Brussels IV – opting out of forced heirship for UK citizens with property in the EU

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On 17th August 2015, EU Succession Regulation (EU/650/2012), known as Brussels IV, came into effect. Brussels IV will have wide-reaching consequences, allowing nationals of all adopting EU states to choose in their will, that the law of their nationality (or any one of their nationalities) will govern the succession of their estate. Although the UK has not adopted Brussels IV, UK citizens with property in adopting EU member states will now be able to choose in their will(s) that English law govern the succession of their estate, allowing them to bypass the usual forced heirship rules that would apply to their EU property.

Purpose of Brussels IV

On 4 July 2012 Brussels IV was formally adopted, and states were given a three year period to prepare for its implementation.

Brussels IV is intended to partially remedy the messy legal situation that often occurs when members of one EU state die with property in other states. Conflicting laws between the states mean that dealing with cross border succession situations often becomes very difficult and expensive. Brussels IV applies a single national law of succession to both testate and intestate succession. In addition, this single law applies to both a person's moveable and immoveable property.

Why has the UK not adopted Brussels IV?

The main reason why the UK has chosen not to opt into Brussels IV is because this would oblige the UK to apply clawback provisions in the law of other member states (such clawback provisions are common in the laws of states where forced heirship applies in order to avoid people making gifts during their lifetime in order to defeat such forced heirship claims). The UK was concerned that this would lead to significant uncertainty in relation to lifetime gifts.

In addition, some significant marital property rights (which can override succession rules) have not adequately been addressed, nor has the concept and recognition of trusts.

What law now governs a cross border succession?

The default position under Brussels IV is that the law in which the deceased was "habitually resident" at the time of his death will apply on succession. This can include the laws of non-adopting EU states, such as the UK. However, the default rule is displaced where it can be shown that:

- the deceased was manifestly more closely associated with another state; or
- the deceased elected in their will for their national law to apply, regardless of whether the state of their nationality is an adopting state or not.

This provides an opportunity for UK nationals, with property in adopting EU states to elect in their English and foreign wills for English law to govern the disposition of their assets. This will avoid the forced heirship provisions which previously applied to the disposition of their foreign assets upon their death.

European Certificate of Succession

A European Certificate of Succession has been introduced allowing beneficiaries or personal representatives to confirm their status and exercise their rights in other states, without further formalities.

Nerine comment

Brussels IV is a welcome initiative which should simplify the administration of cross border estates considerably. However, it is disappointing that Brussels IV does not address lifetime gifts and trust arrangements (with the exception of will trusts and statutory

trusts on intestacy). This is likely to prove troublesome where the deceased has assets situated in jurisdictions which do not fully recognise trusts and the devolution of assets under their terms. Notwithstanding the uncertainty about trusts, Brussels IV still leaves a number of complicated questions unaddressed and, therefore, lifetime planning through trusts or foundations, with appropriate advice, should still be preferred to the uncertainties, costs and delays involved with dealing with a deceased's estate pursuant to Brussels IV.

Accordingly, now is a good time to update your tax and structuring advice. If Brussels IV changes who receives your estate (or at least the residue if other lifetime planning structures are in operation), this is likely to affect how it is taxed.

In addition, it is an opportune time for our clients to revisit their wills. In particular, UK nationals who would prefer English law to apply to succession on their death, should elect in their UK and foreign wills for English law to apply.

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