# REGULATION 650/2012

# (Brussels IV)

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**INTRODUCTION**

1. Regulation 650/2012 ('Brussels IV') simplifies the process of succession in cases where the deceased dies after 17th August 2015 owning property and other assets in a European state.

2. It deals with two questions where previously there could have been conflict of law situations:

2.1 which law governs a cross-border succession?

and

2.2 which court has jurisdiction over such matters?

3. No longer will the deceased's nationality or the location of the asset in question determine the laws of succession. The primary objective of the Regulation is simplification in cross-border cases and to make life easier for the Testator's successors.

**ENGLISH SUCCESSION TO FOREIGN ASSETS**

4. A large number of people in England own assets in Europe, and in many cases the succession laws of the country in which the property is located could govern the disposition of that property on the owner's death. Sometimes the inheritance laws in a foreign country operate quite differently from English law.

5. In the case of property, for example, some countries' laws will provide that local law governs the disposition of the property on the death of the owner, whereas others provide that the law of the owner's country of nationality applies. So without a will that is governed by local law, there could be confusion as to which law applies to the property (and different laws might lead to very different outcomes).

6. In some countries there are 'forced-inheritance' laws that override the intentions of the deceased – requiring that a certain part of the deceased's estate be left to certain specified relatives.

**ESTATE ADMINISTRATION PROBLEMS**

7. If you own property abroad and die with an English will but without a will that is governed by the local law, your heirs could face a number of practical hurdles that could result in delays in their obtaining title to the property as well as additional costs.

8. For example, if the country in question is not an English-speaking country, your executor or heirs may need to have documents translated for presentation to the relevant officials in that country. In addition, there may be notarisation and/or legalisation requirements – which can be time-consuming and expensive. Your heirs might well have to hire a local lawyer to assist them (although they may need a local lawyer in any event, even if you have made a local will).

9. Each state has its own laws on estate administration, succession and the identification of beneficiaries. This has proven to result in complex and costly cross-border succession issues.

**ADVICE ON WILLS**

10. For the legal adviser, attempting to give a client advice in such situations can be a headache: Ernie owns *Casa Tranquilla* in Spain and has asked for advice about making a will (or wills) to pass the property to his chosen beneficiaries on his death.

11. Can he make a will in England, despite the fact that the asset is in Spain? Will Spanish laws of succession apply (a) to his property in Spain; (b) to his other assets?

12. Should he make a will in the local jurisdiction to deal with the foreign property? He has also revealed that he intends to make Spain his home when he retires in 5 years time. Will that make a difference?

13. In order to understand the philosophy behind Regulation 650/2012, it is necessary to look at some of the rules regarding succession, the first one being:

**MOVABLE AND IMMOVABLE PROPERTY**

14. Some states have a concept of **scission**, which means that succession to movable assets is governed by the law of the deceased's residence, domicile or nationality; whereas the law relating to immovable assets is governed by the law of the state in which they are located.

15. These internal laws of succession originate from Private International Law (PIL) which each state has evolved. In England, which has scission, succession to movable property is governed by English domestic law, whereas succession to immovable property is governed by the law of the place in which it is situate.

16. Taking the case of Ernie, this means furniture, cars, bank accounts and boats in Spain devolve on his death according to English law, but *Casa Tranquilla* devolves according to Spanish law.

17. In addition to the separation of movable and immovable property most European states have a system of **civil law**, (codified) whereas England has a system of **common law** (based on statute, custom and judicial precedent).

**CIVIL LAW / COMMON LAW**

18. Civil law systems have rules of **forced-inheritance;** common law, by contrast, has **testamentary freedom***:* the testator can leave his property to whomsoever he wishes… as we can see in the cartoon, the testator has left everything to his favourite pussy.

19. This sort of diversity raises the question: will the local laws of forced-inheritance apply to property held in the European states by an English person who enjoys testamentary freedom? This often causes considerable expense for the client whilst his English lawyer checks with his European counterparts as to which law will be applicable and in regard to what sort of property?

**FOREIGNERS / NATIONALS**

20. Each jurisdiction jealously guards control over its own citizens as regards succession rules (usually in order to ensure they obtain the tax arising from such devolution) but has a different approach to succession for foreigners who own assets in its jurisdiction. Consequently, it is necessary to investigate local laws to see what is its local rule in such matters.

21. English Private International Law states that **immovable property** is governed by the law of the local jurisdiction, i.e. Spanish law in our example above. This would appear to mean that Spanish law will apply to succession in the case of *Casa Tranquilla*.

22. However, Spanish law states, as regards **foreigners** having **immovable property,** in its jurisdiction:

"*Inheritance through death will be regulated by the National law of the deceased person in question at the time of their death, whatever the nature of their possessions and whatever country they may be in. The arrangements made in the Will along with the testator's wishes and in accordance with the National law of the testator at the time of the drawing up of the Will, will remain valid, even if another law of succession exists.*"[1]

23. Meaning that *Casa Tranquilla* devolves on Ernie's chosen beneficiaries via his English will. Spanish rules of forced-inheritance, therefore, apply only to **Spanish nationals** and not foreigners who own property within its borders.

[1] Article 9.8 of the Spanish Civil Code

**FRANCE**

24. France also has a regime of forced inheritance and also has scission (distinction between movable and immovable property). BUT French inheritance laws are applicable to **everyone** who owns immovable property in France, **regardless of their citizenship, habitual residence or nationality**.

25. Movable property in France devolves in accordance with the residence of the deceased.

26. Take another 25 member states all with different regulations and advice to a foreign property owner becomes extremely difficult, particularly when they may decide to take up local residence at a future date and perhaps retain assets in England.

**THE NEW DAWN – SIMPLICITY**

27. Regulation 650/2012 has been implemented to drive a carriage and horses (or even a Citroen) through these complexities. It aims to unify the laws governing succession, whatever the property being transferred.

28. The preamble to the Regulation states: "*The proper functioning of the internal market should be facilitated by removing the obstacles to the free movement of persons who currently face difficulties in asserting their rights in the context of a succession having cross-border implications.*

*In the European area of justice, citizens must be able to organise their succession in advance. The rights of heirs and legatees, of other persons close to the deceased and of creditors of the succession must be effectively guaranteed*". [2]

[2] sub-section (5) of EUR 650/2012

**HABITUAL RESIDENCE**

29. The Regulation states that, **by DEFAULT**, the laws governing succession in cross-border estates will be the law of the **HABITUAL RESIDENCE** of the deceased.[3]

30. The regulation does not distinguish between movable and immovable property. It also means that an intestacy will not defeat matters, as the law of habitual residence will apply.

31. Judicial decisions concerning the succession as a whole are in the hands of the courts of the member state where the testator had his or her *habitual residence* at the time of death. This marks a significant change compared to former legislation, which was focused exclusively on the citizenship of the testator.

[3] Article 21: Unless otherwise provided for in this Regulation, the law applicable to the succession as a whole shall be the law of the State in which the deceased had his habitual residence at the time of death.

32. There is also an important proviso which relates back to existing law: If the deceased has moved to a non-member state, but his assets are located in a member state, the courts of the member state have jurisdiction to rule on the succession provided his nationality is that of the member state at death or he previously had his habitual residence in that member state [Article 10].

33. Advising Ernie is now going to be much easier [and cheaper unfortunately!]. *Casa Tranquilla*, provided Ernie's **habitual residence** is England, will pass to his beneficiaries under English law, as will his personal possessions in Spain, because there is no longer a distinction between movable and immovable property.

**CHOICE OF LAW**

34. The Regulation also refers to "**choice of law**"[4] which means the default position can be overridden by the client's choice of **the law of his nationality** to govern his succession.

[4] Article 22.1 A person may choose as the law to govern his succession as a whole the law of the State whose nationality he possesses at the time of making the choice or at the time of death.

35. He must do this in a declaration in the form of a disposition of property upon death [a will in other words] and that will must be made in accordance with the laws of the chosen nationality.[5]

36. Article 27: *A disposition of property upon death made in writing shall be valid as regards form if its form complies with the law…of the State in which the disposition was made or the agreement as to succession concluded….*

37. The Testator can now control the choice of law albeit that forum shopping is not available as you can see from the wording of Article 22.1. This means that Ernie can say in his will that disposition of his French assets is to be via English law succession rules and the same with his Spanish assets.

[5] Article 22.3 The substantive validity of the act whereby the choice of law was made shall be governed by the chosen law.

**EUROPEAN CERTIFICATE OF SUCCESSION**

38. Another potentially useful element of the Regulation is that a European Certificate of Succession (ECS) will be issued by the country of the person's habitual residence, which will be recognised in all other participating EU States. This could be useful to an English person living in France who also has property in Italy or Germany because the certificate will be recognised in all of these jurisdictions;

39. It will not help a person with sole British nationality who is habitually resident in the UK, because the UK opt-out means Britain will not be able to issue an ECS.

**ENGLAND's OPT OUT**

40. As far as England is concerned, it has always been resistant to two concepts which are prevalent in the member states: forced inheritance (already referred to above) and "**claw-back**".

41. By 'claw-back', I mean that **lifetime gifts** made in the member states can be clawed back by beneficiaries because they reduce their inheritance on death. The thinking behind claw-back is that it has been done deliberately in order to reduce the inheritance of the heirs in a forced inheritance jurisdiction.

42. In England, lifetime gifts form a substantial part of English estate planning, sometimes to mitigate the potential to inheritance tax and sometimes to assist potential beneficiaries… for example a deposit on a house for a child, or a reward to a child who has acted as a carer and for various other reasons.

43. The only curb on lifetime gifts is HMRC involvement, known as the 7-year rule: when a lifetime gift is made the donor must survive for 7 years for it to fall out of his estate.

44. His beneficiaries, unlike their counterpart in the European States, cannot claim that the gift was made to avoid forced inheritance rules in order to make a claw-back claim. Without forced inheritance rules, there can be no room for a law of claw-back.

**CERTAINTY**

45. I hope you can see from the above discussion that the diverse laws existing in the member states caused a considerable amount of conflict of law between the states as regards the devolution of assets on death. EU Regulation 650/2012 was introduced to create certainty in people's lives. European citizens can organise succession before they die and protect the rights of the heirs.

46. Of importance is that the aim of the Regulation is to **harmonise conflicts of law** BUT not to harmonise succession law.

47. This means that each state will retain their own substantive succession laws so that forced inheritance as a tenet of a member state will remain and will affect citizens of that state and the collection of inheritance tax will continue in those States which impose inheritance tax.

48. This will also prevent a Spanish national, for example, from putting into his will that English law and particularly the concept of testamentary freedom will apply to his Spanish estate!

**MOVING TO [SPAIN]/RESIDING THERE ALREADY**

49. However, perversely, the effect of the Regulation is that if Ernie has moved to Spain and has not made a will defining his choice of law, then according to the rules of **habitual residence**, Spain will be his habitual residence and Spanish law will apply to his Spanish assets and the rules of forced inheritance will apply.

Question: Will Spanish law also apply to his worldwide assets ?

**EXCLUSION OF ENGLISH COURTS**

50. Firstly, Regulation 650/2012 will not apply to citizens and residents in England. The Regulation is not enforceable in England, which means the English courts will not be called upon to determine any questions relating to it.

51. This would appear to mean that nationals of European states will not be able to organise their successions in England when they have habitual residence here as English law does not allow testators to choose the succession law governing their succession.

52. BUT if the European citizen does not reside in England but has property here, then the new single succession law will govern the deceased's estate and control his property located in England.

**PROBLEM AREA?**

53. And in the second part of the conundrum: what if an English national has habitual residence in France or Spain or any of the other 27 member states? Over 100,000 over-65 English people resided in Spain two years ago and that number is increasing annually.

54. Without Regulation 650/2012, we are aware that English law separates movable from immovable property and that English law states that the law of the jurisdiction where the property is situate applies, whereas, as we have seen Spanish law refers back to the law of the nationality of the deceased.

55. And again with no forced inheritance laws and no claw-back from lifetime gifts, the deceased's net estate is what is left on his death…current assets less current liabilities.

56. In Spain, 2/3 of the estate will devolve upon the issue and surviving spouse. The deceased has freedom of disposition over 1/3 of his estate. The calculations must also take into account all lifetime gifts made by the deceased [6] but also take into account the freedom to dispose of 1/3. 30 years is the limitation on claw back !

57. This means for an English citizen habitually resident in Spain, the local law will govern the succession to his estate unless he has made a valid disposition choosing the law of his nationality to apply.[7]

58. Which, followed logically, means forced inheritance laws of Spain will apply to the disposition of the English person's estate and even worse, claw-back.

[6] Article 818 Spanish Civil Code

[7] Article 22.2 The choice shall be made expressly in a declaration in the form of a disposition of property upon death or shall be demonstrated by the terms of such a disposition.

59. Will the English courts be able to protect their native citizens living in a member state?

60. It appears not. Article 4 states:

*The courts of the Member State in which the deceased had his habitual residence at the time of death shall have jurisdiction to rule on the succession as a whole.*

**CONCLUSION**

As far as English clients who have assets in the European States are concerned, there would appear to be two situations:

Resident in England: better not to rely on habitual residence, but make a will choosing English law as the succession determinant.

Resident in another State: make a will and determine the choice of law in that will. It may be that a local will would be preferable for reasons of convenience of administration [the problem of PRs, etc] and that if there are any assets in England those could be dealt with via an English will, which states that it limited to assets in England.

For foreigners with assets in England, the situation has not changed because England has opted out of the Regulation.