Freedom *come?*

Succession planning where other European countries are involved is rarely straightforward. ***Alberto Perez Cedillo*** *explains how the Brussels IV Regulation, now in force, aims to simplify matters, and outlines its key provisions*

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As a result of the sometimes profound differences between the various legal systems in force in EU member states, the free movement of goods and persons in those states raises a considerable number of problems when it comes to applying the relevant civil legislation.

This is particularly evident in matters of succession. Examples include the different laws concerning forced heirship rules in terms of issues such as determining legatees and the amount of the forced shares; the laws on agreements as to succession and joint wills (permitted and regulated in some countries and prohibited in others, with variations even between territories within a single country, as is the case in Spain); or the different laws covering intestate succession. The list goes on.

The death of a European citizen outside their country of nationality raises the question of which law is applicable to their succession. The problem is further increased if that person owns property in territories of two EU member states – let alone a third.

In order to try to resolve these issues, the European Parliament approved Regulation 650/2012 of 4 July 2012 on succession (otherwise known as Brussels IV). Brussels IV is applicable to all member states, with the exception of the UK, Ireland and Denmark. It applies to the estates of all individuals dying on or after 17 August 2015, although certain provisions – such as the choice of law applicable to the succession concerned – were already in force. In this article, I consider the key provisions of Brussels IV.

DELIMITATION OF SCOPE

The delimitation of scope set out in article 1 and the preamble of Brussels IV is key, in view of the wide variety of issues relating to succession.

In this respect, it is necessary to bear in mind the meaning which the regulation gives to the legal expression 'disposition of property upon death' which, within its framework, can only refer to the will and the agreement as to succession. Brussels IV therefore expressly excludes from its scope the following succession-related matters, which will continue to be regulated by the relevant national laws:

- the status and family relationships of natural persons, their legal capacity, and declarations of absence and death;
- matrimonial property regimes (including the particular effects arising from them upon death) and property regimes of unmarried partnerships;
- maintenance rights of any kind;
- the formal validity of dispositions of property upon death;
- transfers made after the death of a person otherwise than by succession (eg by way of gifts);
- rules legally provided for by legal persons in matters of hereditary succession of their associates, in respect of the latter's shares in the assets or capital of the entity;
- the extinction of legal persons;
- the creation, administration and dissolution of trusts;
- the nature of rights *in rem* and the recording of such rights in public registers; and
- revenue matters and administrative matters of a public law nature.

APPLICABLE LAW

Personal and territorial law can both apply in succession matters across EU member states; Brussels IV generally inclines towards territorial law, determining that the succession law of the deceased person will be that of their habitual place of residence at the time of death (with certain exceptions).

Out of respect for the principle of free will, Brussels IV does allow that the applicable law may be the law of the nationality which the deceased had at the time of making the choice of law, or at the time of death. The choice of law necessarily has to be made in a disposition of property upon death, either expressly or in such a way that it may be inferred in a clear manner. It may be modified or revoked at any time, using the same type of instrument. For practical purposes, the choice should be made in the clearest possible way.

Logically, in successions where there is no will or agreement as to succession (intestate estates), the general rule, namely that of the deceased's habitual residence, will apply by default.

The applicable law, whether legally determined or freely chosen, will govern the succession 'as a whole', regardless of the nature of the assets or the state in which they are located.

As a general rule, the applicable law under the above-mentioned criteria will apply to both extrajudicial acts of succession and those of a judicial nature.

DEFINITION OF HABITUAL RESIDENCE

Article 21.1 concerns applicable law and refers to the law of the state of the last habitual residence of the deceased as a connecting factor. It states that this has been chosen as a factor, rather than nationality, because habitual residence is

the location of the 'centre of interests' of the deceased, and also probably where their main assets are located.

According to Brussels IV, this is different from the common law concept of 'domicile'. This is because domicile not only presupposes objective proof of residence in and integration into another country, but also the intention to remain there permanently and not to return. Domicile could therefore be described as belonging to a particular territory. Thus, there may be many British people with habitual residence in Spain, but few could be considered to be domiciled there, because it would be necessary to prove that they wish to disconnect themselves from their country and have no intention of returning.

The authority (a notary or judge, in the case of Spain) must determine the place where the centre of interests (the centre of activities or the 'existence' of a person) is located, having regard to a set of elements and real, actual and objective facts, namely: in which country or legally autonomous territorial unit within a country the person has established their residence; where their job is based; whether or not it is a seasonal job and, therefore, the stability of their residence; whether they have acquired assets; the conditions of their stay and so on.

It will not always be easy to determine the place where a person has their habitual residence (their centre of interests), and so in the case of testate succession, it is very important for the testator to state in the clearest possible terms the place of their habitual residence at that time. For example, consider a British national spending half of the year in Spain and the other half in the UK, as is quite often the case.

STATES WITH MORE THAN ONE LEGAL SYSTEM

Brussels IV also addresses the problems that may arise when it is applied in states that have different laws on matters of succession within their own territory – this is the case in Spain, among others. When Brussels IV dictates that it must be 'Spanish law' that regulates the particular succession of a Community citizen, it will be the internal conflict-of-laws rules that will apply in Spain.

SPECIAL RULES IN SUCCESSION MATTERS

Brussels IV provides for a series of special rules relating to succession, as follows.

Agreements as to individual succession are only valid if they are executed pursuant to the law that would be applicable under Brussels IV on the date of conclusion of the agreement, if the death of the person executing it should occur at that time. If the agreement is executed by more than one person, that requirement shall apply in respect of all the parties involved. All of this is without prejudice to the law of choice applicable to every hereditary succession, to which those executing the agreement are entitled.

Where a person invokes a right *in rem* to which they are entitled under a particular hereditary succession, and the law of the member state in which the right is invoked does not know the right in question, that right shall be adapted to the closest equivalent right *in rem*.

If two or more persons die simultaneously and a different succession law is applicable to each of them, none of the deceased persons shall have any rights to the succession of the other(s).

In the case of an estate without a claimant, the member state may, if it is entitled to do so, appropriate the assets located in its territory, regardless of the applicable succession law. It must always respect the rights of the creditors of the deceased.

The public policy (order public) of a state can prevent the application of a succession law, if it is contrary to such policy.

EUROPEAN CERTIFICATE OF SUCCESSION

Brussels IV introduced the creation of a certificate of succession: an authentic instrument establishing the succession rights of an EU citizen, once the law which is applicable to the deceased has been determined. The rights established by the certificate are those relating to the heir, legatee, and executor of the will or administrator of the estate.

The certificate has evidentiary effects, needing no further procedures in the state in which it is to produce its effects. Those effects include that of being a valid document for the recording of succession property in the relevant register of a member state, without prejudice to the fact that the certificate must meet the necessary requirements to proceed with that recording in the state in which the register is located.

The certificate may only be issued in each member state by a court or by public officials who are vested with competence in matters of succession.

In any event, there is no obligation to apply for or use the certificate: it is entirely at the discretion of the person entitled to apply for it.

CONCLUSION

Brussels IV is a positive step in resolving the difficulties around succession for those living in the EU. But it remains fairly complex itself, as it does not define what it means to be habitually resident in a country other than the individual's nationality. Recital 23 refers only to vague concepts such as the 'overall assessment of the circumstances of the life of the deceased during the years preceding his death', the 'duration and regularity of the deceased's presence' and the 'conditions and reasons' for that presence. Surprisingly, a central succession register has not yet been established, and one wonders what will happen if contradictory certificates of succession for the same estate are in circulation.

The complexity of Brussels IV will make it difficult to apply in practice, and therefore the role to be played by the competent authorities will be of great importance. The key point to emphasise is that persons residing outside the country of which they are nationals, or who have properties in another member state, need to take the decisive step of self-regulating their succession property by a gesture as simple as making a will and formally recording their habitual residence.