AN ANALYSIS OF THE PARTICULAR DIFFICULTIES ARISING IN CROSS-BORDER ESTATES

According to a 2006 study by the Institute for Public Policy Research, almost one in 10 British citizens is living overseas, at least 5.5m British-born people live abroad, and over the course of 40 years, some 67,500 more Britons have left the UK every year than have returned. At the same time, annual immigration stands at 300,000 people. [1] As the world gets smaller, the question posed can only increase in relevance to the estate specialist. An estate where the deceased died domiciled in England and Wales [2] with all assets within this jurisdiction is often a straightforward matter for the practitioner. The administration, taxation and eventual distribution of assets are guided by well-established rules which (nearly always) operate in tandem. On the contrary, an estate involving assets and/or a deceased domiciled outside of England presents a soup of often conflicting rules which can catch even the experienced practitioner off guard. In describing the difficulties inherent in such estates, I intend to provide a framework within which the English practitioner can identify the problems he faces and consider best how to navigate them.

Generally, systems of law are based on either the "common-law" model or the "civil-law" model. Between civil and common law there is a fundamentally different approach to the devolution of assets and, put simply, the difficulties arise where these approaches conflict. Broadly, England, the U.S, and the commonwealth nations are common law jurisdictions, while Europe and its ex-colonies apply civil law. China is a glaring omission from the list, but similar legal conflicts to those between the civil law and common law will also exist outside of the civil/common law dichotomy. The universal difficulty is that there will be a conflict of laws, and the practitioner will have to reconcile the differences. It is possible (and helpful) to identify some areas within which these conflicts occur, as follows:

1) The connecting factor (and the doctrine of renvoi)
2) Estate administration
3) Testamentary freedoms (essential validity of wills)
4) Testamentary formalities (material validity of wills)
5) Matrimonial regimes and;
6) Recognition of trusts

1) The connecting factor (and the doctrine of renvoi)

For succession (the law governing the distribution of assets and the validity of wills) and taxation purposes (inheritance and other taxes) it is the connecting factor to a particular jurisdiction at the date of death which is crucial. Generally speaking this will be the domicile, habitual residence or nationality of the deceased which operates to *connect* an individual and/or his assets to one country or another and consequently that country's laws.

Under the common law, a person's connection to a particular legal system is determined by his domicile. From an English standpoint therefore, examination of the deceased's domicile is the starting point for any cross-border administration. A person commences life with a domicile of origin which is generally the country of his father's domicile at the time of his birth. Upon attaining sixteen he remains domiciled as then domiciled unless and until he

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[1] BBC news online - 11 December 2006

[2] For simplicity this is shortened to just England throughout the paper.

abandons that domicile and acquires a domicile of choice. To do so he must both take up residence in another country and demonstrate an intention to make his home in that country permanently or indefinitely. The "intention" aspect of this criterion leaves significant scope for judicial interpretation and the law is applied on a case by case basis with sometimes surprising results[3].

Under the civil law, the connecting factor is often the deceased's habitual residence. This is, as largely an objective question of fact, far simpler to determine than domicile. Article 4B of the French Tax Code[4] states that, among other things, an individual will be connected to the French jurisdiction if his main home was in France or he spent more than 183 days per calendar year in France.

The basic difficulty here is that an individual can therefore be domiciled in a common law country but at the same time habitually resident in a civil law country. This means that two different countries may seek to assert their succession and/or taxation laws over his assets.

In terms of taxation, there may be a double taxation treaty that mitigates against the unfairness of being taxed by both regimes or at least some form of unilateral relief available. In terms of succession, the notoriously arcane doctrines of "renvoi" ("reference back"), "double renvoi" and even "total renvoi" may offer a solution by dictating which country's laws will govern the devolution of assets. This is complicated by different rules applying to movable assets i.e. cash, and immovable assets, namely property. The best way to understand renvoi is via an example. Under English law, immovable property will pass according to the laws of the jurisdiction where it is located, whereas movable property will pass according to the law of his domicile. Under Spanish law on the other hand, property passes according to the nationality of the deceased. If an English person dies owing a house in Spain, Spanish law with refer the devolution to English law, and English law will renvoi (refer back) the devolution to Spanish law.

The difficulty is, some countries do not accept a reference back at all (Denmark, Greece, Morocco, Hungary and the Netherlands). In addition, the terms single, double and total renvoi are often used by different states with different meanings. Ultimately, the practitioner will need to apply a wet towel and methodically work out which country may rightly assert jurisdiction, over what assets (not to mention the corpse!) and which will be the primary taxing jurisdiction. This necessary work does not come cheap and efforts are being made at harmonization across the EU to facilitate at least some of the processes involved.[5]

2) Estate administration

After working out the connecting factors it will be apparent that the overseas assets, regardless of domicile, will normally undergo a foreign administration process. This is because, while the domicile, residence or nationality will determine whether the Will made is valid and who gets the assets and the tax, the applicable rules (as determined by the connecting factor) will still need to be practically implemented in the overseas country. Striving to understand the different approach to administration in that country is therefore the next difficulty. In common law systems a distinction is made between the administration of

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[3] See "Ramsey v Liverpool Royal Infirmary (1930) for an example of one of the more difficult decisions.
[4] Code General des Impots
[5] See European Commission Green paper

an estate, and the distribution of an estate. Hence, the latter cannot generally occur until the administration process has reached the necessary stage (i.e. the grant of probate has been obtained). Consequently, the legal ownership passes first to the deceased's personal representatives, and not his heirs.

In civil law jurisdictions no such distinction is made and consequently the assets pass automatically and almost immediately to the heirs (who may accept or reject the inheritance).

The practical implications of this difference can cause tremendous frustration to the English practitioner. He is used to having a measure of control and authority and may expect an equivalent amount over the foreign assets. Under the civil law however, the executor is given more of a moral than an administrative role. He is there mainly to ensure that any bequests of movable assets have been properly executed. Consequently he may find himself wondering why his correspondence is given little weight by the notary handling the French or Spanish assets. The answer is that there is little perceived need on the part of the notary to correspondent with the English executor. The notary instead focuses on ensuring that the beneficiaries comply with the applicable rules, they, after all, are the legal owners of the assets. This can make the usual job of keeping beneficiaries informed difficult and the role of middle man between the two parties is beset with disappointment at the pace of proceedings on the one hand[6] and bemused ambivalence on the other.

Furthermore, the rule that foreign assets do not automatically vest in the executors will apply even where the will that appoints them contains a gift of foreign property. An easily overlooked consequence of this is that the expenses incurred and tax payable on the assets will be payable by the beneficiary. If therefore, the executors wrongly charge these costs to residue, they will make themselves liable to the residuary beneficiaries.

Finally, one ray of sunshine; practitioners should always consider whether an overseas grant may be resealed or vice versa. The process of resealing grants only applies between common law jurisdictions and relates to grants given in one commonwealth country that can, after a relatively simple procedure, be reused in England. Quote chapter and verse. Thus South African letters of Administration for instance can be resealed in England and used to close any bank accounts here. If an individual dies in an applicable jurisdiction and a grant is taken out there or vice versa this can be very cost effective.

3) Testamentary freedoms ("essential validity" of Wills)

Estate administration leads well into the next area of difficulty. As seen above the civil law notary is concerned firstly (one could say only) with the beneficiaries. This is also to do with the fact that under most civil law jurisdictions the descendants (and ascendants) of a deceased are guaranteed rights of inheritance that the law will protect, and it is the notary's job to implement that law. Most legal systems provide protection of some sort to prevent an individual from neglecting his family in his will. Under the common law, an individual has complete "testamentary freedom", literally, the right to leave one's assets by testament (a Will) to whomsoever he chooses, even at the expense of his wife and children. However, the English courts retain the discretion to set aside his will after his death. This discretion is broadly limited to the situation where he was supporting individuals up to his death (or married); they would therefore have legitimate expectation or need that this would continue

[6] In Denmark for instance, interim distributions of funds to beneficiaries are not permitted.

and the courts will give force to this need. It is however, up to the disgruntled claimant to bring any such claim, and moreover they have a limited time within which to do so. The potential "bounty" is therefore neither awarded automatically nor as of right.

In civil law jurisdictions on the other hand "reserved rights" are conferred upon family members, in the main the children, but sometimes the spouse (ironically, under the IFPDA 1975[7] the spouse is the only potential claimant whose claim is not reliant on dependency). Civil law "reserved rights" are unavoidable and extend not just to the deceased's estate but also to lifetime gifts that he has made.

Problems may therefore arise where the English individual has made a will which includes worldwide assets, and these include property also subject to the laws of a civil law jurisdiction[8]. He will need to ensure that some of this property passes to his children in accordance with the local forced heirship laws. This may not be foreseen or wanted, for instance where he expects to leave all to his partner, or he is estranged from his children and intends to benefit charity. Otherwise his will over worldwide assets will be essentially invalid, as the rights of any reserved heirs taking priority over the disposition contained within it. The difficulty for the practitioner is apparent; he must ensure at the outset the outset that he is dealing with the correct beneficiaries. If he fails to check the position he runs the risk of ongoing liability when distributing assets or advising an executor on distribution.

4) Testamentary formalities (material validity of wills)

This concerns the way a will is construed and executed. The Wills Act 1963 widened the law to allow wills of non-domiciliaries to be proved more easily. However, it is not a "catch-all". Under the Act, wills written in the English form and in the English language will be treated as valid if executed in accordance with the laws of the country where executed, or where the deceased was a national, habitual resident or domiciliary. If therefore, the will was executed overseas and there is no connecting factor to tie the deceased to England, the practitioner will have to provide evidence, often by affidavit, as to the foreign law and the compliance therewith. This is by no means insurmountable, but is another significant step to be undertaken in the administration.

5) Different matrimonial regimes

Matrimonial law becomes particularly relevant to succession law where a cross-border estate is concerned. In a civil law jurisdiction there may be a "community of property" between spouses. Effectively each spouse becomes a fifty percent owner in the assets acquired after marriage. This, naturally, limits the estate of which a spouse can dispose after death. This sits well with forced heirship rights that do not protect the spouse, who will be protected in advance by the matrimonial regime, but conflicts with common law countries that have no comparable system.

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[7] The act under which the English courts may overrule a Will on grounds of unfair provision.

[8] Normally this will be immovable property but could also be movable depending on the application of the connecting factor rules in the country containing the assets

Difficulties here stem from the movement of individuals. An individual may move from a "separation of property", common law system to a community of property system which becomes, under one of the connecting factors described above, entitled to govern the succession of his estate. The unlucky surviving spouse will have restricted rights, having no community of property for the English assets (unless property is held jointly as joint tenants or bank accounts in England are in joint names) and limited forced heirship entitlement under the civil law regime.

Recognition of same sex and non-matrimonial relationships is also a growing area of difficulty. It remains uncertain whether a same sex marriage in another jurisdiction would be recognized by the English courts or instead ruled incompatible with public policy[9]. If such a marriage occurred in Belgium and the deceased held an English Will, would it have been automatically revoked?[10]

6) Recognition of trusts

The will trust is one of the most widely used legal devices in the personal law applicable to residents of common law countries. A Will trust is used, for instance, to defer the legal ownership of minor heirs until the age of eighteen or more or until the death of the testator's spouse. This concept is largely alien in the civil law (although a usufruct is similar in certain limited respects). A particular problem is that posed by the discretionary trust, which by its very nature will offend against the civil law principles of entrenched inheritance described above. Any such trust in the will of a French domiciliary will be liable to be overridden by the reserved heirs.

Conclusion

The cross-border estate has a number of inherent difficulties that are largely due to the conflict of laws but are also a result of the practical misunderstandings, and sometimes misgivings, which stem from linguistic and cultural differences. These international elements can not only make matters expensively complex but injustices may also result and the practitioner may find himself liable. The job of the international estate specialist is to try and reconcile these elements. This will require not just a methodical application of the rules but also diplomacy and an open-mind, which to many will make the task far more interesting and rewarding as a result.

[9] Section 11(c) Matrimonial Causes Act 1973
[10] Wills in England are automatically revoked on marriage.