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Discussion between Peter Harris and Daniel Lehmann off the Trusts Discussion Forum: 8th October to 10th October, 2015

Posted on www.overseaschambers.com on 15th October, 2015.

Peter Harris redacted personal response to Daniel Lehmann on Friday 10th October, 2015 at 10H40.

No, I do not agree with that position. Under the express and mandatory terms of the Regulation, English law applies, not French. One French position, Pascal Chassaing's has been to attempt to disapply the written unitary principle by inventing a contradictory scissionist general principle out of a strictly limited exception which in fact does not even allude to scissionism.

The Regulation is carefully separated into Chapters, each dealing with a delineated area. That delineation creates jurisprudential analysis:

Chapter I Scope and Definitions;
Chapter II Jurisdiction - these are the provisions which override negative and positive *renvoi*;
Chapter III Applicable Law - the law, local of foreign to be applied by the Court to which jurisdiction has been allocated;
Chapter IV Recognition, Enforceability and Enforcement of Decisions - of limited relevance here.

I believe that your proposition as it stands short circuits two distinct issues:

1. That dealt with in Chapter I - that of which court or courts have jurisdiction and if a Court has jurisdiction, in which capacity it is exercising it; primary or ancillary; and then
2. That dealt with in Chapter II - the issue of the law which that court in whichever capacity has to apply: in effect the substance of article 23 regulating the transfers under the succession itself .

Those are two entirely separate jurisdictional issues; one of allocation of jurisdiction to a court, the second as to which law that jurisdiction shall - not may - apply. Not respecting this distinction will lead to missinterpetation of the underlying articles, if their context is not materially respected.

The issue to which you refer as to positive or negative conflict -i.e. which court has competence, whether primary or ancillary- is already dealt with under the First Chapter of the Regulation. If

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the deceased is habitually resident in a third state, then the Regulation only attributes primary jurisdiction i.e. seising of an EU Court under certain defined circumstances.

The error I sense in the analysis which you propose for argument is omitting the effect of the First Chapter of the Regulation which has already dealt with the issue as to allocation of jurisdiction: your proposition as I understand it, assumes that it has not finally done so.

What we are discussing here is a Chapter II issue: what the substance of the law to be applied is by the Courts within the EU, once that court has jurisdiction as either a primary jurisdiction, over the whole of the succession, or as an ancillary jurisdiction over merely part of it. Why? It is clear that where a *de cujus* is habitually resident outside the scope of territorial application of the Regulation, the general principle will be that any EU Member State Court will only have an ancillary jurisdiction barring exceptions such as that in article 10 relevant to nationality in certain cases. For example, where a particular EU Member State uses nationality as one of its connecting factors to take jurisdiction over a foreign, here non EU succession. That might in theory include a Spanish national habitually resident within the United Kingdom.

From that basis, my point I believe is clearly defined.

I am addressing the substance of the English law to be applied to foreign immovables under Chapter II either by a Court exercising primary jurisdiction: the case of a British national resident in France, who has exercised the nationality option; or by a court exercising what is an ancillary jurisdiction, where the *de cujus* died habitually resident in another state, here a third state, whether or not an option has been exercised.

I am addressing the point of what substantive law the competent court applies. Your issue as to positive or negative *renvoi* will already have been dealt with insofar as that issue goes to jurisdiction, already addressed in Chapter I. In the Regulation there is no apparent jurisdictional vacuum left of the type you describe to which any positive negative *renvoi* issues are relevant. That is a Chapter I issue not a Chapter II issue.

Back to the issue of *renvoi* in article 34. It is in the second not the first chapter. My reading is that this is not *renvoi* in the sense of the allocation of a competent court, it is a question of *renvoi* as to what substance that Court once competent will apply. In effect, whilst your proposition appears to have missed this point, the Regulation's overall structure does contain a form of foreign court theory as to the substance of the law which the Court has to apply; see Considerant (57) "The conflict-of-laws rules laid down in this Regulation may lead to the application of the law of a third State" by a Court of a Member State. That is in effect the equivalent of a foreign court

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theory. Whilst not relevant to the argument, I do not understand therefore how it can be argued that the British version of the foreign court theory is alien to the Regulation.

As another point; in that context, the concept of *renvoi* at the relevant points in the French text is formulated more widely and dynamically as a verb, not as a noun, and its subjects are to both internal domestic law principles and PIL / conflict principles. I am sure that you can see that:

> (*57) Les règles de conflit de lois énoncées dans le présent règlement peuvent conduire à l'application de la loi d'un État tiers. Dans un tel cas, il convient de tenir compte des règles de droit international privé dudit État. Si ces règles prévoient le renvoi à la loi d'un État membre ou à la loi d'un État tiers qui appliquerait sa propre loi à la succession, il y a lieu d'accepter ce renvoi afin de garantir une cohérence au niveau international. Il convient toutefois d'exclure le renvoi lorsque le défunt avait fait un choix de loi en faveur de la loi d'un État tiers.*

It is the French text which will be of primal influence in France.

It is not only the "règles de droit international privé dudit État" which are addressed at article 34 (1) but also les "règles de droit en vigueur dans cet État". In other words, here direct seisin to foreign immovables. If there is no *renvoi* contained in those provisions, but substantive transfer why the need of *renvoi* which is not a substantive law concept?

> Article 34
> Renvoi
> 1. Lorsque le présent règlement prescrit l'application de la loi d'un État tiers, il vise l'application des règles de droit en vigueur dans cet État, y compris ses règles de droit international privé, pour autant que ces règles renvoient:
> a) à la loi d'un État membre; ou
> b) à la loi d'un autre État tiers qui appliquerait sa propre loi.

English law simply leaves the foreign immovable property to the heir or legatee when the property is outside the jurisdiction, that rule effectively also applies to movables subject to the executors grant in the case of movables owned by an English domiciled testator or intestate, where the executor is within the power of the English Court by virtue of his grant of probate. For a will to have translative effect in England not elsewhere, it has to be sealed by the Probate Court, otherwise it does not have effect in England at all. That is a purely English issue. It does not affect the validity of the Will in France when France is the competent court whether on a primary or on an ancillary basis.

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Date: 15th October, 2015

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There is no *renvoi* out of the UK to French law, as given the change effectively enacted by the Regulation in the remainder of Europe, therefore article 34 simply does not come into play, unless twisted out of its context into something else.

That functions seamlessly with the substantive rules at article 23 as to (e) and (f). The English rules as to administration are inapplicable where the English legislation does not enable them. In other words over transfers of foreign immovables, and movables where there is no domicile jurisdiction.

I am surprised that the eminent professors of law on the continent have not spotted this opportunity for simplification, which essentially puts the chaotic *renvoi* in its place. *Renvoi* is only available where it is needed in a substantive law context. It is not a concept of substantive property law as such.

Your main point is about the vacuum or double jurisdiction caused by positive and negative *renvoi*. Was not the point of the Regulation to reduce if not eliminate any duality or absence of jurisdiction by imposing or enabling it throughout the relevant articles of the Regulation under Chapter I? It is of direct applicability, and what is more substantially of direct effect.

The chapter by Pascal Chassaing in Defrenois does not stand up to any form of logical analysis whatsoever. It boils down to an attempt to turn a limited exception as to specific asset types into a general principle, thus totally undermining the structure of the Regulation. I have been polite in public, but frankly he did not even bother to get the law right, relying on corridor "jurisprudence". Hence the phrase "dark arts". However, the mischief done has now become widespread.

I have not yet heard any convincing argument, addressing both English law and the Regulation, why French law should apply in his example.

I would suggest that any attempt to theorise an overall and overreaching concept of *renvoi* within continental Europe, outside the zone where the Regulation is applicable is a trifle premature, and in relation to the United Kingdom and Northern Ireland, and also probably Ireland, would not take into account Dicey's comment: "In truth, the acceptance of the doctrine of *renvoi* by English Courts is most intimately connected with their theories as to jurisdiction." Why should our law, which has the physical and jurisdictional constriction of insularity and therefore a limited freedom of judicial action simply be swept aside by continental lawyers used to merely driving across jurisdictional lines. It is little short of continental arrogance. I stress that notaries are not full lawyers in the sense that they have no standing before courts, and appear to be oblivious to

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other, jurisdictionally orientated branches of law, and may simply have not taken the trouble to research it.

The German notarial group responsible for the Regulation cut corners, referred in passing to the Lord Chancellor's office, which frankly is not the right port of call and made no effort to contact the English Bar, had they done so the drafting would have taken that into account.

Sorry, but you may need to reconsider your proposed draft.

Please note that I have practiced physically in France as a barrister in this area, that of the relationship between English and French concepts and jurisdictional analysis for over quarter of a century.

Best regards

Peter

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Peter Harris to Daniel Lehman Thu 08/10/2015 at 22:31

Perhaps you might also see the comment on why *renvoi* is unnecessary under English law, there is direct seisin, and refer to the French text of art 34 which does not only refer to PIL but also internal law.
http://overseaschambers.com/media/31057/eu%20study%20on%20the%20international%20law%20of%20succession%20-%20critique%20of%20eu%20europe's%20deployment%20of%20uk%20report%2025%209%2015.pdf
As I have pointed out, we do not have the same concept of *renvoi*, as our territorial jurisdiction, is insular, not defined by a land boundary. It is mostly English law, not the Regulation nor general EU law which defines *Renvoi* in the cases we are observing on the TDF.

Sorry, the only page I wish to be on is that of the law in which I exercise my profession. To the extent that others wish to join me, that is fine, but I see no point in compromising that law, as to do so is simply inelegant and a source of uncertainty, confusion and injustice.

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Regards,

Peter Harris.

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Daniel Lehman to Peter Harris on Thu 08/10/2015 at 22:19

I was hoping for guidance why our French colleague's position was incorrect because in a publication to be issued soon I wanted to give more or less the same example. For what I understand now the example may appear incorrect from an English view, it still appears correct to me from this side of the Channel, and I understand that with regard to its practical effect we even agree, do we not?

With kind regards,
Daniel Lehmann

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Posting by Daniel Lehmann on TDF

Private International Law and the uneducated look at rules and concepts of foreign jurisdictions is always fascinating, particularly because it so often carries surprises. In this case, I read this interesting and educated commentary with interest, and was surprised how deep my ignorance goes because I realized that even after having studied the succession laws of jurisdictions in Europe for ten years I was not able to follow. Neither do I understand where - apart from legal argument - there is any difference in practice between the French and the English positions

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taken here, nor do I even understand why there is no conflict of laws. Please excuse my ignorance, as this truly is a basic issue where we should all be on the same page. I'm not, I am afraid, and here is why:

In my limited world, conflicts of laws arise in principally two different forms, either a positive conflict or a negative one. A positive conflict results from two jurisdictions both competing for competence to deal with the same case, and a negative one results where no jurisdiction claims competence even though there is a case. If, from a Brussels-IV perspective, we would expect the English to act (as in the example given the decedent was habitually resident in London) and if we receive the answer from England that courts there do not claim competence regarding the French real estate, I accept that this is no direct and open *renvoi*, because I understand from an English perspective it does not really matter who deals with the case - as long as it is not the English courts. However, I would have thought it to be clear that what he have to face here is a (negative) conflict of laws issue: Under Brussels IV we do not claim competence, and the English do not claim competence, either.

In addition to that, German scholars (and I assume the French position is not too far from this) regard this as a hidden or implied *renvoi* by the English law back to the French: The idea is as follows: We understand an English judge will only deal with the succession in English or Welsh real estate. Under the hypothetical assumption that this English judge sat on his French colleagues' chair, he would apply the same principle and thus apply French law to the French real estate. This is no application of French or Brussels-IV rules (the former do not exist any longer and the latter operate differently), this is a hypothetical transfer of English rules into a territory where the English would not apply them. Why do we dare to do that? Because it is in the French-influenced European tradition to assume that conflicts of laws rules are bilateral, whereas many English rules are only unilateral. The gap resulting therefrom in our opinion needs to be filled somehow, and it is this hypothesis that one may wish to use to achieve this.

Daniel Lehmann
Baker Tilly Roelfs