

## Determination of the Objectively Applicable Law Governing Succession to Deceaseds' Estates

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### Introduction

In the absence of a testator having any limited possibility to designate the law to govern succession to his estate duty taken advantage of, it is, of course necessary to establish what law is to be objectively applied as the *lex successionis* (which should, in my view, extend to questions of construing the meaning of the words used in his will as well as the application of such construction to the factual situation prevailing at his death).

The deceased will either have died intestate or have died testate without duly designating a *lex successionis*. It thus needs to be clear what precisely is a due designation. Must the testamentary designation be an express choice of a particular jurisdiction of nationality or habitual residence (whether at the date of the testator's will or death) or may there be a necessarily implicit choice e.g. by reference to some statute or terminology appropriate only for one particular jurisdiction? What if there is an express choice of British law or of Spanish law but not of a particular jurisdiction within the UK or Spain? My preference, in the interest of certainty and clarity, is for the designation to be required to be an **express choice of a specified jurisdiction**. However, if there is an express choice of the law of a multi-jurisdictional State is to be permitted, then that should be regarded as that of the particular jurisdiction therein where the testator was habitually resident at the time of his will, though if the testator's nationality law was designated and he was not then habitually resident in a jurisdiction in such State, the designation should be regarded as that of the jurisdiction therein in which the testator was last habitually resident. This should normally give sensible effect to the presumed wishes of the testator.

Where express choice of nationality law of a **multi-jurisdictional State** is possible there are two further problems. What if the testator had never been habitually resident in any jurisdiction within his nationality State or if he chooses a jurisdiction within his nationality State which is one where he has not been habitually resident? The simplest solution is for such choices to be ineffective.

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Needless to say, a testator needs to be able easily and predictably to ascertain what is his habitual residence when he makes his will so that he can be sure he has made a valid choice of *lex successionis*, so some definition (dealt with below) will be necessary.

In my opinion, **capacity** to make an express testamentary choice needs also to be expressly dealt with but only for the purposes of succession in the conflict of laws. Instead of some States utilising to determine capacity nationality, some habitual residence, some domicile in the technical sense, and some the *lex situs* for immovables, all States should, in my view, rely only upon the *lex successionis* to determine capacity issues for purposes of succession. Having decided upon the most appropriate law for the *lex successionis*, we should have the courage of our convictions and apply such *lex* to capacity. This will then ensure that enforcement of a judgement on the validity of a disposition under the *lex successionis* would be incapable of challenge eg by allegations that such judgement applied the wrong law to determine capacity and, in any event, the appropriate jurisdiction was that of another State.

It may be that there should be express provision that the domestic and conflict of law rules of the *lex successionis* will determine who is or is not a **spouse** (even if of the same sex as the other party) **or cohabitant or child** of the deceased for the purposes of succession to the deceased's estate.

### 1. Time of death as the key time

In the case of **total intestacy** the key time for ascertaining the applicable law must be the date of death in the absence of other possible dates. Where the deceased made a will but did not expressly choose a *lex successionis* to govern transmission of his patrimony at the date of his death, it seems clear that the focus for ascertaining the applicable law to govern transmission at death needs also to be a particular law at the date of the testator's death.

Where a testator expressly chose an available *lex successionis* but died partially intestate, then it would seem that the **chosen *lex successionis* should necessarily govern the intestate position as well** as the testate position since it was this law that the testator had in mind, while application of a single law will avoid the possibility of having to apply two different and, perhaps, inconsistent laws to the one estate.

### 2. One law for whole estate, immovable and movable

As one might expect, in the nineteenth century many jurisdictions established the safe, self-interested rule that succession to **immovables** must be governed by the *lex situs* of the immovable. After all, it was easy for local lawyers to know their local law and thus transfer the immovable to the persons entitled under local law (especially for an intestacy) according to the appropriate local

formalities, while States, then particularly concerned with national security and a national identity, naturally felt it appropriate to have their own laws apply to succession to “their” land.

However, with the increasing wealth of the middle-classes and increasing mobility, especially with freedom of movement in the EU, a person often dies owning immovables in more than one jurisdiction and in a jurisdiction different from the jurisdiction the law of which governs succession to his movables. As a result, the effect of the varying intestacy rules and mandatory family protection rules can lead to spouses and children receiving rather more or rather less than might be considered their fair share and to expenditure of much time and legal costs in resolving matters. It must also be the case that often there will be frustration of the intentions of a deceased who died believing that one law would govern the whole of his estate, a most natural assumption to make.

Thus, in most EU countries (with exceptions, for example, for UK jurisdictions, Ireland, Belgium, Luxembourg, France, Malta) one law applies to the deceased’s whole estate except for immovables happening to be located in schismatic States like the exceptional ones mentioned above.

Reviewing the matter afresh after my involvement in The Hague Convention on Succession to Deceaseds’ Estates 1986 -1988, I remain convinced that **there should only be one *lex successionis* for the whole of a deceased’s estate or patrimony**<sup>1</sup>. This should be simpler and cheaper than having different non-interlocking succession laws apply to different types of assets, while modern textbooks<sup>2</sup>, the ease of communicating with foreign lawyers by phone, fax or e-mail and the ability of a State easily to put its succession law on an internet website should make matters relatively straightforward for local lawyers where immovables are situated. It will also side-step the characterisation difficulties that arise if one forum characterises the distinction between movables and immovables differently from another forum, and the problem as to whether a jurisdiction should consider there to have been a fraudulent manipulation of conflict of laws rules by a person owning an immovable within its jurisdiction through a company, and thus dying owning shares which are movables<sup>3</sup>.

To recognise the legitimate interests of the *lex situs* of assets, whether movable or immovable, some very narrow specified scope should be left for it to apply its rare “**lois de police**” mandatory laws applicable to international situations

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<sup>1</sup> As earlier suggested by MORRIS (1969) 85 LQR 339, HANCOCK (1965) 17 Stanford LR 1095, WEINTRAUB (1966) 52 Cornell LQ 1 – and by Re Collens [1986] Ch 505, the Irish Law Reform Commission Report No 36 in 1991 recommending ratifying The Hague Succession Convention, and the Australian Law Reform Commission Report No 58 (1992)

<sup>2</sup> Eg D J HAYTON (ed) *European Succession Laws* (Jordan Publishing Ltd) 2nd ed 2002 covering domestic and conflict of laws rules of 22 European jurisdictions

<sup>3</sup> Eg the *Caron* case, Aix , 9 March 1982 and Cour de Cassation 20 March 1985, Rev Crit 1986, 66, Clunet 1987, 80

irrespective of conflict of laws rules and any particular inheritance regime it has for special categories of assets (like farming and wine-producing enterprises) because of economic, family or social considerations as provided for in Article 15 of the Succession Convention<sup>4</sup>, so long, of course, as such regime does not amount to discrimination on nationality grounds.

### 3. Which sole connecting factor?

Currently, some jurisdictions apply domicile (in the narrow common law sense) at death, some nationality at death and some the last habitual residence of the deceased.

In examining the utility of these approaches one needs to specify criteria for determining what is required of the connecting factor. It needs to lead as simply and clearly as possible to the easily predictable ascertainment of the law of the one jurisdiction that is most appropriate for being the *lex successionis* for the deceased's patrimony. Thus, it should be the law of the jurisdiction with which the deceased had his most close and real connection when he died.

**3.1. Common law jurisdictions** like England and Ireland use a technical notion of **domicile** as the key to personal status and to succession on death for movables. A person can have only one domicile, starting off with a "domicile of origin" (the domicile of his father if a marital child or of his mother if a non-marital child) which can change while under 16 years old as a "domicile of dependency" following that of the relevant parent. Thereafter, a person can acquire a "domicile of choice" if he becomes resident in a particular jurisdiction with the intention to settle there permanently or indefinitely. Not only are there problems over ascertaining after his death his relevant intent, but an artificial connecting factor can arise because D's domicile of origin revives when he gives up his domicile of choice and then continues until a new domicile of choice is acquired. Often D will be under a misapprehension that his old domicile of choice continues to apply or, if he believes he falls back to his origins, then he will assume his domicile to be that of the jurisdiction where he was born rather than the domicile of his father, which may well be of some other jurisdiction unknown to D. Thus, common law domicile<sup>5</sup> is not always satisfactory as the *lex successionis*.

**3.2. D's nationality** appears to be a more satisfactory personal connecting factor because clear and easily ascertainable, but suffers from the possibility of D having more than one nationality so that a further rule is necessary to determine the most recently dominant nationality. The nationality law can also

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<sup>4</sup> See DWM WATERS' Official Report thereon paras 110-113

<sup>5</sup> For criticism see English Law Commission Report No 168 (1987), CARTER (1987) 36 ICLQ 713, FENTIMAN (1991) 50 CLJ 445 and the Irish Law Reform Commission Report No 7 of 1987 "Domicile and Habitual Residence as Connecting Factors in the Conflict of Laws"

be wholly inappropriate where D has abandoned his nationality jurisdiction and has spent many happy years in a new jurisdiction though not becoming a national thereof. Here one sees the advantages of the common law domicile approach which would rightly base him in his new jurisdiction.

**3.3. D's habitual residence**, however, seems to me to be a much more natural and appropriate connecting factor. However, this has led to the use of habitual residence<sup>6</sup> in determining jurisdiction for many diverse purposes (e.g. divorce<sup>7</sup>, child abduction<sup>8</sup>, taxation<sup>9</sup>, granting income support<sup>10</sup> or loans for university study<sup>11</sup>) and English courts have recognised that a person can have two habitual residences<sup>12</sup>, so leading to the need (as for nationality) to have some statutory provision for determining the most recently dominant habitual residence. There is also the problem of distinguishing between “residence” and “habitual residence” because “residence” is far too lightweight a connection for determining the appropriate *lex successionis*.

In the context of Article 59 of the Council Regulation (EC) 44/2001 (replacing the Brussels Convention on Jurisdiction and the Recognition and Enforcement of Judgements) the UK Civil Jurisdiction and Judgements Order 2001 Sched 1 para 9 (re-enacting s. 41 of the Civil Jurisdiction and Judgements Act 1982) requires a person to be treated as “domiciled” (in the continental sense of “habitually resident”) in England if (a) resident in England and (b) the nature and circumstances of his residence indicate that he has a substantial connection with England which is rebuttably presumed if he has been resident in England for the last three months or more. However, whether a person is “domiciled” in another Member State is to be determined by the law of such other State so that a person may have sufficient connections with two States to justify him being sued in either State.

There is, however, only one jurisdiction that can be the *lex successionis*, while any **period of residence required** for the residence to become a person's “habitual residence” is inevitably arbitrary. Moreover, there will be exceptional cases where someone's job has made them habitually resident in State A for 5 years but they retain strong connections with State B to which they will return permanently when their temporary habitual residence via their job ceases or where someone has deliberately abandoned State A for State B but who dies in State B only a week or a month later. One must also accept that the “tail” cannot be allowed to “wag the dog”, so that trying to cater for exceptional cases cannot

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<sup>6</sup> See CLIVE [1997] Juridical Review 137

<sup>7</sup> *Ikimi v Ikimi* [2002] Fam 72

<sup>8</sup> See *Re J* [1990] 2 AC 562

<sup>9</sup> *Levene v IRC* [1928] AC 217, *Lysaght v IRC* [1928] AC 234

<sup>10</sup> *Nessa v Chief Adjudication Officer* [1997] 1 WLR 1937

<sup>11</sup> *R v Barnet LBC ex parte Shah* [1983] 2 AC 309

<sup>12</sup> *Ikimi v Ikimi* [2002] Fam 72

be allowed to distort and complicate the connecting factor rules. Indeed, for wealthy persons one must remember that their lawyers can easily avoid most problems occasioned by the default rule for the applicable *lex successionis* by express choice of the law that is expressly stated to be the testator's nationality law or that of his habitual residence, any court or notary being very inclined to accept such evidence that the testator's residence is to be regarded as his habitual residence even before his continuing residence has made this objectively clear.

**3.4.** In drafting the **Succession Convention in The Hague** back in 1986-87, I believe we were forced to make **too many compromises** in choosing<sup>13</sup> (1) the law of D's habitual residence at death if also coinciding with his national law, (2) otherwise, the law of D's habitual residence for a period of no fewer than 5 years immediately before his death, unless, "in exceptional circumstances", at his death he was more closely connected with his nationality State, when the law of that State will apply, (3) otherwise, the law of his nationality at death unless D was then more closely connected with another State, when the law of that State will apply. It seems that the complexity of these default rules, coupled with a belief in the unpredictability provoked by the exceptions to the second and third possibilities, led to few States implementing the Convention. However, I believe that the Dutch Notaries Organisation considers that these rules have provoked little difficulty in practice in The Netherlands, so, perhaps, it may be found safer by the ten new EU countries to persuade everyone to fall back on these rules.

**3.5.** In 2004, for those of us who have been involved in this area for almost 20 years, it now seems clear that we should not be over-protective of our national law or our common law domiciliary law. In the EU we are all siblings or, at least, cousins, so we should accept our differences in our family protection rules, some jurisdictions giving more protection, some less. I strongly favour adopting the proposal in the German Notary Institute Report that an **express choice of the law of nationality or of the habitual residence** at the date of the will (or of death) should be valid and the **default rule** should be the simple one of the *lex successionis* being the law of the State of **the deceased's last habitual residence**.

**3.6.** However, I believe that there needs to be a specific exception to enable justice to be done in ascertaining the most appropriate *lex successionis*. It could be provided that in exceptional circumstances where the deceased's habitual residence at death was manifestly intended by him merely to be temporary (like those where the deceased's employment or need to care for a relative or other person connected with the deceased required him to reside where he resided),

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<sup>13</sup> See Article 3

then the *lex successionis* should be the law of his nationality unless, before taking up his temporary last habitual residence he had been habitually resident in another jurisdiction where he had manifestly decided to settle permanently or indefinitely, in which event the *lex successionis* should be the law of that jurisdiction. Of course, the option of choosing the law of nationality or of habitual residence is always open to anyone who wants to make the position clear where fearing there might otherwise be uncertainty.

**3.7.** It seems to me that since it is necessary for all jurisdictions to have the same concept of habitual residence for the purposes only of the law of succession (for express choice and the default rule), there needs to be a **common definition of a person's sole habitual residence** which makes it clear that every person must have a last habitual residence before death even if a person at the time of his death is only resident –and not habitually resident– in the jurisdiction where he died. Perhaps “the last voluntarily acquired<sup>14</sup> *main* centre of a person's personal<sup>15</sup>, social and economic life” could be the core of a definition of “habitual residence” for an adult, with the omission of “voluntarily acquired” for minors.

Having the one connecting factor common to all EU States will not only make it possible to have a workable, satisfactory Regulation on Jurisdiction and Recognition & Enforcement of Succession Judgements, it should diminish the scope currently available to the exceptional testator who wishes to avoid the application of appropriate mandatory family protection rules<sup>16</sup>.

#### 4. Succession to assets in estate at death

Consideration needs to be given to the extent of the deceased's current or former assets to which the relevant *lex successionis* will apply. What law should determine **whether a disposition is a testamentary disposition or a lifetime disposition** and whether a particular asset is or is not part of a deceased person's estate?

Consider D, who (1) takes out a contract of assurance on his life to be held on **trust** for X with an English company, English law governing the contract and trust, who (2) creates a joint account with E over cash and securities held by an English bank, English law governing the contract with the bank and the proprietary relationship between D and E, and who (3) transfers English assets to an English trust company on trusts governed by English law for a

<sup>14</sup> A person could be held in jail or as a hostage or prisoner of war or moved as a mental patient to a secure foreign establishment

<sup>15</sup> Used instead of “family” in case the deceased was not in a family relationship

<sup>16</sup> Within the EU there should be no need to insert a reservation similar to that in Art 24 (1) (c) of the Hague Succession Convention (which enables the express choice of law to be nullified if at the time of death D was no longer habitually resident in or a national of the chosen State law but was an habitually resident national of the State claiming to nullify his choice) or the more complex Art 24 (1) (d)

discretionary class consisting of descendant's of D's father, their spouses and cohabitants (other than D and his spouse). Unless D's dispositions were made within 6 years of his death and with intent to defeat the mandatory family protection rules in the discretionary reasonable provision that a court may order under the Inheritance (Provision for Family and Dependents) Act 1975 if D died domiciled in England, the English *lex successionis* has no scope to apply to assets within the above lifetime dispositions, such assets not being comprised within D's estate at death due to his earlier lifetime dispositions being wholly valid under the applicable English *lex situs*.

What would be the position if Civiolopia regarded X and E as taking property on D's death under a testamentary disposition and regarded the trustees as liable to a personal claim from D's forced heirs to enable them to receive the due amount of their indefeasible share in D's estate taking account of earlier lifetime transfers like the one to the trustees, so a claim was brought in the English court?

The English court would hold that X, E and the trustees took their interests under unimpeachable lifetime dispositions governed by English law so that there was no scope for the application of any Civiolopian *lex successionis*<sup>17</sup>. Assets passing under valid lifetime transfers are not part of D's estate to be governed by D's *lex successionis* and cannot subsequently be impeached or undermined by the fact that D dies with a non-English *lex successionis*, when it can be fortuitous whether the relevant foreign law permits forced heirship claims for gifts made up to 5, 10 or 30 years before D's death and whether such gifts are valued at the date of the gift or at the date of D's death as in Belgium (the difference being huge where shares in a small start-up private company were the subject matter of the gift and the company is now a hugely valuable public company).

No doubt, civil law jurisdictions accustomed to forced heirship claims will wish to continue to give effect to them under foreign laws, though query to what extent if the foreign law goes much further than the local law. Common law jurisdictions, however, will certainly not wish to extend the *lex successionis* beyond assets that are part of the deceased's estate at his death, the *lex situs* of assets determining whether or not the relevant assets are part of the deceased's estate. This already seems to be the position under the Council Regulation 44/2001 where a civil judgement of the English court upon the entitlement of X, E and the trustees would need to be recognised throughout the EU. Any extension of the Regulation to matters governed by a *lex successionis* determined under a new common connecting factor should not be permitted to change that position.

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<sup>17</sup> See HAYTON, *European Succession Laws* 2<sup>nd</sup> ed paras 1.67 to 1.69

Finally, there is the complex question of **matrimonial property regimes**. The pragmatic and simplest practical solution is just to accept that assets which, under the relevant law governing such property, do not fall into the deceased's estate cannot be treated as assets which are to be subjected to the *lex successionis*.

## **Prof. Hayton: Rattachement Objectif en Droit Successoral – Sommaire**

Tout au début, le professeur *Hayton* a constaté que, du point de vue des législateurs, le rattachement objectif de la loi successorale n'entre en jeu qu'à défaut d'un choix de la loi applicable. Dans l'intérêt de la sécurité juridique et de la transparence, il faudrait reconnaître uniquement les clauses expresses du testateur concernant son choix de la loi applicable. Si ce dernier détermine la loi d'un Etat qui connaît plusieurs systèmes juridiques nationaux, le choix ne devrait être valable que si, sous respect de la résidence habituelle du testateur, il n'existe pas de doutes par rapport à la loi applicable.

1. La désignation objective de loi successorale devrait tenir compte des **circonstances au moment de l'ouverture de la succession**. Lorsque le testateur a choisi la loi applicable mais qu'il a disposé seulement partiellement de sa succession, son choix de la loi applicable devrait s'éteindre également aux biens régis par la dévolution successorale légale; autrement, la succession ferait probablement l'objet d'une scission.

2. Le principe de la **scission de la succession**, selon lequel la loi applicable aux différents immeubles est la *lex rei sitae*, serait démodé et devrait être abandonné. A la rigueur, on pourrait prévoir des exceptions – pourtant dans une mesure restreinte - pour la loi de la situation des biens (également des meubles) en vertu de *l'ordre public*.

3. Quant au rattachement objectif, il faudrait retenir la **résidence habituelle** plutôt que la nationalité ou le domicile dans le sens de la *common law*. Il ne serait pas convenable de prévoir une durée minimum pour la résidence habituelle. Les juristes de la pratique et la jurisprudence devraient déterminer les cas exceptionnels. Les règles de la Convention de la Haye sur la loi applicable aux successions à cause de mort seraient trop compliquées. Il serait pourtant possible de prévoir une clause très limitée d'exceptions, dans le cas où la résidence du défunt au moment de la mort était - indubitablement – prévue pour une courte durée.

La législation future de l'UE devrait prévoir une **définition** de la résidence habituelle, dans le sens p.e. du dernier centre de la vie personnelle et économique de la personne concernée, centre choisi par elle-même.

4. Par ailleurs, il faudrait déterminer exactement le champ d'application de la loi successorale par rapport aux **dispositions entre vifs**, comme les donations ou l'institution d'un *trust* ainsi que par rapport au **régime matrimonial** applicable.

**Prof. Hayton:**  
**Objektive Bestimmung des Erbstatutes**  
**- Zusammenfassung -**

Einleitend stellt Prof. *Hayton* fest, dass aus Sicht des gestaltend tätigen Juristen das objektive Erbstatut nur bei Fehlen einer Rechtswahl eine Rolle spielt. Für eine solche Rechtswahl sollte im Interesse der Rechtssicherheit und Rechtsklarheit nur eine ausdrückliche Rechtswahlklausel des Testators anerkannt werden. Sollte dieser das Recht eines Mehrrechtsstaates wählen, so sollte diese Rechtswahl nur wirksam sein, wenn sich aus gewöhnlichen Aufenthalt des Erblassers eindeutig ergebe, welche Teilrechtsordnung gemeint sei.

1. Das objektive Erbstatut müsse sich nach den **Verhältnissen zur Zeit des Erbfalls** bestimmen. Habe der Erblasser eine Rechtswahl getroffen, aber nur teilweise über seinen Nachlass verfügt, so sollte die Rechtswahl auch für den der gesetzlichen Erbfolge unterliegenden Nachlassteil gelten; ansonsten käme es möglicherweise zu einer Nachlasspaltung.

2. Das Prinzip der **Nachlasspaltung**, bei dem für Immobilien das jeweilige Belegenheitsrecht gelte, sei veraltet und aufzugeben. Allenfalls könne man für das Belegenheitsrecht (auch bei Mobilien) eng begrenzte Ausnahmen nach dem *ordre public* zulassen.

3. Für die objektive Anknüpfung erscheine der **gewöhnliche Aufenthalt** besser geeignet als die Staatsangehörigkeit oder das *domicile* im Sinne des *common law*. Es sei nicht sinnvoll, gesetzlich eine zeitliche Mindestdauer des Aufenthaltes festzulegen. Die Abgrenzung von Sonderfällen sollte man besser der Praxis und der Rechtsprechung überlassen; die Regelungen der Haager Erbrechtskonvention waren demgegenüber zu kompliziert. Allenfalls könnte man eine eng gefasste Ausnahmeklausel vorsehen, wenn der Aufenthalt zum Todeszeitpunkt eindeutig nur vorübergehend sein sollte.

Der künftige Rechtsakt der EU müsste eine **Definition** des gewöhnlichen Aufenthalts enthalten, etwa im Sinne des letzten freiwillig gewählten Schwerpunkts des persönlichen und wirtschaftlichen Lebens einer Person.

4. Noch näher zu bestimmen sei auch der Umfang des Erbstatutes gegenüber **lebzeitigen Verfügungen**, insbesondere Schenkungen oder der Schaffung eines *trust*, sowie gegenüber dem **Ehegüterrecht**.

