THE INSTITUTE OF CHARTERED ACCOUNTANTS IN ENGLAND AND WALES

ICAEW REPRESENTATION

ICAEW REP 126/09

SUCCESSION AND WILLS

Memorandum of comment submitted in December 2009 by the Institute of Chartered Accountants in England and Wales in response to the Ministry of Justice consultation paper '*European Commission proposal on Succession and Wills*' published on 21 October 2009 and the invitation from the House of Lords EU Sub-Committee E (Law and Institutions) to contribute evidence to its Inquiry

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SUCCESSION AND WILLS

INTRODUCTION

1. The Institute of Chartered Accountants in England and Wales welcomes the opportunity to comment on the consultation paper '*European Commission proposal on Succession and Wills*' published on 21 October 2009 by the Ministry of Justice at http://www.justice.gov.uk/consultations/ec-succession-wills.htm and submit evidence to the House of Lords EU Sub-Committee E (Law and Institutions) (invitation published at http://www.parliament.uk/documents/upload/CfE231009.pdf) both of which are considering whether the UK should opt in to the proposed EU Regulation in COM(2009)154 dated 14 October 2009 at http://ec.europa.eu/prelex/detail_dossier_real.cfm?CL=en&DosId=198684.

WHO WE ARE

2. The Institute operates under a Royal Charter, working in the public interest. Its regulation of its members, in particular its responsibilities in respect of auditors, is overseen by the Financial Reporting Council. As a world leading professional accountancy body, the Institute provides leadership and practical support to over 132,000 members in more than 160 countries, working with governments, regulators and industry in order to ensure the highest standards are maintained. The Institute is a founding member of the Global Accounting Alliance with over 775,000 members worldwide.

3. Our members provide financial knowledge and guidance based on the highest technical and ethical standards. They are trained to challenge people and organisations to think and act differently, to provide clarity and rigour, and so help create and sustain prosperity. The Institute ensures these skills are constantly developed, recognised and valued.

MAJOR POINTS

4. We support the stance of the Ministry of Justice that the UK should not opt in initially, but should participate in the formulation of the Regulation with a view to making it compatible with UK law and practice and that of other participating States and opt in as and when satisfied that it is.

5. We have read the joint position paper dated 30 November of the Society of Tax & Estate Practitioners, The Law Society and The Notaries Society. We broadly endorse their approach and would emphasise the points below:
   - Habitual residence ('HR') needs to be clearly defined in the Regulation.
   - The removal of domicile as a criterion will make the administration of estates uncertain.
   - HR, and the ability to choose the relevant law of nationality, will make the administration of estates uncertain.
   - There is no mechanism to prevent, or even resolve, 'intermeddling' by heirs from those countries that permit direct claiming of assets by heirs without the involvement of executors, etc.
   - Freedom to 'cherry pick' HR by some may result in a reduction in IHT payable.
   - Succession rules dependent upon HR would impose alien legal systems, for example forced heirship, on the UK, restricting the UK's tradition of lifetime and testamentary unfettered freedom to dispose of assets (subject to Inheritance (Provision for Family and Dependents) Act and claims to legitim in Scotland).
   - Clawback will destroy the fundamental right of an individual to alienate himself from his property in lifetime and on death.

- Clawback is likely to result in donees who are expected to return the gifts objecting on the grounds that under human rights law they are being deprived of the right to enjoy their property.
- The exclusion of trusts will mean that common involuntarily-created trusts such as constructive trusts (eg where property held by more than one person), statutory trusts (which arise on intestacy) and bare trusts will be excluded from the new regime.
- Definitions of family relationships, eg spouses and civil partnerships, are inconsistent between Member States. Changes in family relationships could lead to inconsistencies between jurisdictions as to how such family relationships are recognised.
- It is not clear how the Channel Islands and Isle of Man will fit within the new Regulation given that they are not Member States of the EU.

COMMENTS

6. We recommend that pending resolution of the following issues, the UK should not opt in to the Regulation unless and until it is satisfied that it is compatible with UK law and that the potential for disputes is minimal. It is unfortunate that the decision whether or not to opt in is to be taken before the final version of the Regulation is known.

Habitual residence

7. As the most important point we consider that it is vital that habitual residence ('HR') should have a clear definition and that should be within the Regulation. Whilst the concept of HR is not brand new, for example it is used in the UK in the context of social security contributions and benefits, waiting for court decisions to clarify the meaning of HR in the context of this Regulation will prolong the uncertainty. Certainty as to what it means is essential given that under the draft Regulation HR is a tie-breaker when deciding which Member State has jurisdiction over the disposition of the estate of a deceased individual who may live in, or be habitually resident in, or have assets in, more than one Member State. It also needs to be grasped as many people die without having made a Will.

8. The freedom to choose one's HR may be overtaken by events – the individual may cease being HR in his selected jurisdiction or changes in either national law or case law may render his choice no longer possible.

9. We attach some case studies and should welcome in each case your – or the European Commission's – views on the question in which Member State the deceased is considered to be HR.

Uncertainty owing to domicile not being a criterion

10. The removal of domicile as a criterion and replacing it with HR, or the ability to choose nationality, will make the administration of estates uncertain. Unlike HR, under which one could be HR in more than one country, individuals have only one domicile so once that has been determined, and there are rules that in all but a tiny minority of cases make recourse to the courts unnecessary, the law governing the distribution of the estate is certain. In the UK, domicile governs succession, the tax on estates (ie inheritance tax ('IHT') which follows succession, and matrimonial rights. Also, in the UK the option of 'nationality' will be uncertain, as one is a 'national' of the UK whereas the legal systems for dealing with deceaseds' estates of Scotland and of Northern Ireland differ from that of England and Wales.

'Intermeddling', or jurisdictional disputes

11. We are concerned about the absence of any mechanism to prevent, or even resolve, disputes between beneficiaries. We think that the draft Regulation will give rise to juridictional disputes, or intermeddling, where individuals die with relations and assets in more than two Member States

particularly where some beneficiaries are in civil law jurisdictions. For example, a UK-domiciled individual dies and he is living in France and has assets in England, France and Germany. Despite having specified in his Will governed by English law (because of habitual residence) to whom his German assets should devolve, by the time the UK executors obtain probate, the beneficiaries in France may well have obtained title to the assets in Germany because they have obtained from the French authorities, and presented to the German authorities, a European Certificate of Succession ('ECS'). We should welcome clarification as to how this conflict would be resolved.

12. The UK courts could be overridden not just by foreign courts but by foreign notarial acts and by automatic recognition of ECSs. We are not convinced that Article 40 (or indeed any other) provides sufficient protection.

Protection of the UK tax base

13. The ability to choose one's HR for the purposes of succession will enable individuals to select the jurisdiction with the lowest estate taxes. This freedom to 'cherry pick' will undermine the integrity of the IHT tax base and may well reduce exchequer receipts.

14. The MoJ's Impact Assessment, which is mainly good, is silent on the impact of the proposed Regulation on the tax base. We recommend that this lacuna be rectified.

15. It is also not clear how IHT will be collected from foreign heirs who have obtained an ECS, thereby bypassing UK probate procedures (as in the example above under the heading '"Intermeddling", or jurisdictional disputes').

Knock-on effects on UK succession laws

16. The Regulation will change the effect of UK succession laws. Succession rules dependent upon HR in a country outside the U.K. would impose alien legal systems, for example forced heirship, on the UK, restricting the UK's tradition of lifetime and testamentary unfettered freedom to dispose of assets (subject to Inheritance (Provision for Family and Dependents) Act and claims to legitim in Scotland).

Clawback

17. We are particularly concerned to note the effects of claw-back. In the UK (apart from a claim to legitim in Scotland) an individual has the fundamental right to gift his property to others on an unfettered basis both in his lifetime and on death, subject to Inheritance (Provision for Family and Dependents) Act. If the clawback rules of another jurisdiction were to apply to UK assets that the deceased had gifted in his lifetime before the new rules come into effect then this fundamental right will be lost and we can foresee donees – whether family, friends, trusts, political parties or charities – being called upon to return the gifts. This would seem to give them strong grounds to object on the basis that under human rights law they are being deprived of the right to enjoy their property.

18. Charities, in particular, will be seriously adversely affected as there will now be the possibility that all donations from individuals will be at risk of clawback, should the donor die when the HR is in another country. This could be very many years after the gift was made. It cannot be acceptable to the UK that all gifts will have to be regarded as 'contingent' or revocable, according to circumstances that may apply very many years hence.

19. The problems of returning gifts will be exacerbated by uncertainty over the value of the gift that is to be returned – different jurisdictions compute the value of what is to be returned in different ways, for example whether the value of the gift is when it was made or as at the date of death. Different jurisdictions also have different rules as to how far back clawback operates.

Exclusion of trusts

20. Trusts are specifically excluded from the Regulation (Article 1.3(i)). This will mean that the existing rules will have to remain in order to deal with, inter alia:
    (i) trusts under which the English legal system enables real property, including an individual's main residence, to be held jointly as joint tenant or tenant in common;
    (ii) statutory trusts, which arise under intestacy; and
    (iii) bare trusts, which arise for example where land or savings are held for a minor or incapacitated person.

Minors inheriting land

21. If the forced heirship rules of another jurisdiction such as France apply owing to a deceased being domiciled but not HR in the UK, then this will mean that minors could inherit land in the UK. Unlike in, for example, France, under English law minors are unable to hold land in their own right. Such a transfer to a minor would necessitate a bare or statutory trust having to be set up, which would have the presumably unintended effect of removing the land from the scope of the Regulation if the minor were to die before attaining the age of majority.

Definitions of family relationships

22. Different definitions of family relationships in different EU jurisdictions will make application of the clawback rules even more complex than they are presently. Changes in family relationships could lead to inconsistencies between jurisdictions as to how family relationships are recognised. For example, the answer to the question as to who is a spouse, and whether 'spouse' includes civil partners of the same or, if applicable, different sexes, differs from one EU jurisdiction to another.

Jurisdiction

23. Given that neither the Channel Islands nor the Isle of Man is within the European Union, we should welcome clarification of how the new rules would impact on individuals and assets connected with these jurisdictions, as individuals there can be British nationals and nationality is an option which can be specified to override HR.

Right of appeal

24. We are concerned that Article 31 forbids any right of review of a 'foreign decision'. We do not think that there is ever an occasion where the right of appeal should be forbidden. As not all overseas legal systems are necessarily as scrupulous as those in the UK, it is not appropriate for the UK government voluntarily to subject UK citizens to such regimes, particularly when there is no right of appeal and particularly when those decisions may be notarial acts, rather than Court decisions.

RESPONSES TO QUESTIONS

25. Our answers to these questions should be read in conjunction with our comments above.

Q1. Is it in the national interest for the Government, in accordance with Article 4 of the UK's Protocol on Title IV measures, to seek to opt in to the Regulation? If not, please explain why?

26. We consider that the UK should not opt in to the Regulation because of the concerns listed above, but should participate in its formulation so far as it can (despite not having a right to vote) with a view to ensuring that whether or not ultimately we do opt in, it is compatible with UK law and practice.

Q2. Should the proposed Regulation apply throughout the UK if the UK opts in to the Regulation? If not, please explain why.

27. Yes – there are far too many problems at present which arise from the different laws in the three jurisdictions of the UK and we cannot think of any reason why the Regulation should not apply to the whole of the UK if it opts in.

Q3. Do you agree with the Partial Impact Assessment (which follows separately from this consultation document) made on the Regulation? If not, please explain why

28. We consider that partial impact assessment ('PIA') should take into account the concerns explained above, for example the potential detrimental impact on the tax base which would arise from some individuals' ability to cherry-pick their HR, and, using paragraph numbers in the PIA:

2.2 This para refers to EU 'estimates'. We should welcome clarification of the evidence on which the figures are based.

3.26 A mechanism is needed to prevent foreign heirs intermeddling in UK assets before a UK court grants probate, etc., until which time of probate, the validity, etc. of Will is uncertain.

3.31 If UK legislation is required (as it normally is when implementing directives) there is a likelihood that other Member States will implement differently. Thus, the hoped-for savings of costs may not materialise.

3.32 Different Member States have different definitions of what the UK calls 'civil partners'. Some are not mutually recognised, for example it is understood that the UK recognises the French provisions for same sex couples but that France does not recognise the UK provisions.

3.52 We find it a matter of concern that the UK government and courts will need the permission of the Commission and the Council.

4.5 The Regulation will contravene human rights about quiet enjoyment and non-confiscation of private property. Recipients of gifts will now never know if they may have to refund when donor comes to die.

4.8 We suggest that a health assessment may be appropriate of the anxiety and stress of donees of lifetime gifts who will now be worried about clawback of such gifts, whenever made.

5 We would have thought that some UK legislation will be required (see para 36 of consultation document and para 3.31 of impact assessment).

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ANNEX

HABITUAL RESIDENCE CASE STUDIES

Where were the following habitually resident when they died – assuming they die now?

1. Mr A

   Mr A works in France where he lives in a rented flat. He has lived there for five years. He regards Belgium as his home. He goes to visit his mother each weekend and knows he is going to retire to Belgium in five years time.

2. Miss B

   Miss B is a Luxemburg national. She goes to University in Belgium and spends three quarters of the year in Belgium. Her parents have died and the family house has been sold. She spends six weeks of the year working in the family business in Luxemburg

3. Princess C

   Princess C was born and brought up in Abu Dhabi. She married a Saudi prince but is now a widow. She spends four months of the year in Saudi Arabia, four months in London and four months in New York. Her movements are as regular as clockwork based on the social season. Her houses are all of similar value and substance. When she buys anything for them she tends to buy three – one for each place. All the properties are fully staffed when she is not there. She moves from one house to another with her maid, her homme d'affaires her jewellery and this seasons' clothes. The homme d'affaires brings his laptop and some discs with him.

4. Mrs D

   Mrs D is the British consul in Basra. She does not have a property in the UK although her children go to school there and her posting may only be for a period of six years

5. R (also known as P)

   R is a German national in his seventies. He was born, brought up and has so far spent most of his working life in Germany. He keeps a small house in Germany which he only visits very very occasionally because of his other commitments. As the culmination of a very successful career, he is now based in Vatican City and a house is provided for him in Italy as well. His predecessors have generally died in office. All his post is sent to Vatican City.

6. Mr W

   Mr W lived in the UK but was kidnapped on a visit to Israel. His kidnappers took him to the Lebanon. After six years in captivity, he is killed during an abortive rescue mission

7. Mr K

   Mr K is a Bosnian. He was found guilty of major war crimes and is now in a German jail. The judges held he should never be released

8. Mr and Mrs S

Mr S is an Austrian national and Mrs S a German national. They divided their time between their houses in Austria and Germany before selling both (and all their Austrian and German assets) and bought for euros 5million a penthouse on The World. They have been on board for five years and have never looked back.

9. Mr F

Mr F was brought up in France and having inherited from his parents has sold everything and bought a yacht. He has been sailing round the world for the last six years and has met Miss G (an American) who shares his boat. She also has an apartment in Florida which he has heard about but not yet visited. They are to marry in six months time when Mr F says he will spend nine months of the year on shore with Miss S in Florida

10. Baby Y

Mr and Mrs Y are French. They have always only lived in France. Mrs Y is pregnant and on a car trip to Spain, there is a very serious accident. Mr and Mrs Y die and Baby Y is born prematurely but survives. Sadly Baby Y dies two days later still in the Spanish hospital

11. Mrs Z

Mrs Z is Portuguese and had never been to the Netherlands. At the age of 50 she had a major stroke and is now effectively a vegetable. Five years later her children who both now live in the Netherlands arrange for her to be moved to a Dutch hospital. She dies four years later.

12. Mr I

Mr I left Afghanistan four years ago. He sought asylum in Italy but it was not granted. He worked as an illegal immigrant in France for three years and was caught. He then dies in France while trying to enter the UK

13. Mr G

Mr G who had previously lived all his life in Denmark needs to be officially declared dead. He disappeared ten years ago whilst on holiday in Greece. There were then some (unconfirmed) sightings of him in Greece during the first three years.

14. Mr and Mrs V

Mr and Mrs V are British born and bred and have lived and worked in England all their lives. They have had for over twenty years a second home and euro bank account in France and since their retirement ten years ago have lived there from May to September every year and the rest of the year at home in England. One summer, Mr V becomes ill and, after a spell in hospital in France, dies in France.