurred by way of statute, or
- a certain type of debt that is given the nature of a specialty debt by statute.

In the past, HMRC's approach to the situs of specialty debts has been that this depends on where the relevant document is found. They now believe this may not be the "correct approach in all cases" involving specialty debts; specifically that many such debts are likely to be located where the debtor resides, or where property taken as security for the debts is situated. Any cases involving situs and a specialty debt must be referred to HMRC's Technical Team.

Assets collected by an English executor are (subject to any provision in the will as to which part of the estate is to bear debts) charged equally with the testator's debts wherever situated.

One problem executors may face is a foreign asset which vests directly in the heirs is not available to them for the payment of debts the executors are liable to pay.

Special clauses for possible inclusion in English will

- Is the will to apply worldwide or be limited to England or be limited to exclude one or more jurisdictions;
- Is the will revoking all wills or only those affecting assets in certain jurisdictions;
- Appointment of separate executors of foreign estate;
- On whom does the liability for foreign tax fall;
- Permission for executors to pay foreign tax of estate or beneficiaries;
- Exclusion of liability of executors in relation to foreign debts and assets;
- On whom does the liability for foreign debts fall;
- Permission to transfer assets to different parts of the estate to balance the burden of debts;
- Declaration of domicile;
- English law governing law clause (this does not prevent foreign succession laws from applying);
- Power to appoint agents;
- Forfeiture clause (beneficiary who challenges will receives nothing);

- Limiting will to immovable property;
- Having discretionary trust in respect of movable property the potential beneficiaries being all those capable of entitlement under foreign law;
- Having life interest trust in respect of movable property the beneficiaries being the anticipated heirs under foreign law with overriding powers of appointment capable of adjusting shares and benefitting all those capable of entitlement under foreign law.

Estate planning

It may be appropriate to place some assets in structures which will ensure they are taxed in a more favourable regime, or by converting immovables into movables (e.g. by a company owning land and the testator owning the shares in the company) so that they pass under a different system of law or pass outside the estate (e.g. by use of a trust).

It may also be appropriate for joint interests in land to be held as joint tenants so that the interest passes by survivorship and not as part of the estate.

Where an estate will be subject to forced heirship rules, it is sensible for records to be kept as to gifts, the cost and dates of asset acquisitions and how the acquisitions were funded. It is also sensible for records of the income of each spouse to be kept.

How Rooks Rider Solicitors LLP can help

This is a complex area and the solution in each case needs to be tailored to individual circumstances. We have expertise in this area and can help you to achieve your desired objectives.

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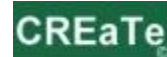
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