Notes United Kingdom

1. Example 1 John

**Domicile (UK law)**

* Under English private international law (PIL) John’s movable estate (his bank accounts) are governed by his domicile and his property ( Munich flat; Washington property) governed by situs;
* Domicile can change, but can only have one domicile; can include domicile of origin (place of birth) or a domicile of choice. No statutory definition of domicile but case law suggests will focus on being “resident in country with intention of staying there”. Current domicile is ambiguous; while John now lives in Germany he retains strong connections with the US (children live there, property and bank accounts);
* Domicile determines the payment of inheritance tax upon death as opposed to citizenship. A non-domiciled UK individual is subject to inheritance tax only on their UK estate at death. A spouse exemption allows assets to pass without inheritance tax between two non-domiciled spouses. Germany, the US and the UK may both seek to impose their own tax regimes and double tax treaties will need to be reviewed to examine tax position.

**John’s assets**

* The first step is to establish whether the bank account is in John’s sole name or whether it is jointly held with his wife. If jointly held, it will pass by survivorship and a grant of probate is not required. Samantha would, in that circumstance, be able to access funds with merely the production of death certificate. As gift between two non-domiciled spouses, this would be exempt for inheritance tax purposes;
* However, if the account is in John’s sole name, one has to look at both the practicalities of releasing the funds and also the entitlement to the grant and the devolution. If the sum in the account is small, an executor may be able to release this with the production of a copy of the will on signing an indemnity to the bank,
* Assuming this is a large sum in John’s sole name, if John is domiciled in Germany, German succession law would apply to the bank accounts; it would also apply to German property (situs);
* Germany will apply the European Succession Regulation (Regulation) to the succession of the whole of John’s world-wide estate. The distributions of his assets would be determined by habitual residence (HR) at death (Article 21) or earlier choice of law in Will (Article 22). John made no choice of law in his Will. Germany may determine he chose US law simply by preparing a Will in that country – I am assuming that the Will is designed to deal with John’s world-wide estate and not be limited in its scope to a particular territory;
* HR undefined in Regulation but where “habitual centre of John’s interests are situated”. It is fact sensitive and all relevant issues taken into account. John has only recently moved to Germany and has strong connection factors still with the US;
* Germany may accept that John was manifestly more closely connected to the US on his death and he therefore has his HR in the US rather than Germany;
* The US is not bound by the Regulation; it is a “third party state”. It could choose to apply its own succession law and enforce the Will’s provisions;
* Regardless of court’s jurisdiction, UK law would require a grant of probate to release the UK bank funds (either a new UK grant or a resealing of a foreign grant). Any power of attorney over bank account would cease on John’s death; Samantha would not be able to access the funds using the power.Example 2 Peter

**Revocation**

* As a general point, it should be noted that in England and Wales a Will is revoke on marriage unless there are express words in the Will allowing for it.

* Is the Will limited in territory? (as mentioned above);

**Domicile (UK law)**

* UK PIL (as mentioned above) will look at domicile to determine succession. Will investigate whether domicile of origin been replaced by domicile of choice; where is Peter’s permanent home? Five years of UK residence does not equate to UK domicile although they may have be seeking to establish a domicile of choice in the UK. Potential domiciles are Germany or Argentina;
* UK law recognises same sex marriages (since 2014) and the same inheritance tax exemptions apply to married couples and same sex marriages.

**Peter’s assets**

* UK law would only apply to his UK property. No UK forced heirship rules and matrimonial property regimes do not exist in the UK. It could apply Will of foreign jurisdiction provided validly prepared (e.g. the Will was properly executed under Argentinian law) and not revoked due to later marriage;
* If Argentinian Will invalid or German domicile without Will, UK could treat Peter as dying intestate. Value of UK property is not given but Pablo would receive all items in the flat and up to £250,000 if the property was sold. Any additional sale proceeds would then be divided between Alex and Pablo equally;
* For IHT purposes, property would be passing between two non-domicile spouses (Peter and Pablo) and IHT should not be paid. If assets passing to Alex over £325,000, possibility of additional inheritance tax payments of 40% on the excess;
* A valid grant of probate would again be required to administer the property.

**Alex’s claim against the estate**

* The UK courts have jurisdiction over UK assets. Alex could consider a claim against the UK property under the Inheritance (Provision for Family and Dependants) Act 1975 (IPFDA) 1975 but only if it can be proved that : Peter was domiciled in the UK at the time of his death. Alex must demonstrate a reasonable belief that reasonable financial provision has not been made for him under Peter’s Will or intestacy;
* Alternatively Alex could consider a claim against the estate in equity, say, on the grounds of proprietary estoppel. He would need to demonstrate that Peter promised him the property and that he acted in reliance on this promise to his detriment. He should bring the claim directly in England and not in Germany (this would have more complex jurisdictional issues under the Regulation). Based on the facts, this claim would not be successful (no such promise has been made).

Example 3 Klaus: Choice of Law and succession agreement (UK domicile in this example)

**Domicile (UK law)**

Under UK PIL, Klaus’ movable estates (his bank accounts) are governed by Klaus’ domicile and his property (German flat) governed by situs of the asset. UK law would therefore apply to bank accounts in Virginia, Germany and Miami.

**Klaus’ assets**

Klaus has made no Will therefore under UK law moveable assets would pass via intestacy rules. Under UK law entitlement is decided as follows:

* Wife receives all personal chattels; his girlfriend would not be entitled to the assets but would receive the bank account in Miami under the rights of survivorship (they would not fall into the intestacy pot);
* Wife receives a statutory legacy of £250,000 free of inheritance tax (IHT);
* The rest of the residuary estate is split equally into two halves. His wife could take one half absolutely and children take the other half on the statutory trusts;
* German property**:** would be governed by German law and the Regulation would apply. No choice of law made and therefore place of last HR determines succession; this could be the UK. Renvoi would apply (as no choice of law) so ultimately German law could determine succession of property and succession agreement (SA) )apply to the property;
* Assets passing to spouse subject to spouse exemption, although as Klaus UK domiciled and wife potentially non- UK domiciled this is capped at £325,000.

**Succession agreement**

* UK court would need to determine whether children disinherited under intestacy rules due to succession agreement ;
* Mutual Wills: a contractual arrangement between two parties not to vary their Wills. When the first party dies without having changed their Will, any changes by the second testator to their Will could be challenged. This is a close analogy to a succession agreement in that it is contractual arrangement which effects the disposition of an estate. Mutual Wills can be difficult to enforce and for the UK to look at the succession agreement as a contractual arrangement key activities need to be present (e.g. consideration pass; children legally advised and not under duress). There is a key difference as under mutual Wills it is parties agreeing to leave their estates in a particular way and it becomes binding on the first death;
* Alternatively, the children do not have to accept the gifts and could implement the terms of the SA using different strategies. They could disclaim the gift (assets would pass to wife) or alternatively could vary their inheritance through use of a deed of variation;
* If the children now wanted to challenge the validity of the succession agreement and the Court had to consider the SA, it is likely the Court would not wish to see its jurisdiction ousted and therefore possible it would not feel it should be bound by its terms.

Example 4 Derek and Julia: Choice of Law and administration difficulties and also multi-unit territories

**Domicile (UK law)**

* Domicile does not have a statutory definition in UK law; domicile of origin (where you are born) can be replaced by domicile of choice or, in this case, deemed domicile. The question does not advise where Julia was born, but potentially her long term links are with the UK (she was married here 30 years ago and is a UK citizen). Otherwise, she has no other current connections with the UK. Julia also needs to consider the implication of being **deemed domicile.** An individual becomes deemed domicile for inheritance tax purposes after having been resident in the UK for 17 of the last tax years (although this is subject to current review see below);
* If Julia has a UK domicile of origin, the Courts will need to consider whether she has acted sufficiently to displace this. Julia has spent considerable time in Luxembourg and also has strong connections with Germany. She has potential domiciles in three places; UK, Luxembourg and Germany;
* The United Kingdom (UK) consists of three jurisdictional countries (England and Wales, Northern Island and Scotland). A person domiciled in the UK can be domiciled in any one of these countries.Julia would need to nominate which territorial unit she is most closely connected with (i.e. England and Wales);
* Even if UK domiciled, Julia does not live in the UK or hold any assets in the country. Under the Regulation, she would struggle to claim HR in the country. It contemplates UK residence over a period of time, which she lacks.

**Succession**

* All Julia’s assets are located in Germany. She has not yet made a Will. Under the Regulation if she died now, her place of HR could either be Germany (where she currently lives) or even Luxembourg (as they have only recently moved to Germany and Luxembourg could be the state with which she has the closest connection). On this basis Julia’s estate could be subject to German succession law and jurisdiction, which would include the application to forced heirship rights.

**UK choice of law**

* Julia can make a choice of law under her Will. While she is a UK citizen, this might not be sufficient to determine nationality under the Regulation;
* She could try and re-stablish connections with the UK (e.g. bring assets to the UK, visit more regularly, and purchase property). She would have to be particularly careful, however, as this could impact upon her residency and UK tax position. Since April 2013, a statutory residence test (SRT) has been used to determine whether an individual is resident in the UK for tax purposes (that is, in relation to income tax, capital gains tax and inheritance tax). Increasing her links with the UK, could mean she becomes tax resident in a tax year;
* In addition, the UK government has recently announced changes to deemed domicile provisions. Julia would only need to be resident in the UK for 15 of the last 20 years, ending in the current tax year, to become deemed domicile for IHT purposes. Periods of residence when a child will count and if Julia lived in the UK when she was younger, she could quickly meet the 15 year residency test;
* If Julia manipulates the situation such that UK and not German law applies to avoid forced heirship, German courts may reject her choice of law. The Regulation envisages situations where this might occur and allows refusal of a choice of law “only if such application is manifestly incompatible with the public policy of the forum” (Article 35).

**Example 5 Trusts (UK citizen)**

**Domicile (UK law)**

Mary is domiciled in Germany.

**Choice of law (US)**

* The Regulation does not give Mary complete freedom to determine the succession for her estate. Article 22 allows her to choose the law applicable to succession, but it must be the law of nationality (at death or date on which Will is made). Any choice must apply to the succession as a whole; it is not possible for Mary to choose two separate laws to apply to her assets (i.e. German law to one and US to another). The US is also a multi-jurisdictional estate. Mary would need to choose the law of the territorial unit with which she has the closest connection (Article 36);
* To nominate Virginia law and for it to be recognised in the German courts, Mary must therefore demonstrate (1) she is a US national (apart from her US assets the question provides no other evidence of US connections) and (2) she has the closet connection with Virginia;
* The US is not bound by the Regulation; it is a “third party state”. As Mary has made a US Will, however, their Courts should be happy to consider it.

**Habitual residence (Germany)**

* If Mary has made an unsuccessful choice of law, German courts will use HR (German) to determine the succession of her assets. Potential forced heirship rules apply and children could inherit on first death;
* The courts would also need to review succession of the assets in the trust. The Regulation (Article 1) specially exempts from its jurisdiction the creation, administration and dissolution of trusts. It is unlikely Mary’s executors could ask the Courts to deal with any issues of trust validity;
* Brussels IV does apply to the devolution of assets and determination of beneficiaries under will trusts and statutory trusts on intestacy (recital 13) .The Court might, therefore, examine, the assets passing into the trust and whether this accords with German succession law and forced heirship;
* The tax position could be affected. Under UK law ,for example, Mary’s proposed life interest will trust would on first death be exempt from inheritance tax as it is passing to her husband (the spouse exemption), assuming both are UK domiciled. IHT would only be payable on second death when assets pass to the children. If, however, they stand to inherit on first death, inheritance tax would potentially be paid at 40% on any assets over £325,000.