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Private Client
Choice of Law

It may now be possible to choose the law of your nationality to apply to your entire estate (not part) on death, in accordance with the EU Succession Regulation (EU/650/2012) (also know as "Brussels IV").

Electing the law of your nationality can allow you the opportunity to avoid the "forced heirship" provisions which apply in the majority of European jurisdictions whereby specified individuals must receive a specific proportion of your estate.

This guide aims to set out when and how to make such a choice, and the consequences of doing so. This guide applies to English nationals living at home or abroad. Specific advice is available on request for non-English nationals.

It is not necessary to make a choice of law if you do not have any foreign assets nor are likely to have any foreign assets as at the date of your death.

If you do have foreign assets as at the date of your death, but no choice of law has been made, then Brussels IV provides that the law of the country in which you are "habitually resident" will apply in the event of your death. However, the UK has not opted in to Brussels IV, and so English law (and, in this guide, reference to English law means the law of England and Wales) provides for the law of the country in which the land/property is situated to apply. For English nationals, this conflict of laws is likely to result in severe difficulties in the administration of your estate.

Which jurisdictions recognise choice of law under Brussels IV?

The jurisdictions which recognise choice of law (the "Brussels IV States") are all of the EU member states except for the UK, Ireland and Denmark.

Whilst English law does not therefore allow someone to choose the law that governs succession to their estate, an English national may nevertheless still want to make a choice of law under Brussels IV. This is because English rules may determine that foreign law applies to, for example, foreign land and property on death. If that foreign jurisdiction is a Brussels IV State then the law of that jurisdiction will recognise a choice of English law.

How to make a choice of law under Brussels IV

A choice of law under Brussels IV must be made in a Will that is substantively valid under the chosen law, even if that law does not permit a choice of law. "Substantively valid" means that someone choosing English law must make the choice in a Will that meets the English test for testamentary capacity and freedom from undue influence.

Scope of Brussels IV

Brussels IV applies to succession to the estates of persons who die on or after 17 August 2015. This covers all forms of transfer of assets, rights and obligations by reason of death, whether there is a Will in place or not.

A choice of law under Brussels IV does not apply to assets that cannot be disposed of by Will or cannot pass under intestacy rules such as jointly owned assets that pass by survivorship, nominated pension plans or life policies, and lifetime gifts. Further, Brussels IV does not apply to:

- Tax matters
- The status of natural persons (for example, whether a person is the child of another person)
- The creation, administration, and dissolution of trusts (other than Will Trusts and statutory trusts on intestacy)

Consequences of choice of law

The consequences of a choice of law include:

- Entitlement to the estate. You may choose to apply English law to avoid foreign forced heirship rules and clawback provisions (that is, taking account of lifetime gifts when calculating an inheritance). However, this may result in claims against your estate under the Inheritance (Provision for Family and Dependants) Act 1975
- Taxation of the estate. A choice of law does not determine which tax law applies, but tax consequences will flow from the distribution of the estate in accordance with the chosen law. For example, a foreign jurisdiction may tax

assets that pass to any children you may have at a lower rate than assets that pass to other relatives or non-relatives. This may lead to a higher tax burden if forced heirship provisions are displaced by the chosen law

- Administration of the estate. In some foreign jurisdictions, the principal beneficiaries of the estate are entitled to administer the estate rather than personal representatives as is the case in English law. Foreign lawyers may have difficulty applying English rules on administration in practice
- Alternative planning. It might be possible to achieve your objectives in a different way to a choice of law, for example, by implementing estate planning tailored to the jurisdictions involved

Specialist legal advice should therefore be taken before making a choice of English law.

Example 1: choice of English law made for French property

Alan and Barbara are an English married couple living in England. They own a holiday home in France, and made Wills after 17 August 2015 (the date on which Brussels IV took effect) that include a choice of English law to govern their estate on death. The Wills provide for their estate to pass to the survivor of them. Alan subsequently dies.

The UK is not a Brussels IV State and so the English Court will continue to apply English rules. Under English rules, what happens to Alan's share of the French property in the event of his death is governed by French law, because it is an immoveable property situated in France. The English Court is therefore likely to follow what the French Court would do.

France is a Brussels IV State and so the French Court will abide by Alan's choice of law which means that English law determines who is entitled to the French property. The terms of Alan's Will therefore apply to pass his share of the property to Barbara, and not the forced heirship rules in French law which would have resulted in Alan's children being the beneficiaries.

Example 2: no choice of English law made for Spanish property

Christine is an English widow living in Spain with her long-term partner David. Christine owns the property in Spain in which she and David have lived ever since Christine sold her property in England some years ago. Christine has an English Will, but not a Spanish Will, made prior to 17 August 2015 (the date on which Brussels IV took effect) and so it does not include a choice of English law to govern her estate on death. The Will provides for Christine's estate to pass to David, and not her children. Christine subsequently dies.

The UK is not a Brussels IV State and so the English Court will continue to apply English rules. Under English rules, what happens to Christine's Spanish property in the event of her death is governed by Spanish law, because it is an immoveable property situated in Spain. The English Court is therefore likely to follow what the Spanish Court would do.

Spain is a Brussels IV State and so the Spanish Court would have abided by Christine's choice of law, meaning that English law could have determined who is entitled to the Spanish property instead of the forced heirship rules in Spanish law, but Christine did not make a choice of law in her Will.

Instead, Brussels IV provides that as Christine was habitually resident in Spain at the time of her death, then Spanish law governs what happens to her estate on death. Christine's children will therefore be entitled to reserved shares in her estate and to a substantial interest in the property.

However, David's solicitor advises him that English law may apply under the provisions of Brussels IV, on the grounds that, for example, an implied choice of English law can be demonstrated by the terms of Christine's Will because it refers to specific provisions of English law.

The result is likely to be a dispute between Christine's children and David about entitlement to the Spanish property. It is uncertain whether the Spanish Court will accept that there is a valid choice of English law. The English Court is likely to apply the law that the Spanish Court would apply in the circumstances (but this is not certain).

A choice of law in Christine's Will could have helped avoid this situation.

Key contacts

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