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Brexit, charitable legacies and succession rules – what's new?

01 JULY 2020

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CATEGORY:
ARTICLE

Let's say your Charity is aware that it has been named as the beneficiary of a European legacy in a benefactor's Will. This is certainly good news, especially during difficult times. However dealing with cross-border succession presents a number of challenges that can often involve expense.

In this context, the first thing of relevance is to identify which law applies to the succession, and to the legacy as a result, as that will determine a number of matters, including the validity of the Will and of the devolution of who has the power to deal with it when the transfer of the gifted assets takes effect, to list just a few. In certain cases, it may even extend to the core concept of 'legacy'.

The European legal framework – the relevance of the EU Succession Regulation (ESR)

On 4 July 2012, the EU promoted the 'Regulation (EU) 650/212 on Jurisdiction, Applicable Law, Recognition and Enforcement of Authentic Instruments in Matters of Succession and the Creation of a European Certificate of Succession' (known as 'Brussels IV', or the 'European Succession Regulation', or 'ESR'), which came into force on 16 August 2015.

Before the ESR entered into force each member state had its own private international law rules to determine (a) which court had the jurisdiction to deal with the estate; (b) which law applied; and © which decisions of foreign courts would be recognised and enforced. This would inevitably create 'conflicts' between the various systems of laws which potentially applied to a succession or inheritance if an estate had connections to more than one member state.

Under the ESR, unless otherwise provided, the law applicable to the succession is that of the deceased's habitual residence at the time of death and this is to apply to the whole of the succession. This also applies even if the applicable law is not the law of a Member State (although in this case, renvoi is still an issue). The ESR also introduced rules to identify the jurisdiction in relation to an estate.

Additionally, the ESR allows a person to choose, either expressly or implicitly, the law of his nationality as the law to govern his succession as a whole.

The ESR applies to all assets situated in any EU Member State, to the succession of persons dying habitually resident in them, or the succession of an EU national who has elected their national law to apply to the succession. Consequently, where an estate has connections to a Member State which has 'opted in', ESR will apply even where the estate also has connections to states which have not opted in (such as the UK). Thus, the UK cannot simply ignore it.

This means that if the applicable law belongs to a civil law system, it may be necessary, for example, to assess whether the forced heirship rules are applicable to the succession and, consequently, whether the testator could leave the assets to the UK charity according to those rules. Indeed, in civil law jurisdictions, forced heirship provisions typically state that a certain proportion of the deceased's assets must be left to certain forced heirs (in particular a spouse or child), with the consequence that the legitimate heirs can promote proceedings to enforce the forced heirship rules and claim their share.

How do these Regulations apply to the UK? Do we have to discuss Brexit?

Contrary to other fields of European law, Brexit will have much less impact on the force and application of the ESR to the UK and its legal system. At least at first (and maybe even second) glance.

As said, the UK has 'opted out' of the ESR, which means that the UK has already declared itself as not bound by its terms.
However, we have to bear in mind that the ESR has universal application. This is a known concept in the international private law environment, be it European or conventional. It means that, as mentioned above, if its rules are applicable to a specific matter, they will be universally applicable and enforceable irrespective of what law is identified, or where the asset is, or where the individual is resident or a national or domiciled, etc.

Therefore, the ESR will ultimately apply, directly or indirectly, to any legacy which has a connection an EU Member State. It is the case now, and it will remain the case after Brexit.

The differences pre- and post-Brexit that one can envisage are perhaps less technical or complex than in other areas of law, but nonetheless have the potential to create yet more complications in already delicate scenarios. For instance, the European Court of Justice's rulings and interpretations will be irrelevant for the UK, once it exits the EU. This will not assist in creating the uniformity of solutions to which the Regulations are striving. And it will not help lawyers and judges in the UK when dealing with Continental matters.

What to expect when you receive the unexpected – some differences between English common law and Continental civil law

Receiving a Continental legacy may be more complicated than it seems. As discussed, one has to identify, amongst others, what law applies to the Will, whether there are any formal validity issues under the relevant law, what law applies to the succession itself, whether matrimonial property regimes or forced heirship rules are of concern, what is the proper jurisdiction and who are the individuals who can assist with the probate process and the ultimate transfer of the property.

In particular, with regards to this last point, it is important to remember that in most Continental civil law jurisdictions the estate vests directly in the heirs, and there are no Personal Representatives (PRs) with power to administer the estate.

This will become relevant when dealing with foreign Wills, or Wills electing for a foreign law to govern the estate, and with no provision for appointment of executors or other representatives. In such circumstances, working with cooperative and internationally-savvy notaries is paramount; obtaining the cooperation of the beneficiaries is also essential, as well as making sure that, where possible, powers of attorney are in place, to ease the administrative burden. In this regards, it is important to ensure that the person who signs the power of attorney on behalf of the charity is duly authorised in accordance with the constitutional documents of the charity – it is not always clear who the relevant person is, so it is helpful if charities can check the documentation clearly shows how the relevant person's authority has been conferred.

Another aspect of concern is in relation to liabilities on the estate which may fall on the residuary legatee. By way of example, following a successful claim by a forced heir, a charity residuary legatee may find itself in a situation where it has accepted a legacy which has been substantially reduced and yet is still liable in relation to outstanding debts and succession taxes.

Although in England PRs are not liable for the debts in excess of the assets of the estate, under most civil law systems heirs take their inheritance subject to liabilities. If, therefore, the liabilities of the deceased exceed the assets, a residuary legatee charity can well end up being liable for the debts.

Under the law of various European jurisdictions, a person who intends to acquire the assets to which they are entitled under the terms of a will has to formally accept the inheritance. As a consequence of the acceptance of the inheritance the heir acquires the deceased's property and is liable for the debts in the deceased's estate (such a liability is pro quota where more than one heir is beneficiary under the will).

With effect from the acceptance of the inheritance, there is no longer a distinction between the patrimony/estate of the deceased and the personal patrimony of the heir: therefore creditors of the deceased can rely not only on the assets which were part of the deceased's estate but also on the personal assets of the heir (ie the heir is bound to payment of the inherited debts beyond the value of the property received). In many circumstances, acceptance can also be implicitly inferred, unless certain steps are put in place within very strict limitation periods. Missing the deadline may clearly lead to unsatisfactory results for the unwary.

Conclusions

Legacies are of course to be welcomed, but it is important to remember that succession matters in civil jurisdictions are dealt with very differently compared to the English common law approach and in particular that claims may arise that would not in the UK. So it is important to identify the applicable law as soon as possible.

It is worth taking advice in order to understand: (i) the formalities required in order to accept the legacy, (ii) the different ways in which you can accept the legacy, (iii) the consequences of accepting the legacy. And timing is often of the essence.

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