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EU Succession Regulation 650/2012: Jersey *légitime* / forced heirship implications over movables: out of the "situs" frying pan into the customary fire? 25th August, 2015.

This is subsequent to a previous posting on The EU Succession Regulation 650/2012 and its application to the Crown Dependencies: see News.

Out of the Civilian "situs" frying pan into the customary fire?

The main point of interest for most commentators in England has been the change brought about since 17th August, 2015 to the issue of forced heirship rules over French immovable property. These are a question of internal public order in France, as opposed to international public order which has led to many British nationals habitually resident there to opt for the application of English law as being one of the laws of their nationality. *Cavete Danaos dona ferentes*.

Some London lawyers are fully aware of the intricacies of Norman customary law in Jersey or Guernsey, but may be unable to advise Jersey 'nationals' or for that matter residents on their property interests in France without putting themselves at risk of making a howler of it.

What happens after 17th August, 2015? As the laws of Jersey allow absolute testamentary freedom over immovables, that is a simple outcome where a direct holding of a French immovable is involved, and where there is no concern as to the succession duty implications of a non-blood line or non-spousal transfer taxable, in France at succession duty rates of up to 60%.

However where the Jersey national or resident has decided to place the immovable into a *société civile* or other form of corporate, wherever these are incorporated or managed, then the conversion into a movable will engender the following issue.

Jersey law, if it applies under the Regulation as being either the law of the nationality under option, or that of the habitual residence of the deceased enables heirs to claim a *légitime* or a portion of the parent's movable property wheresoever situated. I would suggest here that the mere Channel Islander mark on the European Union Passport to which some Islanders are entitled is not the final say on the matter under the Regulation

That means that those who have arranged their French holdings around a movable right will probably already have taken this into consideration, if advised out of Jersey.

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However, those outside the Island will need to be careful to ensure that the full consequences of their arrangements are correctly understood by foreign lawyers, and by that I include English solicitors in this instance, when addressing the issue of how their property is to be held or disposed of under their wills.

If the Jerseyman or woman is habitually resident within the United Kingdom at the time of death, then the issue is not relevant, as it is the underlying law which will apply; be that English, Scottish or Northern Irish. Please note that Scotland also has légitime provisions.

However it will become so where the testator wishes to be certain of the law which will apply, for example, when they are uncertain as to where they intend to pass the residence prior to their last moments.

Please also note that the tax issues on succession are independent of the Regulation, so the fiscal implications of this will also have to be revisited both in France, and also in the Country of domicile or residence. It is essential to ensure that the non-bloodline rates applicable in France do not come into play in any attempt to leave French property, including movable property to a non-spouse or other unrelated legatee.

The main source of irony is this is that it is difficult to see how article 36 can be of simple unclogged application. The Crown Dependencies are not part of the United Kingdom, but are referred to normally as British Islands under the statutory arrangements for them.

Despite a degree of administrative illiteracy shown by Brussels, the Channel Islands are within the European Union as a matter of Treaty law, albeit removed from the substantial application of "the Treaties" by the UK Act of Accession then reincluded but only by reference to the arrangements contained in the Third Protocol to that Act. Reference the accurate and highly constructed [reply](#) by Commissioner Prodi to a European Parliamentary question in 2003. The Passports issued to Channel Islanders are European Union Passports

In other words it will be the customary relationship which will define this, not the Regulation. It will therefore be another source of pragmatic factual assessment as to whether and how articles 36-38 of the Regulation will apply in reach situation:

Article 36

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States with more than one legal system – territorial conflicts of laws

1. *Where the law specified by this Regulation is that of a State which comprises several territorial units each of which has its own rules of law in respect of succession, the internal conflict-of-laws rules of that State shall determine the relevant territorial unit whose rules of law are to apply.*

2. *In the absence of such internal conflict-of-laws rules:*

(a) *any reference to the law of the State referred to in paragraph 1 shall, for the purposes of determining the law applicable pursuant to provisions referring to the habitual residence of the deceased, be construed as referring to the law of the territorial unit in which the deceased had his habitual residence at the time of death;*

(b) *any reference to the law of the State referred to in paragraph 1 shall, for the purposes of determining the law applicable pursuant to provisions referring to the nationality of the deceased, be construed as referring to the law of the territorial unit with which the deceased had the closest connection;*

(c) *any reference to the law of the State referred to in paragraph 1 shall, for the purposes of determining the law applicable pursuant to provisions referring to the nationality of the deceased, be construed as referring to the law of the territorial unit with which the deceased had the closest connection;*

3. *Notwithstanding paragraph 2, any reference to the law of the State referred to in paragraph 1 shall, for the purposes of determining the relevant law pursuant to Article 27, in the absence of internal conflict-of-laws rules in that State, be construed as referring to the law of the territorial unit with which the testator or the persons whose succession is concerned by the agreement as to succession had **the closest connection**.*

Article 37

States with more than one legal system – inter-personal conflicts of laws

In relation to a State which has two or more systems of law or sets of rules applicable to different categories of persons in respect of succession, any reference to the law of that State shall be construed as referring to the system of law or set of rules determined by the rules in force in that State. In the absence of such rules, the system of law or the set of rules with which the deceased had the closest connection shall apply.

Article 38

Non-application of this Regulation to internal conflicts of laws

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A Member State which comprises several territorial units each of which has its own rules of law in respect of succession shall not be required to apply this Regulation to conflicts of laws arising between such units only.

In short are the Channel Islands to be treated a state separate from the United Kingdom for the Regulation, which is doubly inapplicable, or as part of it? The first is constitutionally the preferable "allocation", as we are not part of a Member State under the EU Treaties, but there is no doubt that there will be disagreement over this issue.

Given the generalised misunderstanding of the legal position of the Crown Dependencies in relation to the European Union exhibited by lawyers in the United Kingdom and the Union in general, irony of ironies, the issue might end up being whether it might be the concept of domicile which will be applied under article 36 (1) or a more civilian concept developed under article 36 (3)!

Please either refer to a Jersey lawyer for advice on these points, or contact Peter Harris peter.harris@overseaschambers.com for that and for EU Regulation and Island Constitutional advice and drafting. I stress that I have a continental European Law qualification.

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