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The English concept of renvoi and the containment of its operation by the structure of Regulation n° 650/2012

5th November 2015.

Subject: A summary of the issues relating to the law of a third State to be applied by an Court of a Member State of the European Union where there is a foreign element in a succession.

One of the intentions of the Council and the Parliament was to simplify the succession of individuals moving between Member States within the European Union.

In order to address that, it was decided to institutionalise the concept of a unitary succession rule with only one law governing the whole, as opposed to a series of subordinated successions derived both from the residence or nationality of the deceased and then from the situation of their assets on death: the latter process is sometimes referred to as the scissionist or dualist process as opposed to a unitary one.

The relationship between France, Jersey and the United Kingdom and the practice that has evolved in relation to successions was considerably simplified by the fact that all three jurisdictions operated a scissionist or dualist régime enabling each to shelter its indigenous and frequently opposing principles of succession.

It is therefore necessary to address what happened on the coming into force of Regulation n° 650/2012 on 17th August, 2015, now that France has a unitary régime and is required to apply it. Old habits will either have to adapt or die hard.

What I am proposing is an interpretative model which enables the Succession Regulation to bear fruit as a means of simplification whilst at the same time not sacrificing each jurisdiction's principles as to the registration of transfers on succession, whether by will or otherwise, which inevitably implies a payment of duty in all three jurisdictions concerned. Registration of rights, once defined and transferred is a topic outside the Regulation, see Considerant (18).

The interpretative tool proposed within the context as it has been changed context is based upon the laws of the various British jurisdictions addressed, namely the laws of England and Wales, and the Crown Dependencies.

The process of negotiating the structure of the law within the Regulation involved pruning away other aspects of Private International or Conflict of laws, such as renvoi which is a tool used in several different areas to which the Regulation applies. Renvoi is not treated as a question of substantive law in this analysis, as it is not substantive law, it falls outside the scope of law

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defined as regulating the succession at article 23. 2. Barring the interpretative shepherding guidance in the Preamble, it is only mentioned at article 34. Article 34. 2. expressly excludes any renvoi from the national law chosen in an option for the law of the testator's nationality under article 22 1.

Renvoi is used in two main contexts, and therefore has two different contextual applications:

Firstly, from the English / British perspective - the Germanic, French, Spanish and Italian notions differ - renvoi is used to enable a Court seised of a succession issue to decide if it is competent to sit in its capacity as a domestic court, or whether it is to sit in some manner as if it were a foreign court (the foreign court theory), this fits in with the issue of primary and secondary or ancillary jurisdiction; and

Secondly, if it decides that it is competent to sit in either one of the capacities above, in the process of defining which law, domestic or foreign, the Court adjudicating the issue is to apply. From the British point of view, to quote Dicey in his 2nd edition[1]: "In truth, the acceptance of the doctrine of *renvoi* by English Courts is most intimately connected with their theories as to jurisdiction." What is clear in the definition of sovereign jurisdiction at his Principle n° III is that there is no jurisdiction where it is ineffective. The Regulation does not apply in the United Kingdom and therefore cannot constitute an extension or otherwise be taken as having extended the jurisdiction of the British Courts over foreign immovables where there was none before its coming into force:

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GENERAL Principle No. III. The sovereign of a country,
acting through the Courts thereof, has jurisdiction over (i.e., has a
right to adjudicate upon) any matter with regard to which he can
give an effective judgment, and has no jurisdiction over (i.e., has
no right to adjudicate upon) any matter with regard to which he
cannot give an effective judgment,
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That is confirmed at :

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Rule 39. Subject to the exception hereinafter mentioned, the
Court has no jurisdiction to entertain an action for
(1) the determination of the title to, or the right to the
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[1] *I am using Dicey's 2nd edition as a reference point so as to be as close as possible to the date of the coming into force of eth Land Transfer Act 1897 on 1st January, 1898.*

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possession of, any immovable situate out of England (foreign land), or.
(2) the recovery of damages for trespass to such immovable. (p. 201.)
Exception.—Where the Court has jurisdiction to entertain an action against a person under either Rule 45, or under any of the Exceptions to Rule 46, the Court has jurisdiction to entertain an action against such person respecting an immovable situate out of England (foreign land), on the ground of either
(a) a contract between the parties to the action, or
(b) an equity between such parties,
with reference to such immovable, (p. 203.)

Actions in Personam are addressed at Rules 45 and 46:

Rule 45.—When the defendant in an action in personam is, at the time for the service of the writ, in England, the Court has jurisdiction in respect of any cause of action, in whatever country such cause of action arises, (p. 217.)
Rule 46.—When the defendant in an action in personam is, at the time for the service of the writ, not in England, the Court has (subject to the exceptions hereinafter mentioned) no jurisdiction ta entertain the action, (p. 222.)
Exception 1.—The Court has jurisdiction to entertain an action against a defendant who is not in England, whenever the whole subject-matter of the action is land situate in England, (with or without rents or profits), (p. 225.)
Exception 2.—The Court has jurisdiction whenever any act, deed [will], contract, obligation, or liability affecting land or hereditaments situate in England is sought to be construed,.
…/…

To start at the beginning: the whole process started off with the various questionnaires sent out by the DNotI in 1999, the British one being returned by solicitors, with no member of the Bar being consulted on the issue as to the effective jurisdiction. That omission is a serious one, as the whole issue of the limitations on the territorial effect and extent of the English jurisdiction over foreign property was not mentioned: no English Court will take jurisdiction over assets beyond its boundaries otherwise than by the Admiralty jurisdiction or under a jurisdiction in personam over a person having a form of dominion over foreign assets. The responses to the questionnaires were summarised in a 2002 Report by Professors Dorner and Lagarde issued under the auspices of the DNotI, the German Notariat. Whilst that Report was used as a

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starting point, it is of limited use in providing guidance where the Regulation deliberately sought to change the status quo which the Report summarised.

It is clear that the Regulation had to address the issues of firstly allocation of judicial competence, and secondly the allocation of which law was to govern the succession if it were to succeed in reducing the problematic to a set of simple solutions applying a unitary régime, particularly in relation to the relationship with Third States. Why? I would argue because the concept of renvoi, if introduced into the chain of reasoning that any Court of a Member State has to adopt, will render its judges uncertain as to what capacity it is to sit, if at all, and then which law it is required to adopt under the Regulation when dealing with a succession involving a Third State's courts or laws. The need for certainty in law required that the status of renvoi and its deployment be defined restrictively to avoid the uncertainty which the Regulation was seeking to clarify.

The inter-jurisdictional differences in the definition of renvoi mentioned in the 2002 Report should be sufficient to clarify one point. Keeping its application to a bare minimum in any subsequent Union legislation was essential. Hence the very restricted notion at article34 and the interpretative "should" at Preamble considerant 57. The one point to bear in mind here is that, subsequently to the 2002 Report, it was decided that any option for the law of a nationality should not be considered to include the concept of renvoi used in the Courts of the law of the nationality. The lack of discipline subsequently shown by certain continental commentators in their reading of article 34 (1), who would otherwise require the EU Member States' courts to adopt the British foreign court doctrine of renvoi, is symptomatic of that unfamiliarity. The supeficial question is fortunately resolved, in the case of an option for English law by a French resident British national as excluding renvoi totally from the determination of the substantive law applicable under articles 34.2. and article 23. 2. There is no scope for mining into the option as the Regulation is of direct effect here and the terminology used is "shall".

How does the Regulation transform this unkempt moorland pasture into a form of landscaped garden with defined pathways without re-creating a maze?

Firstly by setting out the principles upon which it is based, in a lengthy Preamble giving interpretative directions, the term "should" is deployed frequently as an interpretative imperative;

Secondly by then allocating which Member State Court is to have jurisdiction whether as the primary Court or as an ancillary jurisdiction , and establishing an order of precedence in certain

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given situations- that then leads into the allocation of the Foreign Court theory, which is apparently unfamiliar to certain jurisdictions such as the German; then

Thirdly, by then determining which law the Member State Court then applies to the succession or to the assets within its jurisdiction.

That pruning back, or even uprooting, of these processes implies that the concept of renvoi within the Regulation is not universalised but is restricted. There is no other logical analysis possible within this construct seeking to regulate issues of Private International and Conflict of laws, as it does not address the substantive law applicable in each succession. Renvoi as will become clear is not allowed to run amok within this system as both it and the concept of nationality which is reduced to an optional status (used in Spain as a connecting factor in relation to third state intestacies) are held under tight rein within the framework outlined above. The difficulty which is arising in Europe is that this mandatory framework is not being respected by some seeking to understand it, who are attempting to retain the now outlawed scissionist status quo by referring to "law" outside the mandatory unitary principle adopted. The doctrine of direct effect as distinct from applicability of a Regulation appears to be a phenomenon with which some private client lawyers unfamiliar with it may need to become conversant.

How does this function in practice for a national of a Third State, such as the United Kingdom or Jersey?

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 or 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.

Whilst it is widely advertised as being based primarily on the notion of habitual residence, the Regulation is based upon the underlying principle or concept of the law of closest connection, which is reduced thereafter to two concepts of allocation that of habitual residence, subject to a

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closest connection exception in certain defined cases, and then by way of option to the law of the nationality. The nationality concept is given an exceptional "boost" under article 10.1. (a). which grants competence over the whole worldwide succession where assets are situated in the Member State and the deceased, resident in a third State, has the nationality of the Member State where the assets are situated[2].

As it is the Regulation which constitutes the positivist legislation designed to overrule inconsistencies such as the chaotic implementation of differing concepts such as renvoi, it is essential not to short circuit 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 any capacity has to apply: in effect the substance of article 23 regulating the transfers under the succession itself .

Once the Court has decided if an if so how it is to sit under Chapter I, it then applies Chapter II; not the other way round. I remain subject here to differing German and French ideas on what is a foreign court theory, the Germans appear not to use it.

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 misinterpretation of the underlying articles, if their context is not materially respected.

Provided that the Regulation is read and respected, its implementation should manage to avoid vacuums or double jurisdictions in relation to positive or negative conflict -i.e. which court has competence, whether primary or ancillary- as that is dealt with under the First Chapter of the Regulation. If 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, for example under an option or under article10.

[2] *This enables a Spanish court to take full worldwide jurisdiction in an intestacy of a Spanish national aboard, for example where a national dies habitually resident, but not domiciled within the United Kingdom. There is a mismatch of concept as between domicile and nationality, but not necessarily of effect.*

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What we are in fact 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.

Once that structure is clearly understood, it in fact relegates renvoi to a clearly defined zone of application, and that application is then circumscribed in a mandatory and therefore directly effective manner under article 34.

So how is renvoi "circumscribed" in the Regulation?

I. By interpretation restrictions at preamble considerant 57:

> (57) The conflict-of-laws rules laid down in this Regulation may lead to the application of the law of a third State. In such cases regard should be had to the private international law rules of that State. If those rules provide for *renvoi* either to the law of a Member State or to the law of a third State which would apply its own law to the succession, such *renvoi* should be accepted in order to ensure international consistency. *Renvoi* should, however, be excluded in situations where the deceased had made a choice of law in favour of the law of a third State.

II. By substantive exclusion from the scope of the applicable law under article 23 2, where it is not particularised; then

III. By the limitations imposed upon it by article 34 1. and 2.

French Text of article 34	British Text of article 34
Article 34 **Renvoi** 1. Lorsque le présent règlement prescrit	*Article 34* ***Renvoi*** 1. The application of the law of any third State

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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. 2. Aucun renvoi n'est applicable pour les lois visées à l'article 21, paragraphe 2, à l'article 22, à l'article 27, à l'article 28, point b), et à l'article 30.	specified by this Regulation shall mean the application of the rules of law in force in that State, including its rules of private international law in so far as those rules make a *renvoi*: (a) to the law of a Member State; or (b) to the law of another third State which would apply its own law. 2. No *renvoi* shall apply with respect to the laws referred to in Article 21(2), Article 22, Article 27, point (b) of Article 28 and Article 30.

Note that this deploys the concept of the Member State's courts having to apply the British foreign court theory as a matter of accepted principle within the operation of the Regulation and the conflict of law rules which it formulates. It is understood as a given that a Member State's courts will have to apply the laws of a third state including its indigenous concept of renvoi, where that renvoi is imposed.

However, as we will see, English law and I suspect the laws of the British Crown Dependencies do not make a renvoi to determine the transfer of the immovable, owing to their indigenous notions of effective probate jurisdiction. Even were they to do so, in the case of a nationality option by a French resident Briton, the French court would be prohibited from taking any renvoi to French law by article 34.2. The interesting point here is that the English and the French texts requires that English Law would make a renvoi to address the issue of the succession to an immovable outside its jurisdiction. As English common law makes no such renvoi as to the transfer of the immovable, article 34 does not apply.

That is where reliance upon the 2002 Report as to the then state of affairs is misleading in that that Report evidently does not take into consideration the subsequent decision enacted to prohibit renvoi in a choice of law option, or in the other cases addressed in article34.

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On the basis that this is a question of succession to a foreign immovable, and not any equitable or personal issue arising in relation to British jurisdiction over the owners of the property which is a separate issue outside the scope of the Regulation. The point here is that the laws of England and Wales in relation to foreign situs immovables were not modified by the Land Transfer Act 1897 and the subsequent consolidation of the laws of English and Welsh property.

That position is confirmed in Dicey's second edition of *The Law of England with Reference to The Conflict of Laws, 1908* following on from the Land Transfer Act of 1879. Rule 63 is quite precise, as is Note 1 thereto:

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Rule 63. The Court has jurisdiction to make a
grant ^ in respect of the property ^ of a deceased person,
either
(1) where such property is locally* situate in
England at the time of his death, or
(2) where such property has, or the proceeds
thereof have, become locally situate in
England at any time since his death,
and not otherwise.^

See the Land Transfer Act, 1897 (60 & 61 Vict. o. 65), s. 1, and Walker &
Elgood (4th ed.), p. 35. The Land Transfer Act, while not affecting the
ultimate beneficial succession to real property, vests such property, with
certain exceptions mentioned in sect. 1, sub-sect. (4), on the death of the
deceased owner in his personal representative, as if it were a chattel real
vesting in him, and gives to the personal representative (executor or
administrator) the administration of such real estate.
The Land Transfer Act, 1897, does not apply to Ireland or Scotland, nor,
indeed,to any land outside England.
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He then states, `'The locality of the deceased's property under this Rule is not affected by his domicil at the time of his death.'`

The old Norman principle in force in England prior to 1898 was an anglicised form of *le mort saisit le vif*, in other words under English law a foreign immovable passed directly to the heir or legatee by the simple operation of English law without any need for a renvoi. That fits perfectly with the schematic of the Regulation as defined in its preamble and articles 23 and 34 in relation to foreign immovables.

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In fact English law makes no renvoi to French law in the matters defined at article 23 for French immovables and the English courts will not seek to acquire jurisdiction over them, if not by pure judicial courtesy, at least because they are not going to judicially reinvade Europe[3].

- Comment upon the issue of personal as distinct from real jurisdiction of the British Courts. Indebtedness of the Estate or succession

The issue of succession is to be distinguished from other areas of law where the British Courts will exercise an in personam jurisdiction over persons within their jurisdiction to compel an individual within their jurisdiction to transfer foreign immovables abroad to their order: such was the case in *Ashurst v Pollard and another* - [2000] 2 All ER 772, where the British resident bankrupt attempted to argue that the Court had no jurisdiction to force him to transfer a half share in a foreign immovable property, in Portugal, to the British Trustee in Bankruptcy. The argument was that the British Court had no jurisdiction to dictate title over a Portuguese immovable. The Court effectively agreed that it could not adjudicate title, but could force the individual over which it had personal jurisdiction to transfer his Portuguese immovable property to his trustee in bankruptcy, and gave order accordingly. That is not the legal issue with which we are concerned here. We are addressing a simple issue of succession to a type of property within the defined scope of a Regulation, not what happens to the property right once transferred. This note is limited to the Succession Regulation and the specific issue as to the application or non-application of renvoi under British Law in the issue of succession to immovables situated outside the Court's real jurisdiction under article 23 Regulation 650/2012.

However, where the issue as to the payment of debts under Regulation n° 650/2012 article 23 2. due by the deceased will need clarification, if that deceased was subject to the English jurisdiction in personam. From the point of view of the Regulation, that issue is partly addressed at article23 2.:

> .../...
> *(e) the transfer to the heirs and, as the case may be, to the legatees of the assets, rights and obligations forming part of the estate, including the conditions and effects of the acceptance or waiver of the succession or of a legacy;*

[3] *The English Courts are insular and will therefore only accept jurisdiction and give judgment where it will be functionally enforceable. They do not seek to over-enforce their national laws abroad except where they have the individual within their jurisdiction .*

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> *(f) the powers of the heirs, the executors of the wills and other administrators of the estate, in particular as regards the sale of property and the payment of creditors, without prejudice to the powers referred to in Article 29(2) and (3);*
>
> *(g) liability for the debts under the succession;*

If English law is to be applied to the succession by say a French Court acting under a nationality option in the case of a French habitually resident *de cujus*, then the French Court will be required to apply the English rules as to liability and precedence as to payment of debts. However as the English rule is that foreign immovables pass directly, and not by an executor, it is therefore at the testator's discretion as to whether they decide to place the foreign immovable under a testamentary mandate such as that of an *executeur testamentaire* or not. Such an appointment is a foreign facility, and operates by way of a post mortem mandate and not by a property transfer to the *executeur*, it is not excluded by English law. If the testator does not appoint an *executeur* or the *executeur* does not accept the appointment, then the heirs or legatees may well be able to argue, in France, that they are not liable to sell the immovables to pay the deceased's debts unless these are secured against them or the creditor can assemble English jurisprudence assisting the recovery against English realty prior to the 1897 legislation. Whether this could be considered a fraud on the law subject to Considerant 26 of the Preamble or as implemented by article will depend firstly on whether this is the type of fraude envisaged, which it may not be and then upon the type of debt and when it was incurred under Considerant 42. The position under Considerants 44 and 45 will also need to be analysed here, particularly by reference to any bankruptcy proceedings in the United Kingdom. A French habitually resident heir or rather legatee may well wish to use the French procedure known as *acceptation sous réserve d'inventaire*, which is available to them under article 13, however if they do so, and then accept the succession, then the absence of any notice will not necessarily affect creditor's rights under English law.

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Note: Domicile or nationality

There is an issue of potential disparity with the British concept of domicil which is used as the connecting factor within the Courts of the British Islands, therefore the Channel Islands. The Union legal framework is not unfamiliar with the disparity as there is a specific statement as to the definition in Council Regulation (EC) No 2201/2003 of 27 November 2003 to the British concept of domicile as being equivalent to that of nationality at article 3.1.(b) as the relevant connecting factor in certain areas of law, but that course was not adopted here, neither was it adopted in article 59 (1) of Council Regulation (EC) No 44/2001 of 22 December 2000, which merely refers back to the internal law definition of the State hearing the case. The Regulation addresses the concept of a given nationality being subject to several underlying distinct legal systems and subject to intra-jurisdictional allocation at article 36. It is therefore possible for a British national resident in the Channel Islands to chose the Bailiwick of his residence as being that of his nationality as being the jurisdiction with which he was the most closely connected under article 36 2. (b), although the wording does not marry well with the constitutional position of the Crown Dependencies. That does not matter overmuch as the decision is that of the Member State Court allocating the law which it is to apply to the succession over which it has competence within the scope of the exercise of a nationality option by the deceased.

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