Spanish **ties**

Nine months after it came into force, ***Alberto Perez Cedillo*** *addresses the impact of the Brussels IV regulation on cross-border successions in Spain – and details other Spanish internal laws you need to be aware of when dealing with an estate*

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Regulation 650/2012 of 4 July 2012 on succession (otherwise known as Brussels IV) came into force on 17 August 2015 for the estates of persons who die on or after that date. It has fundamentally changed the private international laws of Spain regarding succession without affecting its material law. As such, Spanish statutory legacies and any other internal laws of succession remain the same. In this article, I consider what Brussels IV means in practice for Spanish cross-border succession law, and the key considerations for the UK practitioner when dealing with Spanish domestic law as part of the winding up of an estate.

HABITUAL RESIDENCE

The default connecting factor in private international law is habitual residence. So, by default, the competent court and the applicable law will be those of the habitual residence of the deceased. However, this represents a fundamental change for Spaniards, as up to now the law of their nationality was the only law which would govern their succession.

The concept of habitual residence is not defined in Brussels IV. For a significant number of English nationals who, for non-professional or economic reasons, live between Spain and England for several months of the year without settling permanently in either country, this could mean that they may have difficulty in determining where they are habitually resident.

In such cases, it will be necessary to look at where the centre of interest of the deceased's family and social life was located. Failing this, the fact that the deceased was an English national or all their assets were located in Spain could be special factors in the overall assessment of all the factual circumstances. Of course, there will be cases in which the final decision, if contested, will be left at the discretion of the judge: for example, an Englishman with dual Spanish and English nationality and property in both countries, who had lived in each country for six months of the year.

There are matters excluded from the scope of Brussels IV but upon which the regulation may still impact. For example, Brussels IV countries can still apply their own taxation rules, but the choice of law of the deceased may have indirect consequences on taxation. Spanish law may be applicable to an English national habitually resident in Spain, which implies that statutory legacies will be taxed differently than if the state was subject to UK law. Equally, tax will be payable by the beneficiaries and not the state, because in Spain it is not compulsory to appoint an executor and, more often than not, beneficiaries inherit directly and are always responsible for the payment of their own taxes.

MATRIMONIAL ECONOMIC REGIMES

Although they have no equivalent in English law, these regimes are absolutely central to Spanish law. They are a set of legal rules that govern the financial relations of spouses both during and after marriage. In Spain, there is no marriage without an economic regime: if a regime is not chosen by the spouses, one will apply by default. This may affect any English person married to a Spaniard, as if there is no common nationality or place of residence, the applicable law will be that of their habitual place of residence immediately after their marriage. If the surviving spouse is habitually resident in Spain at their time of death, Spanish law may determine that their economic regime should be dissolved, liquidated and divided, excluding some assets from the estate before they are distributed in accordance with the applicable economic regime.

TRUSTS

The creation, administration and dissolution of trusts are excluded from Brussels IV, but trusts should not be overlooked by the practitioner. Spain does not recognise trusts, nor has it anything equivalent. However, if a trust is created by an English will, it will still have to be dealt with.

JURISDICTION

By default, jurisdiction will be that of the last habitual residence of the deceased. The choice of forum is not available to the testator. Brussels IV completely excludes the national rules of member states, which determine whether or not Spanish courts will have general, but not local, jurisdiction (the court within Spain which has local jurisdiction is left to the internal jurisdiction of Spain, where there are no dedicated probate courts).

APPLICABLE LAW

By default, the applicable law is the law of the state where the deceased was habitually resident. By explicit choice, it can be the law of the nationality of the deceased. If the deceased had multiple citizenship, Brussels IV allows them to elect in their will their national law of choice. There are an increasing number of Spanish nationals who have dual nationality and therefore could benefit from this choice.

RENVOI

For English nationals owning property in Spain, it is vital that they make an express choice of English law in their will to ensure that Spanish law does not apply by default. This is because Brussels IV prohibits *renvoi* when English law has been specifically chosen by the deceased, as this will mean overriding the express choice made by the deceased in their will.

LOCAL LEGISLATION

There are 17 autonomous communities in Spain with different statutory legacies and taxation regimes to be aware of. To determine which community applies to an English resident in Spain, it is necessary to use the Spanish internal rules of conflict, applied when there are conflicts between communities, or else apply the law of the community with which the deceased showed the closest links.

EUROPEAN CERTIFICATE OF SUCCESSION (ECS)

The ECS is used by beneficiaries, legatees, executors and administrators invoking their status in other member states to exercise their rights. The ECS will be issued by the authorities of the participating member state in which the deceased was habitually resident, which in Spain's case will be the notary publics. The ECS is valid without the need for any special procedure to be followed.

The obtaining of an ECS is not compulsory or exclusive, in the sense that Spain will still have jurisdiction to issue a similar local certificate according to national law, even if it does not have general jurisdiction for the succession. In this way, Spain will be able to produce a deed of declaration of inheritance to wind up the estate of an English national in Spain. This will remain the standard procedure for small estates that involve a single holiday home in Spain, for example.

In cases where an English national dies owning property in two jurisdictions, such as Spain and the UK, the ECS will not be particularly useful, as it is likely that the winding-up of the estate will remain the same by following the internal procedures of both jurisdictions. The ECS will be more cost-effective and practical in cases when the estate involves property in various countries.

PRACTICAL TIPS FOR ESTATE PLANNING

Wills

Spanish succession laws stipulate that both descendants (children or grandchildren) and ascendants (parents or grandparents) will inherit with priority over a surviving spouse. They are generally entitled by law to inherit two-thirds of the estate. For English nationals, the choice of English law seems to be the standard option. In my opinion, it is vital to have two separate wills: one Spanish and one English, both making clear that they refer solely to the assets located in England or Spain respectively, and that the chosen law is English law or Spanish law.

The best reason to make a Spanish will is that it will make it much easier to administer your Spanish estate upon your death. Spain has a Central Registry of Wills located in Madrid. Any will that is witnessed by a notary anywhere in Spain will have the details sent there. The original will is stored for safekeeping by the notary themselves.

Working with notaries

The Voluntary Jurisdiction Act (15/2015 Act of 2nd July) (VJA) aims to simplify and update procedures in matters where there is no dispute, but the intervention of a member of the judiciary is needed. Matters of voluntary jurisdiction can now be dealt by notaries and registrars, rather than the judiciary.

Spanish notaries are legal professionals and public servants. In this latter role, they authorise public documents, acts, wills etc. Only documents executed before a notary public can be accepted by a registry in Spain.

Wills, deeds of charge, conveyancing, acceptance of inheritance and other documents are drawn up by the notary public in a specific format in which the notary public declares what is happening before them. Their role in the execution of wills is central, as they witness the date of signature, the content, testator's signature, their capacity etc. As public records are based on what the notary sees, hears or perceives, the validity and veracity of acts recorded by the notary public is extremely difficult to challenge before a Spanish court.

Notaries, registrars and court clerks are now entrusted by the VJA with new areas of work where their technical experience is necessary. Notaries now deal with the solemnisation of marriages, separations or divorces when there is mutual consent, no offspring and non-contested monetary claims. Court clerks will deal with the appointment of the Spanish equivalent of the executor (*albacea contador partidor*), mutual consent divorces and segregation of unregistered land, amongst other things.

It is hoped that allowing notaries to authorise intestate successions in non-contentious probate matters will considerably speed up the winding up of estates in Spain.

Spanish inheritance taxes

A recent European Court of Justice ruling (Case C-127/12 *Commission v Spain*, 3 September 2014) has ended the discrimination between Spanish residents and non-residents with regards to inheritance tax (IHT). From now on, British nationals can benefit from the same tax treatment as residents for IHT and gift tax purposes.

Madrid, Cantabria and Rioja have one of the highest deductions for spouse and descendants, which can be as high as 99 per cent, followed by Castilla La Mancha at 95 per cent and Cataluña up to a maximum of 99 per cent. Asturias, Murcia and Andalucía have considerably lower IHT allowances.

Common Reporting Standard

The Common Reporting Standard (CRS) has been in place since January 2016. All banking and financial institutions are obliged to disclose a client's necessary tax information to the tax authorities. The first exchange of information is scheduled for January 2017. This could have a negative impact on those British nationals who are tax residents in Spain and have not previously disclosed their foreign assets by virtue of the 720 form. It is strongly recommended that you check that those clients already resident in Spain, and those who are planning to move there on a permanent basis, are in compliance with the tax legislation in place.