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## **ADOPTION OF EU CROSS BORDER SUCCESSION & THE CERTIFICATE OF SUCCESSION REGULATIONS – CHARLES HAMER PRELIMINARY COMMENT.**

Following the adoption by the European Parliament in March this year of the proposal to simplify cross border inheritances within the EU, the Regulation – known as PE-Cons 14/12 - was duly signed off by the Council of the European Union on the 7<sup>th</sup> June 2012.

The Regulation will not have immediate effect however: it will only become law 3 years after its publication in the Official Journal of the European Union, which hasn't yet occurred at the time of writing, but is expected later this summer. 2015 is therefore the target date.

### ◆ **Aims of the Regulation:**

The basic objectives are to enable the devolution of a deceased person's estate to be treated under the law of a single Member State.

Citizens of the EU are able to choose whether the law dealing with their succession is that of their habitual place of residence (the default position) or their nationality

A European Certificate of Succession is created which allows a person to prove their status, rights as heir, and/or powers as administrator or executor of the estate.

### ◆ **The Status of the UK and France As Regards the Regulation**

As might perhaps be expected, going on past history, France has enthusiastically signed up to the Regulation whilst the UK, (along with Denmark and Ireland) has opted out for the time being.

### ◆ **Impact of the UK Opt Out.**

At this very early stage, the consequences of the UK opt out have not been totally clarified, with some commentators suggesting that the regulations will only apply to British ex pats resident in France (and other participating Member States) but not those who own French property but remain habitually resident in the UK.

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Others believe the Regulation will be less restrictive, allowing a UK resident owner scope to choose for the French property to be devolved under a UK succession law by virtue of France's participation in the Regulation.

◆ **What the Regulation Says on the Matter.**

Closer study of the regulation itself does provide support for this latter view:

Despite the opt out meaning that the UK is not bound by the Regulation nor subject to it, the UK nonetheless remains a Member State<sup>1</sup> for the purposes of the Regulation as it applies to France and other signatory EU states.

The following articles and the remainder of the Regulation therefore apply to France when its legislature determines the scope of application of its succession law:

Articles 4 and 7 of the Regulation make it clear that, by default, it will be the courts of the member State in which the deceased had their habitual residence at the date of death<sup>2</sup>, or, (by prior election!), of the member State of which they were a national<sup>3</sup>, which have sole jurisdiction over the devolution of the estate as a whole.

Meanwhile, Articles 21 and 22 provide that the law applying to the succession will be, by default, the law of the deceased's habitual residence or, (again by prior election), of their nationality.

From the French perspective then, it would be reasonable to imply that the French property directly owned by a UK national or UK habitual resident should be devolved under a UK Succession law. Articles 4 and 7 make it clear that it is simply a matter for the UK court to decide whether or not the dispositions of a UK Will are valid or UK rules of intestacy apply, for the purposes of devolution of the French property.

Depending then on the interpretation made by the UK court, the UK opt out doesn't necessarily appear to exclude the British resident or national from devolving their French property by means of a UK Will.

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<sup>1</sup> See Paragraph 82, page 36 of the Regulation

<sup>2</sup> Article 4

<sup>3</sup> Article 7

On the other hand where the UK opt out does clearly have impact is on the inability for an individual who is UK domiciled (as determined by reference to UK law) but habitually resident in France, to devolve their worldwide estate under French Succession law.

Similarly, an individual both legally domiciled and habitually resident in France would not be able to avail themselves of the regulation for the purposes of the devolution of land and/or buildings directly owned in the UK.

◆ **Impact of the Regulation on Inheritance Tax**

It is important to recognize that the Regulation is solely concerned with Succession Law. There are no direct changes to the current scope for both France and the UK to levy Inheritance Tax on the estates. Indeed, any action taken as a result of the opportunities offered by the Regulation could have detrimental, albeit unintended, consequences

Careful planning will still be needed to ensure that the new found freedom granted to devolve the French property is not totally undermined by a whacking great French IHT bill, levied at the draconian rate of 60% on transfers to unmarried partners and other unrelated beneficiaries.

Furthermore, the scope for UK IHT could easily be extended. Any decision on the part of a French resident but still British legally domiciled individual, to devolve their French property via UK succession law, could lead to a heavier UK IHT burden on their estate as a whole, than would otherwise have been the case:

The Anglo-French double tax convention of 21/06/1963 governing Inheritance Tax provides, in Article 5, that when the deceased is French tax resident, UK IHT will only apply to assets which are either located in the UK<sup>4</sup> **or devolved under UK legislation**.

Thus, a French property owned by a French tax resident and devolved by French succession law falls outside the scope of UK tax, but this would no longer be the case if – as a result of the current Regulation – the property was subsequently dealt with by a UK Will

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<sup>4</sup> As defined under article 4

◆ **Impact of the UK Opt Out on Inheritance Tax**

As a consequence of the opt out, a UK legally domiciled individual cannot avail themselves of the Regulation, even if habitually resident in France. Therefore the UK maintains the scope to continue to levy UK IHT on the worldwide estate of a legally domiciled British individual even if they are French tax resident, as provided for by the same Article 5 of the double tax treaty referred to above.

◆ **Conclusion.**

Overall the present Regulation, whether or not the UK decides to opt in at a later date, will help to simplify the rules on succession to French property, even if consensus has yet to be achieved as to how many owners the rules will reach. With 3 years to go before it becomes effective, we are sure that a concrete conclusion on the scope of the Regulation will be achieved beforehand.

Whichever viewpoint is vindicated, it is clear that from a tax planning perspective, the option to apply a UK Succession law to the devolution of French property will not suit every British domiciled ex-pat, whilst French tax dangers lurk for the complacent planner.

Clearly, professional advice will continue to be needed from a suitably qualified specialist financial or legal practitioner, when determining how to hold the property now whilst waiting to take advantage of the Regulation.