By Barbara R. Hauser

European Harmonization

Will Brussels IV succeed?

Every country[1] in the European Union (EU) has its own laws and traditions for inheritances. This presents a problem when someone dies with assets in more than one country, as the conflict of law rules (known as "private international law") result in somewhat chaotic treatment. The Hague Conference on Private International Law (Hague Conference) considered the following example:

> A person dies domiciled in the Netherlands. Together with his or her Dutch goods, the decedent leaves a building in England, a bank account in France and a trunk in a Swiss bank. The Dutch court may have jurisdiction on the basis of the decedent's domicile. Jurisdiction may be exercised regarding the entire succession, while an English judge probably has jurisdiction only concerning the liquidation of the English building. In France, a judge could make a decision because of the nationality of one of the parties…[2]

As one additional background note, the fact that England is a member means that two extremely different legal systems would need to be harmonized. The English system (common law) allows nearly unlimited testamentary freedom. The other members (civil law countries) all have some form of "forced heirship" (that is, limits on a testator's rights to distribute assets to someone other than his children).

The Hague Conference

The Hague Conference tried to solve this problem back in 1989, when it issued its 32nd Convention,[3] the "Convention on the Law Applicable to Succession to the Estates of Deceased Persons." This Convention's goal was to determine a single law that would apply to the various inheritance issues.

Article 3 sets out the preliminary rules for choosing the law that would apply:

(1) Succession is governed by the law of the State in which the deceased at the time of his death was habitually resident, if he was then a national of that State.

(2) Succession is also governed by the law of the State in which the deceased at the time of his death was habitually resident if he had been resident there for a period of no less than five years immediately preceding his death. However, in exceptional circumstances, if at the time of his death he was manifestly more closely connected with the State of which he was then a national, the law of that State applies.

(3) In other cases succession is governed by the law of the State of which at the time of his death the deceased was a national, unless at that time the deceased was more closely connected with another State, in which case the law of the latter State applies.[4]

This introduced a new concept of "habitual resident," which caused some academic controversy. It became more complicated, however, because Article 5 allows a person to "choose" the law that will apply:

> A person may designate the law of a particular State to govern the succession to the whole of his estate. The designation will be effective only if at the time of the designation or of his death

Barbara R. Hauser is an independent global family advisor based in Washington

such person was a national of that State or had his habitual residence there.

To add even more complexity, Article 6 allows a person to choose (with some limitations) different laws for different assets![5]

Many were hopeful that the Convention would solve many of the problems caused by conflicting jurisdictions. Internation trust expert Donovan Waters, who participated in the Conference, wrote:

> This Convention…is probably one of the most interesting and potentially far reaching that has been adopted by the Hague Conference in recent years…It is very much to be hoped that the enthusiasm…will be translated into an adoption…of this rather remarkable and unexpectedly successful Convention.[6]

In any event, the Hague Convention has met with scant approval. Only one country has ratified it (the Netherlands) so it hasn't gone into effect anywhere.[7]

EU History

After 1989, no significant international attempts were made to harmonize inheritance laws, until the European Commission (EC) issued a "green paper" in 2005, titled "Succession and Wills."[8]

A "green paper" discusses a particular policy area and is addressed to interested parties "who are invited to participate in a process of consultation and debate. In some cases, they provide an impetus for subsequent legislation."[9] The green paper provoked discussion and comments.

In May 2006, the European Parliament (EP) (committee on legal affairs) issued its draft report on the green paper, which concluded with a request for the EC to develop a proposal:

> [The EP] Calls on the Commission, during 2007, to submit a legislative proposal to Parliament under Articles 65(b) and 67(5), second indent, of the EC Treaty in order to deal with succession and wills; calls for that proposal to be drawn up in the light of interinstitutional discussion and in keeping with the detailed recommendations set out at annex.[10]

One of the recitals in the draft report referred to the marked differences in the inheritance laws of member countries and commented:

One of the recitals in the EP's draft report referred to the marked differences in the inheritance laws of member countries.

> [W]hereas these differences, in so far as they make it difficult and expensive—sometimes very difficult and expensive—for heirs to take possession of the estate, create obstacles to the exercise of the freedom of movement and the freedom of establishment referred to in Articles 39 and 43 of the EC Treaty and the enjoyment of the right to own property, which is a general principle of Community law….[11]

That any sort of harmonization might be quite difficult is presaged in another recital:

> [W]hereas, when dealing with the subject of succession and wills, it is essential to uphold certain fundamental tenets of public policy, such as the principle that a portion of the estate must necessarily be reserved for the closest relatives of the deceased, and that the testator is, therefore, subject to those constraints when drawing up his will (the 'reserved portion' principle)….[12]

Brussels IV

It has been a very slow process, but, in late 2009, the EC issued a proposal for the EP to consider. Although the original project, in the green paper described above, was entitled "succession and wills," the 2009 proposal removed the subject of "wills" and deals only with succession.[13]

The EC agreed that there's a serious need for simplification if at all possible. In its October 2009 memo on "Simplification of regulation on international successions" it stated:

> In a Europe whose citizens are ever more mobile, the great difficulties caused by the disparate rules applicable to successions in the Member States can no longer be ignored. It is reckoned that there are 4.5 million successions a year in the EU, about 10% of which have an international dimension. This means there are almost 450,000 successions in the EU with a cross-border dimension. The value of these international successions is estimated at EUR 123 billion a year.[14]

The EC notes that the lack of certainty about which state's succession laws will apply has created a serious lack of certainty, perhaps even causing persons to limit their freedom of movement from one state to another. The EC states that the objective of the proposal is:

> to enable people living in the European Union to organise their succession in advance and effectively to guarantee the rights of heirs and/or legatees and of other persons linked to the deceased, as well as creditors of the succession.[15]

> The proposal's purpose is to determine which single country's succession laws would apply to the estate of a decedent.[16] The actual title is "The proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession."[17]

Known as "Brussels IV," the proposal wouldn't include the concept of renvoi (that is, requiring the court to consider the conflict laws of the foreign jurisdiction) and wouldn't allow a split system (that is, "scission") in which one law would apply to one category of assets (such as homes) and another law would apply to a different category of assets (such as intangible investment interests). For example, the law of England does apply scission:

> Under English common law, the succession to the movables of a person who dies intestate will be governed by the law of his domicile at the date of his death. …
>
> The succession to the immovables of a person who dies intestate will be governed by the law of the state in which the immovables are situated.[18]

Under the EC's proposal, only one country would be selected and that one law would apply (without scission or renvoi) to all of the assets. Actually, though, this will apply only to assets located in one of the 27 EU countries. Also if a country, such as the United Kingdom (or Denmark) doesn't join in the proposal, the EU rules wouldn't apply to decedents or assets in that country.

The one law that would apply to successions would generally be "the law of the last habitual residence of the deceased."[19] There's an exception in Article 17

Brussels IV wouldn't allow a split system in which one law would apply to one category of assets and another law would apply to a different category of assets.

(called "freedom of choice"), which allows someone to "choose as the law to govern the succession as a whole the law of the country whose nationality they possess." That choice would have to be clearly and properly documented.

Brussels IV has provoked extreme reactions in England, which is unlikely to join in the proposal.[20] The principal objection comes from the civil law countries' use of forced heirship and related "claw-back" provisions (that is, provisions allowing heirs to reclaim gifts made by the decedent during the decedent's lifetime). The claw-back provisions are intended to protect the children's inheritance rights from depletion by the use of lifetime gifts. The actual rules vary by country but residents in England object to the uncertainty this would give to any lifetime gifts. England and Wales have no forced heirship rights.

The House of Lords issued its own report (The EU's Regulation on Succession Report with Evidence) in March 2010. It highlighted the problems caused by the claw-back rules:

> We identify, as a serious defect in the proposal, that it could result in gifts made in the UK by deceased persons during their lifetime, including gifts to charity, being claimed back by their heirs, under a process known as clawback.[21]

The highly regarded Max Planck Institute of Comparative Law issued its own 155-page detailed critique of the EC's proposal.[22] Among other topics, the critique cautions that the failure to address marital property rights is likely to increase the complexity of reform in the area of succession. Other commentators have expressed concerns about the lack of uniform treatment to those in same-gender marriages, or to those who follow Shariah succession law, which is a "personal" (not geographic) law followed by Muslims (and which has its own forced heirship provisions).

Although there has been substantial progress within the EU, it thus remains to be seen whether the EP can develop a proposal that will be acceptable to England (and Wales).

As noted in one expert's comments to the House of Lords:

> This proposed regulation is of a very different order to others in the area of judicial co-operation (e.g. Rome I on contractual obligations), because succession (or inheritance) law is much deeper in the spirit of national legal systems. It is a more fundamental part of the DNA of a legal system in a way than is, say, contract law…. In addition, however, land has an almost mystical significance for us as a symbol and a measure of nationhood. …. Rules about land *matter*. …Succession or inheritance law is about the transmission of such property rights from their owners …. But it also goes on to reflect important social and economic choices made by a legal system, such as who is deserving of support on a death, and who is not, and how the entitled are to be protected against others, such as the market. The values and choices that it embodies underpin much of the rest of the system. That is why I refer to it as an important part of the legal DNA. Exposing your legal DNA to foreign influences may have far-reaching consequences which you cannot foresee at the time.[23]

As Martyn Gowar (a well-known English solicitor who speaks and writes on these issues) has commented to me, the depth of the differences between common law and civil law inheritance systems is enormous:

> I think it is fair to say that common lawyers cannot understand how anyone would want to be straight-jacketed by forced heirship—but similarly, Europeans feel as instinctively that forced heirship is the system that is appropriate, and by and large wish to retain it![24]

Will Brussels IV succeed? Will it work at all if the common law countries choose not to participate? Only time will tell, but it will not be simple—inheritance laws reflect deeply embedded cultural policies.

Endnotes

1. There are currently 27 country members in the European Union (EU).
2. G. Droz, in *Actes et Documents de la Douzième session*, 1972, t. II, p. 16.

3. *See www.hcch.net* for a listing of all of the Hague Conventions and their status.
4. Hague 32nd Convention, Article 3.
5. Article 6 provides (subject to some limits): "A person may designate the law of one or more States to govern the succession to particular assets in his estate."
6. Donavan Waters, "The Hague Convention of the Law Applicable to Succession to the Estates of Deceased Persons," *The International Academy of Estate and Trust Law,* 1989, p. 1.18.
7. To go into effect, a Convention requires ratification by at least three countries.
8. Commission of the European Communities, Brussels, Jan. 3, 2005, COM(2005) 65 final, green paper, Succession and wills (SEC (2005) 270).
9. *www.europa.eu/documents/comm/index_en.htm.*
10. Draft Report, Recital "D."
11. Case C-268/96, Generics (UK) and others, (1998) ECR I-7967, point 79, and the case law referred to therein.
12. Draft Report Recital "I".
13. A version of these comments will also appear in Barbara R. Hauser, *International Estate Planning: A Reference Guide* (Juris Publisher, 2010 update.)
14. European Commission, Simplification of regulation on international successions (Oct. 14, 2009), p. 1.
15. Explanatory Memorandum, Section 1.2.
16. By "a country's succession laws" the proposal has eliminated the possible inclusion of "renvoi," which means that the confusion that is often caused by the application of a country's conflict laws (private international law) is eliminated. Only the actual succession laws of a country will be applied.
17. For the full text, *see http://ec.europa.eu/civiljustice/news/docs/succession_proposal_for_regulation_en.pdfj.*
18. "EU study on the international law of succession," (England and Wales) p. 683. (reporters Sarah Albury, Solicitor, London, Judith Ingham, Solicitor, London, Paul Matthews, Solicitor, London, and Samantha Morgan, Solicitor, London.
19. The same concept used in the Hague Convention.
20. Technically, it would be the United Kingdom that would or wouldn't be a member, but even within the United Kingdom there are very different succession laws in England, Wales and Scotland (which is a mix of common law and civil law) and Northern Ireland.
21. House of Lords, 6th Report of Session 2009-10, p. 5.
22. Max Planck Institute for Comparative International Private Law, Comments on the European Commission's Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in mattes of succession and the creation of a European Certification of Succession.
23. Paul Matthews, minutes of evidence to the House of Lords committee on European Union, Nov. 25, 2009, p. 1.
24. Email on file with author.