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Article : The practical implications of the EU Succession Regulation on wills for British nationals in France.

13th August, 2014.

The European Succession Regulation n° 650/2012 of 4th July, 2012 is now in force and will affect successions or estates of those dying after 17th August, 2015, in just over one year's time. The United Kingdom has opted out of its application, and has therefore abdicated any say in the matter otherwise than in five years time when the Commission has to prepare a report on the workings of the Regulation.

Put simply, the old rules no longer apply. Every testamentary disposition involving French property whether movable or immovable by a non-resident needs reappraisal, as does any will of a British national habitually resident in France who wishes to extract any advantage from the new régime. If you are habitually resident in France your succession will, after 17th August, 2015 be governed in any event by the laws of France, whether involving foreign property or not unless something is done.

There has been a recent flurry in will drafting by French notaries and other professionals in France for British nationals who are habitually resident in France, with a view to meeting concerns as to forced heirship issues over French immovable property. The selling pitch is that, if the law of England and Wales can be made to apply, by using the express choice of the law of nationality to govern the succession, the French domestic forced heirship rules will not apply under the Regulation. In other words the French home can be left entirely to the surviving spouse or companion, be it the first or later union, and whether there are children from previous unions or not.

However, this has mostly been done on the assumption that simply adopting the law of the testators nationality, without more, is sufficient. It is not.

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What the majority of French lawyers have not yet noticed is that opting for the law of nationality has other implications under the Regulation as well.

The Regulation at article 23 f) requires that the law governing the succession includes the law dealing with the issues of administration of the estate. In France *le mort sait le vif*. In England and Wales, the opposite is the case: an executor has to be appointed under the will, at least in England and in Wales.

Failure by the French lawyer to appreciate the implications of this will lead to mechanical failure in the administration of the estate, as the executor will not have the ability to use powers whic the Regulation purports to grant him. Most appear to believe that they can send someone off to the probate court in the United Kingdom to secure administration, but fail to appreciate that that does not give the appointee power to call the assets in, in France, including having immovable property transferred to their names, temporarily. That point was passed by even in Mariel Revillard's synopsis of the Regulation: page 70 §153 Defrenois *Droit Européen de Successions Intenationales* .

Whilst technically possible, the French tax administration, which runs the cadastre, is likely to have a field day refusing to convey title to an executor on the cadastre at a *droit fixe*, and seek to impose a degree of proportional taxation at each stage.

Firstly the Administration of Estates Act 1925 governs the issue of the administration of an English estate, and it is specified to be territorially limited to England and Wales, in order to preserve themselves, the Scots and Northern Irish from each others' procedures. Technically, the English Probate court has no statutory or common law jurisdiction over anyone in France, let alone a French immovable as opposed to real estate, whether they are appointed as executor in a will or not. The British Courts will recognise a foreign executor's or assimilated power over English assets, but have no power to approve or constitute that of a purported foreign executor over foreign assets, both outside the Court's statutory and physical jurisdiction .

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Secondly, even if the French lawyer has appointed an English executor or one of the family to act as executor, that individual will have to apply for probate somewhere, and that can only be done in the English Courts, not in the French courts which literally have no adaptable legal framework in which to operate this function.

If the provision for adaptation is mentioned, I would suggest that the suggestion be politely queried, as the legal gulf will be too wide to bridge. The French *executeur testamentaire* does not have any or any sufficient power to appropriate property and pay debts.

What is particularly onerous, is that an executor takes on full personal liability for the debts of the deceased, although they can of course pay these out of the estate, provided that they can get signing powers over the assets. I do not imagine a French bank being particularly keen to oblige

The problem is that French courts do not recognise the concept of an Executor in the English sense, over French immovables. They may currently recognise the status of a foreign executor over movables, under the current division between movable and immovable successions, but, unless some implementing legislation is passed, which is unlikely, the Executor of the will of a British national, opting for the law of their nationality will be operating in an effective legal void for any decease after 17thAugust, 2017. That void is accentuated by the fact that French lawyers do not have any training or awareness in estate administration *à l'anglaise*.

No account has been taken of the fact that any Executor has to appropriate the assets in their own name, as executors in a quasi trust capacity and deal with these on a fiduciary basis. The French tax administration will be licking their lips at the potential 60% tax charge on the Executor on basis of an unwritten trust formed under the laws of England and Wales, and the 60% tax charge out, as the constitution of a trust by a French resident, by will or otherwise since 2011 renders that trust taxable at 60% on all distributions. The Regulation in fact enables this, as it does not address tax. One can argue that it is disproportionate, if one is prepared to await some seven years for the matter to reach the CJEU

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That is the main problem. No consideration has been given in Brussels, or for that matter by the Civil law jurisdictions concerned as to the fiscal ramifications and the administrative issues to which the Regulation gives untimely birth, within the "opt-out" states of the European Union.

Nothing has yet been done, by the learned French professors and experts in international law, who have assumed that that makes them experts in foreign law and foreign practice. The administration of an English estate is rarely abandoned to an academic. The Ministry of Justice has managed just that to those comparative lawyers pushing the Regulation.

There are several ways through this, but they involve a specialist form of drafting machinery which requires the assistance of an English lawyer acquainted with the French concepts of *le mort saisit le vif*. It will generally require separate wills, one for any English property and debts, which can be subject to English statutory administration, and a separate one for French or other foreign assets and liabilities which can be addressed on the basis of *le mort saisit le vif*, and which then can be administered in the usual manner by a French notary, who will address the French tax issues and the French succession declaration. Whilst the current Succession duty Treaty between France and the United Kingdom dates from 1962, its rules can still work for this type of arrangement, providing that a separate probate application is made in England for the separate English will. If carefully drafted; the English executorship can also escape the designation as a foreign trust by the French tax administration, and a will trust or trust of land put in place.

Merely drafting one will opting for the law of say England and Wales, or another part of the United Kingdom, will not be sufficient, and will probably lead to the French succession being blocked by competing claims, and what is worse the tax administrations on both sides of the Channel.

Why? Because in both the United Kingdom and France, the will can only be used once succession duty has been accounted for and an interim payment made. The question is now by whom and in what order?

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Without putting too fine a point on it this is a glorified shambles created by the German notariat ably supported by Brussels, on the basis that it will be alright on the night. The burning of historical precedent in the name of progress requires a little more work than that.

British Residents in France seeking to use the nationality option as a facility or seeking a review should contact Peter Harris at Overseas Chambers for drafting advice, or refer the notary or avocat drafting the will to him for English qualified support.

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