

Cross Border Estate Issues:  
The European Dimension



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FARRER & Co

## Cross border estate issues

- Where are we now?
- Road to harmonisation
- Brussels IV
- Other EU initiatives



## Where are we now?

### **International Succession**

- Foreign Assets
- Foreign Will
- Foreign connections
  - Domicile
  - Residence
  - Nationality

## Where are we now?

### Connecting Factors

- Domicile
  - Origin
  - Dependence
  - Choice
- Habitual Residence
  - Question of fact
  - Centre of living
  - EU legislation
  - Belgium, France, Switzerland
- Nationality
  - Austria, Germany, Greece, Italy, Portugal, Spain and Sweden

## Where are we now?

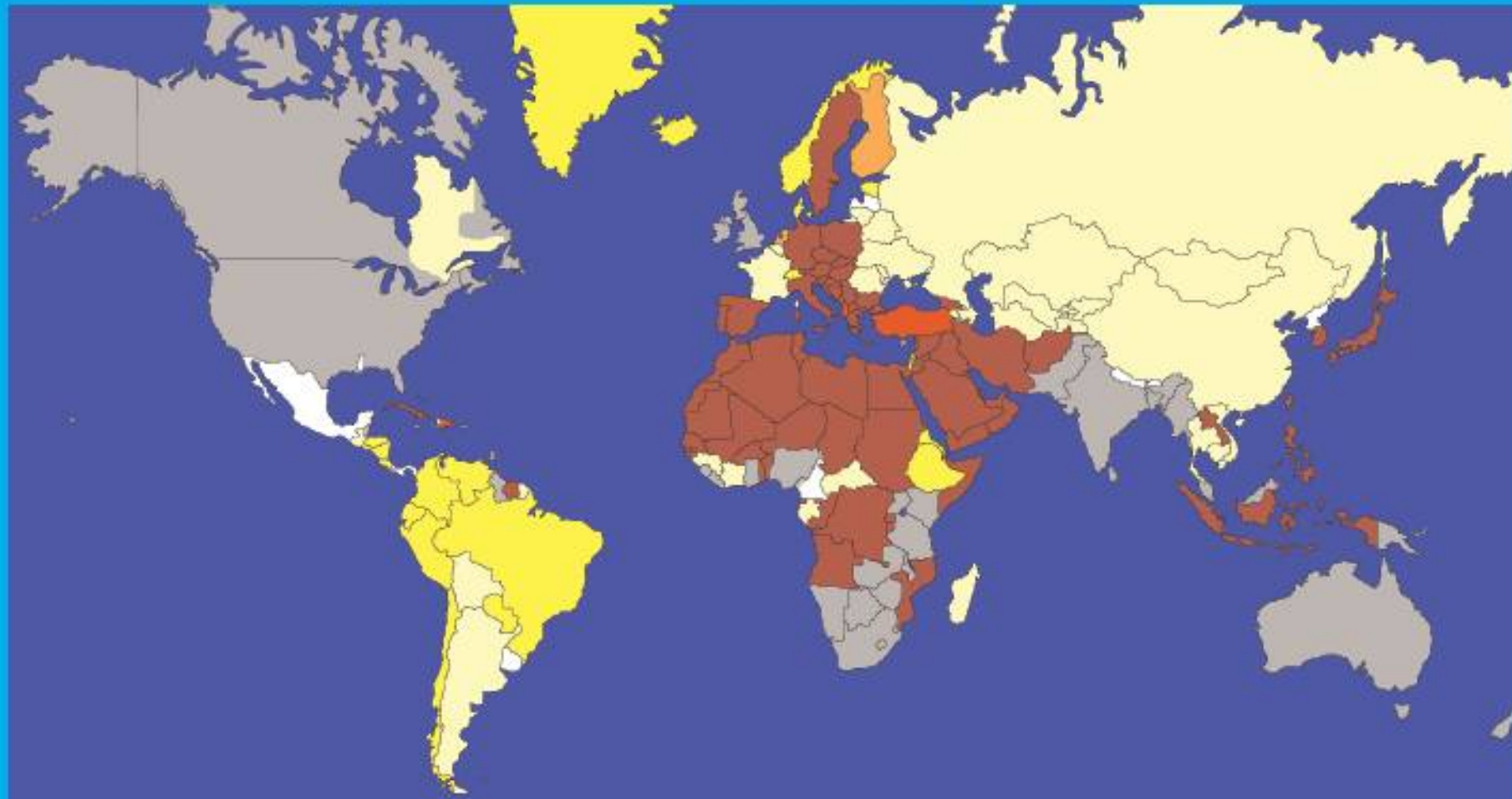
### Law governing Succession

#### Movables v Immovables

- *Lex domicilii* - Movables
- *Lex situs* – Immovables

- Unity
- Division
- *Renvoi*

## World Map: Conflict of Laws in Successions – Mappemonde du rattachement en matière successorale



Dark red: Decedent's Nationality / Nationalité du défunt

Orange: Scission: Decedent's Nationality for Movables + Lex rei sitae for Immovables / Scission: Nationalité du défunt pour les meubles + lex rei sitae pour les immeubles

Light orange: Last Residence, if more than 5 years, otherwise nationality / Dernière Résidence, si plus de 5 ans; sinon nationalité

Yellow: Decedent's Last Residence / Dernière Résidence du défunt

Light yellow: Scission: Decedent's Last Residence for Movables + Lex rei sitae for Immovables (French system) / Scission: Dernière Résidence du défunt pour les meubles + lex rei sitae pour les immeubles (système français)

Grey: Common Law = lex rei sitae for immovables, (common law) "domicile" for movables / Common Law = lex rei sitae pour les immeubles, "domicile" (au sens de la common law) pour les meubles

White: Lex rei sitae also for movables or Lex fori or unknown / Lex rei sitae aussi pour les meubles ou Lex fori ou inconnu

## Where are we now?

### **Forced Heirship**

- Different approaches:
  - *Forced heirship v*
  - *Discretion of Court*
- Strict forced heirship
- Claim against testamentary heirs

### **Matrimonial Property Regimes**

### **Civil Partnerships and Registered Relationships**



## Where are we now?

### **Succession v Administration**

- Ireland, UK, Denmark, Finland and Sweden
  - Personal Representative
- Austria, Italy & Spain
  - Acceptance by heirs
- Belgium, France, Germany, Greece, Luxembourg & Netherlands
  - Property passes to the heirs automatically

CIVIL LAW

COMMON LAW

MUSLIM LAW

CUSTOMARY LAW

MIXED SYSTEM



## The road to Harmonisation

### *International Conventions*

- Hague Wills Convention (1961)
  - 40 contracting States
  - Succession Act 1965 Section 11 Succession Act 1965
- Hague Administration of Estates Convention (1973)
  - 3 contracting States: Czech Republic, Portugal and Slovakia
  - International Certificate
- Washington Convention on International Wills (1973)
  - Form of International Will
  - Ratified by 12 countries including Canada, Cyprus, France, Italy and Portugal

## The road to Harmonisation

### *International Conventions contd.*

- Hague Matrimonial Property Regimes Convention (1978)
  - Ratified by France, Luxembourg and the Netherlands
- Hague Trusts Convention (1985)
  - 12 contracting States including the UK and Switzerland
  - Effect within civil law countries
- Hague Succession Convention (1989)
  - Ratified by the Netherlands only
  - Choice of law – nationality or habitual residence
- Hague Convention on the International Protection of Adults (2000)
  - Ratified by Finland, France, Germany, Switzerland and Scotland
  - Into force on 1 January 2009

## The road to Harmonisation

- March 2005: EU Commission Green Paper on Succession and Wills (COM(2005) 65 Final)
- Opinion of European Economic and Social Committee [2006] OJ C28/1; and European Parliament Resolution of November 2006 (P6 TA(2006) 0496)

## The road to Harmonisation

### *EU Commission Green Paper*

*“... the growing mobility of people in an area without internal frontiers and the increasing frequency of unions between nationals of different Member States, often entailing the acquisition of property in the territory of several Union countries, are a major source of complication in succession to estates. The difficulties facing those involved in a transnational succession mostly flow from the divergence in substantive rules, procedural rules and conflict rules in the Member States..... There is accordingly a clear need for the adoption of harmonised European rules”*

## The road to Harmonisation

### *EU Commission Green Paper*

- Contained 39 questions:
  - What questions should be governed by the law applicable to succession?
  - What connecting factor should be used to determine the applicable law?
  - What law should be applicable to general testamentary capacity?
  - What law should be applicable to the validity of a will?
  - Should the application of the reserved portion of the estate be maintained where the law designated by the conflict rule does not recognise the principle or defines its scope differently?
  - Should provision be made for a scheme for registering wills in all Member States?
- 60 responses to the Green Paper

## Brussels IV

- Regulation 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, COM (2009) 154
- Commission Proposal not being treated as family law matter so unanimity not required
- Equally applicable where law of a non-Member State applies (Article 25)
  - problems of enforcement in non-Member States?



## Brussels IV

- Headline points:

- Habitual residence as connecting factor (article 16)
- Unitarian approach – single law governs whole estate (article 16)
- Abolition of Renvoi (article 26)
- Forum = last place of habitual residence
- Creation of European Certificate of Succession (article 36)

*'It is essential for heir to be able to assert their rights and take possession of the property to which they succeed without having to go through further formalities. With harmonised conflict rules, it would be possible to establish a certificate having uniform effects throughout the Community. This would undeniably constitute value added.'*

## Brussels IV

### *A difference in philosophy*

- English law broadly allows testator the freedom to choose his heirs
- Scottish law allows testamentary freedom
- Irish law seeks to protect spouses
- Most other legal systems contain rules of forced heirship and clawback
- Strong notarial tradition in most Member States
- Court appointed administrator unknown in some Member States

## Brussels IV

### *Meaning of Habitual Residence*

- Not defined in the Regulation
- Strong concern expressed about this
- Persons posted abroad

## Brussels IV

### *Clawback*

- Features in most jurisdictions
- What about lifetime gifts to trusts/charity?
- Significant obstacle for UK and Ireland
- Effect on guarantee of title given by Land Registry

## Brussels IV

### ***Governing law***

- Unitary approach with law of habitual residence governing succession to movables and immovables
- Problems applying anything other than *lex situs* especially when property located in non-Member State
- Testator can choose law of nationality (article 17)
- When is this determined: nationality when choice is made or at death?
- Difficulties in applying nationality test in England, can testator choose the law of his/her English domicile?

## Brussels IV

### *Trusts and foreign property rights*

- Commission considered legislating for the specific property rights arising on death e.g. trusts, usufructs, tontines etc.
- These now excluded
- What if form of property right created on death (e.g. X holding on trust for Y) is not recognised in other Member States

## Brussels IV

### *Jurisdiction over succession matters*

- Courts of habitual residence
- Possibility of discretionary transfer to courts of deceased's nationality
- Member States can take jurisdiction even if deceased died resident outside EU if property in the EU and:
  - prior residence in a Member State within 5 years; or
  - national of that state on death; or
  - any heir was resident in that State; or
  - claim relates solely to the property located in the Member State

## Brussels IV

- Standardised European Certificate of Inheritance
- Certificate shall constitute proof of the capacity of heir or legatee and of the powers of the executors....
- Issued by a competent authority
- The contents “shall be presumed to be accurate”
- No defences to recognition are laid down



## Brussels IV

### *Responses of the UK and Ireland*

- Decision was required by 14 January 2010
- Report of the EU Committee of the House of Lords, published 24 March 2010
- Ministry of Justice
- Major problems:
  - clawback
  - failure to define habitual residence
  - effect on legal right share
  - application of regulation to non-Member States
  - effect of notarial acts and European Certificate of Inheritance

## Other EU Initiatives

- Harmonising conflict rules relating to cross-border inheritance and estate taxes
  - European Commission consultation
  - 27 member states, 18 have an estate/inheritance tax
  - 51 responses, including STEP
  - EU wide multi-lateral treaty
- Common Frame of Reference in the field of contract law
  - First stage: research project of comparative law, draft Common Frame of Reference published in February 2009
  - Includes a section on trusts
- Rome III
- Rome IV (previously referred to as Brussels III)

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A final thought

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