OVERSEAS CHAMBERS OF PETER HARRIS

E: oc@overseaschambers.com
T: +44 (0)1534 625 879
F: +44 (0)1534 491 195
www.**overseaschambers**.com

Chestnut Farm
Mont du Ouaisne
St Brelade
Jersey, JE3 8AW

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Article : The dilemma for those habitually resident in the United Kingdom over their French succession.

13th November, 2015.

How has the direct effect of Regulation 650/2012 ("the Regulation") changed matters since 17th August, 2015, for English testators resident outside its territorial application?

I stress here that I am going against one of the flows of current thinking in relation to the Private International Law effects of the Regulation in England and in France, but only on the basis of the application of the directly effective principles of the Regulation as they refer to English law. Using a nautical analogy it may either be sailing up a reverse eddy to gain advantage against the main opposing current to achieve simplicity and effectiveness without losing the tide, or it may be remaining within the main channel of directly effective provisions to enable the vessel to avoid being swept backwards by mistakenly steering and moving into a reverse eddy created by the misapplication of renvoi where, under English law it is superfluous and therefore irrelevant to the Regulation. The stream of legal process here is relevant.

The first point is: to what extent has the law or laws applicable changed on 17th August 2012?

I will dispense with general observations as to the scope of the Regulation and the manner in which the machinery of renvoi has been curtailed within the Member States in which the Regulation is directly applicable. The issue lies here with Denmark, Ireland and the United Kingdom which have exercised their option to remain outside its scope of application ("The Opt Out States"). I am referring mostly here to English law and its French application under the Regulation.

I will start from the directly effective rules in the Regulation, as that is the superior positive source of law:

> *Article 21*
>
> *General rule*

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1. Unless otherwise provided for in this Regulation, the law applicable to the succession as a whole shall be the law of the State in which the deceased had his habitual residence at the time of death.

Article 22

Choice of law

1. A person may choose as the law to govern his succession as a whole the law of the State whose nationality he possesses at the time of making the choice or at the time of death.

.....

Article 34

Renvoi

1. The application of the law of any third State 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.

Article 34 is to be read alongside the interpretation direction at Considerant 57 of the Preamble, and has to be considered as curtailing the definitions of renvoi as between the States in question,

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be those third States or Member States. The Regulation does not seek to define Renvoi but leaves its definition and its scope to the law of the third State concerned. It does however curtail the deployment of renvoi beyond one stage. There should be no further renvoi allowed after that in Article 34.1 a. or b., and none at all in Article 34.2. as the option renders it clear which law the option refers to.

That is one argument of substance for including an article 22 option for nationality in any will executed which could also be subject to the law of habitual residence on death under article 21, also being that of the nationality of the testator, in any case where domestic rules include a mandatory renvoi under article 34.1, but not under article 34.2

> *(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.*

I stress that the Regulation's conflict of law rules are of direct effect and require a Member State Court in some cases, of which this is one, to apply the law of a third State

It is clear that under article 21 the default position for those habitually resident in an Opt-out State is the law of habitual residence at death, but if there is a choice of law made under article 22 of nationality at the date of the choice, that overrides article 21, and means (as a result of article 34.2) no *renvoi* can apply. It is clear that the default régime that of the law of he habitual residnce as it applies autatically goives liottle apparnet option foreth testator to eliminate renvoi. Howevere as article 22 does, and is intendted to enabel a testator to have the law wwhic he opts fr applied without renvoi, fomr teh pespective of teh freedom of the otion, it woudk be

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discriminatory, on the grounds of nationality to disable a will and its intention, by overriding an option excluding renvoi under article 34.2, where the deceased is habitually resident in the state of his nationality on death. To my mind, renvoi is only tolerated at article 34.1 where the default régime applies by default, not when it is expressly excluded by an option.

To coin a term, as a matter of EU constitutional law, the Danish, Irish and English texts are of equal reference value and force to those texts of other Member States to which the Regulation is applicable. Whilst the Regulation is not applicable within those states, there is no reason why a European citizen or a third State national habitually resident within an Opt-Out State cannot deploy the language version of the Regulation applicable to him, as it is of direct effect upon his position in the circumstances set out in the Regulation.

It is clear that the law contained in the term English Private International Law is relevant in that it determines the scope and the application of renvoi under English law. However that does not finalise the issue outside the scope of application of renvoi as directly and effectively limited and curtailed by the Regulation.

However, does English law automatically make a renvoi to foreign law in the case of the matters contained in the scope of the applicable law defined at article 23 and in particular the succession rules, as opposed to Private international and conflict rules? I believe the answer to be in the negative when treated in the context of the Regulation.

The issue is compounded by the fact that the Competence rules in Chapter 2 define in a mandatory manner which Court in any Member State has competence over either the succession as a whole, or over the ancillary competences over for example immovables situated within their jurisdiction. For the most part the Competence Chapter, Chapter 2 eliminates renvois to other courts in matters of competence at least in the Member States concerned. Article 34 dealing with Renvoi appears within the later Chapter 3 dealing with the law to be applied by a Court to

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whom competence has been allocated, not as to the allocation of competence, whichhas already been defined by a separate directly effective provision.

Those familiar with the classification in English theory for example Dicey will note immediately that there is a superficial if not a material discordance with the manner in which administration and succession issues are classified in the analysis adopted by the eminent lawyers responsible for compiling that authoritative work.

However, the application of the Regulation appears to have been "understood" upon an erroneous interpretation of the scope of the following comment at page 673 in the United Kingdom contribution to the EU study on the international law of succession (the "Report")[1] :

> *" As is well known, in English law, and unlike the civilian systems derived from Roman law, there is no automatic transmission of the ownership of assets from the deceased person to the heirs of the deceased ("le mort saisit le vif "). Instead, the substantive law of succession vests the ownership of the deceased's assets temporarily in a 'personal representative'. This is either the executor of the deceased's valid will, or, if there is no will, or no such executor, an administrator appointed by the Court"*

This statement is entirely correct within the limited scope of the competence of English Courts, over immovable property situated in England and Wales, and to a certain extent, limited to whether an executor of a personal representative subject to the Court seeking probate over movables situated outside the Jurisdiction, on the basis that these can be transferred to the executor or Personal Representative. The Report defines that "power" jurisdiction by refernce to "power" alone. It is not yet justified as correct outside that set of circumstances. The key to understanding this lies in the legislation introduced in 1897 under what the authors describe as a power jurisdiction.

[1] *http://ec.europa.eu/civiljustice/publications/docs/report_conflits_uk.pdf*

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It is clear from 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 , that Dicey could not entertain that this new legislative rule could apply to immovables outside the jurisdiction as the English court had no competence or power to adjudicate over the succession or to impose its law over foreign immovables by the appointment of a real representative abroad. Rule 63 is quite precise, as is Note 1 thereto:

> *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.*

Dicey then states: 'The locality of the deceased's property under this Rule is not affected by his domicil at the time of his death.'

At that point, I revert to an authoritative work by Amhurst Tyssen at the time of the enactment of the Land Transfer Act 1897 - *The Real Representative Law 1897 - being Part I of the Land Transfer Act 1897*[2] - which describes the effect of the introduction of the legislation as part of a

[2] *https://archive.org/stream/realrepresentati00tyss#page/n5/mode/2up*

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continuing process since the Administration of Estates Act 1868. It is clear from this specific work that the common law prior to the 1897 Act was in effect direct seisin to realty and immovables, whether the immovable or realty was within or without he English jurisdiction. Tyssen and Dicey concur that the LTA 1897 did not apply to immovables outside the jurisdiction of the English Court which had no jurisdiction over these enabling it to supervise any transfer of the property to an executor or personal representative. Why, because the English common law would concur with the lex situs insofar as direct seisin was concerned. There is therefore there is no conflict to resolve under article 34.1. If you like the machinery of the LTA 1897 was not apt and was not intended to overturn the pre-existing common law abroad. The absence of caselaw relating to French immovables prior to 1897 is indicative that there were no disputes or conflict as between the effect of the laws applicable to resolve.

I conclude that both prior to and following the Land Transfer Act 1897 the preceding common law rule applicable to immovables wherever situate was that of direct seisin precisely equivalent to "*le mort saisit le vif*"; that the English common law was only modified in relation to English Realty/ immovables within the power jurisdiction enacted by Parliament; and that the comment in the Report above therefore to be correct can only apply to the power jurisdiction of the English Courts over domestic realty and not to the concept of direct seisin to foreign immovables which remained and remains untouched by Parliament in the Land Transfer Act 1897 and in the subsequent legislation thereafter through 1925 to the present day.

Practice, not law, then directed that any question of title to foreign immovables raised to be addressed by an English Court was then decided on the basis of a renvoi under a foreign Court theory to the law of the situation of the immovable. That enabled the English Court, for want of a better term, "adjudicate" if an to what extent it was required and able to so adjudicate to resolve the issue before it. But that does not address the separate issue as to whether or not

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English law itself addresses the transfer defined as part of the applicable law under article 23, which follows :

> *Article 23*
>
> ***The scope of the applicable law***
>
> *1. The law determined pursuant to Article 21 or Article 22 shall govern the succession as a whole.*
>
> *2. That law shall govern in particular:*
>
> *(a) the causes, time and place of the opening of the succession;*
>
> *(b) the determination of the beneficiaries, of their respective shares and of the obligations which may be imposed on them by the deceased, and the determination of other succession rights, including the succession rights of the surviving spouse or partner;*
>
> *(c) the capacity to inherit;*
>
> *(d) disinheritance and disqualification by conduct;*
>
> *(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;*
>
> *(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;*
>
> *(h) the disposable part of the estate, the reserved shares and other restrictions on the disposal of property upon death as well as claims which persons close to the deceased may have against the estate or the heirs;*
>
> *(i) any obligation to restore or account for gifts, advancements or legacies when determining the shares of the different beneficiaries; and*
>
> *(j) the sharing-out of the estate.*

Renvoi here is not mentioned, the applicable law defines the transfers.

So the question is not whether English law switches to PIL mode[3] and makes a renvoi as a matter of course to the law where the immovable is situated, it is firstly whether it already

[3] *Perhaps, with a fundamentalist twist, to a form of "God mode" exiled by the Regulation itself?*

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governs the issues at (e) namely 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 and then (h) the disposable part of the estate, the reserved shares and other restrictions on the disposal of property upon death as well as claims which persons close to the deceased may have against the estate or the heirs.

In both cases the unrepealed English common law as it currently stands in relation to these matter addresses these by the old common law principles of direct seisin, not by a *renvoi*, which is a secondary issue based on a different theory and adapted for a different purpose to the purposes of article 23. That therefore arguably extinguishes the issue of "international consistency".

The second point is that it is not the English Court which will be competent over the registration of the transfer of foreign immovable situated in any Member State. For example in any case where the French court is seised of the succession of an individual habitually resident within the United Kingdom, here England and Wales under the Competence allocation rules, it will be the French Court deciding whether French law or English law will apply to it. As the concept of direct seisin has a parallel in the French "le *mort saisit le vif*" it would be curious were the French Court to insist upon its own law being applied under a superfluous renvoi, simply to avoid the interpositioning of an otherwise incompetent English executor or personal representative subject to a foreign court's supervision. The French court may be sympathetic to a renvoi requested by disgruntled issue seeking a forced heirship benefit outside English rules, but that is not a matter for our consideration in the absolute, once an option under article 22 has been made.

Provided the law is presented in a manner which concurs with the allocation mechanisms in the Regulation, the French court need not be persuaded that it has to define the succession transfers, including forced heirship issues under a renvoi out of English Law.

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E: oc@overseaschambers.com | Chestnut Farm
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The common law of England, as I understand it, given the replacement of the dualist scissionist régime by the unitary rules in the Regulation, does not require that the transfer of foreign immovables be governed by a foreign law, only its registration. That an English Court may in the past have made a renvoi to French law in the manner in which it might decide the issue sitting as a French Court in a case in England is one thing. That the Regulation is to be applied by the French court removes the need for the English Court to sit in any event and in any profile on the substance, is what makes the difference. The law has changed.

I would suggest that, in the absence of a renvoi from the English jurisdiction under an article 22 option, a French Court should not decide the matter as a matter of French law, as if there is direct seisin of the foreign immovable under the English common law, there is no renvoi to determine the validity of the transfer under article 34.1.. I do not believe that an English renvoi has become a rule of substantive and material law to that extent.

That point is critical in the procedure required under the directly effective Regulation. It is no longer an issue of Private International law theory. There is a positivist enactment which overrules that theory.

It would be counterproductive were the advantage to British habitual residents which this methodology to provide be swallowed up in giving *renvoi* a form of substantive content which it was never designed to have. The various contradictions resolved by the Regulation in relation to renvoi were made in a manner to exclude it but only to enable it where international consistency was required. That I respectfully submit does not and should not enable it to transgress into areas or substance covered specifically and in a directly effective manner by article 23 by the English common law:

> *(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;*

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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;*
>
> *(h) the disposable part of the estate, the reserved shares and other restrictions on the disposal of property upon death as well as claims which persons close to the deceased may have against the estate or the heirs;*

This position will not receive support from those adhering to the Private International Law doctrine, but we may still effectively be in the simpler common law rather than a talmud "God mode".

Peter Harris
Barrister in overseas practice
LLB. (Hons.) Dip. ICEI (Amsterdam)
Revenue Bar Association, Mediator
E: peter.harris@overseaschambers.com