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OPEN BORDERS - BRUSSELS IV

Under English law an individual has "freedom of testamentary disposition". What this means is that, subject to certain circumstances, an individual is entitled to leave his/her assets to whoever they want. However, many jurisdictions do not provide for such freedoms. Many countries, particularly those countries whose laws are based on the "Napoleonic Code" (e.g. France, Spain, Italy, etc.) restrict the ability of a testator to decide how their assets should be distributed after their death.

More commonly referred to as "forced heirship", these rules give specific rights to certain persons related to the testator to receive a pre-determined share of the testator's estate regardless of what the provisions of the testator's Will provide for.

For UK nationals owning real estate in a jurisdiction where "forced heirship" applies, it has always been best practice to seek local law advice in that jurisdiction to ensure that not only are the "forced heirship" rules not contravened but also to make matters easier when administering those assets. In most cases this will normally involve making a Will in that jurisdiction to specifically deal with that property so as to avoid any unnecessary complications.

EU SUCCESSION REGULATION ("BRUSSELS IV")

The EU Succession Regulation (more commonly referred to as "Brussels IV") is designed to counter the problem that different EU member states have different laws when it comes to dealing with succession of assets and make it easier for individuals to decide which law they want to apply to their assets situated in the relevant EU member state. So, if a French national wants French law to apply to his assets in Germany, Brussels IV potentially gives him this ability to decide.

Although Brussels IV came into force on 17 August 2012, most of its provisions did not apply until 17 August 2015. Further, although the UK (and Ireland and Denmark) has opted out of Brussels IV (and regardless of Brexit), it will still have consequences for UK nationals who die on or after 17 August 2015 owning assets in one or more EU member states.

The general rule under Brussels IV is that succession to an individual's estate is governed by the law of the state in which he/she was "habitually resident" at the time of their death. There is no definition of "habitually resident" within the legislation but the relevant jurisdiction considering this question will consider all relevant factors, particularly the duration and regularity of the individual in the relevant country or state.

However, an individual can, in most cases, override this general rule by choosing the law of their nationality to govern their entire estate. The choice must be made in a testamentary document (usually a Will) but that choice can either be express or implied. Choosing the law of the individual's nationality to apply is binding on the EU member state where the asset is situated. The ability to make a choice of law has applied since 17 August 2015 and applies to UK nationals as well as nationals of EU member states.

If an individual wants to make an express "choice of law" of their nationality to govern the entirety of their estate then they would usually do so in their Will.

For example, a UK national, living in England, owns real estate in France. He does not want French succession law to apply to the French real estate, preferring instead that English law applies. To avoid the application of French forced heirship provisions, he should make a "choice of law" election in his Will(s), providing that English law should apply to succession of the French asset.

Brussels IV is only concerned with the succession law of EU member states. It will not affect the tax position of the laws of where the asset may be situated or questions relating to matrimonial property regimes. This being the case, in most cases it will be sensible to also seek advice in the EU member state where the asset is situated (which we can do on your behalf) to check how things will work in practice (including, inter alia, the potential tax implications in that jurisdiction and whether a separate local law Will would still be sensible alongside the choice of law election).

DO I NEED TO TAKE ANY ACTION?

Brussels IV will, over time, fundamentally change the succession landscape for EU member states and for UK nationals/non-UK nationals owning assets in those states.

It is therefore recommended that you review your Will(s) and current circumstances to take account of Brussels IV in succession planning if you own assets in any EU member state.

KEY CONTACTS

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