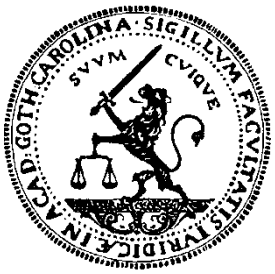

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The consequences of England's decision not to opt into the proposed EU Regulation on succession and wills

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Summary

To date England has decided not to opt into the proposed EU Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate. However, with an eventual opt in England fully engages with the ongoing negotiations on the proposed Regulation between the Member States. From the English viewpoint, the core issues of the Regulation comprise the connecting factor of habitual residence and the impact of foreign clawback regimes. The English conflict of law rules differ considerably from the Regulation and if England does not adopt the Regulation, these rules will coexist.

The English conflict of law rules are based on a scission system where movable property is governed by the law of domicile and the immovable property by the State where it is located. This can be compared to the Regulation which is based on a unitary system where a single law is applicable to the succession as a whole. The scission approach has been under a great deal of criticism for causing distribution of property that is unfair and unreasonable as different laws will be applied to property located in different States, but belonging to the same person. A unitary system is therefore to be favoured. However, as long as an English opt in is not present the scission system survives.

Another discrepancy is clawback that intends to bring back gifts made by the deceased before death to be distributed to the heirs. In England, the deceased's estate does not include property that has been disposed of by gifts and the courts will not consider a claim of clawback even if it is included in the law they are applying. This reflects the fundamental principle of testamentary freedom in English law, a principle that England is not willing to abandon.

Furthermore, the Regulation uses habitual residence as the main connecting factor, while in England, conflict of law rules are based on domicile. Even if England does not adopt the Regulation, English citizens will still be affected by the Regulation as those English citizens resident in a Member State would be subject to the concept of habitual residence, as the courts must apply the Regulation to everyone who is resident in their territory.

Due to the universal character of the Regulation a non opt in by England would lead to legal uncertainty, less predictability and higher costs for legal advice for citizens planning cross-border successions with a connection to England and other Member States as well as for those entitled to a share of the deceased's estate. A non opt in by England would therefore be likely to negatively affect cross-border successions involving English citizens as well as cross-border successions involving citizens of other Member States.

Sammanfattning

England har i dagsläget beslutat att ej anta den förslagna EU- förordningen om behörighet, tillämplig lag, erkännande och verkställighet av domar och officiella handlingar i samband med arv och om inrättandet av ett europeiskt arvsintyg. England deltar dock i de pågående förhandlingarna mellan medlemsstaterna rörande förordningen och en ratificering är fortfarande möjlig. Enligt England omfattar huvudfrågorna i förordningen anknytningskriteriet *habitual residence* och effekten av utländska *clawback* regimer. Anknytningskriteriet i förordningen skiljer sig avsevärt från det tillämpade i England och om England ej antar förordningen kommer dessa regler att existera sida vid sida.

De engelska lagvalsreglerna bygger på ett system där en uppdelning görs mellan lös egendom som regleras av Englands svar på hemvistlandets lag, *domicile,* och fast egendom som regleras av lagen i det land där egendomen befinner sig. Detta skiljer sig från förordningen som tillämpar ett enhetligt system, där endast en lag tillämpas på egendomen i dess helhet. Det engelska systemet har kritiserats under en längre tid för att vara orättvist och orimligt då olika lagar tillämpas på egendom som är belägen i olika medlemsstater men som tillhör samma person. Ett enhetligt system, likt det valda i förordningen, är därför att föredra men så länge England ej antar förordningen kvartstår systemet med en uppdelning mellan lös och fast egendom.

Ett annat problem rör *clawback* som avser återföring av gåvor till den avlidnes dödsbo som den avlidne givet under sin livstid, för distribution till den avlidnes arvingar. Enligt Englands arvsrätt räknas ej egendom som givits bort in i den avlidnes dödsbo och de engelska domstolarna beaktar ej spörsmål rörande *clawback*. Detta återspeglar den engelska grundläggande principen om testamentsfrihet, en princip som England ännu ej är beredd att överge.

Även om England inte antar förordningen kommer engelska medborgare påverkas av den om de omfattas av begreppet *habitual residence,* då förordningsstaterna måste tillämpa förordningen på alla bosatta inom dess territorium. Dessutom påverkas medborgare med hemvist i en förordningsstat och som har tillgångar i England på ett negativt sätt då de blir underkastade två rättssystem.

På grund av förordningens universella karaktär åtföljs ett utanförskap för England av rättsosäkerhet, mindre förutsägbarhet samt högre juridiska rådgivningskostnader för de personer involverade i gränsöverskridande arvsfrågor. Ett utanförskap skulle därför sannolikt påverka den gränsöverskridande arvsrätten negativt både för engelska medborgare och medborgare i förordningsstater.

Preface

I wish to express my sincere appreciation to my supervisor Michael Bogdan, for rapid and great supervision.

I owe Annika Andebark at the law firm Annika Andebark AB the deepest of thanks for believing in me and inspiring me. For all the invaluable support and for the opportunities she has given me.

I wish to dedicate this thesis to my family for their unconditional love and undying support, I would not be where I am today without them.

Abbreviations

A.C	Appeal cases
All E.R	All England law reports
CH	Chancery Division
COM	Commission
ECJ	European Court of Justice
ECS	European Certificate of Succession
EU	European Union
EWHC	High Court of England and Wales
Fam	Family Division
FLR	Family law reports
I.R	Irish reports
NCPR	Non-Contentious Probate Rules
STEP	Society of Trust and Estate Practitioners
UK	United Kingdom
WLR	Weekly law reports

1 Introduction

1.1 Background

The increasing mobility within the EU has led to a growing number of people crossing the borders; living, working and owning property in other Member States.[1] Every Member State has private international law rules that vary fundamentally, determining what their conflict of law rules should be. The laws of the Member States can give rise to different answers to the question of which court is to deal with a cross-border succession, and the possibility that more than one could, by its own law, have jurisdiction to do so.[2] When a person connected to more than one Member State dies, it is necessary to determine which of the Member States' law that should govern the succession.[3]

A European instrument regarding succession has been sought for some considerable time, but all previous attempts have been unsuccessful. The Hague Convention on the Law Applicable to Succession on Estates of Deceased Persons of 1989 has been the most ambitious attempt at harmonisation. It covers the major issues relating to the law of succession, but the Member States provided little support. Many Member States did not want to replace their conflict of law rules for a harmonised convention; only the Netherlands ratified the convention.[4]

Succession is not included in the private international law instruments adopted by the Community so far. With transnational successions increasing it is clear that harmonised European rules on this issue should be addressed. In March 2005, the European Commission[5] issued a Green Paper on succession and wills[6], to fill the shortage.

The Commission observed that harmonisation of substantive law in the Member States is not possible; instead the focus has to be on the conflict of law rules. Further, the Commission concluded that settling the question of applicable law is of priority as this would facilitate the progress on succession, as well as the free movement of people within the Community.[7]

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[1] Member State indicates membership of the European Union as well as Members of the proposed Regulation.
[2] COM (2005) 65.
[3] House of Lords, European Union Committee, 6th Report of Session 2009-10, p.8.
[4] Harris, (2008), p.183.
[5] The European Commission indicates, Commission of the European Communities, and will hereinafter be referred to as the "Commission".
[6] COM (2005) 65. Green Paper on succession and wills will hereinafter be referred to as "Green Paper"
[7] COM (2005) 65.

The Green Paper applies to succession to a deceased's estate, covering all property transmissions as a result of death. It establishes common rules that the Member States have to follow to determine which Member States' law should apply to the cross-border succession where the deceased has assets in more than one Member State, as well as which Member States' courts have the competence to determine the succession.[8]

In late 2005 the Commission appointed an expert group of solicitors and professors with the intention of composing a proposal in the light of the responses to the Green Paper received. This proposal was presented by the Commission on 14 October 2009 and shall enter into force on the twentieth day following its publication in the Official Journal of the European Union and apply from one year after the date of its entry into force.[9]

1.2 Purpose

The purpose of this thesis is to investigate and illustrate the current approach to the core issues surrounding the proposed Regulation from a critical English perspective. My intention is to identify and clarify these issues as well as critically examine why a non opt in decision by England was expected and to analyse the consequences that follow. In order to achieve this purpose a comparative study will be conducted in order to explore and analyse the discrepancy of the rules of the Regulation and the conflict of law rules in England. This comparative study has the aim of comparing an opt in to a non opt in, to accomplish the purpose of analysing and demonstrating the consequence of England's decision.

1.3 Methods and material

To accomplish the purpose of this thesis in a satisfactory way various methods have been used which consist of descriptive, comparative and analytical approaches.

Overall, the subject matter of this thesis has necessitated the use of international sources as well as domestic with regard to both English literature and English case law. This area of law has not been introduced in any previous instruments at Union level, and consequently the amount of literature and national acts provided is limited. Thanks to my Erasmus exchange year at Kingston University, London I have had access to public legal bodies in England as well as other sources of law.

Particular emphasis has been placed on analysing the Green Paper, the Draft Regulation and the preparatory work from the European Parliament and the

[8] Harris, (2008), p.184.
[9] COM (2009)154 article 51.

Commission along with a detailed account of a number of consultation papers and responses. English doctrine and law review articles by professional scholars have also been highlighted in addition to English authorities such as the House of Lords and the Ministry of Justice, since these are the primary sources of information when examining this field of law.

It should be noted that most scholars are practitioners of English law and therefore adopt an English supporting perspective. It has, as a result, been difficult to find as many arguments in support of the Regulation, outside the preparatory work of the Regulation, as non-supportive arguments.

1.4 Structure

This thesis is structured so as to first outline the English response to the Green Paper and to show the critical evaluation of the Regulation from the English point of view in C*hapter 2*. In the following *Chapter 3, 4, 5* and *6* some of the core issues of the Regulation are introduced; applicable law, jurisdiction and recognition and enforcement with their various concepts highlighting the movable and immovable property, the connecting factor of habitual residence, clawback and the administration of estate. This is accompanied by a brief descriptive presentation of the English conflict of law rules with emphasis on the connecting factor of domicile in *Chapter* 3. This outline will present the reader with a sense of the context in which the term domicile exists. This presentation also explores one of the most important principles in English inheritance law, namely the testamentary freedom in *Chapter 4*. These chapters are based on a comparative method, dealing with the concepts both as established in the Regulation and in the English inheritance law.

Within the framework established above, the preceding findings are applied to an analysis in *Chapter 7*, illustrating the consequences of an opt in decision by England compared to a non opt in.

1.5 Delimitations

Because of the substantial number of issues surrounding the Regulation, this thesis is unable to address every issue raised or question posed. Focus has therefore been aimed at the main themes that have emerged. Hence, in order to present a comprehensive and sufficient picture of the English viewpoint of the Regulation this thesis contains an analysis of the core issues of the Regulation. These concepts together create a suitable foundation to conduct further analysis of the controversies surrounding the Regulation from the English perspective.

It should be noted that this thesis only focuses on an evaluation of the rules of England and not regimes of other regions within the UK. The differences

between the English system and the regimes of other regions within the UK lie primarily in substantive succession laws. While the succession laws in England and Wales and Northern Ireland are widely similar, succession laws in Scotland are based on civilian tradition and differ from the common law based rules, in particular as to the extent to which a person is free to direct the distribution of his estate without challenges from members of his family.

2 The proposed EU Regulation

2.1 The English response

The House of Lords[10] reconsidered the Green Paper in October 2007 after the first consideration in 2005 shortly after the Green Paper had been issued. During this time, the English position was much more sceptical towards it while the House of Lords in 2005 stated; "*... We are not convinced that action in family law matters is required to the extent proposed by the Hague Programme. Supplying the individuals concerned with more and better information on their rights under the laws of Member States may be a more effective way of addressing cross-border issues than EU legislation. We believe that such avenues should be explored before embarking on the very ambitious legislative agenda set out in the Hague Programme."* [11] When the House of Lords reconsidered the proposal in October 2007, they gave a more positive response. Here it was observed that, although the Commission had not produced the most convincing case for an instrument at Union level, there are in fact an increasing number of English citizens holding assets, working and owning homes in other Member States. This points to a need for greater and more detailed legal certainty within this area of law. However, the response is not without objections from the House of Lords, who states that: "*It is important to ensure that an EU instrument, suitably qualified or flexible in its provisions, would provide real practical benefits to UK citizen.*"[12]

The English[13] response to the Green Paper stressed that the differences in the Members States' legal systems may make the achievement of harmonised conflict of law rules difficult.[14] England has the view that the Member States' different range of legal traditions must be entirely respected. This is essential because the Member States' different ways of approaching the transfer of property on death are fundamental. Like England, some Member States favour freedom of testamentary disposition, while others provide for compulsory heirship. The share allocated to the surviving spouse is a question that gives rise to the largest number of succession proceedings because of the conflict of interest involved. The allocation of this share differs significantly from country to country. Some countries place the spouse in the same position as a surviving child, which differs from Italy for example where the surviving spouse is entitled to a certain reserved portion,

[10] House of Lords indicates, House of Lords, European Union Committee on EU law and will hereinafter be referred to as "The House of Lords".
[11] House of Lords, European Union Committee, 10th Report of Session 2004- 5, p. 60-63.
[12] House of Lords, European Union Committee, 2nd Report of Session 2007-8, p. 11.
[13] "The English" indicates The English Government and will hereinafter be referred to as "England" or "English".
[14] Ibid. p.6.

whereas in Belgium the spouse is only granted a limited life interest.[15] Furthermore, England – amongst others – practices a so called court based system, where, at the time of death ownership of the deceased's property is given to a third party, who is entrusted with the administration of estate and the distribution to the beneficiaries, while some other countries allow the property to pass directly to the heirs. Some Member States include gifts made by the deceased during his lifetime and others like England define the estate as the property of the deceased at the time of death. This is a fully legitimate diversity, which limits the extent to which any harmonisation proposed by European instruments could be accepted. Even if England were to have a positive attitude to a limited harmonisation that would bring benefits to the citizens, it considers that there is very little scope for being able to create such harmonisation in the field of succession.[16]

2.2 Impact assessment

According to the European Parliament,[17] at the time the Green Paper was issued there were 50,000-100,000 transnational successions opened per year in the EU; a number that rises with the accession of new Member States. Furthermore, the national differences only make it costlier and harder for heirs to take possession of the estate.[18]

The majority of the responses to the Green Paper were positive to a private international law instrument within the area of succession, and many had the view that the legal justification is almost self-evident.[19] However, despite a more positive response, the English response in 2007 pointed to the fact that there is no hard evidence as to the need for a Regulation.[20]

England has a strong view that any proposal should be developed after thorough analysis of the problems with existing law. Any proposal at Union level must flow from such an analysis and be justified by clear evidence that the proposal offers proportionate solutions which cannot be addressed at national level. It suggests that the Green Paper does not contain such clear evidence. The fact that there appear to be around 50,000- 100,000 transnational succession cases each year does not provide evidence that this action is necessary to justify legislation. England stressed that the Commission has to identify the real problems and justify proposed changes

[15] Jenard Report [1979] OJ C59/1.
[16] Harris, (2008), p. 186.
[17] European Parliament indicates European Parliament Committee on Legal Affairs and will hereinafter be referred to as "European Parliament".
[18] Explanatory Statement in the Report of the Committee on Legal Affairs of 16 October 2006 endorsed by the Parliament (2005/2148(INI)), para 1.
[19] The responses to the Green Paper can be found here: http:// ec.europa.eu/justice_home/news/consulting_public/successions/news_ contributions_successions_en.htm
[20] House of Lords, European Union Committee, 2nd Report of Session 2007-8, p. 15 and Harris, (2008), p. 187.

before England can accept the Commission's view as to the need for a reform.[21]

The harmonisation of private international law has never previously been attempted on a scale like this. Notwithstanding the failure to create a harmonisation of law rules on succession with the Hague Succession 1989, the Commission appears to attempt to cover the full range of private international law- jurisdiction, recognition of foreign judgements and choice of law, notarial acts, as well as the introduction of a European Certificate of Succession and Register of wills.[22] England considers this as too much and too soon, which may lead to the collapse of the whole Regulation. England maintains that a single project is unworkable and suggests that the Commission proceeds with a smaller examination of separate areas.[23]

[21] House of Lords, European Union Committee, 2nd Report of Session 2007-8, p. 15.
[22] Harris, (2008), p. 189.
[23] House of Lords, European Union Committee, 2nd Report of Session 2007-8, p.17.

3 Applicable law

3.1 Introduction

One of the most essential questions of the Regulation is what the law applicable to the succession should be. Courts are not obliged to apply their own State's law, thus they may apply the law of another State. For that reason, the Member States have adopted their own conflict of law rules to decide which state's law should be applied to which case. These rules may differ from each other and several Member States may be competent to deal with a given case where they may come to different results. This does not only lead to a major factor of legal uncertainty, but does also have severe consequences on the mutual recognition of judgements between Member States.[24]

3.2 Movable and immovable property

One of the main discrepancies between the Member States' conflict of law rules is whether a unitary system should govern the whole estate or whether there should be separate conflict of law rules depending on the type of property.[25]

Seventeen Member States have a unitary system where both immovable and movable property is subject to a single law, regardless of where it is located, whereas ten Member States have a system based on scission where immovable and movable property located in different states may be subject to different laws. According to this, movable property is subject to the connecting factor, which mainly is the last habitual residence, nationality or domicile, whilst the immovable property is governed by the law of the country where it is located.[26]

At present, England has a scission approach whereby the English private international law rules determining the law applicable to the succession make a distinction between immovable and movable property. Immovable property is governed by the law of the place in which the property is located, *lex situs*, and movable property by the law of the deceased's domicile at the time of death. This approach is adopted after the idea that the deceased is generally most connected to the State where he resided. Lex situs is also used to determine whether something is an immovable or a movable object. [27]

[24] SEC(2009) 410, p. 11.
[25] Harris, (2008), p. 207.
[26] SEC(2009) 410, p. 12.
[27] Harris, (2008), p. 207.

This approach is not without detractors and the scission approach has been under a great deal of criticism by English legal scholars. The key problem is that two different laws will be applied separately to determine the succession of property located in different States but belonging to the same deceased, without fitting in with each other. This will cause distribution that is unfair and unreasonable. It is not hard to envisage family members being denied protection or being excessively enriched.[28]

The approach of a unitary system in the Regulation will lead to unity regarding the transmission of succession and will abandon the frequent use of a scission system. [29] A unitary system is therefore to be favoured, but due to the English non opt in the scission system continues.

3.3 Domicile

The English courts apply the common law test of domicile at the time of death; hence, the *lex domicilii* is favoured as the connecting factor for all aspects of status and capacity for parties who are involved in disputes concerning the distribution of the deceased's estate.[30] There are three different concepts of domicile raised at different points in time in a person's life. In common law legal systems, every citizen obtains a *domicile of origin* at birth, which is that of his or her father.[31] Throughout their minority, children have *domicile of dependency* which follows the domicile of the parents.[32] After reaching the age of majority, an individual can choose a new domicile, the *domicile of choice*. To establish domicile a long-term residence accompanied by an intention to remain in the country indefinitely has to be presented.

3.3.1 Long-term residence

A long-term residence requires an actual residence in the country. This requirement is seen as a permanent residence and thus the residence does not have to be formal.[33] The English court ruled in the case *IRC* v. *Duchess of Portland* that,"…*residence in a country for the purpose of the law of domicile is physical presence in that country as an inhabitant of it"*.[34]

[28] Dicey, Morris and Collins, (2006), p. 121.
[29] Rea Rea [1902] 1 I.R. 45.1
[30] European-Justice and Home Affairs, http://ec.europa.eu/civiljustice/publications/docs/report_conflits_uk.pdf, p.4.
[31] Udny v. Udny (1869) L.R. 1 Sc. & Div. 441.
[32] Dicey, Morris and Collins, (2006), Rule. 156-158..
[33] White v. Tennant, 31 W. Va. 790, 8 S.E. 596 (1888).
[34] IRC v. Duchess of Portland [1982] Ch 314 s. 318-319.

The duration of the residence is not crucial as long as the necessary intention is apparent.[35] Furthermore, a real connection has to exist between the individual and the country for residence to be established. It is not enough to establish oneself in a country just to achieve a specific purpose, e.g. education.[36] If an individual is resident in more than one country, he is considered to be domiciled in the country where he has his primary home, *chief residence*.[37]

In order to determine whether a new domicile has been acquired, the duration of the residence is not essential and other factors play an equally important part in assessing the true nature of the residence. The English High Court has found that the test for whether residence is enough to establish domicile is "*a qualitative as well as a quantitative test*".[38]

3.3.2 Intention to remain indefinitely

Intention to remain indefinitely is difficult to determine and is the one factor that gives rise to the most disputes, as it is both ambiguous and hard to prove.[39]

Residence that is only intended for a limited time or for a specific purpose is not satisfactory as the intention must be for a permanent or indefinite residence. The resident must be, "…*fixed not for a limited period or particular purpose, but general and indefinite in its future contemplation*."[40] Furthermore, the intention shall be for residence in one country only for this requirement to be met.[41]

When the courts try to determine a person's intention they do not only rely upon what the person asserts, but also takes into account every aspect of the person's life which may be important to find out the individual's genuine intention.

3.4 Habitual residence

The connecting factors used by the Member States to determine the applicable law to the succession are quite different. There is specially a difference between Member States who apply the law of the last habitual

[35] White v. Tennant, 31 W. Va. 790, 8 S.E. 596 (1888).
[36] Qureshi v. Qureshi [1972] Fam. 173.
[37] Plummer v. IRC [1988] 1 All ER 97, [1988] 1 WLR 292.
[38] Ramsay v. Liverpool Royal Infirmary [1930] AC 588, s. 598.
[39] Clarkson, Jaffey and Hill, (2006), p. 38.
[40] Udny v. Udny (1869) LR 1 Sc & Div 441, s. 458.
[41] Dicey, Morris and Collins, (2006), p. 128.

residence of the deceased and others who apply the principle of domicile or nationality. [42]

The Regulation envisages a single connecting factor of habitual residence to determine the applicable law to apply to the succession as a whole. According to article 16 of the Regulation, the law of the Member State where the deceased had his habitual residence at the time of death shall be applicable to the succession.[43] However, the connecting factor of habitual residence has been criticised as it is not currently clearly defined and may therefore be interpreted differently in the Member States. The only criterion for its determination which is given by the Regulation is the mentioning that it should coincide with the deceased's "centre of interest".[44] If England decides to opt into the Regulation, there would be great changes to its existing legal system regarding the connecting factor. However, although the English private international law rules are based on domicile and not habitual residence this is not an unknown concept in England. The term has been introduced in various EU Regulations and Hague Conventions [45], several of which England has adhered to.[46]

According to the ECJ[47] in the case C-523/07, habitual residence is equivalent to the place which "*reflected some degree of integration by the child in a social and family environment.*" The following aspects have to be considered: the extent of the stay, regularity, the child's nationality, linguistic knowledge, the family's move to the Member State and the circumstances and reasons for the stay in a Member State as well as the family and social relationships of the child in the State. The national courts have to take all the circumstances specific to each individual case into account to establish the habitual residence of the person.[48]

A definition of habitual residence has also been considered by the English High Court in matrimonial proceedings in the case of *Marinos v Marinos* where the court set out guiding principles to be used in difficult situations:

- EU habitual residence should be defined by an individual's main interest instead of by the length of the individual's residence;

[42] House of Lords, European Union Committee, 2nd Report of Session 2007- 8, p. 12.
[43] Article 16 of the Regulation.
[44] COM(2009) 154, p.12, in relation to article 16 of the Regulation.
[45] *See* the definition in article 19 para. 1 subpara. 2 of Regulation (EC) No 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I) and article 23 para. 2 of Regulation (EC) No 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) and Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (Brussels IIbis).
[46] Frimston, (2009), p. 4.
[47] The ECJ indicates the European Court of Justice.
[48] C-523/07, ECJ, 2 April 2009.

- Even if an individual is resident in more than one State at the same time he can only have one EU habitual residence at any time;

- EU habitual residence can be lost and gained in the same day, thus in the same manner as a change in domicile.[49]

Despite this, the term habitual residence has been criticised by England for being the only connecting factor of the Regulation and for lacking definition. England has also disapproved that the ECJ may subsequently clarify the concept. It can be seen that the definition of habitual residence in various Regulations only relates to the relevant subject matter of that specific Regulation and would therefore not be transferable to the Regulation on succession and wills. The extent of connection that is considered appropriate may be less significant under one Regulation than under another.[50]Furthermore, England has criticised the fact that the use of habitual residence as a single connecting factor "*could subject the estates of individuals, either on short-term secondments overseas or otherwise without a sufficiently substantial connection with a particular legal system, to that system's law of succession if they were to die whilst resident in the country in question*",[51] even if they intended to return to another Member State at the end of their secondments.

The connecting factor of domicile requires a significant connection with the country of residence and helps identify the jurisdiction in relation to the Member State where an individual intends to stay, while the connecting factor of habitual residence has outcomes which would be inappropriate and may contradict the expectations of the deceased and their families. According to England, habitual residence does not provide for a significant degree of connection to a Member State.[52] However nor can one expect that the common law test of domicile will be preserved or that the connecting factor of nationality would be preferred against the habitual residence. A person's nationality may not have any direct connection with the place where the deceased's life was centred or with his assets. Furthermore, the fact is that the common law test of domicile is little known in other Member States. It may also lead to curious results; for example a person born in one Member State may live in another one for all his life but prior to death return to the place of birth and retain domicile there on the basis of a vague intention to return for a short amount of time.[53] Furthermore, the English definition of domicile differs from definitions in other Member States and has a lot of vagueness attached; thus a reform of the existing law of domicile is urgently needed in any event.

[49] *Marinos v Marinos* [2007] EWHC 2047.
[50] Minister's Letter (Lord Bach) of 17 December 2009.
[51] Ibid.
[52] Minister's Letter (Lord Bach) of 14 December 2009.
[53] Harris, (2008), p. 210.

3.5 Freedom to choose the applicable law

As an alternative to article 16 of the Regulation, individuals have some degree of freedom to choose the applicable law by will, through article 17 of the Regulation. The article makes it possible for individuals to choose the law of their own nationality to apply to the succession as a whole. The choice has to be expressed and included in a declaration in the form of disposition of property upon death.[54] At present, there is no such freedom under English law. The only situation where party autonomy is accepted in the English conflict of law rules on succession concerns the interpretation of wills.[55]

Article17 of the Regulation would be a novelty under English law and although it can be seen as an article strengthening the legal certainty for individuals, the reference to nationality alone has consequences for England that has a system based on domicile. This has however been considered and it appears from recital 32 of the Regulation that domicile can be used as an alternative to nationality in Member States with a system like England based on domicile.[56]

Article 22 of the Regulation proposes another aspect of the choice of law rules which appears to be more problematic. The article is an exception to Article 17 of the Regulation and concerns special succession regimes. These are defined as regimes "*to which certain immovable property enterprises, enterprises or other special categories of property are subjected by the law of Member State in which they are located on account of their economic, family or social purpose where, according to that law, this regime is applicable irrespective of the law governing the succession*."[57]

In their consultation paper, the Ministry of Justice describes this exception as uncertain and widely drawn which makes it likely to create legal uncertainty as to what law should be applied.[58]

[54] Article 17 (2) of the Regulation.
[55] Dicey, Morris and Collins, (2006), Rule 147.
[56] Recital 32 of the Regulation.
[57] Article 22 of the Regulation.
[58] Ministry of Justice, (2009), p. 40, recital 36.

4 CLAWBACK

4.1 Introduction

Many difficulties facing England are based on a difference of understanding what matters are included within the word "succession". This issue arises from the English wish to distinguish the term "succession" from "administration of estates" as well as the English conception of what assets are part of the deceased's estate. Perhaps the most important issue in the proposal facing England, is the one of "clawback".[59] One of the main issues of clawback is the imposition of a compulsory inheritance provision that limits the English tradition of testamentary freedom.

4.2 The English tradition of testamentary freedom

Unlike many legal systems in the EU, the English legal system recognises that the testator may dispose of his estate exactly as he wishes. The freedom of testamentary disposition is in theory unrestricted which is primarily provided for in the Wills Act 1837.[60] *"It shall be lawful for every person to devise, bequeath or dispose of, by his will, executed in the manner hereinafter required, all real estate and all personal estate, which he shall be entitled to, either at law of in equity at the time of his death…"*[61]

Previously, the absolute testamentary freedom for the testator resulted in disinheritance of family and dependants of the testator by his will. If valid, the testator was free to determine who his heirs would be and avoid the compulsory heirship, which has been well debated. Due to this the Inheritance (Family Provisions) Act 1938 and later the Inheritance (Provision for Family and Dependants) Act 1975, promulgated in England. The latter allows dependants of the testator to obtain reasonable provisions of the deceased's estate if the will does not give them such provisions. The Inheritance (Provision for Family and Dependants) Act 1975 includes family members and individuals who depend on the deceased financially.[62]

Even though the Wills Act 1837 allows unrestricted freedom for the testator to dispose of his property it can be seen from the foregoing that this freedom is practically restricted by subsequent enactments. So one wonders if the testamentary freedom is just an illusion.

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[59] Harris, (2008), p. 196.
[60] Short Title "The Wills Act 1837" given by Short titles Act 1896 (c. 14).
[61] Section 3 grants the testator unrestricted power of testation.
[62] The Law Commission, Consultation Paper No 191, p. 1-2.

4.3 The effect of clawback and compulsory inheritance

Under article 19(2) (j) of the Regulation, clawback claims are included in the scope of the applicable law of succession "*...any obligation to restore or account for gifts and the taking of them into account when determining the shares of heir...*" [63] and would therefore become enforceable within England.

Clawback arises when gifts are made during lifetime, *inter vivos*. An heir benefiting from a compulsory inheritance is able to claim gifts or trusts made by the deceased during his lifetime. The term clawback intends to bring back gifts made by the deceased under certain conditions; the gifts should be brought back to the estate leaving it to be distributed to the heirs.[64] In England, there is no compulsory inheritance and thus, no clawback. Nor will the courts consider a claim of clawback even if it is included in the law they are applying.

The problem of clawback for England does not seem to be shared by other Member States. In England, the deceased's estate does not include property that has been validly disposed of by gifts, trustees or companies during the lifetime of the deceased. Several other Member States include gifts made by the deceased during his lifetime; hence, inter vivos transactions may be brought back into the estate to ensure that there are sufficient funds to allocate to the heirs.[65] Consequently, there is a considerably greater legal stability in property ownership in England compared to the Member States where clawback claims may be made. This reflects the fundamental principle of testamentary freedom in English law, which places the importance of an individual's freedom to make transactions and alienate property above the protection of the family members' interest.[66]

The Law Society and STEP[67] compiled a joint response stating that the protection of inter vivos transaction in England is a fundamental property law right that should not be undermined by clawback and the requirement that lifetime gifts has to be overturned to provide for fix shares of the deceased's estate. In many civil law jurisdictions, the civil heirs may claim for compensation for the property that is given to the asset holder. These claims are not recognised in common law systems and in England it is only the property owned at the time of death which may be subject to the claims of heirs whether under common or civil law. To allow heirs to overturn inter

[63] COM(2009)154.
[64] House of Lords, European Union Committee, 6th Report of Session 2009-10, p. 25.
[65] Harris, (2008), p. 196.
[66] Ministry of Justice, (2009), p. 51.
[67] STEP indicates Society of Trust and Estate Practitioners.

vivos transactions made lawfully by the deceased in a common law system would lead to great confusion, uncertainty and unfairness.[68]

The conditions for which clawback operates vary significantly from Member State to Member State. Still it is to be found in most legal systems in the EU. One of the main differences in operating the clawback regime includes the time within which a claim for clawback may be made.[69] In Germany, there is a time limit of 10 years and in Austria, the limit is 2 years. In the Netherlands, the clawback is a monetary claim with a time limit of 5 years before death and only for gifts to non-heirs. In France, there is no time limit and the claim is like in the Netherlands- monetary instead of a claim to the assets themselves.[70] As can be seen in the Inheritance (Provision for Family and Dependants) Act 1975, a gift can be made undone in England under some circumstances, and thus clawback does exist in theory. According to the Inheritance (Provision for Family and Dependants) Act 1975 a gift made within 6 years of death and with the intention to defeat a claim can be set aside.[71] This can be compared to the effect of clawback in most continental jurisdictions, which can be a reason to consider if clawback actually presents a problem for England or not.

It is inevitable that England is not the only Member State that needs to find a solution for this problem. Since different legal systems have different time limits beyond which gifts can not be challenged and different ways of assessing compensation claims, whether it is to look at the value at the time of death or the value of the gift at the date it was made, the uncertainty would be multiplied.[72] England may have to apply foreign laws of succession that can go back several years before the deceased's death to determine what assets form part of the deceased's estate. This erodes the security of inter vivos transactions and represents a retrograde step.[73]

The introduction of clawback in England via the inclusion of the obligation to restore or account for gifts in the Regulation could affect the fundamental right of the deceased to bequeath parts of his or her property. This could create great practical problems, particularly for the recipients of such gifts including charities. From the English perspective it is not acceptable that a donee, having received a gift during the lifetime of the deceased, cannot be certain that it will not be claimed back by the heirs if the donor changes his habitual residence after the gift has been made.[74] The impact of the Regulation on this point must also be seen from the perspective of the English trust industry where trusts enable the creation of different forms of estate to be transferred to the following generations.[75]

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[68] The Law Society and STEP, (2007), p. 2.
[69] Ibid, p. 25-27.
[70] Frimston, (2009), p. 6-7.
[71] House of Lords, European Union Committee, 6th Report of Session 2009-10, p. 16.
[72] Ibid and Harris, (2008), p. 197.
[73] Harris, p. 197-198.
[74] See the Minister's Letter (Lord Bach) of 17 December 2009.
[75] Harris, (2008), p. 365.

The House of Lords argued in its 6th report that the freedom for individuals to dispose of their property as they wish is of legal tradition in England. With this comes a strong belief in a cultural heritage and the providing for trusts, which plays an important role in England. Furthermore, the effect of clawback could be alleviated if testators were allowed to choose a law such as the English that does not include clawback to apply to their estate. The Regulation only suggests a choice of the testator's nationality at the time of death; thus it is not possible for an individual who does not have the nationality of a Member State that excludes clawback to choose this mechanism.[76]

For England, the most suitable solution would be to argue for an autonomous definition of the term "estate of the deceased" that excludes property lawfully overturned during the deceased's lifetime and in addition, to clarify that compensation claims for such property do not fall within the scope of the Regulation. An autonomous interpretation would lead to a uniform instrument and the European institutions ask for an autonomous definition of almost every term in other European Regulations so it may be asked why such an interpretation should not be made here.[77] However, an autonomous definition does not seem to be a priority for the European institutions regarding what assets should form part of the deceased's estate. Thus, it is up to the governing law to decide and in turn the application of the Regulation is left even more unpredictable.[78]

Despite the foregoing, the inclusion of gifts made during the deceased's lifetime within the whole estate is part of most Member States' succession laws and England is the exception.[79] Current English conflict of law rules may already lead to the application of a foreign law with rules of compulsory inheritance.[80] Conversely, concerned that family members and dependants may be disinherited if the applicable law to the succession is that of a jurisdiction with no compulsory heirship protection, it is possible that other jurisdictions just as the English one, will push for rules that do not undermine their existing course of action. It is likely that some Member States will be concerned about the fact that the English rules avoid compulsory inheritance and demand a rule enabling some form of protection for family members and dependants.

After having decided not to opt in, England confirms that it is at this point not willing to find compromises acceptable to other Member States but it may have to give way to the unfettered application of its own law in foreign courts.[81]

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[76] With the exception of the vague mentioning of domicile in recital 32 of the Regulation. House of Lords, European Union Committee, 6th Report of Session 2009-10, p. 22.
[77] *See* Brussels I where almost every term is defined autonomous, including succession and wills
[78] Harris, (2008), p. 198.
[79] Ibid, (2008), p. 199.
[80] House of Lords, European Union Committee, 6th Report of Session 2009-10, p. 15.
[81] Harris, (2008), p. 201.

5 JURISDICTION

5.1 Introduction

This area of law is another problematic aspect of the Regulation. It may be seen as less important than the problems attached to the connecting factor and the problems of clawback, but it may nevertheless be of importance for an overall assessment as to whether or not an opt in by England would be in the national interest.

5.2 The Regulation and the English perspective

The question of which court has jurisdiction is different from the question of which law is applicable to the succession. According to article 4 in the Regulation, the general rule is that the courts of the Member State in which the deceased had his habitual residence at the time of death have the jurisdiction to settle matters of succession.[82] The deceased's habitual residence is in principle the central element, whether or not immovable or movable property located abroad is involved.[83]

Where the deceased has chosen another Member State's law to be applicable to the succession according to article 17, the jurisdiction stays with the court of the Member State of habitual residence but the court may invite the parties concerned to use the court of the deceased's nationality under article 5 of the Regulation, if they consider this to be a more suitable form, *professio juris.*[84]

Furthermore article 6 of the Regulation provides for a residual basis of jurisdiction for cases where the deceased had no habitual residence in a Member State to which the Regulation applies. Residual jurisdiction can only apply on succession property located in a Member State and when the following 4 situations occur: a) if the deceased had his earlier habitual residence in that State within the last five years before the court has been seised; b) if the deceased had the nationality of that State at the time of death; c) if an heir has his habitual residence in that State; or d) if the claim relates solely to property located in that State. These situations have to be examined in chronological order and are not to be seen as alternative situations in which a competence can be justified but follow a hierarchical system. Just the location of succession property in a Member State is therefore not sufficient to establish jurisdiction unless this is the last resort.

[82] Article 4 of the Regulation
[83] *See* Recital 12 of the Regulation
[84] Ministry of Justice s, (2009), p. 11. recital 28 and House of Lords, European Union Committee, 6th Report of Session 2009-10, p. 30.

If this is the case, the court's competence is limited to the devolution of the succession property.[85]

According to English law the jurisdiction is not exclusive as it offers the courts of domicile jurisdiction to determine the succession to all the deceased's movable property regardless of where it is located. Furthermore, the English courts will follow the foreign courts decisions if they have been seised. In these cases the connecting factor is domicile and not habitual residence, the former requires a closer local and temporal connection to the State of residence.[86] Regarding immovable property the jurisdiction is determined by lex situs, thus courts of a Member State in which the property is located are competent to determine the succession to all property located there. The deceased's domicile does not affect the jurisdiction.[87]

In English law there is no provision providing for an optional referral by the English courts to another Member States court of nationality in cases of professio juris. However according to English law the jurisdiction is not exclusive. Even if the English courts have jurisdiction they may declare themselves *forum non conveniens* if they find another court more appropriate to deal with the subject matter.[88]

5.3 Administration of estate

The English law only includes a few rules relating to international jurisdiction in succession cases and draws a clear distinction between the administration of estate and devolution of the estate.

The European institutions however, appear to have a preference for a very wide-ranging Regulation. The law applicable to the succession would apply to all matters concerning the devolution of the estate, thus it is very likely to extend the application of this law to the administration of the estate. This would mean that the status of those entitled to distribute the deceased's estate by foreign law would have to be recognised in England and that the powers that they have by that foreign law may be exercised in England.[89]

The European Parliament considers that "*the law specified in the legislative act to be adopted should be competent to cover, regardless of the nature and location of the estate, the whole succession, from the beginning of the procedure to the transmission of the inheritance to the persons entitled*"'.[90] The European Parliament goes on to say that the Regulation should provide:

[85] COM(2009)154.
[86] Mark v Mark, [2005] 2 FLR, 1193.
[87] Dicey, Morris and Collins, (2006), Rule. 31(2).
[88] Ibid.
[89] Harris, (2008), p. 190.
[90] Report of the Committee on Legal Affairs, P6-TA(2006)0469, Recommendation, 6.1.

"... rules of private international law to ensure effective coordination between legal systems with regard to the administration, liquidation and transmission of estates, as well as identification of heirs, with provisions stating: that these aspects of succession,… are to be regulated by the law applicable to the succession…".[91]

It is very unlikely that England would be prepared to accept any changes to its measure of administration of estate.[92] The English courts have no jurisdiction to decide the succession to a deceased's estate unless a personal representative has been constituted before the court. Either this representative can be an executor named in the deceased's will or an administrator appointed by the court if there is no will. A court order, either in the form of a will, a probate or a grant of administration, is necessary to empower a personal representative to deal with the deceased's estate. The English courts have discretion as to whether they grant administration of the estate, but usually only do so if there is property located in England.[93] During the administration the assets are identified, debts paid and the estate balance established.[94] The representative becomes the owner of the estate and deals with any outstanding liabilities before distributing the estate to those entitled to it. The English approach guarantees that the debt does not pass to the heirs.[95]

Once a personal representative has been properly constituted before the English court, the court has to deal with the estate as a whole, regardless of whether the estate consists of immovable or movable property. Hence, English courts have jurisdiction to determine the succession to the property situated in England of any individuals regardless of domicile.[96]

The Non-Contentious Probate Rules 1987[97] governs the appointment of personal representatives in English law. Rule 30 in the NCPR applies where the deceased died domiciled outside of England. In general, where the deceased is domiciled abroad, English courts will issue a grant to a personal representative appointed under the law of the deceased's domicile. [98] A grant may also be issued to a person entrusted with the administration of the estate by the court that has jurisdiction, if this is ordered by a registrar.[99]

Where the estate of a person who died domiciled outside England consists of immovable property in England only, a grant may be issued in respect of the whole estate in accordance with the law that would have applied if the

[91] Ibid, Recommendation 7.1.
[92] House of Lords, European Union Committee, 6th Report of Session 2009-10, p. 33-34.
[93] Dicey, Morris and Collins, (2006), Rule, 129.
[94] Harris, (2008), p. 191.
[95] Ibid, Rule 137.
[96] Ibid.
[97] Hereinafter referred to as NCPR.
[98] NCPR, 30(1)(a).
[99] Ibid, 30(1)(b).

deceased had died domiciled in England.[100] A foreign administrator has no right to be appointed in England and a foreign administrator appointed to act in England would exercise his powers in accordance with the lex fori. Accordingly there is no question of a foreign administrator exercising the powers that he holds under a foreign law in England.[101]

Despite the foregoing the Regulation takes the English administration proceedings into consideration and the differences seem to have been resolved as far as they can be by article 21 in the Regulation. The article provides that *"The law applicable to the succession shall be no obstacle to the application of the law of the Member State in which the property is located where it subjects the administration and liquidation of the succession to the appointment of an administrator or executor of the will via an authority located in this Member State."* [102] However, this provision relates to administration and does not affect the court competence. If England decides not to opt in after the ongoing negotiations, one wonders whether article 21 would continue to be retained in the Regulation.

The English substantive law may need to be amended to enforce an obligation on personal representatives to administer the whole of the succession. No doubt the easiest and most attractive solution for England would be for the Regulation to state in terms that it does not cover administration of estate.

[100] Ibid 30(3)(b).
[101] Harris, (2008), p. 192.
[102] Article 21(2)(a) of the Regulation.

6 RECOGNITION AND ENFORCEMENT

6.1 Introduction

The benefits to be derived from the simplification of the rules resolving conflicts of applicable law and jurisdiction can be improved by making the decisions taken in one Member State recognisable and enforceable in another. A person benefiting from a decision in one Member State would not incur additional costs and delays in going through a process in another Member State in order to have that decision given effect. The question arises whether such recognition and enforcement shall be subject to any protection to uphold the public policy of the Member States in which recognition or enforcement is sought. The Regulation proposes that decisions made in one Member State, whether made by court or by notaries in the form of authentic instruments, shall be recognised and enforced in other Member States in accordance with rules based on those currently in place in respect of civil and commercial matters.[103]

6.2 Court decisions

It would not require any special procedures to recognise a decision of a court in another Member State. The court in which recognition is requested may refuse on limited grounds that: a) the recognition was "manifestly contrary" to public policy; b) the defendant had insufficient opportunities to arrange for his defence and c) the decision was irreconcilable with an existing decision given in a dispute between the same parties.[104] In England, a court decision will be recognised if it is final, conclusive and rendered by a court that had international jurisdiction under English conflict of law rules and if there is no defence of its recognition.

Regarding enforcement, the procedure involves obtaining a declaration of enforceability in the court of the Member States according to a single simplified procedure. A declaration of enforceability may only be refused on the grounds on which recognition may be refused. [105]

[103] Article 29 of the Regulation, House of Lords, European Union Committee, 6th Report of Session 2009-10, p. 31.
[104] Article 29 of the Regulation.
[105] House of Lords, European Union Committee, 6th Report of Session 2009-10, p. 32.

6.3 Authentic instruments

Article 2 in the Regulation defines authentic instruments as instruments formally drawn up or registered as authentic instruments, the authenticity of which relates to the signing and content of the instruments and has been established by a public authority or other authority empowered by the Member State of origin for that purpose.[106]

This provision shall ensure the free movement of authentic instruments by giving them the same evidentiary effect with regard to their content and facts as national instruments. They are presumed to be authentic. In recital 26 of the Regulation the Commission clarifies that, in order to take into account the Member States' different methods of settling the issues regarding succession, the Regulation guarantees the recognition and enforcement of authentic instruments. "*The recognition of authentic instruments means that they enjoy the same evidentiary effect with regard to their contents and the same effects as in their country of origin, as well as a presumption of validity which can be eliminated if they are contested*". Hence, this validity will always be contestable before a court in the Member State of origin of the authentic instrument, in accordance with the procedural conditions defined by the Member State.[107] Furthermore, the recognition and enforcement of authentic instruments may only be refused if they are contrary to the public policy of the Member State in which enforcement was sought.

In the English response to the Regulation many witnesses raised the issues of recognition and enforcement of decisions taken by notaries in the form of authentic instruments and advocated that authentic instruments should have the status of high quality evidence rather than be recognisable and enforceable. It was stressed by the witness, Professor Matthews in the House of Lords, that the notaries' purpose is to record and give publicity to transactions, which usually are concluded in the context of an agreement by the relevant parties, rather than of a dispute. Given the absence of litigation, notarial acts tend not to have the same safeguards built into them as decisions of courts. In particular, a notary may not have the same awareness of existing disputes affecting the succession to a certain property and may not give all interested parties the opportunity to state their case.[108]

Recognition of notarial acts may circumvent the English procedures for personal representatives completely. Since England has no real notarial tradition it does not share common rules of jurisdiction with other Member States in this area and it seems very difficult for England to extend the doctrine of mutual trust to notaries. These are highly problematic provisions for England. The House of Lords stressed that the mutual recognition and

[106] Article 2 lit h of the Regulation.
[107] Recital 26 of the Regulation.
[108] House of Lords, European Union Committee, 6th Report of Session 2009-10, p. 33.

enforcement of court decisions is acceptable in principle, however they do not consider that there is sufficient mutual trust to justify making authentic instruments recognisable and enforceable. Just as many witnesses, they consider that authentic instruments should be given the status of evidence.[109]
If England does not opt into the Regulation it is difficult to say what the impact of the recognition and enforcement of authentic instruments would be in concrete. As the provision is rather unusual for common law jurisdictions it is unclear how this system of mutual recognition and enforcement of authentic instruments would work in practice. England has no notarial tradition that can be compared to the continent and, as a result, follow a different concept of authentic instruments than the countries adhering to the habits of the *notariat latin*.[110] To extend mutual trust to notarial acts could endanger procedures for personal representatives and does not fit with the procedures during the administration of estate. [111]

6.4 European certificate of succession

The Green Paper states that: "*Evidence of status as heir is given in different ways, depending on the legal system. It is essential for heirs to be able to assert their rights and take possession of the property to which they succeed without having to go through further formalities. With harmonised conflict rules, it would be possible to establish a certificate having uniform effects throughout the Community. This would undeniably constitute value added*".[112] The Regulation creates a European Certificate of Succession (ECS), which is a document in standard form produced by a court in a Member State having jurisdiction in accordance with the general rules on jurisdiction set out in the Regulation. The ECS consists of specific information relating to a succession including: the grounds for the issuing court to assume competence to do so, information concerning the deceased and the death, the applicable law and the reasons for determining it, the elements of fact or law giving rise to the power to administer the succession and what those powers are, who is entitled to get what and any restrictions on the rights of the heirs and details of the applicant for the certificate.[113]

Article 42 in the Regulation sets out the effect of an ECS. The ECS shall be recognised automatically for the purpose of the administration of the succession and determining who gets what of the deceased's estate. The content of an ECS shall be presumed to be accurate in all Member States and any person who passes property in accordance with an ECS shall be released from their obligations unless they know that it is not accurate.

[109] Ibid, p. 30.
[110] Member States that are part of the notariat latin use similar forms of authentic instruments. The concepts are different in Scandinavia, the UK and Spain.
[111] Harris, (2008), p. 226.
[112] COM (2005) 65, p. 10.
[113] House of Lords, European Union Committee, 6th Report of Session 2009-10, p. 34.

Those who acquire succession property in accordance with an ECS shall be considered to have properly acquired it.

Furthermore, the ECS shall constitute a valid document allowing inherited property to be registered.[114] The fact that an ECS shall be recognised in all Member States, shall be presumed accurate and can only be rectified by the court issuing it has important consequences. It means that inaccurate information in an ECS can be difficult to correct, and in the meantime it would be necessary to proceed on the basis of the ECS until it is altered. Inaccurate information in an ECS as to the habitual residence or nationality of the deceased would mean that the effect could not be given to a choice made by a testator of the applicable law to be applied to the succession until the issuing court has rectified or cancelled the ECS.

The ECS intends to simplify the process in succession cases as it shall be issued quickly.[115] Although this is a welcomed effect, it is, however, difficult to fulfil this aim for legal orders based on a representative system, as the whole procedure of administration has to be terminated before the heirs can even be identified. Whilst a grant of representation relating to the powers of administrators is issued by a court, a broader certificate of succession is not issued in England. An ECS would require English courts to amend their existing domestic procedures. In that sense, the dividing line between harmonisation of private international law and substantive law erodes.

Furthermore, even if the certificate is intended only to have evidential status rather than being conclusive, it may be the case that such documents are effectively treated as conclusively determining the devolution of the estate unless very narrow grounds are made out providing the contrary.[116]
From an English perspective, the practical implementation of an ECS is subject to obstacles for legal systems that are not familiar with the concept of such a certificate and which are based on a system with compulsory administration.

[114] Article 42 of the Regulation.
[115] Article 40(1) of the Regulation.
[116] See the joint response of the Law Society and STEP, Appendix A, p. 14.

7 ANALYSIS

The probability of the English Government remaining on the sidelines in this proposed Regulation is very worrying. However, even if English legal scholars have questioned the statistics there seems to be rather widespread English consensus on the usefulness of an EU Regulation on succession and wills. English citizens are one of the biggest groups of Europeans moving to other Member States of the EU and the number of cross border successions is growing equally fast, implying various practical problems for mobile English citizens as well as their families.

At present, conflicts arise under the present multitude of regimes and conflict of laws rules in matters of succession differ from one Member State to the other. Authorities of several Member States may be competent to rule on the same succession and can declare different substantive laws applicable. Moreover, options for mobile EU citizens to clarify this situation by a professio iuris are lacking in many countries and a mix of various national rules and bilateral or regional agreements on recognition and enforcement of decisions and documents leads to a very unsatisfactory situation. The outcome of a succession can become unforeseeable.

In principle therefore, efforts to simplify and clarify the rules that apply to international successions could produce huge benefits for English citizens and the Government is strongly supportive of the project in principle. However, there are potentially significant problems identified with the proposal that has been presented in the thesis.

These significant problems identified have a first origin in differing concepts of common law and civil law jurisdictions in the area of succession and property law. The cornerstones of both legal families are very different, from the mere question of what is included in the notion of succession, e.g. only the estate at the time of death or also previous *inter vivos* transactions, to more complicated questions like opposite positions between civil law and common law jurisdictions concerning clawback and compulsory inheritance rights or the different attitudes regarding the question of personal representation and administration of estate

7.1 Habitual residence

The concept of habitual residence as the key connecting factor within the Regulation may pose difficulties. Its success will depend on the degree to which the concept succeeds in identifying suitable jurisdictions and national succession laws with a high degree of predictability. This may be essential to avoid expensive and unnecessary litigations.

The main problem with the concept of habitual residence is the lack of adequate clarity. This may lead to the situation where a English national who prior to death worked in another Member State where he has retained habitually residence, but with the intention to return to England, is being subject to the law of the Member State where he died, unless he has chosen the law of his nationality to apply to his estate.

A single factor to provide for the connection between the applicable law and a succession is very hard to find. I do believe that the concept of habitual residence should be used as the connecting factor in the Regulation. However, it is necessary to define the concept, something that is legally possible. Citizens should not be left to bear the expenses of defining the concept through litigation. The definition should at least address the issues above with citizens working, living or having their central interests in more than one Member State.

7.2 Clawback

The rules of clawback have the potential to cause considerable problems in practice and the importation of such claims is likely to have a significant adverse impact on the certainty of lifetime gifts completed within England.

Two areas with particular concern emerge. These relate to gifts to charities based in England and assets deposited in trusts where the introduction of clawback is likely to harm the operation of trusts in England.

7.2.1 Charities and trusts

Charities are organisations that benefit the public in such a way that the law agrees is charitable. In England there are over 200.000 registered charities which provide a benefit or service to the public. To a greater or lesser degree, charities normally receive a proportion of their funding from voluntary funding, derived from gifts, donations and legacies from the public.[117] From the charities' perspective, clawback may destabilise their work in terms of funding and as a result lead to a reduction in legacy income, which is a significant income stream for many fundraising organisations.

A solution to resolve the difficult problems of clawback would be to exclude clawback claims against individuals who have been given property by the deceased during his lifetime from the scope of the Regulation. The exclusion of clawback would not mean that these claims would not be recognised or enforced in Member States currently recognising and enforcing them, but the recognition and enforcement would remain a matter

[117] Dicey, Morris and Collins, (2006), Rule, 17.

of national, rather than Community law. Hence, this would lead to the preservation of the status quo.

Another option would be to exclude clawback claims in certain Member States, such as England, where these claims are unknown and where they would create significant legal uncertainty. This flexible option would be an advantage for those Member States permitting clawback claims and that are prepared to recognise and enforce such claims from other Member States as it would be regulated at Community level; however, with the disadvantages that it would result in a non-uniform application of the Regulation.

7.3 Choice of law

Article17 in the Regulation enable individuals to choose the law of the Member State of which they are nationals. This provision is another concern that needs to be highlighted as reference has not been made to domicile, other than in recital 32 of the Regulation. This can lead to confusion on the applicable law, as well as an uncertainty as to how effective this provision will be for English nationals since a large proportion do not make any testamentary provisions.

Although I welcome article 17, it needs to be clarified to ensure that the freedom of an individual to choose the applicable law should take effect from the time when the choice is made. This is important to secure the policy of legal certainty, which should underpin this provision. Although I agree with the choice of law having to be limited to preserve the appropriate level of connection between the law chosen and the succession, limiting the choice to the law of nationality is too narrow. It should be possible for an individual to have a broader choice of law and choose the law of the country with which they have a close and concrete connection.

7.3.1 Article 21(2)(a)

Article 21(2)(a) in the Regulation concerns the application of the law of the Member State in which property is located under certain circumstances. The effect of this provision is to preserve the system of personal representatives which currently operates in England.

I support the general intention behind the article and no points of real controversy are raised. However, I find the scope of the article not to be wide enough. In particular, article 21(2)(a) needs to be clarified so as to put beyond doubt that it takes primacy over article 19.

In order to ensure the flexible administration of estate in England, the article should make clear that it also preserves the lex fori in respect of both the selection of administrators and the powers of those individuals to act within England. It is also important that this provision facilitates the payment of debtors as this is a key aspect of the probate process.

7.3.2 Article 22

Article 22 in the Regulation creates an exception to the choice of law rules for special succession regimes. This provision is likely to be problematic as the exception is widely drawn and it is uncertain in its scope. It is therefore likely that the provision will create legal uncertainty as to which law should be applied. This lack of clarity could undermine the certainty and predictability in the choice of law system that are fundamental features of the Regulation.

It is also unclear to what extent it would apply in relation to England. If it does not have significant practical application in relation to the different laws in England, it would also be open to objections for failing to establish equivalence of treatment between the laws of all the Member States. One solution to create legal certainty on this matter is to let all the special succession regimes referred to in the provision be set out in an Annex to the Regulation. These should be the only regimes preserved under this article and the Member States should be able to supplement or delete their national legislation as regards this Annex.

7.4 Jurisdiction

Article 5 in the Regulation provides for the transfer of cases in some instances. This article may have been drafted too restrictively. It may be discussed as to whether transfers may be appropriate in circumstances other than where there has been a selection of foreign law. In principle there should be some additional flexibility in the application of the Regulation's rules of jurisdiction. It would be preferable to reformulate article 5 so as to align the rules of jurisdiction with those on choice of law. This would lead to greater legal certainty and enhance estate planning by the deceased, particular in cases with complex circumstances.

A provision to facilitate the transfer of jurisdiction in certain other types of cases would be of value. For example, where a court in a Member State has jurisdiction on one of the residual bases in article 6, it should be considered if such courts within the EU should be allowed to transfer the proceedings to the courts of the State outside the EU where the deceased was habitually resident at the time of death. The latter courts may be better placed to deal with the succession, especially if the deceased's property is located within their jurisdiction together with the heirs.

Another type of case is where the deceased has chosen the law of a non-Member State of which he is a national. Transfer in these cases would improve the relationship between the EU and the rest of the world.

7.5 Authentic instruments

Articles 34 and 35 in the Regulation provide for the recognition and enforcement of authentic instruments. These instruments are widely drawn up by notaries in many Member States, but not in England. Under the Regulation, recognition and enforcement can only be resisted by an objection that the instruments contravenes public policy. This gives such instruments a preferential position compared to court decisions where recognition and enforcement can be resisted on other grounds under article 30.

The objection to this provision is that the grounds for resisting the recognition and enforcement of authentic instruments appear to be too limited. All grounds for non-recognition and enforcement which are available under article 30 in relation to court decisions should also be available to authentic instruments. This reflects the fact that authentic instruments are more informal than court decisions and would not fall within the scope of the rules of jurisdiction under the Regulation.

7.6 European certificate of succession

Articles 36 to 44 in the Regulation provide for an ECS within the EU. The legal effect of such a document is unclear; it may be intended to be conclusive and not merely of evidential value. This certificate is likely to prove to be of great significance and practical application, specially in those Member States with notarial traditions. As with authentic instruments, there is an issue as to whether there are sufficient mutual trusts to justify the far-reaching effects of an ECS. However, the provision providing that an ECS must be drawn up by a competent court with jurisdiction under the Regulation may be thought to constitute a significant safeguard and provides some reassurance in this context.

Since it is only the court which issued the ECS that can rectify or cancel it, courts in Member State to which the ECS was sent are apparently not entitled to refuse recognition on any ground and the ECS is given preferential position compared to court decisions.

There are a number of concerns regarding the ECS. Some of the provisions relating to the ECS concern issues relating to the administration of estate. These should be properly regulated by the Member States' national laws where part of the deceased's estate is located and being wound up by local administrators. The application of the lex fori to such matters is likely to be both more satisfactory and easier than applying any other law in its place. In order to maximise this utility, the ECS should be focused on issues of entitlement under the succession. It should be made clear that this does not override article 21(2).

There is also a concern that problems arising with the ECS can only be resolved by the Member States that issued it and not in the country addressed. This would impose an excessive burden on those raising such problems.

8 CONCLUSION

The considerable differences between the regimes of the English private international law rules on succession and the Regulation can create significant complications where a person owns property across borders. Efforts to clarify and simplify the rules that apply to cross-border succession would therefore be beneficiary to English citizens. A Regulation harmonising these rules would be highly welcomed. However, one can not help to wondering if this immense work is too much and too soon. This thesis illustrates that the Regulation is one of extraordinary ambition. Compromises between the legal systems and reconciling the different legal traditions are inevitable if the Regulation is to reach a successful conclusion. Turning an area of law that has hitherto barely been touched by harmonisation into an area of law with utterly harmonised private international law rules is a very vast and complex project.

The current proposal is not compatible with the common law legal systems; in fact, it would have substantial impact on the English legal traditions. This thesis shows England's wish to ensure that the applicable foreign law does not undermine its protection of inter vivos transaction and testamentary freedom. Conversely, the ability to choose applicable law in the Regulation is keeping with the English idea of testamentary freedom. Additionally, many other Member States want to ensure that their laws will not be evaded, specially regarding compulsory inheritance, by the application of English law.

Altogether, this thesis confirms that the Regulation would be of clear benefit to the English citizens in terms of legal certainty. The current national law rules may lead to divided court competence and multiple applicable laws while the Regulation would confer jurisdiction to the courts of habitual residence and declare the lex fori as applicable to the succession as a whole. Hence, the individuals concerned only have to face one legal system instead of several. However, the connecting factor of habitual residence in the Regulation is ground for several problems, not only for England. As there is no definition provided by the Regulation and national definitions often vary, a single connecting factor is still to be found for the entire EU. As is so often the case in private international law, it is tempting to find a single connecting factor to solve all problems. But is it worth seeking one connecting factor or would flexibility be preferable?

The Regulation's approach of applying a single law represents a move towards simplification. Different laws would no longer apply depending on whether assets are immovable or movable, this would enable a testator to plan the division of his property between his beneficiaries in a fair way, regardless of where the property is located.

Moreover, despite the Regulation's special provision to recognise common law legal systems, such as in England, concerning the measure of administration of estate in article 21 in the Regulation, the Regulation will have great influence on the domestic procedures in relation to the administration of estate. The question is whether such a level of upheaval is worthwhile for England.

If England does not opt into the Regulation after the ongoing negotiations, this dualism of regimes may lead to complications concerning borderline cases where a Member State considers English citizens to be habitually resident in their State but with immovable property located in England. In these situations, the Member State where the deceased was habitually resident would apply the Regulation and its unitary approach for the succession as a whole while England may apply the lex situs to the immovable property. Because of the Regulation's universal character, it does not matter whether England is bound by the Regulation or not for its rules to affect English citizens.

Reversely, as the Regulation can only be applied by courts in Member States, EU citizens who are habitually resident within England would not benefit from the rules of the Regulation if English courts were seised. Thus, the succession of those EU citizens would instead be determined by the English private international law rules. Consequently, if England does not opt into the Regulation, it would be a backward step for cross-border successions that involve English citizens as well as for citizens of other Member States.

This thesis illustrates that some sort of framework in order to unify the private international law rules is long overdue. I do support the proposal and see the need for common ways in this matter. However, the Regulation's vast work to satisfy all Member States and to harmonise the rules is a great canvas to fill and there is a danger that this house of cards will collapse.

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