SQUIRE PATTON BOGGS

BRUSSELS IV
IS IT THE ANSWER?

Close to 450,000 cross border successions occur in the EU every year with a total estimated value of more than €123 billion. It is not uncommon for wealthy families to have members and assets located in various different countries. Assets in different EU states are subject to deeply conflicting laws governing devolution of estate on death. Private International Law ("PIL") has historically gone some way towards addressing these conflicts but succession planning and the division and distribution of a cross border estate is still unsatisfactorily chaotic. Dealing with such estates becomes very difficult and expensive.

Various attempts have been made over the years to present a unified system for tackling the issue of cross border succession planning, many of which have been met with real enthusiasm and optimism. However it has unsurprisingly been difficult to get past the issue of the inherent difficulty of unifying the UK's common law which allows testamentary freedom with civil law systems and their forced heirship rules. Additionally some states have a "scissionary" system for dispositions that distinguish between movable and immovable assets whereas some states do not.

What is Brussels IV?

The EU doggedly continued with its objective of establishing more simplicity and certainty with the result that back in July 2012 they adopted EU Regulation 650/2012 which included the creation of a European Certificate of Succession. This regulation has become known as Brussel IV because of where it sits in a series of regulations on conflict of laws and PIL within the EU.

25 states are signed up to Brussels IV and it will come into force on 17 August 2015: The UK has not.

What Does Brussels IV Say?

Brussels IV states that generally it is the law in which the deceased was "habitually resident" (which needn't be an EU member state) that should apply on succession. Habitual residence is determined by reference to *an overall assessment of the circumstances of the life of the deceased during the years preceding his death and at the time of his death, taking account of all relevant factual elements, in particular the duration and regularity of the deceased's presence in the State concerned and the conditions and reasons for that presence* (Recital 23).

It is possible for the testator to make a clearly documented express election contrary to his habitual residence and choose for the governing law of where he is a national to apply. Additionally article 21 provides that *where it is clear from all the circumstances of the case that, at the time of death, the deceased was manifestly more closely connected with (another) State* then those laws will apply. I am not sure any of this is overly simple, clear and certain but it is progress in the right direction.

Brussels IV excludes any concept of scission and also precludes renvoi (a PIL conflict of laws concept which broadly enables the presiding court to refer a case back to the original court in certain circumstances).

Why Has the UK Opted Out?

Ireland, Denmark and the UK have opted out of Brussels IV. The main reason for the UK's opposition relates to provisions within the Brussels IV to claw back previous lifetime gifts which is a common feature of civil law systems. The UK was concerned that this would lead to significant uncertainty in relation to lifetime gifts. The abolition of the doctrine of scission may also have been a concerning factor as to why the UK did not sign up as well as a real reluctance to consider any kind of forced heirship.

The UK have also observed that some significant marital property rights (which may in some instances override succession rules) have not really been addressed nor has the concept and recognition of trusts.

UK nationals will still be affected by Brussels IV as they can elect (likely in a will) to use English law where they have assets located in a continental jurisdiction – for example they may want to avoid the forced heirship provisions commonly found under civil law systems or rely on the UK concept of joint tenancy in relation to property ownership. The limited use of Brussels IV for UK nationals is not as straightforward as it seems but detailed discussion of such is beyond the scope of this article and specific advice should be sought.

European Certificate of Succession

Brussels IV creates a European Certificate of Succession, use of which is not mandatory but open to all (including UK nationals) and will allow beneficiaries or personal representatives to confirm their status and ability to exercise their rights in another member state. The hope is that such a declaration should alleviate existing problems of practical difficulties on administering estates between countries as it can override any local law will. Caution will be required in relation to local estate taxes though.

Will Brussels IV Succeed?

The firm intention was for Brussels IV to end the EU disparity of testamentary freedoms on succession and it will surely go some way towards achieving this. However the fundamental differences in deeply embedded cultural rules of inheritance across the EU certainly won't make it easy. With 84 articles divided into 7 chapters simplicity may not have been achieved and new questions have certainly arisen. It has fundamentally excluded too many serious issues and dare I even mention tax again. Certainly the UK still has a lot to think about with over 100 double tax treaties very few of which deal with estate taxes and many of which pre-date the 1984 Inheritance Tax Act. Without an EU wide system that accommodates the common law too we are still in a position of real uncertainty when it comes to cross border succession planning.

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