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The EU Succession Regulation

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The new EU Succession Regulations and its effect on succession planning for South Africans with assets in Europe, as well as EU residents with assets in South Africa.

1. Introduction

The EU Succession Regulation (SR) was agreed in 2012 and came into force on 17 August 2015 for the estates of persons who die on or after that date. The parties to the SR are 25 of the 28 members of the European Union. The United Kingdom, Ireland and Denmark have exercised their right not to opt in to the SR for the time being, so that the provisions of the SR have only limited effect in these countries.

2. What are the aims of the SR?

The SR attempts to harmonize the conflict of law rules on cross-border succession. It aims to answer two important conflict of law questions:

- which court is competent to deal with a cross-border succession?
- which law governs a cross-border succession?

The two issues have assumed increasing importance with the greater mobility of persons, many of whom own assets in several different jurisdictions. In January 2014 the number of individuals living in EU Member States other than their home state was estimated at 14 million. Over 1 million UK residents own property, principally holiday homes, on the Continent. 200,000 German citizens own property in Spain.

3. Traditional connecting factors

Prior to entry into effect of the SR different legal systems in Europe used different connecting factors as a starting point to determine the law applicable to succession matters. For example, Germany would look to the country of nationality of the deceased; France would look to the country of permanent residence ('domicile' in French).

Under English private international law (PIL) the connecting factor was, and remains, the domicile of the deceased (as under South African PIL), and being a schismatic system (like South Africa) England applies the succession law of domicile to movable assets and the law of the situs to immovable property.

Against the background of varying European systems this major step towards harmonization is to be welcomed, although the application of the Succession Regulation does not resolve all the problems that are likely to arise.

4. So what does the SR do?

It provides that one single system of law will, in principle, apply to the deceased's estate and it determines which national court will have jurisdiction over the administration of the estate. It also provides common rules that determine the validity of a will, and the capacity of the testator.

5. What the SR does <u>not</u> do

The SR does not seek to harmonize the substantive law of succession, so each national system will continue to apply its own rules concerning devolution on intestacy or compulsory entitlement for certain related persons (forced heirship). Nor does the SR have any application to the following:

- Taxation
- Matrimonial property
- Gifts
- Insurance contracts
- Trusts

All of the above will remain governed by existing national laws, including the conflicts rules of such systems.

6. So how does the SR achieve harmonization?

Article 21.1. SR stipulates that the general (or default) rule is that the law applicable to the succession as a whole shall be the law of the State in which the deceased had his habitual residence at the time of his death. But if it is clear from all the circumstances of the case that, at the time of death, the deceased was manifestly more closely connected with a State other than the State whose law would be applicable under Article 21.1 then the law applicable to the succession should be the law of the other State.

The SR does not provide a definition of “habitual residence” but it is clear that it is necessary to make an overall assessment of the circumstances of the deceased’s life during the years preceding his death and at the time of his death, taking into account all relevant factual elements. A reasonable definition seems to be: **Habitual residence means the objective outcome of the intention to stay not only temporarily at the place where a person has his family, social and professional closest connection**.

7. The national law option

Under Article 22 SR a testator can override the ‘habitual residence’ rule by choosing as the law to govern his succession as a whole the law of the State whose nationality he possesses at the time of making the choice, or at the time of death. Where a person has more than one nationality he may choose the law of any State of which he is a national. The choice of law is a choice of the substantive law, and does not include the PIL rules of that law.

This option will obviously be of particular help to testators who live in a country having a civil law system with forced heirship rules, but where that testator has the nationality of a common law country whose legal system allows freedom of testamentary disposition.

Article 22(2) SR explains that 'the choice shall be made expressly in a declaration in the form of a disposition of property upon death or shall be demonstrated by the terms of such a disposition'. An express declaration is easy to envisage. An implied demonstration might be as simple as a reference to the statutory provisions of that particular law. Many testators will already unknowingly have made a choice of law; article 83(4) SR allows that 'if a disposition of property was made prior to 17 August 2015 in accordance with the law which the deceased could have chosen in accordance with this Regulation, that law shall be deemed to have been chosen as the law applicable to the Succession'. If therefore a UK resident owns property in France and has an existing English will that includes that property the widely drawn provisions of Article 83.4. SR must mean that this will count as a choice of English law to apply the succession of the French property. However, each situation will need careful consideration and to avoid any doubt it may be best to make a new will containing a clear choice of English law to apply to the estate of the deceased.

8. Jurisdiction in one country

While Article 22 SR allows a testator to select his or her national law to govern his or her succession the Succession Regulation does not allow a testator

to choose the jurisdiction to rule on the succession as a whole. Instead, the courts of the jurisdiction in which the deceased has his habitual residence at the time of death will be competent to administer the succession as a whole.

If an individual dies in a third State outside the SR Zone leaving assets in the SR Zone then the Member States will only have jurisdiction limited to the assets within their territory. However, under Article 10 SR, if the deceased has assets at death in a Member State of which they are a national or in which they have been habitually resident in the previous five years, that Member State will have universal jurisdiction. Thus, if a French national having been habitually resident in France until 2013 emigrates to England where he dies in 2016, but still owns a small property in the South of France in theory at least France will have universal worldwide jurisdiction. How this will work in practice remains to be seen.

9. The European Succession Certificate (ESC)

The EU Succession Regulation introduces the ESC which is intended to allow someone entitled to the estate to demonstrate that fact without having to obtain probate or the equivalent in other Member States. Much of the detail

still stands to be made in the form of subsidiary EU legislation, but already it is doubtful how much difference it will really make, because the ESC will not be conclusive of the facts stated in it, but merely raise a presumption (Article 69.2.).

At present, a French heir seeking to obtain probate or letters of administration in England needs to provide translations and expert evidence of French law to demonstrate his entitlement. This can be expensive. It would be possible for the proposed new English Non-Contentious Probate Rules to allow an ESC to be used to justify a grant without the need for these materials, but the matter has not been the subject of the recent consultation on the new Rules.

However, it is likely that the ESC will be given greater recognition and effect between the civil law countries of the EU, and will allow heirs, legatees, executors, or administrators to prove their legal status and/or rights in relation to cross-border assets.

10. But does this have any relevance to estate planning for South African citizens and/or residents?

The SR is of universal application, and Article 20 provides that any law specified by the Regulations shall be applied whether or not it is the law of a Member State. Therefore it will have application:

- To a national of a third State who is habitually resident in a Member State
- To a person who has his habitual residence in a Member State but owns assets in a third State
- To a person who has his habitual residence in a third State but owns assets situated in a Member State

11. Some practical examples

South African national resident in the SR Zone (e.g. France, Italy or Spain).

If he dies having his habitual residence in a Member State then that State will have jurisdiction over his whole estate and unless he opts for his national law the law of the State of his habitual residence will apply to all his assets. But he can (and probably should) opt for South African law, and this choice will be of the internal law of South Africa, thus excluding South African PIL rules.

South African national resident in South Africa, but owning assets in the SR Zone

The SR Zone immovable assets of a South African citizen whose habitual residence is in South Africa will be subject to the jurisdiction of the courts of the SR Zone State. The law of habitual residence will apply but this includes South African PIL rules and this would mean a renvoi back into the SR Zone. The local law will be applied to the local immovables only. This will not represent a significant change in France, but will in Spain or Portugal, where currently the renvoi has not generally been accepted. To avoid complications the South African resident could make a will governing his SR Zone immovables and elect South African law to govern his estate.

South African law will also apply to the administration of his estate (see Section 8 above) and this will raise some practical problems in civil law jurisdictions. How, for example, will a notary in France acknowledge and give effect to the status of South African executors or trustees under the South African will?

SR Zone resident owning assets in South Africa

The law of his habitual residence in the appropriate SR Zone country will, in principle, apply to his whole estate unless, of course, he elects his national law. With regard to movables in South Africa I understand that South Africa, applying the law of the deceased's domicile (which might or might not be the same as his habitual residence) would apply the law of the SR Zone country. But with regard to any immovable property in South Africa I can imagine that South Africa would apply the law of the situs (i.e. South Africa).

South African resident owning property in England

As noted above, the United Kingdom, while still a member of the EU, has decided not to opt in to the EU Succession Regulation. This has given rise to considerable discussion as to whether the UK is, in the wording of the SR, a “Member State” or a “Third State”. The answer to this in fact has little impact in practice and UK citizens or other nationals habitually resident in England can avail themselves of the optional choice of national law described above in Section 7.

For South African residents owning property in the United Kingdom, the rules for determining the law applicable to the succession to that property remain unchanged. Succession to movable property will be governed by the law of domicile of the deceased including the rules of renvoi (if applicable) under that law and succession to real estate in England will be governed by the law of the situs i.e. English law.

11. Public policy – Article 35 SR

The application of a provision of the law of any State specified by the Regulation may be refused only if such application is manifestly incompatible

with public policy (*ordre public*) of the forum. This could, for example, potentially upset the plans of a French citizen who moves to England specifically to avoid the application of French forced heirship rules to his estate. But most commentators agree that Article 35 SR would be judged by the courts of the forum on the specific facts of the case, and it would not apply to the case of an habitual resident and national of a common law country who chose his national law (which allows testamentary freedom) to apply to his whole estate, including assets in a civil law jurisdiction.

12. Conclusion

The EU Succession Regulation will certainly simplify cross-border estate planning within the SR Zone, although some clarification may still be necessary. The European Court of Justice will in due course provide that further clarification. The EU Succession Regulation will, as we have noted, have an impact on Third State nationals who are habitual residents of the SR Zone, or who have assets there, and the optional choice of national law will be a welcome solution for residents of countries such as South Africa where freedom of testamentary disposition is a traditional precept.