The Offshore Tax Planning Review

THE RELEVANCE OF FOREIGN SUCCESSION LAWS IN ESTATE PLANNING

Dr David Hayton[1]

A client's needs may require a local practitioner to have, or to acquire, knowledge of some foreign succession law[2] in more cases than one might imagine. Indeed, he may require, even for one client, a knowledge of the foreign succession law of more than one country. He cannot assume that there will only be one relevant *lex successionis* or, if he is a common lawyer, that the deceased's property will vest in personal representatives or, if he is a civil lawyer, will vest directly in the heirs.

If a client T dies domiciled (in the technical common law sense) in State A (e.g., England, Ireland), habitually resident in State B (e.g., France or Belgium or Denmark) but a national of State C (e.g., Spain, Portugal, Germany, Austria, Netherlands, Italy), it is possible for State A to apply its *lex successionis* to assets situated in State A, for State B to apply its *lex successionis* to assets situated in State B, for State C, to apply its *lex successionis* to assets situated in State C and for State D to apply its *lex successionis* to immoveables situated in State D, where State D is a State which applies the *lex situs* to immoveables, though having succession to moveables governed by the law of the deceased's last domicile or habitual residence or nationality.

A yet further complication is to relate to the relevant *lex successionis* any relevant matrimonial property regime so as to ascertain what property is

---

1 Dr David Hayton, Professor of Law, King's College London and Barrister of 5 Stone Buildings, Lincoln's Inn, London WC2A 3XT.
Tel (071) 242 6201 Fax (071) 831 8102.

2 See *European Succession Laws* (ed D J Hayton), Chancery Law Publishing 1991.

available to pass under the relevant *lex successionis* as opposed to the relevant matrimonial property regime.

Properly to assist a client with his estate planning thus requires ascertaining the client's likely last domicile or habitual residence or nationality, discovering which States apply domicile or habitual residence or nationality, and ascertaining the *situs* of the client's assets. It is then important to discover which States are "schismatic" (like England, France and Belgium) in having one law govern succession to moveables and another govern succession to immoveables and which States are "unitarians" in having one *lex successionis* for moveables and immoveables. In some cases it may be necessary to know how a relevant State characterises what is a moveable and what is an immoveable where this distinction is significant.

If the client's domicile, habitual residence and nationality are all that of the local jurisdiction there can still be problems if he owns foreign immoveables and the local State is a schismatic one letting immoveables be governed by the *lex situs* or if the immoveable is situate in a schismatic jurisdiction applying its *lex situs*. Thus, if an English citizen habitually resident and domiciled in England dies owning an immoveable in Suntopia, does Suntopia accept the reference from English law to its law as the *lex successionis* for such immoveable or is it one of the rare jurisdictions like Italy or Denmark which rejects such "renvoi" in favour of English law governing the whole estate of the deceased? If "renvoi" is not rejected then if Suntopia has forced heirship rules requiring a sizeable fraction (e.g., half or three quarters) of the immoveable to pass to the deceased's children and the client does not wish this, then avoidance measures have to be investigated (e.g., selling the house and buying a new one in a favourable jurisdiction or owning the immoveable through a company, the shares in which will be moveables passing under the *lex successionis* for moveables).

There may be further "renvoi" complexities if the client, though habitually resident and domiciled in the local jurisdiction, has a foreign nationality and owns foreign immoveables. Thus, if a Portuguese national habitually resident and domiciled in England has succession in respect of his Suntopia villa referred by English law to Suntopian law, which regards nationality as the connecting factor for the *lex successionis*, then succession to the villa (and forced heirship shares therein) will be governed by Portuguese law due to the reference on by Suntopian law.

If the client is domiciled abroad and the local jurisdiction accepts that the law of the domicile at death is the *lex successionis* then no will should be drawn up nor any *inter vivos* estate planning measures undertaken without a full appreciation of the impact of the foreign *lex successionis*. It will be sensible to liaise with a law firm in the foreign locality and to ensure that misunderstanding of familiar-sounding terminology does not lead to discussions at cross-purposes. By use of *inter vivos* joint tenancies or trusts in the local jurisdiction there may well be opportunities to avoid any unsatisfactory forced heirship rules of the foreign *lex successionis*[3].

If the client is domiciled and habitually resident in the local jurisdiction but is a national of a foreign jurisdiction which has nationality law as the *lex successionis*, while the local jurisdiction has as the *lex successionis* the law of domicile or habitual residence, it will be necessary to appreciate the potential impact of the foreign *lex successionis* in respect of assets or beneficiaries within its jurisdiction or another foreign jurisdiction which recognises nationality law as the *lex successionis*. The use of *inter vivos* joint tenancies or trusts in the local jurisdiction should obviate some of the foreign problems, so long as none of the relevant assets find their way into the foreign jurisdiction[4] until after forced heirship claims in such jurisdiction have become time-barred, and so long as a relevant beneficiary is not within the foreign jurisdiction where the courts can compel him to bring his share of trust assets within the jurisdiction for the benefit of the settlor's "forced heirs" or to pay an equivalent amount to such heirs.

Finally, the client needs to be warned that if he changes his domicile or his habitual residence or his nationality then his estate planning measures need to be reviewed. Will he dare to make such a change having once experienced the above complexities?

---

3 See D J Hayton, "Trusts and Forced Heirship Problems" [1993] 1 J Int P 3.

4 E.g., as in *Holzberg v Sasson*, French Cass Civ 4 Feb 1980, (1986) Rev crit de dr int pr 685 and *Trust General du Canada v Drolet* (1991) 31 Quebec AC 103.