Table of contents

The succession law ramifications of relocation

Richard Frimston
Russell-Cooke LLP

1. Introduction

The interplay of succession laws has always been complex. The mismatch between differing legal systems is not usually understood by citizens. Similarly, advisers are usually trained in and insured to advise on one system alone. While it is often wealthier or more entrepreneurial citizens who move between states, advisers usually remain firmly attached to their home state and are uncomfortable in considering the effects of other laws and systems.

However, by definition, a citizen relocating will automatically bring into play cross-border issues; while residing in a new place, he or she will be extremely unlikely not to have assets and family in more than one jurisdiction. Entrepreneurial families that migrate will inevitably have more complex lives and affairs.

Matters of succession are often culturally entwined in a society and citizens learn about them at their mother's knee. It often comes as a surprise to learn that the system in the country of relocation is very different. Assumptions need to be challenged; it is the 'unknown unknowns' that cause the most trouble.

2. Private international law

'Private international law [PIL] is that part of law which comes into play when the issue before the court is so closely connected with a foreign system of law as to necessitate recourse to that system.'[1]

PIL deals primarily with the application of laws in space and time to decide the circumstances in which foreign law will apply. The local courts at a particular time are sovereign and can define as they wish, and place a boundary at that or any other time as they think appropriate. Unlike garden fences, the boundaries created by separate countries' legal systems rarely meet and can be in different places at different times. Each country has its own separate and distinct PIL rules, which do not necessarily mesh with those of other states.

Federal states – such as Australia, Canada, the United Kingdom and the

1 James Fawcett, Janeen Carruthers, Sir Peter North, Cheshire, *North & Fawcett: Private International Law* (14th edition, OUP, 2008).

United States – are themselves subdivided into numbers of separate individual areas with different legal systems.

Nomenclature causes its own difficulties. In common law states, the subject may be known as 'conflict of laws' or 'conflicts of laws'; while it is known as 'PIL' or 'international private law' in civil law states.

'Choice of law' can be used to mean either:

- the applicable law or also a *professio juris*; or
- the ability of a party to make his or her own particular valid choice as to the law that will be applicable.

2.1 Conflicts between different connecting factors

Different categories or classes of topics of law will have different connecting factors to establish jurisdiction, applicable law and recognition and enforcement. The connecting factors may be:

- a concept such as the domicile, nationality or habitual residence of the person;
- a law chosen by him or her (*professio juris*); or
- the situation (*situs*) of property.

Most states which can trace their civil code to influences from the German Civil Code have historically regarded questions of inheritance (whether movable or immovable) as a matter for the 'personal law' of the individual, usually governed by the law of nationality.

By contrast, common law states and states which can trace their civil code to influences from the French Napoleonic Code have historically regarded questions of inheritance of movables as a matter for the 'personal law' of the individual, usually governed by the law of the deceased's domicile; while immovables are subject to the law of the *situs*.

2.2 *Renvoi*

Renvoi is a concept that many find difficult. If the relevant connecting factor establishes that a foreign substantive law is to be applied, the question that must be decided is whether the reference to the foreign law includes a reference to all of the PIL rules of that law or merely the internal foreign law with no reference to PIL. Some jurisdictions apply forwards or backwards *renvoi* only once or sometimes twice; while other jurisdictions, such as the United Kingdom, apply the foreign court theory to the inheritance aspects of succession (but not others) and apply *renvoi* as many times as the foreign court would do. It is sensible to view *renvoi* from the standing of the country that will have relevant jurisdiction, which is usually the place of the relevant asset.

2.3 EU Succession Regulation

The EU Succession Regulation (EU) No 650/2012 has been fully effective since Summer 2015 and has changed the landscape for PIL regarding succession in all of the European Union, other than Denmark and Ireland. This harmonisation has not yet fully bedded in and the view of the regulation from each member state is still somewhat individual and different.

The EU Succession Regulation has codified PIL for succession within most of the European Union and is a useful tool for analysing succession PIL generally.

(a) What is succession?

Succession has as many different meanings as there are legal systems.

In common law systems, the meaning of 'succession' is usually limited to the inheritance on death of those assets in the deceased's estate. The administration of the estate may be classified separately from the succession.

The EU Succession Regulation, by contrast, has within its scope all aspects connected to succession. These include:

- the formal, substantive and material validity of wills, succession agreements and other dispositions of property upon death, including proprietary estoppel;
- inheritance law – who inherits and who may claim, whether under intestacy or against a will or succession agreement;
- disclaimer and acceptance;
- portions, reductions and other clawbacks; and
- administration, probate and debts.

Other systems may lie somewhere between these two extremes; but in any event, it is always sensible to begin by considering the relevant connecting factors in relation to the widest definition of matters within succession.

3. Matrimonial property regimes

Matrimonial property regimes are considered in some detail in the chapter on the matrimonial aspects of relocation. While a considerable number of marriages and registered partnerships end in divorce or dissolution, all others end on death. The aspects of matrimonial and registered partnership property regimes are therefore even more important in relation to succession issues than they are to divorce.

Before the assets within the succession of the deceased spouse can be ascertained, the relevant matrimonial or registered partnership property regime must be dissolved.

While the matrimonial or registered partnership property regime aspects are therefore outside the succession, the contractual or other terms of the regime must be considered in relation to any succession planning.

The EU property regime regulations on the property effects of marriage (EU Regulation No 2016/1103) and of registered partnerships (EU Regulation No 2016/1004) are complex. These two regulations deal with the usual PIL questions of jurisdiction, recognition and enforcement and applicable law. The proposals are gender neutral, but the different treatment of marriage and of registered partnerships should be carefully noted. The transitional provisions mean that the regulations have been fully effective since 29 January 2019, but the parts relating to applicable law apply only to marriages or partnerships made after that date or to regimes amended after that date.

These two enhanced cooperation regulations are in force in only 18 member states (Austria, Belgium, Bulgaria, Croatia, the Czech Republic, Cyprus, Finland, France, Germany, Greece, Italy, Luxembourg, Malta, the Netherlands, Portugal, Slovenia, Spain and Sweden), although Estonia also intends to opt in.

The regulations give one or more of the 18 states that have opted in jurisdiction over property in that part of the European Union. The interaction with the EU Succession Regulation is somewhat unclear, particularly if a member state is bound by the EU Succession Regulation, but not by the EU property regime regulations. Various problems on the interaction between the EU Succession Regulation and the EU property regime regulations generally have become apparent, although more issues may emerge.

For tax purposes, the transfer of property by a survivorship provision in a property regime is dealt with very differently under different systems. In France, such matrimonial transfers have not been subject to succession tax; while in Germany, they have.

4. Gifts, reductions and clawbacks

Generally, under systems with stronger and more far-reaching inheritance rights, the requirements for the formal validity of wills may be lower and vice versa. In England and Wales, with supposedly lower rights for family members, there is a higher hurdle for the internal formal validity of dispositions. By contrast, unwitnessed holographic wills are a usual feature of many civil law systems. Similarly, under systems with stronger and more far-reaching inheritance rights, the anti-avoidance provisions preventing steps to get around obligations to restore are also more far reaching. Clawbacks bring back into the estate lifetime gifts in order to calculate the size of the share of the estate to which beneficiaries are entitled and oblige donees to return assets or contribute money in order for succession rights to be met.

In practice, this issue affects many jurisdictions, many of which have very different rules for lifetime gifts to persons classified as heirs (reductions) and to those classified as non-heirs (clawbacks). In the Netherlands, clawback is limited for gifts to non-heirs made within the five years before death and is a monetary claim rather than a claim to the asset itself. In France, there are no time limits

and the value of the asset is that as at the date of death. In Italy, the claim is to the asset itself, with no time limits.

Many other EU member states – such as the Czech Republic, Denmark, Estonia, Finland, Hungary, Lithuania, Malta, Slovakia and Sweden – give family members full succession rights, but do not consider lifetime gifts to be part of the estate and under their own law do not claw back from third parties.

There is an inherent tension within the EU Succession Regulation in that while Article 1.2(g) excludes "property rights, interests and assets created or transferred otherwise than by succession, for instance by way of gifts, joint ownership with a right of survivorship, pension plans, insurance contracts and arrangements of a similar nature, without prejudice to point (i) of Article 23(2)" from the overall scope of the regulation, Article 23.2(i) on the scope of the applicable succession law includes "any obligation to restore or account for gifts, advancements or legacies when determining the shares of the different beneficiaries".

It can be argued that Article 23(i) only includes the obligation to restore within the scope of the applicable law for the purposes "when determining the shares of the different beneficiaries", and does not include any obligation on third parties to restore. However, the list of matters within Article 23 is not exhaustive, so that obligations on third parties to restore could be within the scope of the relevant applicable law. The key question is whether such an obligation could be within the overall scope of the Succession Regulation.

Establishing whether any previous gifts may have been made and what clawback rules might apply – whether to gifts to family members or into trust – is clearly vital. The presumption that valid gifts into trust cannot be challenged is unwise.

Whether a future change of habitual residence or nationality might bring into play different clawback rules, and whether any binding obligation as to the relevant *professio juris* could be enforceable, should also be considered.

The prospect of an ageing malevolent testator deliberately becoming habitually resident in, for example, Italy so that Italian clawback rules would then apply to previous gifts made in another state to a member of the family who has now fallen out of favour should not be ignored.

5. Assets outside the succession, but dealt with by will substitutes

There is an almost limitless list of will substitutes – trusts, foundations, usufructs, *fideicommissum*, pension funds, life assurance, conditional gifts, contracts with third parties, *donatio mortis causa*, joint property passing by survivorship or accounts or property with set destinations and nominations for death lump sums. Many will substitutes are revocable, but some can be irrevocable. Some transfer property rights immediately, while others do so only on death.

Each jurisdiction has its own favoured child. In France, the *assurance vie* is generally outside the scope of succession rights and enjoys favoured tax treatment; while in the United States, the revocable living trust is used by many as a means to avoid expensive probate procedures, while being tax neutral.

In most states, much personal wealth is held in structures such as pension trusts, *assurances vie* and accounts with automatic designations. These are often directed by means of letters of wishes or other will substitutes. Many such assets will also be outside the usual scope of succession, but must still be considered and brought within the context of estate planning.

There is perhaps a dichotomy between:

- the more common law approach to will substitutes, being seen as complementary and a tool additional to testaments; and
- the more civil law approach of suspicion towards such substitutes, being seen as in some way attempting to circumvent or evade the norms of succession or tax.

The distinction between testator autonomy on the one hand and protection of the family and society on the other is sharply demonstrated.

The civil lawyer may generally regard the will substitute as a nuisance, precariously built on shaky legal ground, and will therefore classify it either as a will or as a gift and thus bring it within traditional succession mechanisms.

Migrants often presume that the favoured tax treatment of such structures is universal and are surprised to discover not only that such structures may not have the same tax treatment in another jurisdiction, but also that they may actually create serious additional tax obligations.

It is important, therefore, that all assets – including those that may be outside the scope of the succession – are still considered in all cross-border estate planning.

The boundaries between succession law and the transfer of property rights are murky and difficult. Death automatically transfers property, since the owner is no more. The exclusion of property rights, interests and assets created or transferred otherwise than by succession – for instance, by way of gifts, joint ownership with a right of survivorship, pension plans, insurance contracts and arrangements of a similar nature – in Article 1.2(g) of the EU Succession Regulation is based on Article 1.2(d) of the Hague Succession Convention (HccH32).

Paragraph 46 of the relevant explanatory report by Donavan Waters lists many different varieties of will substitutes which would all be excluded. Paragraph 4.1 states that: "the exclusion of rights and properties created or transferred other than by means of succession to the estates of deceased persons covers not only the forms of joint property [joint tenancy] known under common law, but also all forms of gifts under civil law."

Thus, none of the EU Succession Regulation applies to property passing by

survivorship if that is property passing otherwise than by succession. However, the definition in Article 1.2(g) is somewhat circular, since whether a right is transferred by succession is precisely the issue in question. While Waters' explanatory report makes it clear that all will substitutes are to be excluded from the scope of the Hague Succession Convention, the EU Succession Regulation, by contrast, has opened the door to will substitutes by them being included within the definition of an 'agreement as to succession'. The door may be pushed further ajar in the future.

6. Conditional gifts

The law of England and Wales is familiar with the concept of conditional gifts by way of a *donatio mortis causa*. Other legal systems have similar conditional gifts, such as the French *donation entre époux*, which can be made at any time and not merely when death is in sight.

Generally, the law of England and Wales might classify a French donation *entre époux* as a testamentary disposition (as it may do for a US revocable living trust); while for the EU Succession Regulation, it and a *donatio mortis causa* will be classified as gifts and will usually be excluded from the scope of the regulation. However, it is generally gifts with an immediate proprietary effect that are excluded. A donation *entre époux* relating to the gift of a future estate may well be within the definition of an 'agreement as to succession'. Similar issues arise for property passing under a joint tenancy or other rights of survivorship. These will usually be excluded from the scope of the EU Succession Regulation. Notwithstanding the Court of Justice of the European Union's (CJEU) decision in *Mahnkopf*,[2] an attribution clause of the entire universal community under Article 1524 of the French Civil Code will also usually be outside the scope of the EU Succession Regulation.

For the purposes of clawback, the applicable succession law might include the rights of beneficiaries not only against other beneficiaries, but also against third parties in relation to property received both within and without the scope of the EU Succession Regulation, since Article 1.2(g) is expressed to be subject to such rights. Thus, although a gift itself may be outside the scope of succession, the rights of beneficiaries to a clawback claim may still be available.

This is an extract from the chapter 'The succession law ramifications of relocation' by Richard Frimston in Global Mobility of Ultra-High-Net-Worth Individuals, *published by Globe Law and Business.*

2 C-558/16.