



HOUSE OF LORDS

European Union Committee

6th Report of Session 2009–10

The EU's Regulation on Succession

Report with Evidence

Ordered to be printed 9 March 2010 and published 24 March 2010

Published by the Authority of the House of Lords

London : The Stationery Office Limited
£price

HL Paper 75

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- (Q) refers to a question in oral evidence;
- (p) refers to a page of written evidence.

SUMMARY

In October 2009 the EU Commission proposed legislation which aims to simplify the law affecting those who die having exercised their right to free movement, either by moving to another Member State to live or by buying property in a Member State other than their own. The law of succession regulates how a person's property is dealt with on their death—including the mechanism for paying taxes and other creditors, establishing who is entitled to inherit the deceased's property and how that property is to be transferred to those entitled to it. Where this involves the law of more than one Member State complications arise which can have a significant impact since the people affected are likely to be emotionally vulnerable because of bereavement.

Our inquiry into this proposal was undertaken as part of our ongoing scrutiny of the Commission's proposal. We welcome the fact that the Commission has not proposed harmonisation of the substantive law of succession. This would have been too ambitious given the complexity and cultural importance of property law and the law of succession in each Member State. We support the Commission's underlying, and more limited, objective of prescribing which state's law of succession is to apply to the whole of a deceased person's estate; but only to the extent of determining who is entitled to inherit what property. Our caution arises from the difficulty faced by the EU in legislating in this field at all, and the lack of empirical evidence of how far the complex legal position presently impairs free movement. To go further than we suggest puts at risk important interests, not least property rights, the collection of taxes and the protection of creditors.

We conclude that the test put forward by the Commission to determine which law is to govern a cross-border succession, namely the law of the place where the deceased was habitually resident at the time of death, must be further refined.

We identify, as a serious defect in the proposal, that it could result in gifts made in the UK by deceased persons during their lifetime, including gifts to charity, being claimed back by their heirs, under a process known as clawback.

We also examined the additional elements included in the Commission proposal: a single EU rule for establishing which court has the power to deal with disputes relating to succession; a single EU rule for the recognition and enforcement of decisions of courts and other public authorities concerned in dealing with succession; and the creation of a "European Certificate of Succession" which could be used throughout the EU to establish the rights of those administering a succession and the heirs, and so facilitate the transfer of the deceased's property. We draw attention to how the recognition and enforcement of documents produced by notaries in other Member States could undermine the legitimate interests of those with a claim in a succession.

As it is entitled under the EU Treaties, the UK is not taking part in the formal negotiations on this proposal and will not be bound by the legislation unless it specifically opts in after its adoption by the other Member States. With the possibility of the UK opting in at this later stage we have highlighted the major issues that we consider need to be resolved satisfactorily.

The EU's Regulation on Succession

CHAPTER 1: INTRODUCTION

1. When a person dies their property has to be accounted for, creditors and taxes paid, and the property duly passed on to those who should inherit it. This process is known as succession. The expansion of the EU, and increasing mobility within it, have led to more and more people moving from one Member State to another to work or to retire, and owning property in another Member State. The laws of the Member States governing who is entitled to what of the deceased's property and how that estate is to be administered differ fundamentally. This makes dealing with a succession with cross-border implications potentially very complex. When a person dies resident in Member State A as a national of Member State B, or owning property in both Member States A and B, it is necessary to determine whether it is the law of Member State A or B which governs the succession. Even once that has been resolved it can be difficult to ascertain just how the law of succession of one Member State applies to property located in another.
2. The complexity of cross-border succession makes it difficult and expensive for individuals affected to plan what should happen to their estate when they die and for creditors and heirs to ascertain and vindicate their rights. This situation is exacerbated by the fact that the period surrounding the death is emotionally charged.
3. The same issues arise when the cross-border element involves an EU Member State and a third country.
4. Simplification of the law applying to cross-border succession has been sought for some considerable time, but without success. At the broader international level a number of Conventions have been negotiated within the framework of the Hague Conference on Private International Law.¹ Legislative action by the EU in this area has been envisaged for almost a decade in successive programmes relating to the Area of Freedom, Security and Justice.²
5. Legislation by the EU can fully address the problems that arise when the cross-border elements of a succession are confined to Member States. Where those cross-border elements involve third countries EU legislation can only regulate how that succession is to be dealt with as between Member States insofar as it involves more than one Member State. A further international agreement would be necessary in order to achieve with a third country the same full degree of regulation that EU legislation can bring to Member States.

¹ As at February 2010, the Convention of 5 October 1961 on the Conflict of Laws relating to the Form of Testamentary Dispositions has been ratified by 16 Member States; the Convention of 2 October 1973 Concerning the International Administration of the Estates of Deceased Persons has been ratified by three; and the Convention of 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons has been ratified only by the Netherlands.

² The Tampere Programme (OJ C 12, 15.1.2001, p.1), the Hague Programme (OJ C 53, 3.3.2005, p.1), and more recently paragraph 3.1.2 of the Stockholm Programme adopted by the Council and approved by the European Council at its meeting of 10–11 December 2009, available at http://www.se2009.eu/polopoly_fs/1.26419!menu/standard/file/Klar_Stockholmsprogram.pdf

6. In March 2005 the Commission issued a Green Paper³ seeking views on what action might be taken at the level of the European Union in relation to the law governing wills and succession. This was the subject of a report by this Committee⁴ and correspondence with the Minister. We recognised the real practical benefits that could be derived from suitable European legislation. We also highlighted the difficulty in finding common workable rules in this area and set out some “red lines” which European legislation should not cross if it was to be acceptable to the UK.⁵
7. On 14 October 2009 the Commission brought forward their proposal⁶ for a Regulation to simplify the rules on cross-border succession. The ordinary legislative procedure⁷ applies to the proposal. It is currently under detailed negotiation in the Council. The European Parliament has yet to give it a first reading.
8. Sub-Committee E, a list of whose members is at Appendix 1, has conducted an inquiry into this proposal. The call for evidence is reproduced at Appendix 2. Those who have submitted written or oral evidence are listed at Appendix 3. We are grateful to all those who submitted evidence, particularly for their elucidation of a highly technical subject.
9. The Protocol on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice gives the UK an opt-in to the formal negotiations and adoption of this proposal. If the UK does not opt in, it will not be bound by the Regulation that is adopted. The opt-in to the formal negotiations of the proposal needed to be exercised by 22 January 2010.
10. In the course of this inquiry the Committee formed a preliminary view on whether the UK should opt in to the proposal. We took the view that the opt-in should not be exercised at that stage. In his written statement to the House on 16 December 2009⁸ the Minister indicated that the Government had decided not to opt in, but intended to engage informally in the forthcoming negotiations between Member States with a view to improving the proposal. If those negotiations resulted in sufficient improvement, the UK would still have another opportunity to opt in to the Regulation after its adoption by the other Member States.
11. In deciding whether the UK should opt in, the Ministry of Justice undertook a consultation, on the basis of a paper which provided background information.⁹ Those of our witnesses whose evidence was also submitted in response to this consultation are identified in Appendix 3.
12. The Commission’s proposal was chosen by the Conference of Community and European Affairs Committees of Parliaments of the European Union

³ 7027/05, COM (2005) 65.

⁴ EU Select Committee, 2nd Report (2007–2008): *Green Paper on Succession and Wills* (HL Paper 12).

⁵ The red lines were: the EU measure should not in any way call into question the validity of otherwise valid *inter vivos* gifts, and it should not deal with the administration of estates, the validity and operation of testamentary trusts, matrimonial property law and interests terminating on death such as joint tenancies.

⁶ 14722/09, COM (2009) 154.

⁷ The ordinary legislative procedure corresponds to the pre-Lisbon co-decision procedure, under which the Council acts by qualified majority and the measure can only be adopted if the Council and the European Parliament agree.

⁸ HL 16 December 2009 WS 274.

⁹ <http://www.justice.gov.uk/consultations/ec-succession-wills.htm>

(COSAC) for a pilot exercise on the operation of the new arrangements under the Lisbon Treaty for national parliaments to raise subsidiarity issues in accordance with the Subsidiarity Protocol. The arrangements did not formally apply to this proposal since it was presented by the Commission before the coming into force of the Lisbon Treaty. As part of this pilot exercise we formed a preliminary view that the proposal complies with the principle of subsidiarity.

13. The correspondence with the Minister on the opt-in, and our response to the COSAC secretariat on subsidiarity, are at Appendix 4.
14. In this report we outline the major problems arising in cross-border successions and their impact; we consider the major issues of principle in the Commission's proposal to address these problems; and we address the specific issues of subsidiarity and the opt-in. We focus on cross-border successions within the EU, addressing, where it is relevant, the effect of the proposal on successions with a wider international dimension. In our conclusions we highlight where we consider changes to the proposal need to be made.
15. The subject matter of this proposal is highly technical and the original Commission proposal is likely to evolve in the course of the legislative procedure. This may well stretch into 2011. The Committee will consider the more detailed technical and drafting points, as they evolve in the course of that legislative procedure, as part of its ongoing scrutiny of the proposal.
16. A glossary of the terms used in this report is at Appendix 5.
17. The proposal is subject to the scrutiny reserve according to which the Government may not give their agreement to the proposal in the Council until the Committee has finished its consideration and cleared it from scrutiny. As the proposal is likely to evolve in the course of negotiations and the Government intend to continue to negotiate informally, **we have decided to retain it under scrutiny** despite the fact that the UK has not opted in to the proposal at this stage.
18. **We make this report to the House for information.**

CHAPTER 2: ISSUES ARISING IN CROSS-BORDER SUCCESSIONS

The reach of the law of succession

19. The law of succession is complex, particularly because it concerns the transfer of property rights. Property rights are complex when compared, for example, to contractual rights. Property rights frequently involve third parties and consequently states run systems for the registration of such rights in order to give them publicity. The property rights, especially those attaching to land, found in different legal systems are extraordinarily different. The property law of the UK tends to be more complex than in most other Member States. It often concerns a bundle of rights or interests in property as arises, for example, when property is held by trustees for a beneficiary with a life interest. In most other Member States there is more commonly absolute ownership of property. Land and succession rules tell an immense amount about the society in which they are found and in many ways constitute the most distinguishing feature of any given legal system. This inherent complexity makes establishing common rules across the Member States in the area of succession very difficult, and changing the law of succession might have unforeseen side effects.
20. The law of succession also interacts with other aspects of domestic law. The transfer of property on death gives rise to liability to pay tax and the collection of tax arising from the death is linked to the administration of the succession. In the UK, for example, payment of Inheritance Tax is the responsibility of the personal representatives,¹⁰ who have to satisfy HM Revenue and Customs that it has been paid or accounted for before they are appointed to administer the succession. The administration of a succession also involves dealing with creditors, which can involve the law of insolvency if the deceased was insolvent at the time of death.

The applicable law

21. Within this context of complexity a fundamental issue is the determination of which law applies to a cross-border succession. Determination of the applicable law can make a crucial difference, not only to how the succession must be administered but even to such basic questions as what constitutes the estate of the deceased and who is entitled to get what. This is the case whether or not the deceased made a will. Box 1 compares three broad principles of the French law of succession and that of the separate UK jurisdictions¹¹ in order to illustrate the fundamental differences that can arise.

¹⁰ A personal representative is a person appointed to administer a succession. In Scotland the equivalent to personal representatives are called executors-nominative or executors-dative. In this report references to UK personal representatives include such executors.

¹¹ England and Wales, Scotland, and Northern Ireland have separate laws of succession.

BOX 1**The contrast of succession law in France and the UK****France:**

- (a) The heirs inherit their share of the property of the deceased directly on death and assume responsibility for the debts of the deceased and the tax on inheritance.
- (b) The value of the estate to be taken into account is not just the property owned by the deceased at the time of death but also gifts made during his or her lifetime.
- (c) A fixed proportion of the estate (of at least one half) is inherited by the child or children of the deceased, irrespective of any wishes of the testator as expressed in a will. This is known as a “forced inheritance”.

United Kingdom:

- (a) The property of the deceased passes initially to personal representatives who administer the estate by collecting it in, paying creditors and taxes and then passing the balance to the heirs.
- (b) The estate available for distribution to heirs comprises only property owned by the deceased at the time of death.
- (c) After payment of creditors and taxes the estate is distributed in accordance with the wishes of the deceased as expressed in a will, or according to set statutory rules if there is not one. In Scotland a surviving spouse or child can choose to inherit a fixed proportion of at least one third of the moveable property¹² (divided equally if there are two or more children) in place of their entitlement under a will.

- 22. The legal systems of Member States all lay down tests to determine which law is to be applied to a cross-border succession. They involve establishing a connection ensuring that the law to be applied is relevant either to the property involved or the people interested in the succession. Member States use different connecting factors which can sometimes result in a conflict as to which law should be applied.
- 23. There are four main connecting factors currently in use: the nationality, habitual residence and domicile of the deceased, and the location of the deceased's property. For example, German courts apply the law of the nationality of the deceased to deal with a succession. French courts apply, in respect of moveable property, the law of the state where the deceased was habitually resident at the time of death. For immovable property (essentially land) they apply the law of the place where the property is situated. The courts of the United Kingdom apply the law of England and Wales, Scotland or Northern Ireland, as the case may be, to the moveable property of those dying domiciled (as opposed to habitually resident) in these jurisdictions. Like France, immovable property is governed by the law of the place where it is situated.
- 24. There is a further layer of complexity and academic debate. This is the doctrine of *renvoi*. This arises when the law of state A indicates that the law

¹² Essentially all property other than land.

of state B should apply. The question then is whether it is simply the internal substantive domestic law of state B which should apply,¹³ or also that part of the law of state B which concerns the resolution of cases which engage conflicting laws of two or more states (known as “private international law”). If the private international law of state B applies, the result could be different from that if only the substantive internal domestic law applies, because the private international law of state B could effectively send the matter back to the law of state A.¹⁴

25. The complexity arising from the application of different connecting factors by different legal systems is compounded by the fact that those connecting factors can themselves be uncertain. Nationality is reasonably certain, although not entirely so as some people have dual nationality, and some Member States, such as the United Kingdom, have more than one system of law. However, a national of one Member State may have been settled for many years with a family, and own most, or even all, of their property in another Member State. In such circumstances, the test of nationality may lead to the application of a law which is neither convenient nor appropriate.
26. The concepts of habitual residence and domicile are less certain than nationality but impose a more consistent connection between the succession and the law to be applied to it. They are not only different from each other but can have a different meaning depending on the jurisdiction in which they are being used. In broad terms habitual residence connotes the place, based on past experience, where an individual usually resides. Domicile is a more stringent test and takes into account, to a greater extent than the test of habitual residence, the intention of the person concerned as to his or her permanent home. The concept of domicile as it applies in England and Wales is outlined in Box 2. The distinction can become critical where a person is seconded to another Member State to work. In those circumstances the domicile is more likely to remain that of the home Member State whilst the habitual residence is more likely to be that of the Member State of secondment.

BOX 2

Domicile under the law of England and Wales

Ordinarily, a person’s domicile is the place where they have their permanent home to which, if absent, they intend to return. Such absence may be long term. This is known as the domicile of choice.

Every person acquires at birth a domicile of origin which is generally the domicile of their father. This can revive if a domicile of choice is abandoned without a new one being acquired.

A dependant generally has the same domicile as the person on whom they are dependent.

27. It is, of course, possible to determine with the greatest degree of certainty the jurisdiction in which land is situated. But an estate normally comprises both land and other property, in which case another connecting factor will need to

¹³ In the case of succession that would be matters such as the administration of the estate and who is entitled to what property.

¹⁴ See the example found in Box 4. The Commission proposes that the doctrine of *renvoi* should not apply.

be applied to the other property, raising the prospect of one law applying to the land and another applying to that other property.

28. Box 3 illustrates how even a simple cross-border succession can give rise to results that may come as a surprise to the layman.

BOX 3

A simple cross-border succession

A British national dies domiciled in France, owning a house in France, a house in England and other assets in both countries. As the test of domicile applied by English law is more stringent than the test of habitual residence applied by French law the net effect would be the same under the law of France and the law of England and Wales. The house in France and all the moveable assets (both in France and England) would be governed by the French law of succession; the house in England by that of England and Wales.

In such circumstances the testator is likely to be advised to make separate wills under the law of each jurisdiction. The property governed by French law would be subject to the French forced inheritance rules.

29. There was general agreement among our witnesses that the complexity of cross-border successions does give rise, in practice, to difficulties. The complex and sometimes even conflicting legal rules make it more difficult and expensive to plan a succession, to administer it or resolve any dispute. A cross-border succession, even one that is not contentious, is likely to require the involvement of specialist lawyers from more than one Member State. A person may not appreciate which law is going to apply to their succession. Anyone domiciled in the UK who owns land in another Member State needs to know the law of that Member State governing the succession of that land.
30. Furthermore the complexity and uncertainty of cross-border succession make it more likely that disputes will arise in the first place dragging those concerned into expensive litigation.
31. Richard Frimston, a solicitor practising in the field, a member of the Law Society's International Committee, gave an example from his own experience how even a relatively simple cross-border succession could give rise to added expense (QQ 53 and 87). This is outlined in Box 4.

BOX 4

An example of the additional expense involved in a cross-border succession

A UK citizen died living in Germany but owning a UK building society account. Under English law he was domiciled in Germany and therefore German law applied. Although the basic rule of German law was that English law should apply, the doctrine of *renvoi* allowed the German authorities to apply German law. A conflict of applicable law was therefore avoided. The German authorities, applying German laws, issued a certificate that the UK citizen "died a British citizen under British law" and named the heir. But this certificate was not acceptable to the building society to unlock the account and expert legal services in the United Kingdom were needed to obtain authority from the English court for the account to be released, despite the fact that the German certificate contained all the necessary information.

Testator's choice of applicable law

32. One possible way of alleviating the complexity and expense concerning the law that applies to a cross-border succession is to allow a person to choose which law should be applied to his or her succession. At present this possibility is very restricted. Choice is not permitted under the law of most Member States, including all the jurisdictions of the UK. One reason to limit the choice of applicable law is to ensure an appropriate connection between the succession and the law to be applied to it, albeit that different Member States take different views as to what is the most appropriate connecting factor. For those Member States which, like France, impose a forced inheritance, there is another reason to restrict this choice. This is to prevent a testator evading the forced inheritance rules by choosing a law, such as that of England and Wales, which does not include forced inheritance.

Jurisdiction

33. Cross-border succession also gives rise to the problem of deciding which courts or other authorities should have the power to deal with the succession. In every Member State succession is subject to the oversight of a public authority. In the UK jurisdictions this is done by the court (whether or not there is any dispute over the succession). In the majority of other Member States this function is mostly carried out by a notary whose decisions are recorded in formal documents having the status of authentic instruments, with courts only becoming involved if it is necessary to resolve a dispute.
34. The question of jurisdiction is separate from the issue of the applicable law. It is possible, for example, for a UK court to deal with a disputed succession by applying French law. In cases where a court of one Member State applies the law of another to determine a dispute there is inevitably the added expense and inconvenience of establishing, normally by expert evidence, the substantive content of the law to be applied. It is also inevitably the case that courts and other authorities are more efficient and effective when applying law with which they are familiar.
35. The laws of the Member States each include tests for deciding whether their courts and authorities should assume jurisdiction, seeking the appropriate connection between the succession and their courts or authorities dealing with it. Like the connecting factors in respect of the applicable law, the connecting factors used to determine jurisdiction in the various Member States differ and can conflict, with the result that more than one Member State may have jurisdiction to deal with the matter by its own law. A party to a dispute may perceive an advantage in using the court or authority of a particular Member State and try to steer the dispute to that jurisdiction even if it is not, objectively, the most suitable.

Recognition and enforcement

36. There is yet a further issue. A decision of a court or other authority made in one Member State in the field of succession is not, in general, automatically recognised and enforced by the courts of another. The difference between recognition and enforcement is outlined in Box 5.

BOX 5**Recognition and enforcement**

Enforcement of a judgment entails taking steps against a person in order to give the judgment effect, for example by the recovery of money from that person in satisfaction of a judgment.

Recognition of a judgment happens when a court of one Member State takes a judgment of another into account in reaching a decision on a matter before it. For example a defendant in a dispute in Member State A may want to resist a claim on the grounds that judgment in the same dispute has been given in Member State B in their favour. This can only succeed if the court in Member State A recognises the judgment of the court of Member State B.

37. Recognition and enforcement of decisions are easier to achieve where there is trust, on the part of the court or other authority in the Member State where the recognition or enforcement is sought, in the procedures and decisions of the courts or authorities where the decision is originally taken. Making recognition and enforcement of decisions given in other Member States easier reduces the expense involved in dealing with cross-border successions but may call for safeguards to prevent abuse.

The scale of the problems associated with cross-border successions

38. Statistics which illustrate the scale of the problem are difficult to obtain. The Commission has attempted to provide some in its impact assessment¹⁵ although we did not find them particularly helpful. This impact assessment indicates that an estimated 29 million EU citizens are currently living outside the borders of the EU. This is about 6% of the 2006 EU population. About the same number of EU Member State inhabitants are non-nationals, of which the majority are citizens of another Member State. The Commission expects there to be an upward trend in mobility as more and more EU citizens take advantage of the internal market and the mobility it affords, although it accepts that many citizens who work or live in another state do so only temporarily and return to their state of origin. The evidence of the scale of citizens buying property in a Member State other than that of their nationality is thin.
39. The Commission's impact assessment also seeks to quantify the added cost of cross-border successions.¹⁶ It estimates that 4.5 million people die each year in the EU and that 1 in 10 of the consequent successions involves an international dimension. It attributes an average value of €274,000 to cross-border estates, giving rise to average legal costs of 3% of the value of the estates. This results in an estimate of the costs concerned of €3.699 billion, to which it adds further costs of the same order of magnitude on account of the extra delay in dealing with international successions. As legal professionals estimate that the costs of dealing with cross-border cases are twice or three times as high as in national cases the Commission puts forward the estimate of €4 billion as the extra legal costs resulting from the international dimension of such successions. The Commission does not appear to distinguish between cross-border successions confined to the EU and those involving a third country.

¹⁵ SEC (2009) 411.

¹⁶ On the basis of an external study commissioned by it from EPEC.

40. Jonathan Faull, Director-General, DG Justice, Freedom and Security, provided an estimate of 8 million Europeans living in a Member State other than the one in which they were born (QQ 97–98). This appears to be a conservative estimate compared with that found in the Commission's impact assessment. However he accepted that it was difficult to find precise data in this field and that the Commission had only provided its best possible estimate.
41. The Government, in their partial impact assessment published as part of the consultation document,¹⁷ indicate that the quantification of numbers, costs and benefits has not been possible. They do, however, indicate that there are 2.2 million UK nationals living in other Member States.
42. Professor Matthews, a solicitor practising in the field and Visiting Professor of Law at King's College London, did not accept the Commission's estimate, on the basis that it assumed that a certain number of cross-border successions would cause a problem when there is no empirical evidence that this is the right number (Q 11). Although very little was known about the statistics in this area because they were not collected, it was the case that cross-border succession did give rise to greater complexity (Q 1). He specifically warned of the danger that changing the law in a general way could have the effect of pushing the costs of solving the problems of cross-border successions onto the general population whose successions do not, as in the majority of cases, involve cross-border elements. He also warned of substituting one set of complications for an existing set (Q 39, p 5).
43. Richard Frimston pointed to his own experience showing that cross-border succession arose in a significant number of cases. In general terms he considered that the Commission's proposal would make a significant impact in addressing the problems of cross-border successions, particularly the severe problems that arise when assets in a succession are governed by two sets of law or by none (QQ 47–50). He saw the proposal as providing a rough and ready solution for those he termed "ordinary folk" without very valuable estates (Q 53). The experience of Andrew Francis, a barrister practising in this field and author on the law of succession, was also that there were a number of estates containing assets outside of the UK. He welcomed the prospect of simplification of the law of cross-border succession (p 67).
44. **The law of succession involves dealing with complex property rights that vary considerably between Member States. Where there is a cross-border element in the succession, and in particular where the deceased owned property in more than one country, that law becomes even more complex with the inevitable consequence that those involved with cross-border successions are encumbered with greater expense and inconvenience.**
45. **Whilst simplification of the law on cross-border successions, if it could be achieved, would be likely to bring real practical benefits, there is a lack of evidence of the number of cross-border successions and also the extent to which the complexity and expense of dealing with the issues actually impairs mobility and the exercise of free movement rights within the EU. This suggests that the EU should be cautious in seeking to legislate in this complex area. Particular care is needed to ensure that any legislation intended to simplify the law does not have the unintended consequence in practice of replacing one type of complexity with another.**

¹⁷ <http://www.justice.gov.uk/consultations/ec-succession-wills.htm>

CHAPTER 3: THE COMMISSION'S GENERAL APPROACH

46. The area is so complicated as to bring into question whether EU legislation could succeed at all. Jonathan Faull argued that the complexity of the subject matter and the problems it causes make EU legislation necessary (Q 99). Richard Frimston thought that it could succeed (Q 52), although he suggested that any future Regulation should only deal with the applicable law (Q 83). Professor Matthews suggested dealing with the issues one at a time, starting with the applicable law question, and considered that legislation covering a limited range of matters such as the applicable law was attainable with goodwill (Q 40–41).
47. The Commission is not proposing that the substantive law of succession across the Member States should be harmonised, for example by laying down a single EU rule determining who is entitled to what property of the deceased. None of our witnesses suggested that it should. Jonathan Faull described the underlying principle behind the Commission proposal as being to ensure that one legal system was applicable to any individual cross-border succession and that a person making a will should be able to choose, within limits, the applicable law. He also indicated that the Commission was searching for legislation which would be understandable to the general public (Q 103).
48. This approach would, in principle, allow each Member State to retain its own law of succession. The proposal would replace the private international law rules of the Member States and not significantly change the substantive internal domestic rules contained in the laws of the Member States.
49. But even this limited approach would have a significant impact in practice in those cases where the law presently applied to a succession would change. For example, if that change is from a law which does not include forced inheritance to one which does, the testator's wishes as to who should be entitled to what property might not be fulfilled. There could also be significant effects on how the succession was administered.
50. The Commission proposal extends beyond providing a single rule for determining the law to be applied to a cross-border succession. It deals with jurisdiction, recognition and enforcement of judgments, and seeks to make authentic instruments produced by notaries readily recognisable and enforceable. It also seeks to introduce a European Certificate of Succession (the "ECS"), which would be a standard form, produced by a court or other public authority in a Member State, which would certify, with supporting reasons where relevant, the details of some or all of the following: the identity of the deceased, who is empowered to administer the succession, who is entitled to claim what part of the estate, and whether there is any known dispute. The Commission proposes that an ECS would be recognised and have effect throughout the EU. We deal with the ECS in Chapter 6.
51. Mr Faull nevertheless considered that the Commission had been reasonably modest and circumspect in dealing with the set of issues that arise (Q 99). He thought the proposal, if adopted, would solve some, but not all, of the problems and predicted that once everyone was used to having European law in this area some of the remaining problems might prove easier to address in due course (Q 124).

52. He appreciated the concern about EU legislation having unforeseen consequences but indicated that the Commission had spent a long time trying to foresee them (Q 109). He considered that limiting the approach to the issue of the applicable law would have made for an inadequate proposal which would have left the debate in the legislature a little devoid of content. Many other issues would arise for discussion before the Council and the European Parliament which a limited proposal would not address. He concluded “We will see in the process of legislation precisely where the scope ends up, but we thought in order to start the legislative process it was a service to the legislative institutions of the Union that we set our ambitions a little higher” (Q 102).
53. **We strongly agree with the Commission that it is not appropriate to harmonise the substantive law of succession across the Member States. We also agree that this is an area for a step by step approach to legislation. However, it would have been preferable for the first proposal in this field to have focussed on the issue of the law that should apply to a cross-border succession (the applicable law).**

CHAPTER 4: THE APPLICABLE LAW

54. The Commission's proposal envisages a single test of habitual residence to determine the applicable law to apply to a succession, subject to a testator making a valid choice of a different applicable law of his or her nationality. The same test would be applied to cross-border successions involving a third country. This would only resolve any conflict that there may be between Member States as to which law is to apply to the succession. Any conflict with the third country law could only be resolved by agreement with that third country.
55. Whilst our witnesses mostly agreed that there was benefit to be derived from simplifying the issue of the law to be applied to cross-border successions, even this presents considerable challenges.

The test for determining the applicable law

56. At present the connecting factors used in the laws of the Member States to determine the applicable law are: nationality, the place where immovable property is situated, domicile and habitual residence. They are used both where the cross-border elements to the succession are limited to other Member States and where they extend to third countries.
57. Although it is possible to be certain of the place where immovable property is situated, no witness suggested that this was a connecting factor which could be applied to the whole of the estate. In cross-border successions it would result in different laws being applied to determine and administer the succession of different property situated in different states but belonging to the same deceased. This is already a feature of the UK laws of succession. Oliver Parker, a senior lawyer in the Ministry of Justice, indicated that the UK system of treating moveable and immovable property differently had been widely criticised by academic commentators and also by the judiciary in a handful of decided cases. He described it as a historical anomaly although he had not detected pressure to change it (QQ 128–129). The joint evidence of the Law Society, the Society of Trust and Estate Practitioners (STEP) and the Notaries Society of England and Wales, supported a single law applicable to the whole of a person's estate (p 81) as did the Hon. Mr Justice David Hayton, a Justice of the Caribbean Court of Justice and Fellow of King's College London (p 70). The Chancery Bar Association cited judicial criticism of the UK system¹⁸ and considered that it was hard for people to understand (p 64). Professor Elizabeth Crawford, Professor of International Private Law at Glasgow University and her colleague, Dr Janeen Carruthers, Reader in Conflict of Laws, saw the benefit of a single law applicable to the whole estate, but considered that there needed to be sufficient certainty in the connecting factor for it to be workable.
58. **We agree with the Commission's objective of seeking a single law to apply to the whole of the estate of a deceased. However to achieve this objective it is necessary to find a suitable connecting factor between the succession and the applicable law which can be applied with reasonable certainty.**

¹⁸ *Re Collens deceased* [1986] Ch 505.

59. None of our witnesses pressed for nationality to be the connecting factor. It risks providing an outcome that would be inconvenient to all those concerned in the succession, as could be the case where a national of one state had settled at an early age in another and raised a family there. The Government accepted that habitual residence stood a better chance of agreement than domicile (Q 135). Andrew Francis welcomed the use of habitual residence, in principle, as the connecting factor (p 67) and Richard Frimston also considered it preferable to domicile (Q 65).
60. However the EU legislator has an open choice as to what should be the connecting factor. The proposal uses habitual residence without further definition for this purpose. Given the disadvantages of nationality and the location of property as connecting factors and the prospect of agreement around habitual residence, there is merit in using the concept of habitual residence as a starting point for finding an appropriate connecting factor.
61. The term “habitual residence” is used in other EU legislation, sometimes defined in that legislation and sometimes not. But whether or not it is defined, the European Court of Justice interprets the concept in its specific legislative context and an interpretation used in one context cannot be directly transposed to another.¹⁹ A clear majority of our witnesses considered the term “habitual residence” needed definition. Professor Matthews pointed out that the use of the term in the proposal was different from its use in existing legislation. In existing legislation the concept is largely directed at the short term purposes personal to the person concerned by the legislation. But in succession the effects are not on the deceased but on the heirs and creditors of the estate and those effects could stretch over generations. To leave the term undefined was, in his view, a political fudge (QQ 13–14 and p 6–7).
62. The problem areas identified concerned, in particular, workers temporarily posted abroad and those retiring abroad. However, there was no clear sight among our witnesses of what the definition should be. The Hon. Mr Justice David Hayton, who led the UK Delegation to the Hague Conference preparing the Hague Succession Convention,²⁰ recalled the difficulty in negotiating a definition then (p 71). In the event only the Netherlands signed up to this Convention. He suggested refining the concept of habitual residence to exclude the place where a person only intends to reside for a temporary period; in which case habitual residence could revert either to the previous habitual residence or to the nationality of the person concerned (p 70).
63. Jonathan Faull agreed that the interpretation of the term depended on the context of the legislation but added that the concept would have to be applied to the factual situation in the particular case under consideration. The Commission’s legal advice was that it would not be useful, even if it were possible, to provide a general definition of habitual residence because it would almost certainly be too vague (Q 101).
64. This approach would, however, mean that more individuals than would otherwise be the case would be faced with uncertainty as to how to interpret

¹⁹ For a recent example see Case C-523/07, *A*.

²⁰ The Convention of 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons.

the term “habitual residence” and would be forced into the delay and expense of litigation, ultimately in the European Court of Justice.

65. **A single factor to provide the connection between a succession and the applicable law is difficult to find. There must be a compromise between providing an appropriate connection between the succession and the law to be applied to it, and providing certainty. We believe that the concept of habitual residence should be used as the basis for the connecting factor in this proposal. However it is legally possible and necessary in practice to define the concept. Citizens should not be left to bear the expense of refining the concept through litigation. The definition should, as a minimum, address in a satisfactory way the position of employees posted to another Member State and those who retire to another Member State.**

Choice of applicable law

66. Article 17 of the proposal would introduce the possibility for individuals to stipulate in their wills that the law of their own nationality should apply to their succession when they die. This choice is not found in the laws of most Member States and does not exist in any of the laws of the UK.
67. One underlying reason for preventing or limiting a choice of applicable law is that the wider the choice the greater the chance of an inappropriate law being chosen to govern the succession. Another reason, relevant to those states whose law of succession includes forced inheritance, is that testators could, if they wished, exploit the choice in order to avoid their property passing as prescribed by the forced inheritance rules.
68. The introduction of an element of choice was generally welcomed by the witnesses, although some considered that it did not go far enough. Professor Matthews started from the position that if there was real mutual respect between Member States for each other’s legal systems then it would be reasonable to allow a choice of any EU law to apply. But he conceded that was unlikely to be accepted and put forward a number of possible limiting connections: place of birth, where the testator’s parents come from, and where property is owned (Q 19). The joint evidence of the Law Society, STEP, and the Notaries Society favoured extending the choice to habitual residence at the time the choice is made (p 81).
69. **We welcome the introduction of a choice of applicable law, not least because a choice is comparatively easy to ascertain. We accept that the choice must be limited to preserve an appropriate level of connection between the law chosen and the succession. Limiting a person to choosing the law of his or her own nationality is, however, too narrow. It should be possible for a person to choose the law of habitual residence at the time the choice is made. We consider that it would also be acceptable to extend the choice of available law to one with which the testator has a genuine and concrete connection and which can be ascertained with sufficient certainty.**

Administration of the succession and payment of tax

70. The law of succession has close links, and overlaps, with other areas of law, particularly property law, family law and tax. Any EU legislation determining

which law is to apply to a cross-border succession must, therefore, carefully define the scope of the applicable law.

71. In our report on the Commission's Green Paper²¹ we expressed the opinion that it was necessary to limit the scope of application of any EU legislation to "succession issues" by excluding matters such as the administration of estates and questions relating to the validity and operation of testamentary trusts, matrimonial property law, and interests terminating on death such as joint tenancies.
72. The scope of the proposal as a whole is set out in Article 1 of the proposal and the scope of the provisions relating to applicable law in Article 19. These provisions in combination do exclude from the scope of the law to be applied to cross-border successions some of the matters we previously raised, but the proposal nevertheless includes within its scope most aspects of the administration of a succession, albeit limited in a way which would fit in with the UK's procedures. Thus, Article 21 permits a Member State in which property is located to subject the administration of the succession to the appointment of personal representatives. So for example, if a succession was governed by French law, any dealing in the assets in the UK would require the appointment of personal representatives, as is now the case. This would assist in ensuring the proper distribution of the estate. However, eligibility to be a personal representative would be determined by French law as would their powers. This could mean that a person would have to be accepted as a personal representative even if they would not be qualified to act in that capacity under the relevant UK law.
73. The law concerning what tax is payable and how it is collected does not follow the law otherwise applicable to the succession; and the tax legislation of the UK differs from that of many other Member States. In the UK payment of Inheritance Tax is the responsibility of the personal representatives who have to satisfy HM Revenue and Customs that it has been paid or accounted for before they are appointed to administer the succession. Many other Member States do not have personal representatives fulfilling this role and tax is the responsibility of the heirs, who inherit property directly.
74. Revenue and customs matters are specifically excluded from the scope of the proposal by Article 1. Article 21 permits a Member State to subject to prior payment of tax the final transfer of property located in that State to those inheriting it. This does not appear to achieve its objective of protecting the collection of tax, because in the UK tax is collected or otherwise accounted for before the formal appointment of the personal representatives. For his part, Jonathan Faull claimed that the proposal was absolutely neutral in tax matters (Q 116). That may be the intention of the proposal but it has not been achieved as far as the collection of tax is concerned.
75. Inclusion of the administration of estates within the scope of the proposal would require consequential changes to domestic law. For example, in England and Wales the personal representatives who administer a succession are not at present obliged to administer foreign assets. Were the proposal to be adopted and apply to the United Kingdom they would have to do so. This is likely to be a practical benefit, but the present protection afforded to

²¹ EU Select Committee, 2nd Report (2007–2008): *Green Paper on Succession and Wills* (HL Paper 12).

personal representatives against being sued personally in respect of their distribution of the estate provided they have previously advertised their intentions in the London Gazette would become inappropriate. People residing outside the UK with an interest in the succession are even less likely to consult or have access to the London Gazette than those presently residing in the UK.²²

76. **Limiting the scope of the proposal to determining the law applicable to the issue of who is entitled to what asset in any particular succession would result in simpler legislation that would require fewer consequential changes to the domestic law of Member States. It would be consistent with the cautious approach we advocate. It would also permit the continuation of important UK procedures for administering successions which ensure the protection of the interests of creditors, beneficiaries and HM Revenue and Customs.**

Property rights and registration of land

77. Article 1(3)(j) of the proposal excludes from the matters that are covered by the proposal “the nature of rights *in rem* relating to property and publicising these rights”.²³ The Commission explains in its Explanatory Memorandum to the proposal that this provision is intended to prevent the introduction into a Member State of a right in relation to real property (essentially land) which is not found in its law.²⁴ It uses the example of a usufruct, which is the right of a person to use and derive profit or benefit from property that belongs to another; for example a farmer may give a right of usufruct to a neighbour, thus enabling that neighbour to sow and reap the harvest of that land. This right does not exist as part of the substantive domestic law of England and Wales but does in other Member States, for example France. The reference in the proposal to publicising these rights includes the system of land registration in the United Kingdom.
78. Professor Matthews did not agree that the Commission’s objective had been fully achieved. He interpreted this provision as simply saying that the domestic law of England and Wales, for example, did not need to introduce usufruct as a property right. However, if the law of France were to apply to the succession of land located in England, then one consequence would be that a usufruct imposed under French law could, in fact, attach to that land. However there would be no requirement in the proposal to change the UK domestic Land Registry rules to show that ownership of the property was subject to the usufruct (Q 36). If those rules were not changed the result would be that the usufruct would be effective but not publicised in the Land Register. This could cause difficulties if the land is then sold to a third party. At present the issue does not arise because UK law applies to the succession of land situated in the UK.
79. Another issue affecting the registration of land arises in relation to clawback, and is discussed later in this chapter.

²² Evidence of Richard Frimston (Q 56).

²³ A right *in rem* is a right which relates to property which can be asserted against anyone who infringes it, in comparison with a right *in personam* such a right under a contract which can only be asserted against a specific person.

²⁴ 14722/09, COM (2009) 154, paragraph 4.1.

80. The Institute of Chartered Accountants of England and Wales (ICAEW) cited the example of French law, under which minors can inherit and hold land, whereas under English law minors are unable to hold land in their own right.²⁵ Provision would have to be made for those cases where French law applied to a succession and under that law a minor inherited land in England (p 75).
81. The position as far as property other than land is concerned is different. Professor Matthews provided an example of a valuable painting located in England belonging to a person who died domiciled in France. As matters stand, under the law of England and Wales the law applying to the succession of the painting is French. If that painting was given in the will to A subject to a usufruct in favour of B in order to allow B to hang the painting in his house for the rest of his life, any dispute between A and B coming before an English court would be resolved by the court applying French law and allowing B to take possession of the painting for the rest of his life. Professor Matthews did not interpret the proposal as seeking to change this (Q 36).
82. **We support the principle that substantive property rights should be interfered with as little as possible by the proposal. We do not consider that the proposal meets this requirement. As it stands the proposal would have the effect of making land in the UK subject to novel property rights as a result of applying the law of another Member State to a succession which includes that land. This would be the expected consequence of applying a single law to the succession of the whole of an estate, including land. A further consequence would be that the system of land registration would need adjustment to cater for this possibility.**

Special succession regimes

83. In addition to the exceptions relating to the administration of successions already mentioned in this chapter, the proposal includes, in Article 22, other exceptions in respect of “special succession regimes”. The effect of this Article would be that the law of the Member State in which certain immoveable property, enterprises or other special categories of property are located can be applied irrespective of the law which would otherwise be applied, provided that these properties are subject, in domestic law, to a special regime “on account of their economic, family or social purpose” which applies irrespective of the law governing succession. The Commission’s Explanatory Memorandum to the proposal²⁶ cites the special regimes applicable in some Member States in respect of family farms as an example of a special succession regime. The intention appears to be to preserve aspects of succession which Member States regard as culturally important.
84. These exceptions were characterised by Professor Matthews as special pleading (Q 34). He pointed out that they would result in a different law being applied to the succession of certain land from that which would otherwise be applied under the proposal, thus undermining the underlying objective of providing a single law applicable to the whole of an estate (p 6). Richard Frimston also considered these exceptions to be loosely worded and would have preferred Article 22 to be omitted, but accepted that exceptions might be needed in order to achieve agreement on the proposal (QQ 69, 70).

²⁵ Minors are unable to hold a “legal estate” in land, i.e. freehold or leasehold, in their own right but can do so as beneficiaries of trusts.

²⁶ 14722/09, COM (2009) 154, paragraph 4.3.

85. **The exceptions for special succession regimes found in the proposal detract from the proposal's objective of simplifying the handling of cross-border successions and should, ideally, be removed. Whilst we accept that some exceptions may be necessary to achieve agreement to the proposal, they should be kept to the absolute minimum and the present drafting improved to ensure that this is the case.**

Clawback

86. This is the single most contentious issue in the proposal for the UK. Clawback arises when a person benefiting from a forced inheritance is able to make a claim for that inheritance from the lifetime gifts made by the deceased. Clawback is intended to stop the possibility of individuals evading the forced inheritance rules by giving away their property during their lifetime. In the law of England and Wales and that of Northern Ireland there is no forced inheritance and therefore no clawback. Nor will the courts entertain a claim for clawback even if they are applying a law which includes it. In Scotland there is forced inheritance in respect of moveable property, but the evidence to us was that clawback either did not exist in the UK or was only very limited.²⁷ Under Article 19(2)(j) of the proposal, clawback claims would specifically be within the scope of the applicable law and therefore would operate in the UK when the law being applied to a succession provides for clawback.
87. The rules of clawback vary considerably between Member States whose law includes it, as demonstrated by a study commissioned from Professor Paisley, Professor of Commercial Property Law at the University of Aberdeen, by the Ministry of Justice and published as part of its consultation document.²⁸ These differences in the operation of clawback would exacerbate the difficulty in coping with clawback. They include the following:
- The period of time before death in which a gift is made before it may be taken into account.
 - The time within which a claim for clawback may be made.
 - Whether clawback can be claimed only against the person receiving the gift or against anyone else to whom the property has been passed or sold.
 - Whether a claim can be made for the return of the property itself or for monetary recompense.
88. An example of how clawback would operate in an extreme case was given by Professor Matthews (Q 33) and is outlined in Box 6.

BOX 6

An extreme example of clawback

A British national domiciled in, and entirely connected with, England gives away a significant proportion of his property. Forty years later he dies, having moved to France, having become domiciled, bought property, married and raised a family there.

The forced inheritance claims and clawback will apply to the gifts made when he was domiciled in England as far as French law is concerned. They are liable to be returned to the estate to meet these claims.

²⁷ Evidence of Professor Matthews (p 4) and Professor Crawford and Dr Carruthers (p 65).

²⁸ <http://www.justice.gov.uk/consultations/docs/ec-succession-wills.pdf>

89. A variety of unwelcome consequences if clawback were to operate in the UK have been raised. These are summarised in Box 7.

BOX 7

The adverse effects of clawback in the UK

- Those receiving gifts, including charitable gifts and gifts made on marriage, would be uncertain whether the property would be subject to clawback. This would either inhibit the use of the gift or force them to seek forms of protection such as insurance.
- Anyone whose property might possibly have been acquired from a donee and subject to clawback, whether or not they were aware of this fact, may feel the need to take out protection against a clawback claim.
- It would be difficult to fix a price for assets subject to clawback.
- Trusts and the use of insurance or pension policies to effect estate planning would be undermined, even transfers to offshore trustees if the property remains in the UK.
- Increasing legal costs would be incurred in advising on property rights and the transfer of property.
- The various UK registers of property title would be undermined because they would not provide a guarantee as to the ownership of the property.

90. A particular problem could arise with registered land, bearing in mind that clawback can, in some circumstances, be exercised against specific property transferred from the original donee to a third party. There would be two possible responses to the possibility of clawback. Either the potential effect of clawback could be excluded from the Land Registry's guarantee of title, in which case those acquiring property were likely to want to seek insurance against a clawback claim which might well be difficult and expensive to obtain. Alternatively the guarantee could remain and the Land Registry budget would bear the increased costs of indemnifying those whose title to property becomes undermined by a successful claim for clawback. This would inevitably push up the fees which underpin the guarantee.²⁹
91. Richard Frimston suggested that limited clawback may have a benign effect. There would be a greater onus on a donee, such as a charity, to ask responsible questions when receiving a large gift (Q 81).
92. In England and Wales there are some circumstances where gifts can be undone. That most frequently raised, and the closest to clawback as found in this proposal, is the Inheritance (Provision for Family and Dependents) Act 1975 which provides a mechanism for family or dependants of a deceased to obtain reasonable financial provision from the estate. Under this Act, a court can set aside a gift if made within 6 years of death and made with the intention of defeating a claim under the Act. Other examples raised include legislation to protect creditors of the insolvent, and adjustment of property in divorce proceedings. These are all, however, of relatively limited impact, and practitioners know how to advise their clients. Richard Frimston was of the opinion that people in the UK were used to clawback in all sorts of ways

²⁹ Evidence of Oliver Parker (Q 155).

(Q 81). Professor Roger Kerridge, Professor of Law at Bristol University, suggested that in most continental jurisdictions the effect of clawback was much the same as the anti-avoidance provisions which exist under the English Family Provision legislation (p 79).

93. Additionally, some gifts (although not those to charities) can give rise to Inheritance Tax if made up to seven years before the death of the donor.
94. Lord Bach, Parliamentary Under Secretary of State at the Ministry of Justice, indicated that many of the respondents to the Ministry of Justice consultation cited clawback as a reason for the UK not to opt in (Q 139). This was also the strong flavour of the evidence presented to us. However, he also indicated that many Member States would be reluctant to see clawback removed from the proposal (Q 127). Given that clawback forms part of the law of the majority of Member States and given that processes having a similar effect can arise in the UK, we considered whether clawback presents a particular problem to the UK. We believe it does. As a number of our witnesses pointed out, there is in the UK a legal culture of freedom for individuals to dispose of their property as they wish; and there is a strong UK cultural heritage of providing social support through gifts to charity. To this may be added the important role played by trusts in the UK. Trusts are not part of the law of many other Member States and trustees frequently acquire property through gifts; for example trusts set up to provide for a disabled person or protecting the interests of a child could be vulnerable to clawback.³⁰ Professor Matthews attributed clawback as the main reason he considered that the proposal would have detrimental effects on the City (Q 9). Lord Bach expanded on this by indicating that clawback would have a chilling effect on the functioning of trusts within the City (Q 151).
95. Jonathan Faull appreciated that clawback was a difficult and sensitive issue and one which would play a large part in any UK decision to opt in. He indicated that the Commission, having consulted with British lawyers, officials and others, had crafted this aspect of the proposal to meet the support of most Member States (Q 106).
96. It is undoubtedly the case that the impact of clawback could be alleviated by permitting testators to choose a law to apply to the whole of their estates which did not include clawback, such as that of England and Wales. The proposal as it stands only allows a choice of testator's nationality at the time of death. This mechanism would therefore not be available to anyone who did not have the nationality of a state whose law excluded clawback. This option was regarded as inadequate by Professor Matthews on a number of further grounds: it depended on the person concerned realising that a change in their habitual residence to a State with clawback laws had occurred, making a formal choice in a valid will which was not thereafter revoked, and not changing nationality. Furthermore he considered that the broad exceptions to the applicable law contained in the proposal also undermined this choice (Q 33, p 5). Lord Bach pointed out that only a minority of those dying made wills (Q 139).
97. It would, of course, be possible to amend the proposal so as to exclude or limit clawback. Richard Frimston suggested that Member States with limited clawback may also be reluctant to see clawback extended. He cited the case

³⁰ Joint evidence of the Law Society, STEP and the Notaries Society (p 81).

of Austria whose law only takes into account gifts made two years before the deceased's death (Q 61). The joint evidence of the Law Society, STEP and the Notaries Society suggested some possible ways of achieving this: limiting clawback to gifts made after the choice of an applicable law, and limiting it to gifts made with six years of the deceased's death (p 82). Professor Kerridge considered the significant question to be whether clawback applied only to the original donee or also to anyone who acquires the property from the original donee (p 79). There are more possible ways to limit clawback and a combination can be used.

98. **We consider that the impact of the clawback in the proposal as it stands would be detrimental to UK interests. The Government should consult with accountants, lawyers, charities and others who would be likely to be affected by it.**

CHAPTER 5: JURISDICTION, RECOGNITION AND ENFORCEMENT

99. The Commission proposal envisages the single basic rule that the court of the Member State in which the deceased was habitually resident at the time of death should have jurisdiction to deal with a succession.
100. The same test would be applied to cross-border successions involving a third country where the deceased was habitually resident in a Member State. But this could only resolve any conflict of jurisdiction there might be between Member States. Any conflict with a third country could only be resolved by agreement with that country.
101. Specific provision is also made in the proposal to resolve any conflict of jurisdiction between Member States where the deceased was not habitually resident in the EU at the time of death. This is termed “residual jurisdiction” in the proposal.
102. The Commission proposal also envisages establishing consistent rules to simplify the recognition and enforcement of decisions given by the courts of the Member States and also of authentic instruments produced by notaries. This would not apply to decisions or authentic instruments from third countries.

Jurisdiction

103. The laws of the individual 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. This gives rise to the further possibility that there may be a race by those contemplating litigation to start proceedings in the jurisdiction they perceive will give them an advantage. For example, delay in reaching a decision may favour one party, with a resultant rush by that party to start proceedings in a jurisdiction which is slow to process litigation.
104. The resolution of the question of which court has jurisdiction is different from the question of which law should apply to the succession. It may be the case, for example, that all the litigants in a succession dispute live in a Member State other than that of the applicable law, making it more convenient for the court of their Member State to resolve their dispute. There is, however, a strong link between the jurisdiction and the applicable law in that it is cheaper and more convenient for the court dealing with succession to apply its national law.
105. For Richard Frimston, including in the proposal provisions dealing with jurisdiction was one of the matters making the proposal difficult in practice because it was so novel (Q 65). None of our other witnesses questioned the underlying benefit in principle of EU legislation providing a single rule for determining which court should have jurisdiction. However there were questions as to how the proposal seeks to achieve this. The Commission proposes that jurisdiction should be determined by the habitual residence of the deceased at the time of death, mirroring the basic rule of determining the applicable law. This choice raises the same issues of certainty as arise from using this connecting factor to determine the applicable law. It raises the spectre, in a case where it is uncertain where the habitual residence of the deceased was, of a race to start proceedings. As the proposal stands the first

court to which the matter is brought would have the sole right to deal with the case unless and until it decides that it did not have jurisdiction, irrespective of the objective merits of the various claims for habitual residence.

106. However jurisdiction would not follow applicable law where a person chooses to apply the law of his nationality. In this case jurisdiction remains with the court of the Member State of habitual residence, but that court would have a discretion to invite the parties concerned to use the court of the nationality of the deceased which would also be the court of the applicable law.
107. Professor Matthews, Richard Frimston, the Chancery Bar Association and the joint evidence of the Law Society, STEP and the Notaries Society favoured jurisdiction following the applicable law (QQ 37, 51, pp 61, 83). This approach would avoid the added cost and inconvenience arising from the need to provide expert evidence of the content of the law applicable to the case and the need for the court to apply a law with which it was not familiar.
108. This is a particularly important question for the UK where succession can involve complicated issues of trust law with which the courts of most other Member States are not familiar and which can often require an assessment of oral evidence, after cross-examination, to be resolved. The legal traditions of most other Member States favour written evidence including notarial acts. They tend to relegate oral evidence to a lower level and do not employ the technique of cross-examination to test the veracity of witnesses.³¹
109. Jonathan Faull indicated that the Commission had chosen the approach found in its proposal because it envisaged that most Member States would not be persuaded to make the link between the applicable law and jurisdiction mandatory. Instead it had chosen flexibility (Q 110).
110. **We consider that the connecting factor to determine jurisdiction should be the same as that used to determine the applicable law, including in cases where a testator has chosen the applicable law.**
111. Different considerations apply where the cross-border element of the succession involves third countries. The proposal would apply the rule applicable to Member States if the deceased died habitually resident in the EU. If, on the other hand, the deceased died habitually resident in a third country, there would be a hierarchy of connecting factors to determine which Member State has residual jurisdiction. The hierarchy is: the previous habitual residence in a Member State of the deceased, the nationality of the deceased, the habitual residence of those inheriting (irrespective of the size or proportion of the inheritance), and the location of the property which is the subject of the proceedings. These clearly provide the potential for more than one Member State to have residual jurisdiction. Where this happens the first court to which any dispute is brought would have sole jurisdiction until it decided otherwise.
112. In their Explanatory Memorandum³² the Government identified a need to tighten the categories for attributing residual jurisdiction. For example the rules set out in the proposal could lead to the court of a Member State of an heir who only benefits from a very small inheritance having jurisdiction.

³¹ Evidence of Professor Matthews (p 9).

³² <http://europeanmemorandum.cabinetoffice.gov.uk/files/Numbered%20EMs%2009/14001-15000/14722-09.pdf>

113. Jonathan Faull characterised the circumstances in which residual jurisdiction would arise as “circumscribed” and thought the hierarchy sufficiently clear. He accepted that the test of this would be the extent to which they would invite or facilitate forum shopping by potential litigants (Q 112). Professor Matthews saw nothing wrong in having a hierarchy of factors to determine residual jurisdiction, but accepted that it was for negotiation precisely what it ought to be (Q 37). Richard Frimston described the proposal for residual jurisdiction as “fairly sensible” (Q 83).
114. **We believe that if the proposal is to deal with jurisdiction it should include provision for residual jurisdiction. The proposal is however capable of being tightened up to ensure that the circumstances in which more than one residual jurisdiction arises are more limited and the connection between the succession and any residual jurisdiction is stronger.**

Recognition and enforcement of court decisions and authentic instruments

115. The potential benefits to be derived from the simplification of the rules resolving conflicts of applicable law and jurisdiction can be enhanced 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 added expense and delay in going through a process in another Member State in order to have that decision given effect. The question arises whether such recognition or enforcement should be subject to safeguards to protect the public policy of the Member State in which recognition or enforcement is sought. This might happen, for example, if the original decision were made without an interested party having what was considered to be a sufficient opportunity to contest it.
116. The Commission proposes that decisions made in one Member State, whether made by courts or by notaries in the form of authentic instruments, should 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.³³
117. Recognition of a decision of a court in another Member State would not require any special procedure, but the court in which recognition is requested might refuse on limited grounds: that recognition was “manifestly contrary” to public policy, the defendant had insufficient opportunity to arrange the defence, and the decision was irreconcilable with an existing decision in a dispute between the same parties. The procedure for enforcement, following the rules for civil and commercial matters, would involve obtaining a declaration of enforceability in the court of the Member State of enforcement according to a single simplified procedure. If contested, a declaration of enforceability could only be refused on the grounds on which recognition could be refused.
118. In contrast, an authentic instrument would have to be recognised unless it was “contrary” to the public policy of the Member State in which recognition was sought. The procedure for enforcement of an authentic instrument

³³ Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

would follow that of a court decision save that the only ground for refusal would be that enforcement was contrary to the public policy of the Member State in which enforcement was sought.

119. The recognition and enforcement of court decisions was regarded by Richard Frimston as an objective worthy of pursuing, but one which could raise tricky issues. He cited the example of Malta, which does not have a law of divorce. He asked whether that meant that a Maltese court would not recognise a divorce obtained elsewhere, with a consequential effect on succession issues which were dependent on whether the marriage was regarded as continuing to exist up to the time of the death (Q 86). Other witnesses did not raise objections to the provision for recognition and enforcement of judgments.
120. On the other hand there was widespread concern at the recognition and enforcement of decisions taken by notaries in the form of authentic instruments. Professor Matthews explained that the functions of notaries are to record and give publicity to transactions. Those transactions are generally concluded in the context of an agreement by the relevant parties, rather than a dispute. Given the absence of litigation, transactions before a notary tended not have the same procedural safeguards built into them as do decisions of courts. In particular a notary might not have been made aware of the existence of a dispute affecting the succession to a particular property and might not have given all interested parties a chance to state their case. Professor Matthews therefore advocated that authentic instruments should have the status of high quality evidence rather than be recognised and enforceable (Q 38, p 11).
121. Lord Bach and Oliver Parker raised a serious concern about the recognition and enforcement of authentic instruments which had been apparent from the early discussions of the proposal in the Council Working Group. It arises from the fact that the proposal would provide rules for resolving conflicts of jurisdiction between courts but would not apply the same rules to determine who should be able to produce an authentic instrument. This discriminates against court-based systems in favour of systems which use notaries. The specific example used to illustrate this concern is outlined in Box 8 (Q 162).

BOX 8

An effect of the proposal for recognition and enforcement of an authentic instrument

A contested succession is being litigated in London according to the jurisdiction provisions of the proposal. A disgruntled party could nevertheless seek an authentic instrument from a notary in another Member State and that notary could properly issue one as the jurisdiction rules only apply to courts. The notary might not even be made aware of the contested proceedings in London. The likelihood is that the authentic instrument could be obtained before any judgment was delivered by the London court.

Recognition and enforcement of the authentic instrument is automatic unless it can be proved to be in breach of public policy in the enforcing state, which is likely to be difficult to achieve in the majority of cases. The effect would be to pre-empt or undermine the London judgment.

122. Jonathan Faull suggested that the Commission had not gone too far in providing for the mutual recognition and enforcement of authentic

instruments because of the important role that notaries played and the safeguards provided (Q 118). He pointed out that notaries were firmly established as an indispensable part of the system in the Member States where they took a prominent role in overseeing successions (Q 122).

123. **We consider that the mutual recognition and enforcement of court decisions is likely to be sufficiently non-controversial to be acceptable in principle. However we do not consider that there is sufficient mutual trust at present to justify making authentic instruments recognisable and enforceable. We consider that authentic instruments should be given the status of evidence rather than being recognisable and enforceable.**

CHAPTER 6: THE EUROPEAN CERTIFICATE OF SUCCESSION

124. The proposal would create a European Certificate of Succession. This would be a certificate 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 proposal. The Chancery Bar Association highlighted that the definition of a “court” in Article 2 was wide enough to enable notaries authorised by the internal law of their Member State to issue an ECS (p 61).
125. The certificate would set out 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 heir, and details of the applicant for the certificate.
126. Article 42 of the proposal sets out the effects of an ECS. This is outlined in Box 9. These would last for three months after which a renewed copy would be required.

BOX 9

The effect of an ECS under the proposal

- An ECS would be recognised automatically for the purposes of the administration of the succession and determining who is entitled to get what of the deceased’s property.
- The content of an ECS would be presumed accurate in all Member States throughout its period of validity.
- Any person who passed property in accordance with an ECS would be released from their obligations under the succession unless they knew the contents of the ECS were not accurate.
- Those who acquired succession property in accordance with an ECS would be considered to have properly acquired it unless they knew that the contents of the ECS were not accurate.
- The ECS would be a valid document for allowing inherited property to be registered.

127. Two initial points can be made. First, an ECS would be more readily recognised in other Member States than a court decision, even if it was issued by a notary. Secondly, an ECS could only be rectified by the issuing authority.
128. Richard Frimston considered that an ECS could assist UK personal representatives to administer a succession involving property in a Member State which does not use personal representatives for this purpose (Q 87). It is not clear, however, how an ECS would be issued in the UK. The Notaries Society, in a separate submission, called for clarification, and pointed to the suitability of notaries to undertake this task in view of their existing special involvement in international law (p 85).
129. Professor Matthews gave evidence of the drawbacks of an ECS for a UK succession. At a practical level it would not be suitable to deal with the greater complexities that could arise in a UK succession than in most other Member States whose property law tended to be simpler, and where there were more often a limited number of heirs who normally acquire absolute ownership of the property they have inherited. He suggested that none but

the simplest English succession could be summarised in the way contemplated by the proposal (Q 27, pp 11–12).

130. With regard to how an ECS could be used in the UK, it is not clear whether an ECS could be used to secure the transfer of property in the UK to the heir without obtaining a grant of representation in accordance with ordinary UK procedures. Richard Frimston interpreted the proposal as meaning that an ECS could be used to obtain a grant, but not to secure the release of property without one (QQ 87–89). Jonathan Faull indicated that he was consulting Commission lawyers as to this interpretation (Q 119). This is an important question because in the UK the internal procedures ensure the payment of tax. This is not the case with an ECS.
131. The fact that, under the proposal, an ECS would have to be recognised in all Member States, would be presumed accurate and could only be rectified by the court which issued it has important consequences. It means that an inaccurate statement in an ECS issued in another Member State could be hard to correct, and in the meantime it would be necessary to proceed on the basis of the ECS until it was altered. An inaccurate statement in an ECS as to the nationality or habitual residence of the deceased would mean that effect could not be given to a choice made by a testator of the applicable law to be applied to a succession until the issuing court had been persuaded to rectify or cancel it. These problems would be exacerbated by the fact that an incorrect ECS would provide absolute protection to a third party acquiring property on the back of an ECS in the absence of knowledge of the inaccuracy.³⁴ This would presumably be the case even if it were subsequently rectified.
132. Professor Matthews accepted that an ECS could be useful if its effect was to provide evidence of the matters stated in it but was not conclusive (QQ 24–27). Richard Frimston cited the example given in Box 4 as an occasion when an ECS would have enabled an English grant of probate to be obtained without difficulty (Q 87). The joint evidence of the Law Society, STEP and the Notaries Society recognised the need for the ECS to be able to accommodate the different laws of different Member States, but supported an ECS provided it were subject to local procedures in the Member State of recognition. It would not be acceptable for an ECS to be used, for example, to secure the release of money from a UK bank account without securing a grant of representation or paying taxes (p 83).
133. Jonathan Faull emphasised that an ECS would reflect a genuine understanding of the situation by the court issuing it and could be changed if that proved incorrect. He regarded it as sensible for any error to be corrected at source (QQ 120–121).
134. The Government evidence was that they were still considering the provisions on the ECS, as they appeared particularly obscurely drafted. It was important that the ECS should not by-pass the existing system in the UK for administering succession and collection of tax (Q 163).
135. **We do not support an ECS which overrides national law and practice as a consequence of being automatically recognised in every Member State and treated as conclusive of the matters stated in it. We can, however, see advantages in an ECS which facilitates the operation of national procedures by providing non-conclusive evidence of the salient aspects of a succession.**

³⁴ Evidence of Professor Matthews (Q 27, p 12).

CHAPTER 7: SUBSIDIARITY AND OPT-IN

Subsidiarity

136. The proposal was made before the Treaty of Lisbon came into force. Its legal basis is stated to be Article 61(c) and the second indent of Article 67(5) of the Treaty establishing the European Community. These provisions allowed the Community to legislate in the field of judicial cooperation in civil matters having cross-border implications insofar as necessary for the proper functioning of the internal market. The equivalent powers are now found in Article 81 of the Treaty on the Functioning of the European Union which clearly encompasses the subject matter of this proposal. This is not an area where the European Union has exclusive competence so the principle of subsidiarity applies.
137. Under this principle the European Union should act only insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States. Whilst this is a legal principle and it is possible to challenge the validity of an EU measure on the grounds that it does not comply with the principle of subsidiarity, in practice the determination whether a measure complies includes a significant political assessment based on the evidence as a whole.
138. Recital (6) of the proposal is the key statement of the objective of the proposal:
- “The smooth functioning of the internal market should be facilitated by removing the obstacles to the free movement of persons who currently face difficulties asserting their rights in the context of international succession. In the European area of justice, citizens must be able to organize their succession in advance. The rights of heirs and/or legatees, other persons linked to the deceased and creditors of the succession must be effectively guaranteed.”
139. In reviewing our preliminary decision on subsidiarity (see paragraph 12) we first considered whether the objectives justify legislative action at all and then considered whether that legislative action should be taken at EU level.
140. The evidence provided to us, and discussed in Chapter 2, confirms that there are indeed difficulties associated with successions that involve a cross-border dimension. Although the scale of those difficulties has not been fully established, there is likely to be an increase in the number people affected by cross-border succession who would benefit from simplification of the law in this area.
141. To achieve simplification would require action at EU level because it entails creating rules which are the same in every Member State, for example establishing a single connecting factor for determining the law to be applied to a cross-border succession. Therefore the objective cannot be achieved by the Member States acting separately. This conclusion is reinforced by the longstanding failure of broader international initiatives to achieve simplification.³⁵ This conclusion remains valid despite our concerns that the complexity of the subject matter is such that an over-ambitious proposal runs

³⁵ See paragraph 4.

the risk of replacing one complexity with another or creating new and unforeseen difficulties. These concerns point to the need for care in framing EU legislation; they do not point to the possibility of the Member States, acting individually, being able to achieve the objective which the proposal seeks.

142. None of our witnesses considered that the proposal raised subsidiarity concerns.
143. **We therefore confirm our preliminary view that the proposal complies with the principle of subsidiarity.**

The UK opt-in

144. The Lord Chancellor and Secretary of State for Justice announced on 16 December 2009 that the UK would not opt in to the formal negotiations on the Commission's proposal.³⁶ This followed a consultation exercise,³⁷ the invitation to which highlighted two key concerns with the proposal: over clawback and the lack of clarity of the habitual residence test. These concerns were widely shared by the respondents to the consultation. The Government concluded that the potential benefits of the proposal were outweighed by the risks. However the Government indicated that they would engage fully in the forthcoming negotiations with the aim of removing the points of concern. This approach would give the possibility of opting in to the final Regulation if the points of concern had been successfully negotiated out.
145. We in turn formed a preliminary view that the UK should not opt in to formal negotiations.³⁸ Whilst there were concrete benefits to be gained from EU legislation in this field, the risk of introducing clawback to the UK was unacceptable. There were also other factors. We pointed to the significant incentive for other Member States to adopt a measure to which the UK could opt in, which would have the effect of reducing the disadvantage of conducting negotiations with the UK on the proposal informally rather than formally. Finally we drew attention to the possibility, raised by Mr Justice Hayton (p 72), that the UK could, whilst not opting in to EU legislation, nevertheless gain some of the benefits of that law, and avoid the disadvantages of it, by suitably amending its own domestic law. For example, if the provisions of the EU legislation for determining the law to apply to the whole of a deceased's property were acceptable it would be possible to amend UK legislation to align it with the EU legislation in this respect, whilst still excluding or limiting the operation of clawback in the UK.
146. If the UK does not, ultimately, opt in, and its domestic laws remain unchanged, its citizens living and owning property in other Member States would continue to be faced, with the added expense and inconvenience presented by the issues identified in Chapter 2. There would be conflict between the laws of all the jurisdictions of the UK and the EU Regulation as to which law should apply to cross-border successions and which court should have jurisdiction to resolve disputes. UK citizens would not have the benefit of simplified rules for recognition and enforcement of court decisions,

³⁶ HL 16 December 2009 WS 274.

³⁷ <http://www.justice.gov.uk/consultations/ec-succession-wills.htm>

³⁸ Letter at Appendix 4.

nor the possible advantages from an ECS which would be recognised in other Member States. Their position would, however, be better than it is at present. This is because the rules concerning cross-border succession of 24 or more individual Member States³⁹ would have been replaced by one EU Regulation, officially published in English, and therefore more readily available and transparent than the individual laws of the Member States.

147. Furthermore, there would still remain the possibility of amending the UK domestic laws to align with the EU Regulation to the extent that it is considered beneficial to do so, whilst avoiding importing those elements we have identified as detrimental.

148. **The decision whether the UK should opt in to the Regulation once it has been adopted is different from the decision whether or not to opt in to negotiations. The latter involves an assessment of the prospects of negotiation whilst the former requires a straight balance of the advantages and disadvantages of that Regulation, as a whole, in the form in which it is adopted. However the balancing exercise should take into account the extent to which it is possible and practical to attract some, at least, of the benefits of simplifying the law in the field of cross-border succession by amending domestic law in line with EU law. The issues that need to be resolved are:**

- **The refinement of the concept of habitual residence as the connecting factor for determining the applicable law to apply to a cross-border succession and the jurisdiction of the courts (see paragraphs 65 and 110).**
- **The extent of testator choice of applicable law (see paragraph 69).**
- **The protection of creditors, beneficiaries and HM Revenue and Customs (see paragraph 76).**
- **The restriction of special succession regimes (see paragraph 85).**
- **Clawback (see paragraph 98).**
- **The recognition and enforcement of authentic instruments (see paragraph 123).**
- **The automatic recognition of a European Certificate of Succession (see paragraph 135).**

³⁹ Ireland, like the UK, is able to choose whether or not to opt in. Like the UK it has not opted in to the formal negotiations. Denmark does not participate and does not have the power to opt in.

CHAPTER 8: SUMMARY OF CONCLUSIONS

The objective of simplifying cross-border succession

149. The law of succession involves dealing with complex property rights that vary considerably between Member States. Where there is a cross-border element in the succession, and in particular where the deceased owned property in more than one country, that law becomes even more complex with the inevitable consequence that those involved with cross-border successions are encumbered with greater expense and inconvenience (see paragraph 44).
150. Whilst simplification of the law on cross-border successions, if it could be achieved, would be likely to bring real practical benefits, there is a lack of evidence of the number of cross-border successions and also the extent to which the complexity and expense of dealing with the issues actually impairs mobility and the exercise of free movement rights within the EU. This suggests that the EU should be cautious in seeking to legislate in this complex area. Particular care is needed to ensure that any legislation intended to simplify the law does not have the unintended consequence in practice of replacing one type of complexity with another (see paragraph 45).
151. We strongly agree with the Commission that it is not appropriate to harmonise the substantive law of succession across the Member States. We also agree that this is an area for a step by step approach to legislation. However it would have been preferable for the first proposal in this field to have focussed on the issue of the law that should apply to a cross-border succession (the applicable law) (see paragraph 53).

The applicable law

152. We agree with the Commission's objective of seeking a single law to apply to the whole of the estate of a deceased. But to achieve this objective it is necessary to find a suitable connecting factor between the succession and the applicable law which can be applied with reasonable certainty (see paragraph 58).
153. A single factor to provide the connection between a succession and the applicable law is difficult to find. There must be a compromise between providing an appropriate connection between the succession and the law to be applied to it, and providing certainty. We believe that the concept of habitual residence should be used as the basis for the connecting factor in this proposal. However it is legally possible and necessary in practice to define the concept. Citizens should not be left to bear the expense of refining the concept through litigation. The definition should, as a minimum, address in a satisfactory way the position of employees posted to another Member State and those who retire to another Member State (see paragraph 65).
154. We welcome the introduction of a choice of applicable law, not least because a choice is comparatively easy to ascertain. We accept that the choice must be limited to preserve an appropriate level of connection between the law chosen and the succession. Limiting a person to choosing the law of his or her own nationality is, however, too narrow. It should be possible for a person to choose the law of habitual residence at the time the choice is made. We consider that it would also be acceptable to extend the choice of available law to one with which the testator has a genuine and concrete connection and which can be ascertained with sufficient certainty (see paragraph 69).

155. Limiting the scope of the proposal to determining the law applicable to the issue of who is entitled to what asset in any particular succession would result in simpler legislation that would require fewer consequential changes to the domestic law of Member States. It would be consistent with the cautious approach we advocate. It would also permit the continuation of important UK procedures for administering successions which ensure the protection of the interests of creditors, beneficiaries and HM Revenue and Customs (see paragraph 76).
156. We support the principle that substantive property rights should be interfered with as little as possible by the proposal. We do not consider that the proposal meets this requirement. As it stands the proposal would have the effect of making land in the UK subject to novel property rights as a result of applying the law of another Member State to a succession which includes that land. This would be the expected consequence of applying a single law to the succession of the whole of an estate, including land. A further consequence would be that the system of land registration would need adjustment to cater for this possibility (see paragraph 82).
157. The exceptions for special succession regimes found in the proposal detract from the proposal's objective of simplifying the handling of cross-border successions and should, ideally, be removed. Whilst we accept that some exceptions may be necessary to achieve agreement to the proposal, they should be kept to the absolute minimum and the present drafting improved to ensure that this is the case (see paragraph 85).
158. We consider that the impact of the clawback in the proposal as it stands would be detrimental to UK interests. The Government should consult with accountants, lawyers, charities and others who would be likely to be affected by it (see paragraph 98).

Jurisdiction, recognition and enforcement

159. We consider that the connecting factor to determine jurisdiction should be the same as that used to determine the applicable law, including in cases where a testator has chosen the applicable law (see paragraph 110).
160. We believe that if the proposal is to deal with jurisdiction it should include provision for residual jurisdiction. The proposal is however capable of being tightened up to ensure that the circumstances in which more than one residual jurisdiction arises are more limited and the connection between the succession and any residual jurisdiction is stronger (see paragraph 114).
161. We consider that the mutual recognition and enforcement of court decisions is likely to be sufficiently non-controversial to accept in principle. However we do not consider that there is sufficient mutual trust at present to justify making authentic instruments recognisable and enforceable. We consider that authentic instruments should be given the status of evidence rather than being recognisable and enforceable (see paragraph 123).

European Certificates of Succession

162. We do not support an ECS which overrides national law and practice as a consequence of being automatically recognised in every Member State and treated as conclusive of the matters stated in it. We can, however, see advantages in an ECS which facilitates the operation of national procedures

by providing non-conclusive evidence of the salient aspects of a succession (see paragraph 135).

Subsidiarity and Opt-in

163. We confirm our preliminary view that the proposal complies with the principle of subsidiarity (see paragraph 143).
164. The decision whether the UK should opt in to the Regulation once it has been adopted is different from the decision whether or not to opt in to negotiations. The latter involves an assessment of the prospects of negotiation whilst the former requires a straight balance of the advantages and disadvantages of that Regulation, as a whole, in the form in which it is adopted. However the balancing exercise should take into account the extent to which it is possible and practical to attract some, at least, of the benefits of simplifying the law in the field of cross-border succession by amending domestic law in line with EU law. The issues that need to be resolved are:
 - The refinement of the concept of habitual residence as the connecting factor for determining the applicable law to apply to a cross-border succession and the jurisdiction of the courts.
 - The extent of testator choice of applicable law.
 - The protection of creditors, beneficiaries and the collection of tax.
 - The restriction of special succession regimes.
 - Clawback.
 - The recognition and enforcement of authentic instruments.
 - The automatic recognition of a European Certificate of Succession (see paragraph 148).

APPENDIX 1: EU SUB-COMMITTEE E (LAW AND INSTITUTIONS)

The members of the Sub-Committee who conducted this inquiry were:

Lord Blackwell
 Lord Bowness (Chairman)
 Lord Burnett
 Lord Kerr of Kinlochard
 Lord MacLennan of Rogart
 Lord Norton of Louth*
 Baroness O’Cathain
 Lord Renton of Mount Harry†
 Lord Rosser
 Lord Rowlands††
 The Earl of Sandwich†
 Lord Tomlinson**
 Lord Wedderburn of Charlton**
 Lord Wright of Richmond

* Member until 12 November 2009

** Member until 18 January 2009

† Member since 24 November 2009

†† Member since 19 January 2010

Declarations of Interests

Lord Blackwell

No relevant interests

Lord Bowness (Chairman)

Regular remunerated employment:

Streeter Marshall Solicitors (31 March 2009)

Notary Public (fees)

Lord Burnett

No relevant interests

Lord Kerr of Kinlochard

No relevant interests

Lord MacLennan of Rogart

Property in USA

Lord Norton of Louth

No relevant interests

Baroness O’Cathain

No relevant interests

Lord Renton of Mount Harry

No relevant interests

Lord Rosser

No relevant interests

Lord Rowlands

No relevant interests

The Earl of Sandwich

No relevant interests

Lord Tomlinson

Property in Spain and Belgium

Lord Wedderburn of Charlton

No relevant interests

Lord Wright of Richmond

No relevant interests

A full list of registered interests of Members of the House of Lords can be found at <http://pubs1.tso.parliament.uk/pa/ld/ldreg/reg01.htm>

APPENDIX 2: CALL FOR EVIDENCE

EU Sub-Committee E (Law and Institutions) is conducting an inquiry as part of its scrutiny of the European Commission's proposal for a Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession.⁴⁰

It has previously published a short report as part of its scrutiny of the Commission's Green Paper on Succession and Wills.⁴¹

In its Explanatory Memorandum accompanying its proposal the Commission highlights the significance of cross-border successions within the European Union. It considers that the present divergent laws and the number of different authorities involved in these successions prevent the full exercise of private property law. Its objective is legislation to enable people living in the European Union to organise their succession in advance, and to guarantee the rights of heirs and/or legatees and other persons linked to the deceased, as well as creditors of the succession.

The Regulation would—

- establish rules determining which Member State's court or national authority should deal with a succession, the basic rule being that it should be that of the Member State where the deceased was habitually resident at the time of death;
- establish which state's law should be applied to specific aspects of the succession;
- require mutual recognition and enforcement of judgments in this area; and also of "authentic instruments," which are documents formally drawn up and registered in a Member State; and
- provide for the recognition of a European Certificate of Inheritance ("ECI") which has been issued in accordance with the proposal.

The proposal is subject to the UK opt-in under Protocol (No.4) on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and the Treaty establishing the European Community.

Particular questions raised by the Commission's proposed Regulation to which we invite your response are as follows:

Subsidiarity and proportionality

- What is the extent of cross-border successions involving other Member States and what problems arise?
- What issues need to be addressed by legislation?
- Is it necessary that legislation be in the form of a directly applicable Regulation?

⁴⁰ COM (2009) 154.

⁴¹ European Union Committee, 2nd Report (2007–08): *Green paper on Succession and Wills* (HL 12).

Jurisdiction

- What should be the connecting factor(s) determining the Member State whose national authorities or courts have jurisdiction to deal with a succession?
- Does the Commission's proposed connecting factor of habitual residence require defining, and if so how?
- Should there be rules conferring residual jurisdiction on the courts and authorities of one or more Member State when the habitual residence of the deceased was not a Member State, and if so what?
- Should there be an exceptional jurisdiction for a Member State in respect of the transfer of property situated there which requires the involvement of its courts or public registration?
- What should be the rules to prevent actions on the same or related issues proceeding in different Member States?

Applicable law

- What areas of succession should the applicable law rules cover? In particular should they affect (and if so how):
 - (a) payment of the debts of the deceased and for the collection of taxes,
 - (b) the clawback of gifts made during the lifetime of the deceased,
 - (c) testamentary trusts and interests terminating on death such as joint tenancies,
 - (d) the validity, interpretation, rectification and revocation of wills,
 - (e) special succession regimes with economic, family or social objectives in the law of the Member State where the property is located?
- What should be the test(s) for determining the applicable law?
- How far should there be freedom for a testator to choose the law applicable to the succession of his or her estate?
- Should a public policy exception to the applicable law rules be available if the applicable law is that of another Member State?

Mutual recognition and enforcement of judgments and authentic instruments

- What should be the scope and procedure for mutual recognition and enforcement of judgments?
- On what grounds should it be possible for a court to refuse to recognise or enforce a judgment of the court of another Member State?
- Should documents which have been formally drawn up or registered as authentic instruments in one Member State be recognised and enforceable in another Member State?

European Certificate of Inheritance ("ECI")

- Could an ECI be of practical benefit, and what would be needed to achieve this, particularly in terms of:

- (a) the persons to whom it should be available,
 - (b) the matters capable of certification,
 - (c) its probative effect,
 - (d) whether it is optional or mandatory?
- Should an ECI be complemented by a European Register of Wills? If so what form should it take?

We would also welcome your views on any other aspect of the Commission's proposal.

APPENDIX 3: LIST OF WITNESSES

The following witnesses gave evidence. Those marked * gave oral evidence only, those marked ** gave both oral and written evidence. The written evidence of those marked † was also provided to the Ministry of Justice in response to its consultation on the proposal.

- * Lord Bach, Parliamentary Under Secretary of State, Ministry of Justice
- † The Chancery Bar Association
Professor Elizabeth Crawford and Dr Janeen Carruthers, University of Glasgow
- * Jonathan Faull, Director-General, Freedom Security and Justice, European Commission
- † Andrew Francis, Serle Court, Lincoln's Inn
- * Richard Frimston, Law Society and the Society of Trust and Estate Practitioners, Russell-Cooke LLP
- † The Honourable Mr Justice Hayton, Judge of the Caribbean Court of Justice
- † The Institute of Chartered Accountants in England and Wales
- † Professor Roger Kerridge, University of Bristol
- † The Law Society of England and Wales and the Society of Trust and Estate Practitioners and the Notaries Society of England and Wales—Joint submission
The Notaries Society of England and Wales
- ** Professor Paul Matthews, King's College London, Withers LLP

APPENDIX 4: CORRESPONDENCE WITH THE GOVERNMENT AND RESPONSE TO COSAC

Letter of 12 November 2009 from the Chairman to Lord Bach, Parliamentary Under Secretary of State, Ministry of Justice

Your Explanatory Memorandum on this proposal was considered by Sub-Committee E (Law and Institutions) at its meeting of 11 November. The Committee had already launched an inquiry into the proposal and published a call for evidence on 23 October.

This proposal is, as you are aware, subject to the United Kingdom opt-in and accordingly subject to the commitments made by Baroness Ashton in June last year. They include a commitment to set out in the Explanatory Memorandum, to the extent possible, an indication of the Government's view as to whether or not it would opt in. In this case the Explanatory Memorandum provides no substantive discussion on this issue. Whilst we appreciate that the proposal is also subject to Government consultation and this precludes any firm statement of the Government position it would nevertheless be of assistance to us to know the Government view as to the significant considerations governing a decision to opt in and the approach you were minded to take; and we consider that this is information which could have been provided in the Explanatory Memorandum. We should therefore be grateful if you would provide us with further information on the exercise of the opt-in. It would be useful to have this information in time for our next meeting on 25 November.

Letter of 17 November 2009 from Lord Bach to the Chairman

I am writing in response to your letter of 12 November in which you ask what considerations the Government will be taking into account, and the approach it is minded to take, on whether to opt-in or not to the proposed Regulation on succession matters.

The Government supports, in principle, simplifying cross-border inheritance issues. We recognise that with over 2 million UK citizens living in other EU countries, the possibility of their estates being governed by a single law has considerable merit. Those considerations weigh significantly towards opting in.

As the Explanatory Memorandum made clear, however, we have identified some significant concerns, particularly in relation to the issue of clawback and the absence of an adequate connecting factor. These were set out in our initial Explanatory Memorandum. Our initial analysis of the Regulation concluded that these issues were significant enough to weigh heavily towards a decision not to opt-in to this proposal. These issues will certainly be addressed during negotiations, but we estimate that it is far from certain that a satisfactory compromise can be agreed. In the context of a qualified majority voting regime, and having regard to the impact this provision might have on our legal system if it remains unamended, the Government's preliminary view is that opting-in might carry a significant risk.

As you acknowledge in your letter, we are still in the early stages of consulting on this proposal and await the collective evidence to inform our decision. It is hoped that the issues we have identified, and the concern resulting from them, will be tested in the consultation exercise which could reveal other unforeseen benefits and risks. The results of the consultation exercise, which ends on 2 December, coupled with a considered view as to the negotiability of solutions, will inform the Government's

decision on whether to opt-in to the Regulation or not. In accordance with Baroness Ashton's undertaking, the Government will also take into account the Committee's opinion if it can be expressed within the first 8 weeks of the 3-month opt-in period. The Government must make its decision by 22 January 2010.

I hope this helps explain the general position of the Government in respect of this dossier at this point in time. I would of course be interested in hearing your own views on this matter. I know your own inquiry is underway and I look forward to meeting the Committee as part of that on 16 December.

Letter of 17 December 2009 to Lord Bach, Parliamentary Under Secretary of State, Ministry of Justice

Thank you for giving evidence to Sub-Committee E (Law and Institutions). The Committee has considered whether the UK should opt in to the Commission's proposal in the light of your Explanatory Memorandum, your useful letter of 17 November, the consultation exercise carried out by your department and the evidence we have received in the course of our ongoing inquiry. The evidence we have heard points to there being concrete benefit to be gained from European legislation simplifying the handling of cross-border successions. However, we have formed the view that the UK should not opt in to the proposal for the reasons set out below.

Our preliminary view is that it would be unacceptable to run the risk of the claw back provisions found in the law of other Member States jeopardising lifetime gifts which would otherwise be valid under UK law. We also consider that there are other valid concerns which make the proposal undesirable as it stands; including the lack of definition in the proposal for the concept of habitual residence, giving jurisdiction to the Member State of habitual residence of the deceased even if he or she had chosen a different applicable law, and the broad nature of the special succession regimes which derogate from the basic principle of a single applicable law applying to a succession.

Our present belief is that the prospects of negotiating changes to the proposal are not sufficiently certain to counterbalance these concerns. Indeed it is questionable whether they would, in any event, be significantly improved by opting in, given that there is a significant incentive for other Member States to include the UK in the framework of any adopted Regulation because a significant number of cross-border successions involve a UK dimension.

We noted with interest the suggestion made by Mr Justice Hayton in his response to the consultation that the UK could remain out of the Regulation but seek to benefit from it to the extent desirable by suitably adjusting its domestic legislation.

We should be grateful to be informed of the outcome of your consultation.

Response to the COSAC Subsidiarity Check

Procedure

Which parliamentary committees were involved in the subsidiarity check and how?

The Sub-Committee on Law and Institutions (Sub-Committee E) of the House of Lords European Union Committee.

Was the plenary involved?

No.

At which level the final decision was taken and who signed it?

The decision was taken by the Sub-Committee. This Response was approved by the Chairman of the European Union Committee who has signed it.

Which administrative services of your parliament were involved and how?

The Committee Office of the House of Lords provided administrative support and legal advice for the Sub-Committee.

In the case of a bicameral parliament, did you coordinate the subsidiarity check with the other chamber?

There was consultation between officials advising the respective Committees.

Did your government provide any information on the compliance of the proposal with the principle of subsidiarity?

The Government provided an Explanatory Memorandum on the proposal which included comments on compliance with the principle and expanded on these comments in response to a specific request.

Did you consult your regional parliaments with legislative powers?

Yes. The European and External Relations Committee of the Scottish Parliament were unable to consider the matter within the timetable set. The Welsh Assembly responded that they were content to leave the response to the Lords as succession is not currently a devolved matter. The Northern Irish Assembly considered the proposal but had no comment to make.

Did you consult any non-government organisations, interest groups, external experts or other stakeholders?

Yes, evidence was taken from two experts (Professor Matthews and Richard Frimston) as part of a more general inquiry undertaken by Sub-Committee E in the course of its scrutiny of the Commission's proposal.

What was the chronology of events?

14 October: publication of the Commission's proposal

2 November: receipt of the Government's Explanatory Memorandum

3 November: contact made with the regional assemblies for Scotland, Wales and Northern Ireland

25 November: evidence heard from Professor Paul Matthews as part of the Committee's inquiry into the proposal

2 December: evidence heard from Mr Richard Frimston as part of the Committee's inquiry into the proposal

9 December: approval of this Response by Sub-Committee E

10 December: approval of this Response by the Chairman of the European Union Committee

Did you cooperate with other national parliaments in the process?

No.

Did you publicise your findings?

Updates on progress will be available on the website of the European Union Committee and via IPEX.

Findings

Did you find any breach of the principle of subsidiarity?

The Committee concluded that the draft Framework Decision complies with the principle of subsidiarity.

Did you adopt a reasoned opinion on the proposal?

No.

Did you find the Commission's justification with regard to the principle of subsidiarity satisfactory?

The justification given under the heading "Subsidiarity" in the Commission's explanatory memorandum is limited to:

- asserting that the objectives of the proposal can only be met by way of common rules which must be identical;
- indicating that activity within the Hague Conference on Private International Law has not provided a solution to date; and
- indicating in general terms only that consultations and studies have illustrated the amplitude of the problems.

The recitals include only limited reasoning in respect of subsidiarity.

Of greatest assistance was the Impact Assessment (and its summary) which did seek to identify and quantify the underlying impediments to free movement in this area.

Did you encounter any specific difficulties during this subsidiarity check?

The Committee is undertaking a formal inquiry into the Commission proposal. In order to meet the deadline for this response, the normal 6 week period for written evidence to be submitted for that inquiry was shortened. Also it was necessary to form a view before the completion of all the sessions of oral evidence to the inquiry.

APPENDIX 5: GLOSSARY

Applicable law	The law that governs a particular question.
Authentic instrument	A document formally drawn up (usually by a notary) or registered in a Member State, which is in public form and which can be the basis for the enforcement of the right or obligation it certifies.
Beneficiary	A person or organisation entitled to a benefit under a will, a trust, or the rules that govern the property of those who have not made a will.
Clawback	A claim made by a person benefiting from a forced inheritance for that inheritance to be met from the lifetime gifts made by the deceased.
Cross-border succession	A succession which involves a cross-border element, usually because the deceased owned property in more than one state or died whilst living in a state other than that of his or her nationality.
Enforcement	Giving effect to a decision of a court or other authority by taking steps against a person who owes an obligation or who has failed to observe the right of another.
Estate	The property of a deceased person taken into account for the purposes of their succession.
Forced inheritance	The share of an estate legally required to pass to close relatives of the deceased, irrespective of the terms of any will.
Grant of representation	The formal document that authorises the personal representatives to administer a succession.
Heir	A person who is entitled to inherit property of a deceased person.
Immoveable property	Property not liable to be moved, essentially land and everything permanently attached to it.
<i>In rem</i>	A right is <i>in rem</i> when it relates to property and can be asserted against anyone who infringes it.
Jurisdiction	A place having a distinct system of law <i>or</i> the power of a court to deal with a particular case.
Moveable Property	Property other than immoveable property.
Personal representative	A person appointed to administer a succession.
Private international law	That part of the law of a state which concerns the resolution of conflicts between the laws of two or more states.
Real property	Immoveable property, essentially land and everything permanently attached to it.

<i>Renvoi</i>	The doctrine of law which arises when the law of state A indicates that the law of state B should apply. <i>Renvoi</i> arises if the law of state B to be applied includes its rules of private international law.
Residual jurisdiction	The power of a court of a Member State to deal with the succession of a person who died whilst habitually resident in a third country.
Special succession regime	A special legal regime which applies, irrespective of the law governing succession, to certain immovable property, enterprises or other special categories of property located in a Member State, and which has a specific economic, family or social purpose.
Succession	How a person's property is dealt with on their death, including who is entitled to inherit the deceased's property.
Testator	A person who has made a will to govern his or her succession.
Trustee	A person who formally owns property but does so on behalf of another.
Usufruct	The right of a person to use and derive profit or benefit from property that belongs to another.

Minutes of Evidence

TAKEN BEFORE THE SELECT COMMITTEE ON THE EUROPEAN UNION
(SUB-COMMITTEE E)

WEDNESDAY 25 NOVEMBER 2009

Present:	Bowness, L (Chairman)	Rosser, L
	Burnett, L	Tomlinson, L
	Kerr of Kinlochard, L	Wedderburn of Charlton, L
	Maclennan of Rogart, L	Wright of Richmond, L
	Renton of Mounty Harry, L	

Memorandum by Paul Matthews¹

1. This is a response to the request for evidence in writing concerning the EU Commission draft regulation relating to matters of succession. My comments are largely at a high level of generality, i.e. directed towards “big picture” ideas, rather than at points of detail. I am concerned that the significance of the historical and socio-cultural problems created by this draft regulation should be clear to the Committee. However there are also a few comments on points of detail.

EUROPEAN LEGAL SYSTEMS

2. I begin with the background to the draft regulation. In my view, we need to start at the top of the tree, way above succession law. As is well known, Europe is divided between different groups of legal systems. The easiest and best known distinction is between:

- (i) the common law systems of England and Wales, Northern Ireland, the Republic of Ireland, Gibraltar and (perhaps) the Isle of Man on the one hand, and
- (ii) the much more numerous civil law systems tracing their descent (more or less) from Roman law, on the other.

3. This distinction is fundamental, and its importance can hardly be overestimated. It embodies not just different substantive rules, but indeed different ways of ordering ideas, and different ways of thinking and reasoning. The former is more pragmatic and empiricist, the latter more abstract and idealist. This reflects different schools of philosophy. But the differences which provoke different schools of philosophy also provoke different legal systems. The law of the former is largely based on individual judicial decisions, building up over time into a mosaic of rules. The watchword is “Don’t cross your bridges till you come to them”. The latter, on the other hand, is typically based on compilations of rules, called codes, in which the whole law is posited *in advance*, and the judge faced with a new problem need only locate the provision of the code dealing with it (as in theory there must be).

4. Moreover, the common and civil law judicial functions and styles are different. The common law judge often has to make new law, in deciding points not previously the subject of judicial decision. His reasoning is often *inductive* or *inferential*, i.e. first positing facts and then inferring a legal rule which would lead to what he considers what be the “right” result. The civil law judge is however forbidden to make new law.² He typically reasons in a *deductive* way, or syllogistic form. He first states the law (from the code) as major premise, then the facts as minor premise, and finally states the conclusion flowing from that.

5. A further point is that, in the common law tradition, the judges are practitioners of many years’ experience, chosen for their outstanding qualities. They are well suited to exercising a discretion. Judges in the civil law tradition are appointed after attending a special judges’ school (immediately after law school) in their 20s, and may never have practised as lawyers at all. This is deliberate. On the whole, the civil law systems want judges who simply apply the legislated law automatically, with as little influence from the outside world as possible.

¹ LLB (UCL), BCL (Oxford), LLD (London), formerly lecturer in law at University College London, currently part-time professor at King’s College London, teaching LLM courses on International and Comparative Inheritance Law, International and Comparative Property Law, and International and Comparative Trust Law, and a consultant solicitor to Withers LLP, in the Contentious Trust and Succession Group, dealing with both domestic and international matters, deputy master in the Chancery Division of the High Court, Coroner for the City of London, deputy chairman of the Trust Law Committee.

² E.g. French *Code Civil*, Art 5.

It is therefore hardly surprising that civil law systems give very little discretion to their judges, compared to common law systems. This is a matter of some importance to which I shall return below.

6. As for the common law systems, English law has continued to dominate among the common law systems, despite the political separation of the Republic of Ireland and the formal systemic separations of the other jurisdictions. This is to some extent inevitable, given the small size of the systems concerned compared to the English, and the geographical closeness to the mother system. At least where technical lawyers' law is concerned, following judicial precedents and even statutory reforms from England is the line of least resistance. The complexity of the underlying common law, coupled with the limited resources of the smaller common law jurisdictions, means that borrowing the English developments is economical and relatively efficient. It also means that there are, relatively speaking, fewer conflicts problems between the common law jurisdictions.

7. As for the civil law systems, the Roman law influence might have been expected to be equally homogenous. But amongst the European civil law systems we find also profound distinctions between two further sub-groups, namely the Germanic and the Latin families. Much of this difference in spirit and approach is due to the fact that most of Germany was never part of the Roman Empire. Another factor was that (as stated below) the modern German code is a century younger than the French one, and they were subject to different historical and philosophical (as well as political) influences. The French *Code Civil* of 1804,³ and the German *BGB* of 1900 respectively represent a more casuistic, "revolutionary" approach on the one hand, and a more abstract, "romantic" approach on the other.⁴ The former was based directly on the work of Gaius, divided into (1) persons, (2) things and (3) actions.⁵ The latter was Pandectist,⁶ divided into (1) general part, (2) obligations, (3) things, (4) family and (5) inheritance.

8. Nor does it end there. These sub-groups are also further subdivided. Most European codes today (including those of states formerly part of the so-called "Soviet bloc" of Eastern Europe) follow one or the other of the two main codes. Some follow both, but in different respects. Thus, the Belgian, Luxembourg and Monegasque Codes are particularly close to the French, the Maltese and Roumanian nearly as much, and the Greek and the Swiss are similar to the German, and the Turkish is based on the Swiss, although, as with the Italian Code of 1942, and the Dutch New Civil Code of 1992, in every case exhibiting many important differences from the original progenitor.

9. But the systems of two small European states (not members of the EU), Andorra and the Republic of San Marino, still apply an uncoded version of the Roman *ius commune*, albeit modernised. And another group of systems (Scotland, the two bailiwicks of the Channel Islands,⁷ and Cyprus) have an uncoded non-common law base but are so influenced by the common law that it is proper to call them "mixed".

10. As well as the civil law and the common law systems there is a third group: the so-called "Nordic" systems (Denmark, Finland, Iceland, Norway and Sweden). They are sometimes referred to as the Scandinavian systems, but neither Denmark nor Iceland is geographically part of Scandinavia, although (with the exception of Finnish) their languages are all very similar. In some ways these systems stand between the civil law and the common law (without being "mixed" in the sense just described). They have uncoded private law,⁸ modest Roman law influence, a limited regard for precedent, and some laws (mostly commercial) more or less in common, as having sprung from regional law reform initiatives. In the EU context, the specific characteristics of the Nordic systems are often overlooked.

THE CONTEXT OF THE PROPOSED REGULATION

11. The foregoing discussion is important for this reason. This proposed regulation is of a very different order to others in the area of judicial co-operation (e.g. Rome I on contractual obligations), because succession (or inheritance) law is much deeper in the spirit of national legal systems. It is a more fundamental part of the DNA of a legal system in a way than is, say, contract law. In part this is because property law is more complicated. Contract law is about how persons voluntarily assume personal obligations towards others. Third parties are not affected. The legal relationships thus created are relatively simple. Contracts operate in much the same way everywhere, albeit that rules about formalities and remedies differ inevitably from one system to another.

³ See Halperin, *Le Code Civil*, 2nd ed 2003, trans Weir 2006.

⁴ There were also other codes, including an earlier Prussian Code, of 1792, and an Austrian one of 1811.

⁵ It has been modified in recent years and now contains a fourth part, dealing with security, and a fifth, dealing with Mayotte (a French possession north-west of Madagascar).

⁶ I.e. based on the Digest (*Pandectae*) of Roman law compiled by order of Justinian.

⁷ Not part of the EU, of course, but useful for comparative purposes.

⁸ Although Sweden had a civil code as long ago as 1734, but not based on Roman law.

12. But property law is very different. Property law is about the creation and management of rights about *things*—particularly in relation to land—which bind persons outside the original relationship. That in itself makes it more complicated. *Which* third parties are to be bound, and *how* they are to be bound, also tells us much about a society. In addition, however, land has an almost mystical significance for us as a symbol and a measure of nationhood. In earlier times it was the only permanent store of value, and even today remains at least psychologically still the most powerful. It also has the practical importance that everyone has to live, work and indeed simply *be* somewhere. Rules about land *matter*. They therefore tell us a great deal about the society from which they come.

13. Succession or inheritance law is about the transmission of such property rights from their owners on or in connection with the owners' deaths. It therefore relies heavily on the nature of the property system in force in the particular system. But it also goes on to reflect important social and economic choices made by a legal system, such as who is deserving of support on a death, and who is not, and how the entitled are to be protected against others, such as the market. The values and choices that it embodies underpin much of the rest of the system. That is why I refer to it as an important part of the legal DNA. Exposing your legal DNA to foreign influences may have far-reaching consequences which you cannot foresee at the time. In the face of potential reforms having that effect, such as this draft regulation does, this suggests a need for caution, though not necessarily for inaction.

14. The proposed regulation very sensibly does not even attempt to harmonise substantive succession rules, but limits itself to private international law rules. However, even here there are enormous difficulties, because the basic building blocks and fundamental values used by the various EU property systems are so different. I set out some of these basic differences here:

- The very idea of “property” itself, on which all conveyancing and land registration systems depend: is the idea physical (“*dominium*”) or metaphysical (estates and interests)?
- Preventive justice (notarial intervention)⁹ or *caveat emptor*?
- Primacy of publicity to protect third parties or respect for privacy and autonomy of property owners?
- The nature and scope of “succession”: does it cover *inter vivos* gifts and matrimonial property, or only assets left on death?
- Freedom of testation, or compulsory inheritance (also known as forced heirship)?
- Clawback of *inter vivos* gifts (in support of forced heirship) or stability of *inter vivos* transactions?
- The distinction between patrimony and estate;
- Direct transmission to heirs on death (“*le mort saisit le vif*”) or interposition of administration (personal representatives)?
- Are the heirs personally liable for the debts of the deceased or not?¹⁰

In addition, there is no concept in the common law equivalent to “*État civil*” in the civil law,¹¹ and this has some significance in the context of authentic instruments.

15. With many of these alternatives, there is complete polarisation, and it is impossible to find any kind of compromise. It would be like trying to say that someone could be slightly pregnant or somewhat dead. You are either pregnant, or dead, or you are not. In the same way, for many of these alternative choices, there is no middle course. In formulating rules, even rules of private international law, these alternative approaches clash, and someone has to win.

THE EXAMPLE OF CLAWBACK

16. One example of this, probably the most controversial of all, relates to so-called “clawback”. It means that after the death of a person who has given away assets during his life, those assets are subject to being recovered and returned to the patrimony of the deceased so that the protected share of the heir under a compulsory inheritance scheme can be satisfied. This is imposed in civil law systems in order to protect the heirs' positions against the decedent's desire to deal with his property in a different way and thus defeat the heir's rights in whole or in part. In some countries it has the status of constitutional right, and represents an essential element of solidarity between the generations. It is simply unthinkable for such people that these rights should not be enforced *everywhere*. This makes it very difficult to see how any compromise can be made.

⁹ All transactions of a certain class must be carried out in front of a notary (at considerable expense) in order to lessen the possibility of some dispute later between the parties about the terms of the transaction, the title of the vendor, the rights of the parties etc.

¹⁰ In practice there are mechanisms in the civil law systems to mitigate the severity of the liability rule.

¹¹ That is, the official recognition by the state of the existence of a person and of the important events and relations in his or her life. Nor is there any *livret de famille* in which copies of the *actes d'état civil* of all the members of the family are recorded.

17. The rules on clawback of course differ from one system to another.¹² In particular there are different rules on timing. In some systems, gifts can only be attacked if they were made in the two years,¹³ five years¹⁴ or the 10 years¹⁵ before death. In other systems they can be attacked after the death of the donor *no matter when* during his life they were made.¹⁶ In some systems, the assets must be returned *in specie*.¹⁷ In others it is only necessary for the recipient to pay back the value.¹⁸ The time limits after death within which any claim must be made also vary. In some systems, not only must the assets be returned *in specie*, but they must be free of any encumbrances created in the meantime. There are also distinctions drawn between gifts to reserved heirs and gifts to others.

18. It should be noted that the clawback rules depend on the succession law applicable at death. This means that, under the draft regulation, they will apply to gifts made by (say) a British national, domiciled in England, unmarried and without children at the time of the gifts concerned, if by the time of his death he has become, or has acquired assets, subject to a foreign clawback regime (e.g. he has become a national of or habitually resident in that country, or he has land or perhaps other assets there) *and* at his death has heirs having protected rights under that regime. It is not necessary to prove that the donor had any intention at the time of the gift to defeat these claims. Even though it could not be known at the time that he would change his nationality or habitual residence, or that he would marry or have children, and even if he has no intention of ever doing so, the heirs are entitled in accordance with the relevant rules to attack the *inter vivos* gifts made perhaps many years before.

19. There is at present no such clawback in the common law systems, at least in the absence of proof of an intention to defeat future creditors, or in the context of a bankruptcy. Indeed, although Scottish law has a form of forced heirship in relation to *movable* property (not land), it has no clawback rules.¹⁹ Moreover, the fact that characterisation of claims is a matter for the forum means that foreign forced heirship and clawback claims in relation to *inter vivos* gifts will not be entertained in UK courts. In the UK, therefore, the legal systems prize the stability of *inter vivos* transactions above the protection of heirs. This stability reduces uncertainty in the market place, and allows assets to be priced more fully, because they (or their value) are less likely to be required to be returned after death. It also allows trustees to get on with the management, development and distribution of trust assets, and the charity “industry” to play a much more significant role in the social and economic life of the UK than takes place in civil law countries. This in turn reduces the need for taxation to finance such charitable activities.

20. It is impossible to devise a *general* compromise between these two positions. Either the clawback claims are possible, or they are not.²⁰ If they are—even for those made in (say) the last two years of life, and subject to a short limitation period after death—there is nonetheless instability, and the market prices accordingly. The instability arises from the fact that, at the time of the gift, it cannot be known that the assets (or their value) will not be needed after the death, whenever that takes place. Donees, trustees and charities would either have to park the assets safely²¹ until the uncertainty resolved itself by the death (or the lapse of a certain number of years) and the presence or absence of claims within the time limit, or pay for insurance (assuming that to be available).²²

21. So the EU Commission in the draft Regulation has had to make a decision, which (perhaps unsurprisingly) is to enforce clawback cross the board, even in common law systems. (It is not reciprocal, however. It will not normally lead to the enforcement of claims under the Inheritance (Provision for Family and Dependents) Act 1975 abroad, as the English legislation at present is only applicable if the deceased died domiciled in England and Wales.) So clawback claims from other legal systems will be capable for the first time of being imported into the UK. This will apply in principle not only to gifts made in the UK by foreigners, but also to gifts made by UK people too, provided that they at *some* time before death (e.g. years later) become habitually resident in a clawback jurisdiction.

¹² See for example the useful survey by Prof Paisley annexed to the MoJ's Consultation Paper.

¹³ Austria.

¹⁴ The Netherlands (also Switzerland).

¹⁵ Germany, Greece, Poland.

¹⁶ France, Belgium, Luxembourg, Malta, the Netherlands, Portugal, Spain. In one famous French case in the 1990s, the gifts successfully attacked had been made in 1953.

¹⁷ France (before 2007), Belgium, Luxembourg, Italy (some exceptions for immovables), Malta (immovables).

¹⁸ Germany, France (since 2007), Greece, The Netherlands.

¹⁹ This is also true under Islamic law.

²⁰ It would however be possible to devise a compromise for *individual transactions*, such as some kind of putative applicable law applicable to the asset given, ascertained at the time of the gift. But that is rather different. It was also obviously unacceptable to the EU Commission, because although floated at the experts' meetings it has found no place in the draft. Cf Art 18(1), where the Commission accepted such an idea for agreements as to succession.

²¹ I.e. avoiding any significant degree of risk, and so withdrawing the assets from both current consumption and risk capital.

²² The Inheritance (Provision for Family and Dependents) Act 1975, s 10, provides only a very limited parallel. It only applies to allow the court to set aside *inter vivos* transfers made less than six years before death and *with the intention of defeating a claim under the Act*. Intention is hard to prove and such claims are very rare in practice. Charities in effect self-insure these cases.

22. The problem for common law states is said by the EU Commission²³ to be mitigated to some extent by the provisions in Art 17, permitting a person to choose *his national law* to govern the whole of his succession. Thus, for example, if a British national becomes habitually resident in France, but has elected in due form for (say) English²⁴ law to govern his succession, clawback should not be a problem, at least to the extent that none of the various exceptions (e.g. Art 22 on special regimes) applies. But this supposed mitigation at its highest nevertheless depends upon the person (i) realising that he has become “habitually resident” (within the—undefined—meaning of Art 16) in France, (ii) making the formally valid²⁵ declaration of choice, and (iii) not thereafter losing or giving up his British nationality. Moreover, it is not much use to a person perhaps born or brought up in the UK, and domiciled there, but a national of a foreign country (one where clawback applies), who later becomes habitually resident in France.

23. In any event, however, the Commission in proposing this element of party autonomy has missed the point. It thinks that the problem with clawback is one for the owner of property who gives it away and wants to perfect the title of the donee there and then. However, the problem is not one for the *donor* but for the *donee* of the gift, and the donee has no way of ensuring that the donor makes (and does not revoke) the declaration of choice. So the uncertainty will persist.

24. The European Certificate of Succession, which may also have an impact on this problem, is discussed later.²⁶

Defining succession

25. The problem of clawback illustrates the difficulty of defining the *concept* or indeed the *content* of the law of succession. English (and Scottish) law holds that it covers only what is left at the date of death. Civil law systems hold that it goes wider than that, to cover gifts made during at least some part of the deceased's life. But it is important to notice that other significant differences between civil law systems also complicate the question. For example, in both French and German law there are detailed rules on matrimonial property regimes. But in France, when a married person dies, the matrimonial property regime is liquidated *before* the succession rules can bite, whereas in German law the matrimonial property regime is dealt with *as part of* the succession itself. Hence for the French “succession” *excludes* matrimonial property, but for the Germans it *includes* it. It will be noted that the Regulation does not define “succession”, but only “succession to the estates of deceased persons”. The definition is in terms wide enough to cover all three positions.

THE ASSUMED NEED FOR THE REGULATION

26. It is a curious feature of the draft regulation that there is no empirical evidence available to support the argument for it. No scientific studies have been carried out of the nature, size, cause or extent of problems currently occurring, where each member state's rules of private international law operate independently of every other state. Every legal practitioner operating in the area of cross-border succession can tell you of particular cases where some hardship was encountered (as well as others where none was). But that is far from saying how big the problem is, let alone what is the answer. If for example only one in a hundred such cases throws up a problem, and ninety-nine do not, the importance of legislating is less than if the proportions are reversed. But no-one knows what the proportions are.

27. And even if there are lots of problems, it does not follow that they are susceptible of cure by a regulation such as this. For example, a problem caused by (say) an absence of evidence, an error in an important document, a mistaken view taken by one lawyer, a lying witness, a corrupt judge or many other things will not be cured merely by changing the private international law rules relating to succession. Such matters will cause problems, whatever the rules are. How many of the anecdotal problem cases are caused by such factors? We do not know.

28. Further, although changing the private international law rules has at least the potential to solve some of the problems of which lawyers are aware, it also has the potential to create new problems for other cases where there were no such problems before. So any proposed solutions must be carefully examined, to see what may be the result on the other side, before weighing up the pros and cons.

29. I have said that there is no empirical evidence in the present case. What the Commission has done is to take the number of deaths and from that to *estimate* the number of cross-border successions in the EU, and to *suppose* that a percentage of these involve problems, for which a solution can then be *hypothesised*. This is

²³ The Explanatory Memorandum at para 4.3 (under Art 17) says that “testators who are nationals of member states in which *inter vivos* gifts are considered irrevocable may confirm the validity of such acts by opting for their national law as that applying to their successions”.

²⁴ There is thus a need for a mechanism to produce this reference on.

²⁵ This must be “in the form of a disposition of property upon death”, i.e. a will. So if the existing will is revoked for any reason (e.g. marriage), it must be remade.

²⁶ See paras 67–72.

plainly an idealist (rather than empiricist) way of legislating. In cultural terms, the common law systems are already one-nil down. Moreover, the legislation imposes a number of important changes on the way that general systems operate on the whole population.²⁷ In other words, it pushes the cost of solving these problems on the general population, or a section of it. It is an application of the civilian principle of preventive justice. You make everyone pay more for a service so that a few people do not have a problem with it, i.e. a form of compulsory insurance.

30. The treaty base for the draft regulation is Art 65. There is an important question as to whether this is family or succession law. It matters because family law instruments need unanimity whereas succession only requires qualified majority voting. The Commission takes the latter view. Any member state feeling strongly enough about the Regulation may seek to argue the other way before the ECJ.

THE BENEFITS OF THE DRAFT REGULATION

31. A regulation of this kind will have effects in two main areas; (1) estate planning by a person before his or her death; (2) dealing with disputes arising out of the affairs of a person who has died. There is no doubt that, as a general proposition, simpler rules and greater certainty produce benefits: a simple rule, even if unfair at the margins, has a procedural justice value that a substantively fairer but more complex rule lacks. From an estate planning point of view, an unfair but clear (i.e. certain) rule is better than a fair but unclear (i.e. uncertain or discretionary) rule. The person affected can look at the rules and decide how to proceed, weighing up the pros and cons. From the point of view of disputes and litigation, a simpler rule is cheaper and quicker to apply, and can be predicted to have effect with greater accuracy. There is less risk of inconsistent application by different judges, particularly where such judges come from different backgrounds and traditions.

Single applicable law

32. It is claimed that, if a single choice of law rule were introduced, coupled with the adoption throughout the EU of the unitary succession principle (that the whole succession be governed by the same law), that should lead to greater simplicity and certainty, and therefore less litigation. The claim goes too far. A schismatic system in which immovables are regulated by the *lex situs*, whilst more complicated, and perhaps throwing up other problems, is actually *more certain* than a unitary one. This is because there are always arguments about other connecting factors (e.g. domicile, habitual residence, even nationality) but there is virtually never any doubt where a piece of land lies and therefore which system applies to it. The merit of the unitary system is therefore not greater certainty, but instead greater *simplicity*.

33. However, the benefit of the single applicable law in this case is not as great as it may at first sight appear. It is lessened by a number of features of the draft regulation:

- The vagueness of the test based on (undefined) habitual residence, likely to lead to subsidiary litigation;
- Derogations for (again unspecified) special regimes;
- Exceptions for rights *in rem* and publicity;
- Exceptions for the *lex situs* of particular assets (formalities, personal representatives, payment of taxes, *bona vacantia*);
- Exception for matrimonial property regimes;
- Exception for trusts;
- (a peculiarly common law concern) uncertainty about the position of proprietary estoppel and constructive trusts.

34. The first of these features reduces the benefit of certainty; the others may lead to the application of a different law than that indicated by the choice of law rule in relation to particular assets or assets in particular places, so producing a form of scission which the rule is designed to avoid. This reduces the scope for benefit of the “single law” rule.

35. The meaning of habitual residence is key, but it is left undefined. It is a phrase which is used elsewhere in EU legislation, such as tax, social security, insolvency, divorce jurisdiction and the proper law of a contract. But, as the ECJ said in a tax case,

“‘habitual residence’ under Art 7 of Directive 83/182 is a definition peculiar to taxation which must be interpreted in the light of the aim and scheme of the Community legislation concerned.”

²⁷ E.g. taking account of the risk of clawback, creating court offices to issue certificates of inheritance, etc.

All legislation has its own purpose and function, and it is thus not possible to apply the meaning of habitual residence from one context to another. For example, in the social security context a person who arrived in the UK with the intention of settling there was held not to have become habitually resident,²⁸ whereas in a divorce case a wife previously habitually resident in Greece was held to have become habitually resident in England on arrival there.²⁹

36. The other contexts in which “habitual residence” is used in EU legislation are largely directed at short term purposes personal to the actor. But succession is different. Its effects are not on the deceased at all, but on the heirs and creditors of the deceased. Moreover, the effects in relation to heirs are long rather than short term, particularly where intergenerational structures (trusts, usufructs etc) are concerned. It therefore cannot be assumed that the other contexts will provide any assistance as to the meaning of the phrase in this Regulation. What this means is that, until the ECJ has delivered its views on the meaning of habitual residence in the context of this Regulation, there will be continuing uncertainty.

37. The exception for rights *in rem* needs to be specifically addressed. Article 222 of the original Treaty of Rome, now Article 345 of the Lisbon Treaty, provides that the treaty “shall in no way prejudice the rules in Member States governing the system of property ownership”. Yet there is consistent caselaw of the ECJ dating back to 1966,³⁰ providing that this Article does not stand in the way of European legislation which does not affect *the grant* of local property rights, but which instead limits *the exercise* of those rights. If therefore this legislation allowed (say) the French usufruct to have effect against English land, it would affect the exercise of their rights by the fee simple owners of the land, but would not prevent the grant of those rights to others. The legislation would thus not infringe the treaty.

38. So what does this legislation do? The draft states that “the nature of rights *in rem* relating to property and publicising these rights” are “excluded from the scope of this Regulation” (Art 1, para 3(j)). This has been interpreted by the MoJ³¹ as meaning “that a legal right in immovable property cannot be introduced into a member state which does not recognise such a right under its own law”, and thus “a usufruct under French law, for example, would not be required to be registered, as such, by HM Land Registry”. The former statement is clearly based on a sentence in the Commission’s own Explanatory Memorandum at paragraph 4.1.

39. However, these two statements do not necessarily stand or fall together. It is possible to allow a French usufruct to have effect in England without requiring it to be registered. Many interests in land (e.g. certain leases, interests of persons in actual occupation) have effect without being noted on the register. Para 3(j) provides that the Regulation does not affect the *nature* of rights *in rem*, nor the means of *publicising* them. But the effect of this is only that the Regulation does not require the *domestic* law to change.

40. As to the former point (nature of rights), this does not in itself prevent French usufructs from applying to English land where the Regulation says that French law applies to a succession. It just says that English law is not required to introduce such a concept into its own law. A contract made and litigated in England may be governed by foreign law and have incidents which are not known to English law. The English courts will nevertheless give effect to it. Similarly, English private international law at present treats French law as applicable to the succession of movables of a deceased habitually resident in France at death. Thus for example a French testator could by will subject English sited movable property to (say) a usufruct not otherwise known to English law, and the English courts will enforce that. But in neither case does this introduce the foreign concepts into English law.

41. In the context of this Regulation it would make no sense not to enforce the usufruct, as it would defeat a major purpose of the legislation. Suppose, for example, that the widow of the deceased whose succession was governed by foreign law would receive a usufruct as part of her forced heirship entitlement. If para 3(j) really went to the lengths suggested, it would actually have the effect that a French usufruct not only could not have effect on English sited *immovable* property, but also (since it does not distinguish types of property) not on English-sited *movables* either. That would mean that the existing position would change and become more restrictive. And if the usufruct was not enforced, what would be the result? Presumably the interest of the bare owner must be enlarged into full ownership. That would lead to a result consistent neither with the law applicable under the Regulation nor with the *lex situs* (English law).

42. This reasoning leads to the conclusion that despite the wording of paragraph 3(j) a French usufruct *can* be made to have effect in relation to English land.

²⁸ *Nessa v Chief Adjudication Officer* [1999] 1 WLR 1937, HL.

²⁹ *Marinos v Marinos* [2007] EWHC 2047 Fam.

³⁰ *Etablissements Consten SaRL and Grundig-Verkaufs GmbH v EEC Commission* (Cases 56 and 58 of 1964), 13 July 1966.

³¹ CP 41/09 of 21 October 2009, para 8.

43. As to the latter point (means of publicity), this does not mean that French usufructs cannot be made subject to registration requirements, only that it is not *required*. That would mean that English land was in the worst of all possible worlds, i.e. potentially subject to foreign law but with no way of displaying this to potential purchasers and others.

44. The exception for matrimonial property regimes is problematic, because the common law has no standard regimes created or imposed by law in the way that the civil law systems do.³² However, the common law historically employed a form of trust for this purpose, the marriage settlement, amounting to a tailor-made, private sector response to the same problem. Although few marriage settlements are made nowadays, because of the impact of capital taxation, there are a great many still in existence. Does this exclusion extend to such marriage settlements or not?

45. There is a further exclusion for the constitution, functioning and dissolution of trusts. This is obscure. It must cover trusts in the will itself. Does it cover trusts *inter vivos*? If so, what about clawback, since (unlike the paragraph relating to *inter vivos* transactions generally) this exclusion does not contain an exception for clawback? What about the administration trusts commonly inserted in wills, and what about the personal representatives themselves, who are in the position of quasi-trustees?

46. The doctrines of English law known as *proprietary estoppel* and common intention constructive trusts are in a strange position. They permit informal agreements or promises or expectations to be given effect to where they have been relied on to the promisee's detriment, and thus it would be unfair not to enforce them. Many such cases relate to *inter vivos* transactions having nothing to do with succession. But others relate to promises or expectations of sharing in an inheritance. The very recent decision of the House of Lords of *Thorner v Majors*³³ was just such a case. Typically they do not involve an enforceable contract, either because there is no consideration, or because they do not comply with formalities rules, or both. But the definition of "succession" in the draft regulation includes transfer of property as a result of a death in accordance with "an agreement as to succession".³⁴ That latter expression is defined as including an agreement which confers rights to the future succession of a person, "with or without consideration".³⁵ It must be at least arguable that those proprietary estoppel and common intention constructive trust claims arising out of a common intention between the parties arise from "agreements as to succession" within the meaning of the regulation.³⁶ And therefore such agreements are governed by the law applicable to the succession.

47. Even in relation to the purely *inter vivos* form of claim which has not been resolved by the time of the death of the promisor, there are difficulties. On the face of it, when such a claim is made against the estate of a deceased person, that must be dealt with (like any other claim) before liquidating the succession. But it is in the context of the administration of the estate, and that *is* something dealt with by the regulation. The applicable law selected by the regulation will deal with "the powers of . . . the executors of the wills and other administrators of the succession, in particular . . . the payment of creditors".³⁷ The court having jurisdiction will be that of the habitual residence of the deceased, which may be foreign. So such a claim (made under English law and concerning English land) may be dealt with by a foreign court under a foreign procedure, and by applying a foreign law to the question how the claim may be settled. As I say below,³⁸ that may cause difficulties.

Deceased's choice of law

48. A person is not necessarily bound to accept his succession being regulated by the law of his habitual residence at death. He may by appropriately formal means choose his national law³⁹ instead, if it is different. Art 17 implies that this is the law of nationality at death, not at the time of choice. However this chosen law will still not prevail against the *lex situs* (or aspects of that law) applicable to assets under Arts 20, 21 and 22.

³² Some academic commentators have argued that the English courts' approach in recent years to ancillary relief applications on divorce amounts to such a regime, but the statutory discretion is simply too wide for that to be a tenable view.

³³ [2009] 1 WLR 776.

³⁴ Art 2(a).

³⁵ Art 2(c).

³⁶ Of course, this may be altered during the negotiations between the member states.

³⁷ Art 19(2)(g). Here creditor must be given its wider, European meaning of one with a personal claim against another. This covers such a claim as I am discussing.

³⁸ See para 61.

³⁹ Art 28 provides that where member states (including the UK) have more than one legal system within the state, each system is considered a separate state for the purpose of identifying the applicable law. This works for habitual residence but not for nationality. It is assumed that member states will agree a provision permitting a national of a multi-system state to select an appropriate system from amongst those of that state.

The scope of the applicable law

49. The scope of the applicable law is set out in Art 19. This omits formal validity of the will. But it includes matters such as the powers of personal representatives, the priority of debts and the transfer of assets to heirs and legatees. In the case of an English administration of English assets, all these matters would have been governed by English law, even if the substantive provisions of the succession would have been governed by the (foreign) applicable law. So this will change, as mentioned further below.

Jurisdiction

50. A further benefit flows from the provisions on jurisdiction. Instead of having a jurisdictional race to be the first to take on a case, and thus exclude all the others, there is (in theory, at least) a single court to exercise jurisdiction. But again this simple rule is complicated by a number of derogations permitting another court to take jurisdiction, most notably the court of the *lex situs* of the property concerned, under arts 6 (residual jurisdiction) and 9 (courts involved in transfer or registration), upon certain facts occurring. The existence of these derogations means that in many cases there will be more than one court competent to deal with a matter. Moreover, the fact that there are factual conditions for the operation of the derogations means that there will be scope for satellite litigation about whether the derogation applies in the circumstances. This similarly reduces the benefit of the "single jurisdiction" provisions.

51. There is a disadvantage of the "single jurisdiction" provisions in their application to land which should be taken into account. This is that the procedural rules which have been developed in different systems are designed specifically to mesh with the substantive law of that jurisdiction.⁴⁰ Under current English private international law rules the law applicable to succession to land is the *lex situs*. Moreover, the English jurisdiction rule is that the *situs* court alone is competent to decide title to land. Under the draft regulation there is normally a single jurisdiction, to be based on habitual residence and not (save for some exceptional cases) on the *situs*. If in a case concerning English land that jurisdiction is foreign, the procedural rules for deciding any dispute about the succession to that land will not be the English rules, *even if* under the regulation the applicable law itself is English (e.g. because the deceased exercised the power to select his national law to govern his succession), unless the foreign court allows the English court to take jurisdiction on the application of one of the parties.

52. This is problematic, because civil law procedures favour written evidence, notarial acts, and so on. They relegate oral evidence to a lower level than written, and usually do not employ the techniques developed by common lawyers (such as cross-examination) to test the veracity of witnesses so that their evidence may be safely relied upon. It is difficult to see, for example, how, say, rectification, proprietary estoppel or constructive trust claims (all fairly common in relation to English successions to land, and rarely involving other than oral or informal evidence) could be justly dealt with according to, say, French or German procedural rules.

53. It is also the case that areas of law where *discretion* is to be exercised by the court (as in rectification, proprietary estoppel and constructive trust claims) can best be exercised by judges with that kind of experience. *Ex hypothesi*, foreign judges will not possess it.

54. It is also to be noted that civil law systems typically obtain expert evidence of foreign law from a single expert. This may work well when the expert is looking at a code, but is more problematic when the expert is considering what the common law position is, because there is no single definitive text to look at.

PERSONAL REPRESENTATIVES

55. Civil law inheritance systems operate according to a principle known in French as "*le mort saisit le vif*". This means that ownership of the deceased's patrimony passes directly to the heirs. Since patrimony includes everything of economic value, including debts as well as assets, this could result in the heirs having to pay the debts of an insolvent deceased. The Romans called this situation the "*dammosa hereditas*". In practice there are mechanisms in modern civil laws to mitigate this risk, by which the heirs can decide whether to accept the inheritance or not. If the heirs do accept it, they nevertheless take the property together with the obligation personally to pay the debts of the deceased.

56. Common law systems operate differently. Personal property has never been subject to such a principle of direct transmission, and has instead vested immediately on death in a "personal representative" (hence the name, although the word "representative" is misleading, as it suggests *agency* rather than ownership, as is in fact the case). The personal representative is called the executor if appointed by the deceased in a will, and otherwise is called the administrator, and is appointed by the court.⁴¹

⁴⁰ The parallel with wine being made so as to go with the local food is irresistible.

⁴¹ By statute the assets vest on death in the Public Trustee as a kind of temporary administrator (though without active duties) until the court can make an appointment.

57. Until 1925 there were separate regimes for inheritance of real and personal property in English law. In particular realty passed directly to the heir at law on intestacy or to the devisee under the will, and was only subject to claims to pay the deceased's debts if the personalty proved insufficient. The system was altered in stages, but since 1925 the position has been that all of the deceased's realty also now vests in the personal representative⁴² on death. There is now a single set of rules for determining who will ultimately be entitled to the deceased's property.

58. In the hands of the personal representative the real and personal property is subject to a period of administration, when debts are paid. Only once that is concluded does the balance (if any) pass to the persons beneficially entitled, who are those designated by the will or the intestacy legislation. It follows that the beneficiaries are never required to pay the deceased's debts. At worst they receive nothing.

59. It would be wrong to think that only the common law systems have personal representatives, however. In the mixed legal systems of Scotland and Cyprus there is no direct transmission to heirs but personal representatives are invariably interposed, as in the common law. And in the Nordic systems personal representatives are also often encountered. (In the civil law systems they are sometimes permitted, but as *agents* of the heirs not as owners in their own right.) The draft regulation has therefore to try to deal with both the common law and civil law positions.

60. Arts 19(2)(g)(h) and 21(2) are relevant to this question. The former provision states that the law applicable to the succession (i.e. habitual residence or national law) shall govern the powers of personal representatives, responsibility for debts and the payment of creditors. The latter states (perhaps rather elliptically) that the *lex situs* applies to assets in so far as it subjects the administration and liquidation of the succession to a personal representative system through the authorities of the place where the assets are. However, the law applicable to the succession must determine the *identity* of the persons to be appointed to administer the succession. So for example if the succession is to be governed by French law, assets in the UK will be subject to a personal representative system of administration, with *French* law choosing who the personal representative should be and also what his powers will be.

61. The current English law (including conflicts rules) provides that the English law requires an English⁴³ grant of probate or administration to be able to deal with English assets, and the selection of the PR and the powers of the PRs are a matter for English law. The draft Regulation permits the PR system to remain. However, the new allocation of responsibility between the applicable law and the *lex situs* in relation to the administration does not simplify things, and indeed takes away some matters which currently it deals with. To that extent it is (from a UK perspective, at least) less good. Moreover the fact that the PRs' powers are limited by foreign law has the potential to make dealings more complex and expensive, with the need for foreign legal advice and the meshing together of the two systems in the administration. There may for example be a problem where under English law creditors of the deceased would be paid with a certain priority, but the succession was governed by (say) French law, which imposed a different priority.

62. A footnote to this discussion is the provision in Art 21(2)(b) that the *lex situs* may also have effect where it subjects the final transfer of the property inherited to the payment of taxes before it is transferred to the beneficiaries. From the point of view of UK inheritance tax, of course, this provision is ineptly worded, since inheritance tax must be paid by the personal representatives before a grant of probate or administration may be made at all, let alone any distribution to the beneficiaries.

AUTHENTIC INSTRUMENTS

63. The draft regulation provides for the cross-border recognition⁴⁴ and enforcement⁴⁵ of authentic instruments, that is, instruments formally drawn up whose signing *and content* have been established by a public authority. In practice, the expression refers to instruments made before a notary. However, because UK notaries public are not normally concerned to establish the authenticity of the *content* of instruments made before them,⁴⁶ most (though not all) such instruments will fall outside the scope of these provisions. In the context of succession law, it is very unlikely that any UK instruments will qualify. This is the direct result of the differing approaches of civil and common law systems to the principle of preventive justice and to the need for publicity of certain types of property transaction.

⁴² But the name was not altered to "personal *and real* representative".

⁴³ Some foreign grants may be recognised through "resealing".

⁴⁴ Art 34.

⁴⁵ Art 35.

⁴⁶ Meaning that they do not carry out any independent checks on the accuracy of that which is deposited to by the person making the statement.

64. As is well known, the written instrument with the highest degree of formality in the English law is the deed, which requires signed writing and a witness, but not a notary. This saves considerable costs. Civil law notaries typically charge an *ad valorem* fee for their services, which may amount to several per cent of the purchase price of the asset concerned.⁴⁷ All transactions concerning land and succession in English law can be carried out by means of a deed alone,⁴⁸ which is much less expensive than a notarial act. The provisions of the draft regulation will render foreign instruments (whether or not in English) automatically of direct effect in the UK, and enforceable by the local court on application made under Reg 44/2001, arts 38-57. But the same will not be true for UK instruments made in the form of a deed in any circumstances, nor for most UK notarial acts. Because of the underlying differences in the civil and common law legal systems, leading to differences in the approach to formality and publicity, there is not a level playing field in the regulation on this issue. To do that would require recognition of common law deeds as enforceable in the same way. That however is no part of this regulation.⁴⁹

65. There is a potential problem with the idea that a notarial act should be enforceable without the need for a local court judgment. If a notary (say, in Italy) produces an act without all the interested persons knowing of what is happening (perhaps because they are in England and not in Italy), and it is made enforceable in England, the procedure for challenging that involves an appeal. But the only grounds for the appeal are those in Arts 34 and 35 of Reg 44/2001, which are limited. It is unfortunate that the grounds of appeal are taken from a regulation dealing with commercial litigation, where the parties involved are in a direct legal relationship (mostly contractual) with each other on a single issue since before the litigation arose, and transplanted to a situation concerning succession to the entire property of the deceased, in which the parties concerned (heirs and creditors of the deceased) may have no prior contact with, *or indeed knowledge of*, each other.

66. In any event, to my mind it is wrong in principle that English courts should be bound to enforce foreign notarial acts as if they were court judgments. Notarial acts do not have the same procedural safeguards built into them as do judgments of foreign courts, and notaries do not operate in the same way as judges. They do not decide disputes; they record and give publicity to transactions. In particular, it seems to me to be wrong that English courts under this regulation will be unable in the context of litigation to deal with allegations of error or fraud in relation to a notarial act, as they can in relation to deeds (the functional equivalent in English law). The status of foreign notarial acts should be relegated to its usual position, i.e. that of *evidence of high quality*. But nothing more than this. However, that is not the choice made by the EU Commission.

THE EUROPEAN CERTIFICATE OF SUCCESSION

67. The Commission's idea of the European Certificate of Succession is transplanted directly from the German law, which provides for an *Erbschein* to be produced in relation to every succession. It is also known in Alsace Lorraine and some parts of Northern Italy formerly within the Austro-Hungarian Empire (but not elsewhere in France or Italy).

68. To my mind the idea rather resembles the history of land registration in England. Nineteenth century English journalists thought it would be a good idea if there could be what amounts to a card index system explaining who owned what land in England. In essence they were seduced by the simplicity of continental land ownership under the civil law systems. There could be a card identifying a piece of land, 99 Acacia Avenue Surbiton, say. There would be a house built on it. There would usually be an owner-occupier, perhaps a mortgagee, in rare cases a long lessee or the owner of some other important rights in relation to it. Easy enough to note these few details upon a single record card. Of course, it was never so easy in reality. And English land ownership in the middle of the nineteenth century was in truth far more complex than could be accommodated on a single record card. Worse, the early land registration legislation was of very poor quality, reflecting not only the degree of difficulty in adapting a much more complex land law than the civilian to such a simple recording model, but also the paucity of resources which government was prepared to allocate to it, and it was a failure. More serious attempts were made in 1897 and 1925, but in truth it is only in the late 20th century, with the considerable simplification of land law in 1925 and later, and the devotion of significant resources to the project, that land registration has got serious. And only in 2002 did England acquire really first class land registration legislation. The lesson is that you need three things to make it work: (1) a much simpler national property system; (2) significant resources; (3) first rate legislation.

69. The idea of the European Certificate of Succession shows a similar underestimate of the difficulties, at least so far as concern the UK and Ireland. The certificate assumes that (1) the property law is simple, and focuses largely on absolute ownership; (2) there will be a limited number of heirs (each having either absolute

⁴⁷ They may also, in effect, collect taxes for the government. The writer has personal (domestic) experience of both French and Italian notaries, and professional experience of others.

⁴⁸ Law of Property Act 1925, s 52.

⁴⁹ It was suggested, albeit somewhat faintly, during the experts' meetings.

ownership or one of a small number of lesser rights, such as usufruct); (3) the property rights will be transmitted directly to the heirs; (4) there are standard and well-known powers and procedures to deal with the property and the deceased's debts. None of these assumptions is correct for the common law. Consequently, none but the very simplest English succession could be summarised in the way contemplated by the certificate procedure. The usual procedure in England is to issue a probate or letters of administration once the inheritance tax has been accounted for and paid, and the powers of the personal representatives are those set out in the will or the intestacy legislation. The interests of the beneficiaries (not "heirs") are also as there set out. But such documents may not be issued for many months, and will not correspond to the certificate in the standard form contemplated.

70. The certificate is to be recognised automatically in all the member states. Its contents are presumed accurate throughout those states, and can only be rectified or cancelled by the authorities of the *issuing* state. These contents will include statements as to the nationality and the habitual residence of the deceased. Thus an inaccurate statement in the certificate as to the nationality or habitual residence of a deceased could mean that effect could not be given to a declaration of choice unless and until proceedings have been successfully taken in the issuing state to rectify or cancel it. Such proceedings will inevitably involve questions of foreign law (i.e. different from the law of the forum), with all the attendant delay, cost, and risk of error (largely uncorrectable), that such questions involve.

71. Meanwhile, third parties are able to rely on the certificate, which increases the risk of cross-border injustice resulting from mistake or even fraud. For example, a certificate is issued in state A in relation to a deceased who owned immovables in state B, and the "heir" designated by the certificate purports to sell (or charge by way of security) the B immovables to a purchaser (or lender) in state C. The certificate may be wrong about the entitlement of the "heir", e.g. because of clerical error, factual mistake, misrepresentation (whether innocent or negligent) or even outright fraud. If the certificate was merely *evidential*, it would help all parties to know what their rights were. No-one could quarrel with that, unless maybe it turned out to be very expensive to operate. But no-one in such a case would rely on it alone, except perhaps in the smallest and simplest cases.

72. It is also to be noted that the UK could not easily issue certificates of the type and form suggest by the draft regulation, because the four assumptions referred to are not correct for UK legal systems. In particular, (1) the property law is *not* simple, and in English and NI law at least is based on estates and interest rather than absolute ownership; (2) there is no limited number of heirs (each having either absolute ownership or one of a small number of lesser rights, such as usufruct); on the contrary there is (qualified) freedom of testation, and testators can and do leave property to a very wide range of people, giving them a wide range of interests in property; (3) the property rights are *not* transmitted directly to the heirs, but are first vested in personal representatives, who administer the estate, and only pass on the balance (if any) to those beneficially entitled; (4) in the case of testate succession, the powers and procedures to deal with the property and the deceased's debts are those laid down by the testator as a matter of free choice. This means that any certificates issued in the UK would have to be much the same as grants of representation (with any will annexed), as at present.

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Examination of Witness

Witness: PROFESSOR PAUL MATTHEWS, King's College London, gave evidence.

Q1 *Chairman:* Professor Matthews, good afternoon. Thank you very much indeed for coming to help us with this inquiry. Can I just cover some formalities first of all? You do have in front of you a list of interests of Members of this Sub-Committee as they appear in the Register of Interests. This session is going to be on the record, it is webcast live and it will be accessible via the Parliamentary website. You will receive a transcript of what is said during the session and you will have an opportunity to go through it and it will be put in the public record in a printed form and also on the website. Perhaps when you come to make the opening statement, which I understand you have agreed to make to assist us, at the start of our inquiry you would be kind enough for the record to state your name and official title, and equally for the record I should declare straight away the only

relevant interests that I have are as a practising solicitor and notary public.

Professor Matthews: Thank you very much. I am very glad to have the opportunity to give you such comments as I have on the questions which you may ask. I am, first of all, a practising solicitor, a consultant with the firm of Withers, which has a very extensive practice in relation to succession matters, particularly international. I am a part-time professor at King's College, London, where I teach property and trusts, and in particular I teach courses in the LLM on international comparative trusts, property and inheritance law. As far as I know, they are the first courses of their kind in the world. In addition to that, I do sit part-time as a Deputy Master in the Chancery Division of the High Court and I am also the part-time Coroner for the City of London, though that has

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not very much to do with the law of succession. I wonder if I could begin the short statement which I was asked to prepare and give by giving you the context in which these questions arise, an international context, before looking at the domestic position. This draft regulation is of a quite different order to other draft regulations in the private international law area, because of the nature of the subject matter. Previous regulations dealing with private international law issues such as Brussels I, Regulation 44/2001, have shied away from anything to do with succession. The reason for that is because it is much more complicated and much more difficult to deal with at a private international law level than some other things such as, say, contract disputes. Contracts are much the same everywhere. There are different rules in every different jurisdiction, but they do much the same things in much the same way. Succession is very different because it relates to the transfer of property rights on death and property rights are a much more complex form of right than any contractual rights may be. Contract rights concern only the people involved in the contract. Property rights, however, extend wider to cover third parties. Third parties may be bound, so the state has an interest in taking care of the relationship in a way which it does not have to where the contracting parties agree. In addition, the state will run systems for registration of property rights so that people can know about them, and so on. More than that, land is a particularly important form of property. It has a special place in the hearts of all people. People have to be somewhere; they have to live somewhere. There is a territorial aspect to it, not only domestically—an Englishman's home is his castle, and all that—but also internationally. The notion of a nation state will depend on the place where it is. All that is well known and obvious. What is less well known is that the legal systems which deal with property rights are extraordinarily different from one another. They fall into different groups. The most well-known distinction is between common law systems and civil law systems, but there are other groups as well and it is as well not to forget that they exist. One, for example, is the so-called "mixed systems" which have features of both common law and civil law, and good examples in the European Union are Scotland and Cyprus. In addition to that, there is another group of legal systems often referred to as the Nordic legal systems, Scandinavian if you like, except that Denmark and Iceland are both Nordic but not Scandinavian, and they have characteristics which are neither common law nor civil law and they must be taken into account too. Coming back to the distinction between common law and civil law, it is important to realise that it is very difficult for property lawyers from those two types of system even to talk to each other, to have a dialogue without

getting into problematic situations. This is because there are fundamental building blocks which you use to speak, to discuss and to define what you are doing, which are actually different. We do not use the same building blocks. For example, the notion of property in the civil law systems is rather physical. You look at something and say, "That is my thing." In the common law world, at any rate dealing with land, you do not own a *thing* or a *piece of land*, you own a *bundle of rights* in relation to the thing. You own an *estate* or an *interest*. In other words, the civil lawyers look at it in a rather physical way, the idea of property, but the common lawyers in a metaphysical way, and that has profound implications for any discussion of succession law. Secondly, we have the idea that in the civil law systems it is better that everybody should pay a lot more for their conveyancing to be done because a notary is involved in the interests of the whole community by way of the principle of preventative justice in order to get the terms so certain that there can never thereafter be any dispute, so as to cut down the risk of litigation and litigation costs later. The common law is the opposite, *caveat emptor*, let the buyer beware. So we have a fundamental cultural shift there, about what we want the system to do and how we want it to be done. In the civil law systems the important thing is to have publicity of third party rights so that creditors cannot be misled into giving credit to people who are not as well off as they seem, so that everybody knows what it is they are getting. In the civil law the notion of succession itself includes, in large part, gifts made during the lifetime of the deceased, whereas in the common law world the notion of succession resolutely excludes any such idea. Everything you do during your life is done with by the time you are dead and at that point and that point only the notion of succession kicks in. In the common law world there is far greater freedom of testation than there is in the civil law world. There is so-called forced heirship in the civil law world by which portions of the assets available are to be left to particular relatives, close relatives, and the share of the property available which can be left to persons other than the so-called forced heirs may be only a quarter or a third, or whatever. In addition to that, there are other important differences. The role of the notary, as I have already mentioned. A notary is someone who is involved in giving publicity to transactions. They play a much larger role in succession than any notaries do in our system in the common law world. In addition to that, there is a very important distinction in terminological and substantive terms between the way we describe the property available for distribution by way of succession in the common law world, where we talk about the *estate* of a deceased person, and in the civil law world, where we talk about the *patrimony* of a deceased person.

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“Patrimony” is often thought to mean the same as “estate”; it is sometimes even used as a translation device, but it is not correct. “Patrimony” is a quite different concept. “Estate” is simply a snapshot of the position at the time of your death. You simply say that at the time of your death you have these assets and these liabilities, you take one from the other and that is the balance. The notion of “patrimony”, however, is much better described, perhaps, as an empty bag which you carry around with you during the whole of your life and into this bag you put everything of economic value. Every asset you acquire and every liability which you incur goes into the bag. Not only do we talk about the patrimony of those assets and liabilities which you have at the moment, it also includes every asset and every liability which you will obtain in the future. So it is not a snapshot at all, it is looking forwards as well as backwards. It is actually looking at the whole of your economic personality. The patrimony is an expression of economic personality and on death that patrimony is to be transmitted intact to the next generation so that the economic personality continues. Now, you can see already that it is going to be very difficult to have any kind of sensible dialogue between common lawyers and civil lawyers, and I have not even taken into account the mixed systems or the Nordic systems, which have their own interesting characteristics. Just one practical point that flows from this patrimony idea. The Romans had a word for it. If the debts outweighed the assets the Roman heir would receive what was called the *damnosa hereditas*, the cursed inheritance, because he was personally liable to pay the debts of the deceased. In theory that is still the law in the civil law countries, although most of them have introduced in modern times mechanisms by which the heirs can weigh up the balance before they actually accept the inheritance and decide whether it is worth accepting. That is not a position that can ever happen in the common law system, where it is simply a net balance. And also the administration is carried on by the personal representatives, so that they are interposed between the death of the deceased and the time of the receipt by the beneficiaries of any property. If there is a balance in their favour, they get it; if there is nothing left or worse, there are debts still outstanding, they get nothing but they are not liable to pay the debts. So that is the international context into which this draft regulation fits. Can I now turn very, very briefly just to describe in a few words what happens under English law? The English law position is relatively straightforward. A person dies and immediately upon the death, unlike the civil law systems (where the property vests directly and immediately in the heirs), the property vests on death in a personal representative. The personal representative is called the executor if there is a will appointing a person as

executor and otherwise is called the administrator. The administrator, of course, not having been appointed by the will, is appointed by the court. There is, of course a gap between the date of death and the date when the court appoints the administrator and in that interim period the gap is filled by the public trustee by statute but without any duties to perform; it is simply a holding operation. Once the personal representatives have been appointed, either by proving the will and obtaining a draft of probate or by obtaining letters of administration from the court, they have the powers and they will embark upon the exercise of gathering in the assets of the deceased and then deciding in what order and how far to pay the debts, and so on. There is, however, one very important debt which they will already have paid even before they receive the grant of probate and letters of administration and that is the Inheritance Tax bill. The Inheritance Tax bill is paid by the executors or administrators at the time when they have prepared the documents for the grant of probate or letters of administration but before they have actually received the grant because the tax law is so organised that before the court can actually pass the grant it has to have clearance from the Inland Revenue that it is satisfied that the Inheritance Tax due has been paid or accounted for. Perhaps it is payable by instalments in some cases, and so on. The consequence is that the Inheritance Tax aspect of death is dealt with right at the beginning. It is incredibly cheap and efficient because nobody can get started on the administration until that has been dealt with. Not so, necessarily, in other European legal systems and I will perhaps come back to that question a bit later on. The administration, of course, as I say, is two ways really. One is to gather in assets, the other is to pay them out, to pay the liabilities that are outstanding. If there is a balance left, then that balance will be distributed to the persons entitled to it. It may consist of specific assets given by will which will not be taken and sold to meet the debts of the estate unless it is absolutely necessary. Generally speaking, you will start by looking at the cash available in order to meet the debts and only sell assets if you have not got enough cash to meet the debts. The assets that are remaining, therefore, are distributed to the persons entitled by way of an assent or sometimes by another form of vesting document. That is how it works in principle and of course in a very, very high proportion of all cases there is no need for any international features or factors to come into play at all. In a small minority of cases there are international features which require a different treatment. In those cases the rules of private international law come into play. Now, a given legal system consists in broad terms of three things. It consists of domestic substantive rules of law, it consists of procedural rules which you operate in

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order to vindicate the substantive legal rules in the courts, and it consists of private international law rules. The private international law rules are basically like the procedural rules. They are not substantive, they are ancillary in the sense that they tell you where you look to find the substantive rules. I will give you an example. Suppose a person dies, maybe a British national but dies domiciled in France. That means that they have their permanent home in France, they intend to die there. They have got a house in France, but they have also got some assets in the United Kingdom. What it is important to do is to work out which system of substantive law rules—the French rules or the English rules, or indeed some other rules—is going to determine how the succession works and who benefits. So you look for what is known as a *choice of law rule*, and the choice of law rule in English private international law depends on what kind of property you are talking about. If it is immovable property, which in broad terms means “land”, then the choice of law rule that is applicable is the law of the place where the land is. It is dead simple and very easy to operate. Everybody knows where the land is, and that is the legal system that governs it. So the succession to the French house will be governed by French law. On the other hand, where the property concerned is moveable property, that means anything which is not land, so it includes a yacht, it includes paintings, it includes furniture, it includes cash, it includes motorcars, shares in companies, and so on, all of that according to the English private international law rule, the succession to that kind of property is governed by the law of the deceased’s domicile at death. At his death he was domiciled in France, that was his permanent home, and therefore you will look to the law of France for that succession. In that case the two rules coincide, but they do so in quite different ways. Suppose he had also got some land in England. That would not be governed by French law because the *situs* of the English land would be in England and therefore the succession would be governed by English law. That is known as a schismatic system because the rule for moveable and immovable property is different. There is a schism between the two major kinds of property, moveable and immovable. I should also say there is no choice for a British national in making his provisions for his succession on his death in the English private international law rules. There is no provision for him making any kind of decision as to which law he would like to govern. There is a rule for moveable property and a rule for immovable property, and that is it. Of course, he could change his residence and his domicile, and so on, and buy land in different places but that is something which flows from the nature of the thing that he has got or the place where he is. It is not a choice he makes in a document like a will. French law is equally

schismatic. The rules of private international law in France on this point are actually quite similar. Immovable property is governed by the law of the place where the land is. Moveable property is governed essentially by the law of the place where he has his habitual residence, which is not quite such a tough test to satisfy as is domicile, although confusingly enough the French word “*domicile*” tends to mean much the same as habitual residence and that just gets in the way of people understanding what is happening.¹ There is, therefore, a rule for moveable property and a rule for immovable property. Like English law, there is no choice that can be exercised by the deceased. German law, on the other hand, is Unitarian. German law says there will be one law which governs the succession to both moveable and immovable property and it is the law of the nationality. So it does not look at the place where the property is and it does not look at where you are living, it looks at what nationality you are. This causes a minor difficulty in relation to British nationals because, of course, in the United Kingdom there are in fact three quite different systems of law. In fact if you want to include all the others who call themselves British nationals, such as those who actually come from Jersey and Guernsey and the Isle of Man, you have actually got six legal systems to deal with. So German law has to accept that in fact you cannot just look at the nationality because there is not a relevant law of the nationality. You have to look at where they actually come from within the state, which has got a multiple of legal systems. But what it does say in German law, curiously enough, is that the deceased actually has the option to select German law, if he wishes, for immovable property situated in Germany. That is not a very interesting or very important degree of discretion or choice given to the deceased, but it is at least an element of choice which is given by German law. If you go to Switzerland you can actually enjoy an even greater degree of discretion because under Swiss private international law the deceased person is able to choose his national law for the succession to his property. So actually it is a very similar rule in Swiss law to the one which is being proposed in this draft regulation. So that is the private international law background. I should just say this: the connecting factors that are generally used to decide which law should govern the succession can be rules which are not completely certain, such as habitual residence or domicile. They have grey areas at the edges where you are not quite sure, “After five years am I habitually resident in this new place? Am I domiciled in this place that I have just moved to?” and so on. Because you are not sure about that, it means that there is a

¹ *Note by witness*: It might have been clearer if I had said “The test for moveable property in French law is the law of the (French) *domicile*, but (French) *domicile* means something closer to habitual residence”.

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slight lack of certainty at the edges as to whether or not a particular law will govern your succession. Nationality is easier in the sense that you either are a British national or you are not and it is relatively easy to decide that question. It causes problems when you have more than one nationality, of course, as well as when you are national of a country that has got more than one system. Paradoxically, the schismatic systems like France and England score more highly on certainty in relation to immovable property because the choice of law rule in relation to immovable property in both France and England is the law of the place where the land is and there usually is no doubt about where a piece of land actually is. I know there are a few villages on the borders of Germany and Switzerland that cannot tell whether they are in one country or the other, but on the whole there are not too many difficulties in that. What are the major problems then in relation to the current system? The major problem is, is there a problem, or rather how big is the problem? We do not actually know how big the problem is. We know anecdotally because lawyers who deal with international succession law say, "Oh, I had this case and there was a big problem with X, Y, Z," but of course we do not know how many cases cause problems and how many cases are totally straightforward. We know in fact very little about statistics in this area because nobody collects them, but it is undeniably true, whatever the proportion that is of the whole number of successions in the country, that whenever you have a cross-border succession you do have more complexity because you have to go through the private international law exercises of working out what the applicable law is and what mechanisms there are for dealing with the property and for resolving conflicts between the different jurisdictions. So you will need foreign legal advice. That costs money and it takes time. It may be you will have to take proceedings in a foreign country. That, too, costs money, takes time and is uncertain in its result, in many cases at any rate. There is also an unfortunate aspect of private international law in the succession area which does not affect many other areas of private international law and that is a doctrine which was invented by academic commentators called the doctrine of *renvoi*. Now, any lawyer who knows anything about this area, when you mention the doctrine of *renvoi* their faces turn ashen and they usually grasp at whatever text books they have to hand and say, "Just run that past me again. What is *renvoi*?" *Renvoi* is a curious doctrine by which lawyers in this area are not very clear. When they say that their choice of law rule says you look to the law of the place where the land is, or you look to the law of the place where the deceased was habitually resident, there is an imprecision in saying that. When you say, "We look to the law of

anywhere," do you mean the whole law including the private international law rules of that country or do you mean just the domestic substantive rules of law relating to succession? Because if you mean the domestic substantive rules, that is dead easy, you just go straight for them. Unfortunately, the doctrine of *renvoi* says that is the one thing you do not look for. You actually look either for what the private international law rules tell you or, in one version of the *renvoi* theory, you look for what the foreign court would do if it was answering the question which you have got in front of you in your own court. It is sometimes called the foreign court theory. The trouble is that people cannot agree on which is the better way to approach this, so you get inconsistent decisions, you get inconsistent approaches in different countries. So how do you resolve the question of *renvoi*? The draft regulation very sensibly says, "There will be no *renvoi*. We will look simply to the substantive provisions of whichever law it is we are looking at. We will look at their succession rules, their domestic rules. We will not look at any private international law rules." So the problems which we have at the moment are delay, cost, confusion, the need sometimes to take legal proceedings, but we do not know how often those are problems as a proportion of the whole and the danger is always that we bring in regulation which not only solves or tries to solve the problems in those cases but creates difficulties for everybody else in all the other cases which at the moment do not have any. What are the broad principles behind the proposal? Well, I have just explained one of them, which is to try and reduce the amount of confusion, delay and cost by saying, "There will be a single applicable law which applies to the whole succession, which will be selected in exactly the same way in every EU Member State." That is a nice, simple, straightforward approach. If you cannot have uniform substantive rules of succession—and it is accepted by everybody that you could not possibly do that—the next best thing is at least to have uniform private international law rules, which means that in theory at least you should have the same answer being given as to which law governs and how it governs no matter in which EU Member State the question arose, no matter in which EU State there was property in somebody's succession. The purity of that approach is, I am afraid, somewhat lessened by the draft regulation itself but that is the approach which is being taken. I wonder, my Lord Chairman, whether I might stop there?

Chairman: Thank you very much indeed. I am sure we have all found that very, very helpful indeed. Before we go on to the questions, are there any questions which Members have not covered by questions which we are going to be asking later on arising out of Professor Matthews's introduction?

Q2 Lord Renton of Mount Harry: Could I possibly ask, my Lord Chairman, why *renvoi*? Why is it called

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the law of *renvoi*? Where does that come from?

Professor Matthews: *Renvoi* is a French word meaning “reference on” or “reference to”.

Q3 Lord MacLennan of Rogart: Two quick questions, if I may, arising from what you said. I was not quite clear, at the very end of your remarks, whether you were saying that the system of single law would apply in a way that treated immoveable and moveable property differently, because in some countries at present it is one. That is the first question. The second question is, in considering this should we bear in mind that Scotland might have different interests and should we seek to take evidence on that?

Professor Matthews: As to the first question, the answer is that the approach taken by this regulation is to apply a unitarian approach. No more schismatic systems, everybody has a single choice of law rule. As I said a moment ago, the purity of that is diminished by some of the provisions actually in the regulation, which will mean that there is still a schismatic approach in some cases, but the general approach is a unitarian one. So there would be one choice of law rule which applied to both moveable and immoveable property in principle. As to the second question, I am not at all qualified in Scottish law, although I am aware of at least some of the significant differences between the Scottish law of succession and the English law of succession. On a number of quite important points of the sort I mentioned at the beginning, distinguishing between common law and civil law, Scotland is in fact on the common law side of the fence. I said it was a mixed system because it has characteristics of both sides, but it is right to say that there are areas, for example in relation to forced heirship, where it is very similar to the civil law systems, but on the question of claw-back, which we will come on to, Scotland is on the side of England because there is no claw-back in Scottish law, as I understand it. So it may be that there are some elements on which evidence might be usefully taken in relation to Scottish law, but I am afraid I am not qualified to give you a definitive view on that.

Q4 Lord Wedderburn of Charlton: This does not really follow from the questions, I think, but could I ask you a general question about the regulation? It is prompted really by your saying “domicile in English law”. I have a faint memory of Kurt Lipstein trying to teach me what “domicile” was about and meant and it is far from clear sometimes. Similarly, I wondered about the rock on which the regulation seems to be built, namely “habitual residence”. Do you think there might be further reference or guidance in the regulation as to the meanings and limits of that phrase?

Professor Matthews: The short answer to your second question is, yes. In relation to domicile, the meaning I usually give to my students is to say that it is your permanent home, in the sense of the place you are most closely connected with and intend to govern your affairs.

Q5 Lord Wright of Richmond: Professor Matthews, I think the complexity of the situation, as you very helpfully described it, certainly explains to me why someone thought that a regulation was necessary, but can I just ask you a question which you might want to answer perhaps later on. With your understanding of the situation and your understanding of the regulation, do you think that the British Government should opt in or not?

Professor Matthews: At this stage, no. It seems to me that there is nothing to be gained of any real value by opting in at this stage. There is plenty to be gained by not sitting on the sidelines but joining in the negotiations and seeing what results, perhaps having a shopping list of things that would have to be put right before it would be in the interests of the United Kingdom to opt in.

Q6 Lord Wright of Richmond: But with presumably considerably less chance of getting our way?

Professor Matthews: I am not sure about that. I am not a politician of any kind, let alone a European politician and others will know better than I how these things work, but it seems to me your negotiating position is going to be a lot better, if you have not signed up irrevocably at the beginning, to get your way on the things that matter to you. The fact is that most of the other European Member States would quite like the United Kingdom to sign up to this because there are so many of their nationals who have got property in this country and therefore they have a great interest in trying to get us bound by common rules. Otherwise, if we are outside, there is the risk that all the good that they think they are doing is going to be undone because all these people have got their houses in the country here and claw-back, and so on, will be of no effect. So we do have a negotiating position, but I think it is strengthened by not opting in at this stage.

Q7 Lord Burnett: I am very grateful to you. Two things. You talked about a shopping list a minute ago. Could you provide us with one in the next week or so, so that we can have a quick look at it? That is the first question. The second question is—I think you were talking about the regulations seeking to provide a common approach to private international law by each Member States. Could you just be a little more clear about that, just as far as wills and succession are concerned?

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Professor Matthews: The idea of the regulation is to replace the existing rules of private international law in the area of succession in each Member State by the provisions of this regulation so that you end up with common or uniform rules of private international law in this area.

Q8 Lord Burnett: What effect will that have on matters other than wills and succession?

Professor Matthews: That is an extraordinarily good question, if I may say so. It seems to me, as I said at the beginning of my remarks—and this may be a part which you were not present for, Lord Burnett—the law relating to property and relating to succession goes much deeper into the legal system than contract law, for example, because it is so much easier to make common rules of private international law in relation to contracts. Land and succession rules tell you an immense amount about the society in which you find them. They constitute in many ways the most distinguishing features of any given legal system. They are in a very real sense part of the legal DNA, the national identity of a system. What is happening here is that a European regulation is going right to the heart of the DNA, not just of this country but of every European country, and is replacing some of the genes in the system and is saying, “We are not going to have that gene any more, we are going to have this one.” If the gene that is being put into the regulation is actually not very different from the one you have already got you may not mind too much. If it is quite different—and I have pointed out that there is a significant number of areas where things are very different indeed so that you cannot even talk to each other from the beginning—then you might begin to mind because you do not know what the effect is going to be on other areas. It is going to weaken the structure. It is going to provide bridges into other areas and you may find in 20, 30, 40, 50 years’ time that you have unforeseen side-effects leading to other things that might happen which would not have happened if you had not accepted this entry into your DNA at this stage. So I cannot answer the question, all I can say is that it is a very good question and I wish I knew the answer.

Lord Burnett: Could I add a supplementary then, my Lord Chairman?

Chairman: Yes, then we really should move on to the rest of the questions.

Q9 Lord Burnett: The supplementary is: who do you think can answer that question? Is there an eminent land lawyer or an eminent contract lawyer? I am not asking for an individual’s name, but who else should we be looking for to answer that question? Will it affect the forms of trust? Will that affect debentures and City instruments, and so forth and so on? The way the City is run, money is raised for industry, and

so forth, and all sorts of things, it depends often on our trust law.

Professor Matthews: Certainly as far as trusts are concerned, I suppose I am probably in as good a position as anybody would be because it is also one of my main research and teaching interests. So far as the City is concerned, I have thought quite a lot about this. There are undoubtedly potentially detrimental effects on the City and it may be better if I deal with that when it comes to claw-back because it is in that area that most of those points arise. As to whether there is anyone, a land lawyer, or someone who would be eminently capable of answering the question, I do not think it is a question that is easily capable of answer by anybody, however eminent.

Q10 Chairman: Thank you. Can I just ask you two quick questions. You said we do not know the size of the problem. You probably know that the Commission has said it thinks there are 450,000 successions with a cross-border dimension?

Professor Matthews: Yes. It is a mystery to me as to where they got that figure from.

Q11 Chairman: I was going to say, you do not attach much credibility to that figure?

Professor Matthews: No. For example, we know, because there are statistics, that there are about 500,000 deaths in England and Wales every year. Indeed, I know that because I am a coroner as well, but that is another story! We also know that there are about 280/290,000 grants per annum of either probate or letters of administration. We have very little way of knowing, without actually looking at the IHT 200s and the probates and the wills, and so on, and possibly the accounts produced in every single case (which of course the Government does not normally see) to the beneficiaries. We cannot tell where the property is and whether it is a cross-border case at all. There is no official body that collects such statistics and I do not think it is true that there is such a body in any other Member State. Could I just add to that that what the European Commission seems to have done is to first of all estimate the number of cross-border successions and then to say, “We estimate that in a certain proportion of them there will be a problem.” Again, there is absolutely no empirical evidence that that is the right number at all. You just cannot know. All we have is the anecdotal evidence of those who practise in this area saying, “Occasionally there is a problem.”

Q12 Chairman: When you were answering Lord Burnett’s question you talked about the proposals going to the heart of the DNA, as it were. Would I be right in assuming that you would not agree with the Commission’s assertion that the regulation does not effectively replace national laws on succession of

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property, because they have said quite clearly: "This initiative is aimed neither at replacing nor harmonising succession law, property law, family law, in the Member States."

Professor Matthews: The way I would answer that question is to say this: as I have said before, there are basically three types of rules in a legal system, domestic substantive rules, procedural rules and private international law rules. There is no doubt that this operates to replace the private international law rules, so that is clearly going to change. It does operate in significant ways to change some of the procedural rules. The question is, does it do anything to the substantive domestic rules? The answer is, almost nothing. So in that sense, in a very strict and narrow sense of the first of those three categories of sets of rules, they are right, but not otherwise.

Q13 Chairman: Thank you. We understand that the provisions on applicable law are the ones which are central to the proposal. Could you perhaps tell us about this choice of "habitual residence"? Can you outline the sort of test that you will have to apply? Is it the right test, and indeed have they got the scope of their rules on applicable law correct? We have looked at 19(2) and the things to which it does not apply. Are there things which in your view should be added to or taken away from that list, and indeed should there be a public policy exception to the applicable law rules?

Professor Matthews: I think the problem with "habitual residence" is that at the moment in the draft it is entirely undefined. I am sure that was deliberate because the meetings of the experts advising the Commission, of whom I was one, did discuss various draft wordings for "habitual residence". None was considered to be sufficiently satisfactory. I have no doubt that it is overall considered by the Commission that to go for any particular definition would lead to some Member States being against the proposal, whereas if it is left entirely undefined everybody can take away from it what they like and they can assume that it means what they think it means, and the result is a political fudge. I make no bones for suggesting that that is the way forward because it is much easier to obtain what appears to be an agreement in that way. It was extraordinarily difficult to produce a form of words which everybody liked and you will undoubtedly offend somebody whatever you do. At the same time, leaving it entirely undefined means that you have got no certainty at all about what the test is. The words "habitual residence" appear in a number of different contexts in EU legislation. For example, tax, social security, jurisdiction on divorce, the proper law of a contract, various aspects of the insolvency regulation, depend on the use of this phrase. In some of them it is defined and in some of them it is not, and in a European Court decision some years ago the

court actually said that the meaning of "habitual residence" in such-and-such a particular Directive depended on the aims and purposes of the particular piece of legislation and it therefore could not be applied blindly wherever you found those words in a different piece of legislation. So until the European Court of Justice actually resolves the question of what it means, it will remain uncertain. You even have this at the moment. In a case called *Nessa* in 1999 the House of Lords held that some people who came to this country and who wanted to claim, I think, social security, were held not to have become habitually resident when they arrived, whereas in *Marinos v. Marinos* last year, or two years ago, the High Court held for the purposes of the divorce jurisdiction that a lady became habitually resident on the day she arrived. So it is perfectly obvious that the contexts are different and my point, I think, would be this in relation to succession: all of the other contexts in which "habitual residence" is used are directed at something to do with the actor, the person concerned, in the short-term, but this use of "habitual residence", although it is describing something about the deceased, actually has the effect for the purpose of distributing the estate or the succession of the deceased, which will affect lots of other people, the heirs and the creditors—and you must not forget the creditors, who may be in different jurisdictions—and may be, especially if trusts are concerned, over several generations. So the whole thrust of the use of "habitual residence" in this draft regulation to choose an applicable law is completely different from the context in which you see it elsewhere. So my view would be that unless you can get some kind of definition of what you mean, this is a recipe for litigation and uncertainty until the litigation is resolved by the European Court of Justice.

Q14 Lord MacLennan of Rogart: Is it any more uncertain than the existing use of the word "domicile"? Having also sat at the feet of Kurt Lipstein, I remain unclear about that. It seems to me that "domicile" does not necessarily mean "habitual residence", as I think you perhaps might have implied. It can mean things such as the possession of a lair in a Scottish churchyard in which you intend to be buried and might set at nought the fact that you had a residence south of the border?

Professor Matthews: Yes, I think you are quite right to say that "domicile" can be also uncertain. I have two points, though, which I think can be put in relation to that. The first is that even if it has areas of uncertainty, there is a lot of case law already on what it means. A lot of factual situations have been dealt with and therefore advisors do have some ground to stand on when actually saying, "Are you or are you not domiciled?" even if there are grey margins. The second thing is that here we are not talking about a

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concept which is peculiar to the common law systems and applies inside one type of legal system, we are talking about a definition which has to mean, *ex hypothesi*, the same in every single one of the EU Member States, and that is a completely different bag of tricks.

Q15 Lord Burnett: I thought, Professor Matthews, you defined “domiciled” to your students as a permanent home, not habitual residence?

Professor Matthews: I did, yes.

Lord Burnett: That is a concept I understand, “domicile”, and am familiar with, my Lord Chairman, and I do not find it as confusing as some of my colleagues on the Committee because there has been so much litigation about it and it is relatively clear. Of course, there is still uncertainty.

Q16 Chairman: Is it that clear? I thought that if you spent 40 years serving the Raj with an intention to return home you remained domiciled here?

Professor Matthews: That is clear. The point is, is it certain or is it uncertain? It may be capricious, but it is nonetheless certain.

Q17 Chairman: But it did not mean the same as “habitual residence”.

Professor Matthews: Certainly that is right. If I gave the impression that it did mean the same as “habitual residence” of course that is not correct.

Q18 Lord Wright of Richmond: I think also, Professor Matthews told us it is not the same as “domicile”?

Professor Matthews: That is right, “domicile” in French law is rather closer to “habitual residence”.

Q19 Chairman: I am conscious of the time, Professor Matthews, and I know we would like to try and cover all the other questions we have got here. How far do you think it is practical and what considerations should you take into account when trying to give testators the freedom to choose the applicable law?

Professor Matthews: I would start from the position that if you are keen on mutual respect for each other’s legal systems—and the rules on enforcement of foreign judgments and that kind of thing demonstrate that, I think—then I would start from the position of saying that it must be reasonable for you to pick any EU Member State’s law, if you want, to govern your succession. Now, some may think that is a bit too liberal. I am sure that some of the civil law states would think that. If that is going too far, then I would say any EU Member State’s law with which you have some reasonable connection, and we can obviously work a bit on what a “reasonably connection” might be—you were born there, your parents come from there, you have got property

there, you have got this, you have got that. There is a number of ways in which you can look at that, but I would start by saying, yes, give people lots of choice. If they think a particular legal system suits them, why should they not choose it? The trouble is, of course, every time you make that kind of pro-liberal suggestion you get the people who are saying, “Yes, but people will only do it and choose a system to avoid the forced heirship obligations, solidarity between the generations, claw-back,” and so on. So you have got a rock and a hard place really.

Q20 Chairman: Quite! Would you extend that choice to situations like the UK with multiple jurisdictions?

Professor Matthews: Yes. I see no particular reason for not doing so.

Q21 Lord MacLennan of Rogart: Would it be possible, as the regulation is drafted, for citizens of the EU to opt into the regulation individually?

Professor Matthews: I am not sure I follow the question.

Q22 Lord MacLennan of Rogart: If they had a choice of opting into national law, could they also opt into the European regulation?

Professor Matthews: No, the regulation applies when it applies and there is no choice to say, “This regulation applies to me,” when otherwise it would not have applied to me.

Q23 Lord MacLennan of Rogart: So they could opt into Greek law but not into European law?

Professor Matthews: Oh, I see what you mean. I am so sorry. No, there is no such thing as European law as such. Although this is an instrument of European law, it effectively becomes the national law in the area of private international law rules in the area of succession and therefore when you talk about Greek law you get these rules because these rules will be part of Greek law. But you cannot opt into European law because there is no such concept so far as the private international law is concerned. Private international law is part of individual legal systems, not of some pan-European.

Q24 Lord Kerr of Kinlochard: Can I pick up on that? I understand the point which has just been made. Does it apply to the Certificate of Succession? Supposing there was nothing else on the table but a proposal for a Certificate of Succession. It would be freestanding, would it not? You would not need to harmonise the practice across Europe?

Professor Matthews: It would depend upon the way in which the European Certificate of Succession was to be treated when it is received by the target country. If you are simply saying, “This is a matter of evidence which you can take into account in operating your

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own succession procedures,” I entirely agree with you. If, on the other hand, you say, “And it shall be conclusive as to the matters stated in it and you cannot change that in any way or challenge it,” then that could have a very significant impact on the domestic system.

Q25 Lord Kerr of Kinlochard: It seems to be a sort of optional add-on to the regulation at the moment?

Professor Matthews: Oh, yes, it was certainly something which came along at the end, so to speak. It was not, if you like, part of the mainstream features of the regulation.

Q26 Lord Kerr of Kinlochard: In itself it does not seem to me to raise the sorts of problems we are discussing?

Professor Matthews: It actually raises a whole host of different problems, but that is another story.

Q27 Chairman: It may be another story, and we hope to get to it, but if we start another story perhaps we could deal with this question of the Certificate of Succession. Do you think there are benefits there? You said it would have a huge impact. I think the Committee, when we discussed this before, saw it as a useful aid to practitioners, that they would have something which confirmed the authority of the people who were trying to deal with assets in this country or another country. Can you elaborate a bit about the problems?

Professor Matthews: Yes. At an evidential level, if it was simply a question of an extra piece of evidence it would, I think, be useful in providing information, for example, to personal representatives about who they can deal with in another country, who are the people who are going to receive benefits under the intestacy rules of Bulgaria, for example. You can see the importance of that. It would save costs on legal advice and maybe on proceedings as well. It would not in itself, of course, affect the personal representative system. That could stay exactly or pretty much as it is now, although it would, perhaps, have an impact on who became a personal representative because one of the interesting features of this draft regulation is that the scope of the applicable law is to govern various aspects of the administration of the estate, which is not currently the law in this country. In this country private international law rules say that administration is governed essentially by the law of the forum, that is English law rather than the foreign law. The difficulties, I think, stem from the fact that the European Certificate of Succession is drafted on the basis of certain assumptions about the legal system which is going to use it. The first of the assumptions is that the property law in that system is as simple as in the traditional civil law system, in particular that

the primary position for an owner is to be the absolute owner *of a thing* and not to be, for example, the owner of a *bundle of rights* or *interest* or *estate* in the thing, because that means that you can have a box which says “Owner” and then a name. There is a limited number of lesser rights than ownership and you can make provision for them, but in the common law systems you cannot do that because people can have a multiplicity of different estates and interests and to be able to identify them, much less to put boxes on the form, would actually be quite a task. The second thing is that typically in the civil law systems there is a limited number of heirs. That is just not the case in the common law with anything other than the simplest form of will. You would have a trust, let us say, which gave life interests over here, which gave interests in the remainder over here, which gave legacies over there, and so on, and when you say, “Who are the heirs?” you say, “Well, what do you mean by ‘heir’? I can describe all the people who have got some financial interest,” and there is a long list of them, maybe a page or two. That is not what they are contemplating in this certificate. They are thinking you are going to say, “Oh, the widow and the two children,” full stop. So that is the second thing. The third assumption that is being made is that the property rights are to be directly transmitted to the heirs and do not go through a personal representative system. The significance of that is that they think they can get these certificates issued within a few weeks of the death. Now, you cannot in all but the simplest of cases get a probate as quickly as a couple of weeks. It is just not possible. In complex cases it may be a year, it may be a couple of years even. Those are the worst cases. In ordinary cases you would think six to eight months, perhaps.² The fourth assumption which is made is that in every legal system there are standard and well-known procedures which are the same in every case for dealing with the administration of the estate. Of course, that may be true in England insofar as intestate successions are concerned, but where testate succession is concerned the rules of the administration are those that are set out in the will and the powers that are given are those that are set out in the will. What you would end up with as far as England is concerned would be a certificate which said, “This is the personal representative and for the powers and the beneficiaries and the heirs, and so on, please see the attached will,” which is exactly what we have got at the moment. Those are the assumptions upon which this system is based. It is plainly not going to be possible for it to be operated, therefore, out of England towards Europe in that way. What

² *Note by witness:* I should make clear that I am not just referring to the time taken by the Probate Registry to process the application. I am thinking of the preparation by the executors of the necessary documents, including research into the deceased's estate, liabilities etc. the submission of the HMRC documents and finally the processing of the application by the Registry.

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happens when it comes in the other way? The problem is, okay, that's fine, it's going to give us the information that may help us, but any inaccurate statement in that certificate is actually going to be, under the current draft, very hard to change or to remove because you have to go back to the issuing authority. If now there is a dispute, it goes in front of a judge in England, who says, "Well, the evidence is this, the evidence is that, and I have got the certificate of inheritance, which is evidence, and I am going to take it into account, but I can see there is a mistake in that because the evidence from the other people satisfies me that this chap wasn't habitually resident in France, he was habitually resident in Luxembourg." But in the future that cannot happen. It has to go back to France, or to Luxembourg, or wherever, in order for proceedings to be taken there in order to get that right. In the meantime, you have to proceed on the basis, because it has not been altered, that the mistaken view that is stated there, that he was habitually resident in France, is accurate and therefore you are proceeding to apply French law, which you know at the end of the day will probably turn out not to be the case. So you are spending all your money to no useful purpose. It seems to me that if you just left it at an evidential level it would be quite useful, but the problem arises when you make it, in a sense, definitive and difficult to change without going back to base. Is that an answer to your question?

Lord Kerr of Kinlochard: A rather depressing one, but yes.

Q28 Chairman: Perhaps we should go on to the question of claw-back. Perhaps you would like to tell us your interpretation of claw-back and what impact it would have?

Professor Matthews: Yes. Start from the position that there are, in broad terms, two possibilities. You can either say to people, "You can do what you like with your property on your death," freedom of testation, or you can say, "You can't do exactly what you like with your property on your death, you have got to leave some to certain people," or all of it for that matter. That second position we call "forced heirship". English law, certainly since about the end of the 15th century, has not had any forced heirship worth speaking of. There were some tiny remnants which were abolished in the 19th century. Therefore, the cultural expectation in England has long been one of freedom of testation. In the 20th century, some 70 years ago, legislation was passed to provide the judge with a discretion to re-make a will which did not make adequate provision for a family and dependents. That is now governed by a statute of 1975, but that actually operates in a relatively small number of cases, and the practitioners know how to deal with it and know how to advise their clients in

relation to it. So in cultural terms you still have a situation or expectation of freedom of testation. In the civil law countries it is the opposite: you expect that property will descend to certain close relatives. There is a huge difference in principle between the Latin systems and the Germanic systems in that until comparatively recently spouses, widows and widowers, did not count for this purpose in the Latin systems whereas they did in the Germanic ones. That is something, it is said, to do with the practices of Germanic tribes at the time of the Roman Empire. We do not need to go there! My point in mentioning it at all is simply to say that you must not assume that all civil law systems are the same, because they are not, they have very different rules in some areas. At all events, it means that certain relatives have indefeasible rights once the person has died. In Scottish law there is such a rule, only in relation to moveable property, not in relation to immoveable property. However, the rule in itself would be useless and easily avoided—well, not useless but easily avoided—if you did not make some provision for what happens if people try to give away their property during their lifetime to people who would not get it on their death. So let us suppose that I want to give all my money to Battersea Dogs Home and not to my children. During my lifetime, perhaps not long before I die, I make over my house, I make over my shares, and so on, to Battersea Dogs Home. Freedom of testation. It does not matter where there is freedom of testation. If this was Scotland, for example, that would also be the end of it because at the time of my death the forced heirship rules will bite only on what I actually have then, and I do not have the house, I do not have the shares any more. So in many civil law countries, but not Scotland and not, incidentally, the Islamic systems either, there are *secondary* rules which are designed to protect the rights of the close heirs under the forced heirship rules and these secondary rules are generally referred to colloquially as "claw-back". What they do is they look at not only what was left at death but they look at what the deceased gave away during his life, for two purposes: one, in order to decide what notionally the patrimony at death consisted of (i.e. it did not consist simply of what he left but also of what he gave away during his life) you calculate the rights of the beneficiaries, the heirs, based on the notionally enlarged patrimony, and then you try to satisfy the claim of the heir out of the assets left at death. If they are not enough, you need to go after the assets that went out during life. You need to claw them back and the civil law countries that have claw-back rules do it in different ways; they do not all do it in the same way. Sometimes they allow the heirs to make a personal claim for compensation, effectively, against the person who received the asset during the lifetime. Sometimes they say, "Oh, you can actually get the

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asset back from the donee.” Sometimes they say, “You can not only get the asset back but you can get it back not only from the donee but from anybody in whose hands it now is,” and even in some cases free of any encumbrance which has been created in the meantime. That takes you a long, long way. There is another feature which you need to bear in mind and that is that not all of the civil law countries operate the protection to the same degree. Some of them, such as Austria, will only take into account gifts made in the last two years of the deceased’s life. Some, like Germany, take into account a longer period, ten years. Some, like France, take into account gifts made during the whole of somebody’s life if, of course, you have got the evidence to show what they were. There was a famous case which went to the Cour de Cassation in the 1990s in France where the gifts which were successfully upset by this means had been made in 1953.

Q29 Lord Burnett: Could I just at this stage ask the question: what about the position of a bona fide purchaser of a value without notice of the asset? Are there jurisdictions where that individual, that person, whether it is a company or individual, can have a gift ten years, five years, or whatever, effectively revoked? Does he have to be put into the position he would have been in had he not purchased the asset?

Professor Matthews: In general terms, the test of a bona fide purchaser for value is not one which you find in the civil law. You generally find some other mechanism for adjusting the rights in that kind of difficult situation. For example, in Austria it is comparatively simple. You wait two years after it is given to you and then you know that it cannot be brought into account, it cannot be clawed back.

Q30 Lord Burnett: The asset itself?

Professor Matthews: Yes, and looking at it in terms of what you have actually got, as I have said, there are different systems which make different kinds of claims possible for the heirs. Sometimes you can only claim the value from the donee and not the thing itself, so anybody who has got the thing is safe, although if they are the original donee they may have to pay the value.

Q31 Lord Burnett: What about if they do not have the money?

Professor Matthews: If they do not have the money, they do not have the money.

Q32 Lord Burnett: It cannot be traced?

Professor Matthews: In general terms there is not what the civilians would call “real subrogation”, what we would call tracing. Generally, you are not allowed to do that, but in some rare cases you can. The problem is that there are cases in some of the systems where a

person who is in perfect good faith may even have bought it.

Q33 Lord Burnett: A purchase from a donee?

Professor Matthews: Exactly. He has purchased it from a donee. He may or may not have known that this was a donee from somebody during life. He may not have known the history of the thing and in some systems the asset can be effectively clawed back. That is not true of all systems, but it does sometimes happen. It depends upon which law we are talking about. That will mean, incidentally, of course, that if you are a lawyer advising a donee who happens to be English and the donee is saying, “Is it safe for me to hang onto this?” you are going to have to get advice from any relevant EU legal system in order to be absolutely 100 per cent sure. One point further I should add to the layer of complexity, which you can already see here, is that the time at which you judge which law applies and therefore which claw-back system you are concerned about is the law which applies at the time of the death of the deceased, which may not be in any way the same as one which you could have imagined at the time of the given having been made. In other words, a British national, domiciled, resident, entirely connected with England, let us say, gives away property, being unmarried and without children. Forty years later he dies, having moved to France, become domiciled there, maybe even acquired French nationality, it does not matter, having bought property, and so on, having acquired a wife, having acquired children, and dies. The forced heirship claims and the claw-back claims will apply so far as French law is concerned to the gifts made while he was in England, before he was married, before he had any children before anybody knew that there was even any possibility of that. This kind of example was put to the Commission during the experts’ meetings and the answer you get back is something like, “Well, it’s important from the point of view of social solidarity.” All right, that is a political question, but also under this regulation the deceased will have the option, he can opt for his national law, which let us assume in this case is English. That is absolutely true, but first of all he has got to be satisfied that he is within the scope of the regulation at all because he has become habitually resident, which is an uncertain quantity. Secondly, he has got to actually make the choice in a will or other testamentary document. Thirdly, he must not change his nationality after he has done that, because if he changes his nationality his choice goes out of the window. It seems to me that even with all of those points taken into account, the answer is that it misses the point entirely because it is not the donor that you need to be worried about, it is the donee who wants to know, and he has no way of guaranteeing that the choice made by the donor will ever be effective

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because it is entirely within the control of the donor whether he becomes a French national or whether he revokes his will, or whatever he does. So the risk is going to be there in relation to everything that anybody does.

Q34 Chairman: Can we just move on quickly to this Article 22, the special succession regimes? In fact, given the exceptions listed there, do they actually undermine what it is trying to do in any event?

Professor Matthews: Yes, they do. They essentially bring back schismatic systems because they are saying the law of the *situs* rules where any of these special systems applies. These are all special pleading. Different systems say, "Yes, but we have got this particular problem with the ancestral homelands of X, Y, Z, and there are special rules which apply to those," and so on. Most of these special rules are attacked by the EU when you join the Union, but some of them are still left.

Q35 Chairman: The question of the collection of tax. You have talked about the process as it currently stands with us and creditors. Is there anything you want to add to that of the impact this proposal might have on taxation and creditors?

Professor Matthews: Yes. There is a provision in Article 21(2)(b) which is designed to deal with this particular problem. It is, however, ineptly worded so far as the UK is concerned because it refers to provisions for the collection of tax before the final distribution to the beneficiaries, whereas in the UK the tax legislation collects it at the point before you even get the grant of probate. You cannot get the grant of probate until you have paid the tax. Whether it could be construed or amended so as to more precisely correspond with what happens, I do not know.

Q36 Chairman: Thank you. About land and shares, which again we have talked about, are there any special points you want to raise?

Professor Matthews: There is a very big problem here. One of the spectres, if you like, that haunted the discussions of the experts was what do you do about the French usufruct over English land or the English trust over French land? The question was, how far are these foreign legal concepts to be allowed to create interests or rights over land outside their own legal system, because there are all kinds of interested parties like the Land Registry, and so on, who have something to say about that. The way in which the draft regulation deals with this is by purporting to exclude from the scope of the regulation all such questions. The way, however, it is done is, I think, not effective because what it says in Article 1(3) is: "The following shall be excluded from the scope of this Regulation . . . (j) the nature of rights in rem relating

to property and publicising these rights." That only says, as I understand it, that the regulation does not require any Member State to introduce foreign or different ideas into their own *domestic* rules of law. It does not mean to say that foreign concepts cannot govern the land or other property inside your country if the applicable law for the succession in which that property is contained is the foreign law. I will give you an example from the existing law. As I have already told you, the choice of law rule for land and succession is always the place of the land, so there can never be a case under the present system where a French usufruct could govern English land. It cannot happen. But it is possible, for example, for a person to die domiciled in France and have *moveable* property in England, let us say a valuable painting, and in his will the deceased has actually given the painting to one person, A, but has given a usufruct in the painting to B, so that B can actually hang it in his house for the rest of his life and then when he dies A will get it in full ownership and can do what he likes with it. If the painting is in England that will nevertheless be enforced in principle by the English courts. If A and B were having a row about the possession of the painting before the English courts, the English courts would say, "Well, the applicable law for the succession was French law. French law allows the creation of usufructs. It is created over this moveable property, therefore, A, you must allow B to enjoy the property and take possession of it for the rest of his life." It seems to me that if that is possible at present the question is, does this provision 1(3)(j) take that away? Does it row backwards so that that is no longer possible? To my mind it is not doing that at all. It is simply saying that the domestic law of England does not have to change to introduce the concept of the French usufruct. Therefore, since 1(3)(j) does not distinguish between moveable and immoveable property but applies equally to both, it seems to me that the effect of this regulation will be that, since for the first time the applicable law for the succession to land can be foreign law, it means that you now have the possibility of a French usufruct applying to English land. At the same time, it is clear from 1(3)(j) that there is no requirement to change the Land Registry rules so that anybody will know about it, because it says you do not have to do anything about changing the publicising of the rights. So we have actually got the worst of all possible worlds. On the other hand, you could say, if you wanted to be entrepreneurial, that it means the French will have to accept trusts on their land. I do not know whether they have worked that out. I should, my Lord Chairman, also say this: in the explanatory memorandum it seems to me that what the Commission is saying about this provision is unsupportable. They say this prevents the situation I have just described from happening. I do not think it does.

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Q37 Chairman: Thank you. Can we go on quickly to jurisdiction conferring on the courts of a Member State the residual jurisdiction to deal with the succession of those who die habitually resident in a third country and combine that with a limited facility for the transfer of jurisdiction? What is the implication for that? Does it bring about people going around forum-shopping, looking for the best courts?

Professor Matthews: Can I start one step back and just say that the main provision in the regulation is for the courts of the country where the deceased has his habitual residence to take jurisdiction? What is curious is that although that is the same as the applicable law, in the case of applicable law you have the choice to go for the law of your nationality. You do not have that freedom in the case of jurisdiction, which could lead you to the case where you have moved to France, you have become habitually resident in France but you are a Brit, so you want in this case, let us say, English law to govern. So you make the choice of English law in your will and therefore the French courts will have jurisdiction but have to decide all the questions by reference to English law. That is not actually going to make things easier, it is actually going to make things more difficult because there are certain types of a dispute which can arise on succession, a proprietary estoppel claim, for example, or a constructive trust claim. Can you imagine a French judge trying to decide a question of that sort? I mean, it is just not fair. The judge has got no experience of that. He is not used to the exercise of discretion anyway because the French Court forbids judges to exercise discretion. It says, "You apply the law and that is it." So I think the main provision on jurisdiction is defective to start with. This provision, the residual jurisdiction, kicks in at the point where you have got a person who does not have habitual residence in a Member State and therefore you cannot apply the primary rule, but there is some other reason why an EU state should be involved, either because property is here or because he used to be. In fact, it is because property is in the Member State that the question arises. Then there is a kind of lexical ordering of connecting factors which say which court should have jurisdiction and it seems to me that you can argue about what that order should be, whether it should be in the order which it is now, but I do not see anything wrong in principle with the idea of having an order which applies in a case where somebody is habitually resident outside the European Union.

Q38 Chairman: Lastly, we are talking about the recognition and enforcement of decisions and authentic instruments. This Committee has generally been supportive of measures which have supported mutual recognition, but what are the policy and

technical and practical problems in connection with the recognition and enforcement of these things, as you see it, in this connection?

Professor Matthews: In relation to the mutual recognition and enforcement of judgments, I do not have anything particular to say. It seems to me—and I am a litigator by experience—that that is a positive thing. What I feel rather more doubtful about is whether it is appropriate in any way to apply it in the case of authentic instruments. At the beginning there is a real problem about the definition of "authentic instruments" because no UK notary's acts in relation to succession are ever likely to qualify as authentic instruments for this purpose, so it is actually a one-way street. It is not a level playing field at all. There is that aspect to it, but more than that, the problem is that in the succession area what you are dealing with is not a dispute or an agreement between two people as between themselves in some kind of contractual context. What you are dealing with is the allocation of rights in relation to property between heirs and creditors who may not know of each other's existence. So anything that happens in front of the notary is being done in a context of people doing a deal, not people having a row. It is not litigation. Notaries are not judges. They do not have natural justice concepts and things like that. So you get in a notarial act from somewhere in southern Europe which says that the ownership of this piece of land in Scunthorpe is now different from what it was and you say to yourself, "Well, hang on! What notice was given to the people who have interests in this?" The answer is, none, and the only way in which you can challenge an authentic instrument which would otherwise have direct effect is to take proceedings in the place where it was made. You cannot challenge it in proceedings in the target country. So I think you have got very severe problems in justifying, as things stand, the wholesale recognition and enforcement of authentic instruments in relation to succession. This is not like the Brussels I position, for example, where you can also have enforcement of authentic instruments, but that is in the context usually of contracts where you have got people involved and they have made a deal and for some reason it has not gone through, or something else has gone wrong. This is a case, as I said, where the people who have interests may not even know of the hearing before the notary and the fact that the notary is proposing to do anything at all, let alone challenge it, and so on.

Q39 Lord MacLennan of Rogart: I wonder if I might ask what I would describe as a layman's question? Is it your view, Professor Matthews, that this exercise has really no point, by which I mean the attempt to produce a regulation which may simplify for the man in the street his understanding of what is going to be the consequence of his death? Is it your view that the

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complexity of the law is such that there are bound to be anomalies and difficult matters for the courts in all the countries of the Union?

Professor Matthews: Yes. You are substituting one set of complications for an existing set of complications.

Q40 Lord MacLennan of Rogart: Yes, but it does not feel that that is the objective behind the regulation. The objective is simplification or clarification. Is that actually an unreasonable goal, in your view, or is it not an attainable goal because of the existing complexities?

Professor Matthews: I do not think it is an unreasonable goal. I think it is at present attainable only with great difficulty and with more resources and more discussion about how to resolve the problems. I think this would have been a better regulation if it had concentrated on a more limited range of matters, for example the applicable law question. I think with a bit of goodwill we could have produced something which was likely to work and resolve that difficult question. We could, perhaps, have added on to that something about jurisdiction and judgments, but as for the rest I would have said it is biting off more than we can reasonably chew, digest and absorb.

Q41 Lord Renton of Mount Harry: If I may follow on from Lord MacLennan, again as an absolute non-expert in this field. Where you started, the difference between civil law and common law, is that not always likely to make this an impossibility to solve?

Professor Matthews: I would like to think it is not an impossibility. I agree that it is extremely difficult and that is why I think you should only deal with one bit at a time, and once you have solved the first bit and the most important bit, the applicable law question, move on, if you like, to consider whether you can do something about the next point. But I do think that trying to do everything at once has left us with what I am afraid to say is a second-rate draft which bristles with difficulties at every turn. It is not helped by the fact that the translation is defective. The original is French. The translation is—well, you know what a translation should be. It should be both idiomatic and accurate, and this is neither.

Chairman: There is one last question I would like to ask you. Are there any other questions from any of my colleagues?

Q42 Lord Burnett: Just one. On a lighter note, my Lord Chairman, I wonder whether the case involving the celebrated and allegedly very gifted actor, Errol Flynn is still good law. He was born, was he, in Tasmania or on the high seas?

Professor Matthews: Tasmania, I think.

Q43 Lord Burnett: He was, and did he claim that he did not have a domicile? Is my memory correct?

Professor Matthews: Well, he was dead by the time it mattered, but he certainly spent the last few years of his life living on a boat around the Caribbean and the Mediterranean. His father had been born, I think, in London and he lived his life in very many different parts of the world including California and Jamaica, where he had houses, and at his death there was a very big question as to where he died domiciled, which was resolved by Mr Justice Megarry, in a rather erudite and long judgment.

Q44 Chairman: The question I was going to ask you was this, and you have already kindly given us your opinion about whether the Government should opt in or not: we are also charged with having to answer the question as to whether or not this proposal offends against the principle of subsidiarity. Is that a matter on which you would be prepared to express a view? In fact, I suppose it is relatively simple from our point of view. Whether you agree with what is proposed or not is irrelevant. Is what is proposed achievable, other than by action at a European level?

Professor Matthews: I think if you are going to have a uniform set of private international law rules you cannot easily do this at a national level. You can, of course, embark upon a series of bilateral negotiations, and there has been a little bit of that in the past in relation to jurisdiction and judgments, but to be effective it has to be done at the European level.

Q45 Lord Wedderburn of Charlton: Most of what you have said today is in effect a case against opting in and about, at least from our point of view, the difficulty of negotiations thereafter? That is the way my mind reacts to what you have said. Is that perverse?

Professor Matthews: No, it is not perverse. I think the safer course is not to opt in at this stage, to see where you get to in terms of the negotiation and if you think you have gone far enough to justify it then opting in at that stage; but if not, then not opting in.

Chairman: Thank you very much. Professor Matthews, can I, on behalf of the Committee, thank you very much indeed for your presentation in answering the questions. It is a difficult subject and I think it is fair to say that you have fascinated us and kept our interest and informed the Committee and we are really very grateful indeed. I am sure we know a lot more about it than we did when we started. Thank you so much.

Supplementary Memorandum by Professor Paul Matthews, King's College London**A "SHOPPING LIST"?**

73. If one were to prepare a "shopping list" of matters which would need to be addressed in order for the regulation to do no significant harm to the UK and its legal systems, it might look something like this:

- Clawback not as proposed, but maybe e.g. in form of putative proper law for a particular transaction (see fn 20 above);
- Jurisdiction coinciding with applicable law;
- Defining habitual residence;
- More choice of applicable law, e.g. habitual residence at the time of the choice;
- Some clear guidance as to how far foreign property concepts are to be applicable to immovable property, and what protection must be available for purchasers etc.
- Identification (and reduction) of the special local property regimes;
- The ECS should be evidential only;
- Authentic acts should not be required to be directly recognised/enforced elsewhere;
- Administration should be carried out according to local law, not applicable law.

At the end of the day, of course, it is a political and not a legal question how far one goes down this road. Nevertheless I hope that it is a helpful starting point.

16 December 2009

WEDNESDAY 2 DECEMBER 2009

Present:	Blackwell, L Bowness, L (Chairman) Kerr of Kinlochard, L O'Cathain, B	Renton of Mount Harry, L Rosser, L Sandwich, E of Wright of Richmond, L
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Examination of Witness

Witness: MR RICHARD FRIMSTON, The Law Society and Society of Trust and Estate Practitioners (STEP),
Russell-Cooke Solicitors, examined.

Q46 Chairman: Mr Frimston, welcome. Thank you very much for coming to give evidence to the Sub-Committee on the draft Regulation on Succession. If I may, for the record, point out that you have before you a list of the interests that have been declared by Members. They may not all be relevant particularly to this inquiry, although in dealing with that I will declare my relevant interest as a practising solicitor and notary public. This session is on the record, as you know. It is being webcast live. It will be accessible on the website. You will have a transcript after the session to enable you to go through and correct anything which you think is not correct and that will go into the public domain in printed form on the website. Mr Frimston, could I ask you first of all if you could begin, for the record, by stating your name and the capacity in which you are here and also ask you whether you want to make any statement to begin with in general terms on the matter or whether you want to go straight to questions?

Mr Frimston: Thank you, my Lord. Perhaps it would be helpful if I just describe myself a little. I am Richard Frimston. I am a solicitor and a notary public and I have practised in London all my life. I have been dealing with private client matters since the mid-1980s. I sit on the Law Society's International Committee. I represent the Law Society to the European Committee of the Union of International Latin Notaries. I am also involved in an organisation called the Society of Trust and Estate Practitioners (known as STEP) and I chair the Cross-Border Estates Committee for STEP. Professor Matthews and I have been experts on the Commission's group of experts in relation to this topic of succession for two years and he and I are still on the Commission's group of experts looking at the question of matrimonial property regimes. So, with that background, I have been involved in putting together responses on behalf of the Law Society and STEP and the Notaries Society to this draft Regulation, and that paper has gone in to the Ministry of Justice, but I suspect that it only went in yesterday and nobody has had the time to read it. So I am happy to wear all of those hats and put the views which are consolidated from all of those places. My personal

views are fairly similar, but I might from time to time just say that I have a view which perhaps many of my colleagues may not share quite so enthusiastically.

Chairman: Thank you very much indeed.

Q47 Chairman: Can I perhaps begin then and say that you know in its explanatory paper the Commission has attempted to assess the scale of the problem created by cross-border successions. A previous witness suggested that there was not much evidence for the figures either of the total or those that actually gave rise to any particular problems. I think 450,000 was the total figure. What is your assessment of the nature and scale of the problem and whether this proposal would have an impact upon it, good or bad?

Mr Frimston: I think it does depend where you are, my Lord. In London, I think the current statistics are that something like a third of London was born outside the United Kingdom, so certainly in my practice in London it is a huge issue. I think probably 80 per cent of my work involves some sort of cross-border element. I think in the country as a whole probably the position is less extreme, but I think even that there is something like 11 per cent of the population is born outside the United Kingdom, and of course that is not the only issue. There are very English people, or very Welsh people, or very Scottish people who own property in other parts of the European Union, or who have children who go and live and work in other parts of the European Union. So certainly my experience is that this is an issue which is a growing one and the position is so complex that ordinary folk find it very difficult to deal with.

Q48 Chairman: Have you any view about the 450,000 estimate which was given in the Impact Assessment? I know they talk about nine to ten per cent involving an international dimension.

Mr Frimston: I think it is very difficult to get any statistics, my Lord. I think those statistics are probably quite old now and I think all the information there is out there from the ONS and others is that migration is increasing and that people

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are moving around more and own property and assets in more than one jurisdiction.

Q49 Chairman: Let us take that as read then. In general terms, although we will be asking you about specifics, do you feel that this proposal would make a significant impact on solving some of these problems?

Mr Frimston: Cautiously, yes, my Lord.

Q50 Baroness O’Cathain: Which way?

Mr Frimston: The applicable law issues are particularly difficult. The fact that at the moment within the European Union we have three different ways of doing it, whether it is domicile, whether it is habitual residence or whether it is nationality, means that for many people either assets are governed by two sets of laws or by none and it can cause severe problems.

Q51 Lord Wright of Richmond: When you started your advisory role two years ago did the Commission have a fairly clear idea of what it wanted, or does the draft legislation reflect your advice and the advice of your colleagues?

Mr Frimston: My Lord, I think that is quite a difficult question to answer. The process has been going on for more than seven years. The original report from Professor Dörner and Lagarde came out in 2002 and made various suggestions. A lot of those suggestions have been followed. The two big areas where I still regard the Regulation—well, there are probably three areas where I regard the Regulation as being defective. One is that reference to the validity of wills has been completely removed, which I do not understand, the formal validity of a will document. Is a will validly executed as a document and recognised in another jurisdiction? A lot of European Union Member States have ratified the Hague Convention on the validity of wills, which means that broadly if you sign a will in England in English form that will be recognised in other countries, but there are a number of Member States which have not, such as Malta, so that unless the fundamental question of what is a valid document, is it a valid will or not, is addressed it is very difficult to move on to the question of what law should apply. I think that is one thing which is peculiar but has not been taken up. The other was the question of choice of law. I think most people who have been involved in the subject thought that the choice of law of your habitual residence at the time of choice ought to be a valid choice and that has been discarded. The other big contentious question, I think, is that of jurisdiction in that in the Rome regulations if a party chooses a particular law for a contract there is no reason why they cannot choose the jurisdiction and many of us thought that if there was a valid choice of law it would be much more sensible that jurisdiction should follow that choice.

Lord Wright of Richmond: Thank you very much.

Q52 Lord Renton of Mount Harry: I do not have the advantage of being a lawyer and I listened with very great interest to Professor Matthews last week and I think we were all very impressed by him. He put over his case very well. But as a non-lawyer I did come to wonder, at the end of an hour and a half or so, whether the whole matter was too complex to attempt EU legislation. As you said, we have been trying for seven years. Do you think it could succeed, or do you think it is too complex?

Mr Frimston: My Lord, I do think it can succeed, indeed I think because of the complex nature it is crying out for regulation to make it simpler. So many of my clients say to me, “Why hasn’t the EU done something about this? Why haven’t they sorted it out?” I do think that the current position is completely unsatisfactory and any regulation, almost, is better than the place we are at at the moment. Not quite, but a regulation could do a great deal in this area.

Q53 Lord Renton of Mount Harry: If I may, just for a moment, be difficult—I am not necessarily disagreeing with you—if you do get down to it on an EU law basis, and as you say that is without taking down either domicile or residence, or jurisdiction, you would also, for a very ignorant person like myself, come to the difference between common law and civil law. Is that not likely, however much it is needed, to lead to a lot of arguing which is likely for the client, the heirs, and so forth, to actually mean a good deal of expense, on legal matters?

Mr Frimston: My Lord, I do not think I would agree. The majority of the population do not make a will. Two-thirds of the population die intestate and the intestacy law is there to make a rough and ready decision as to what happens to people’s estates if they do not, or do not bother, or cannot afford to, and I think the Regulation is a bit like that in trying to provide a rough and ready solution for the ordinary folk who cannot afford to come to me and spend £2,000 for me to help them sort it out but want to go to their local probate registry and deal with the money that is sitting in Germany, or anything else. I was very struck last week, when I had a new piece of work from a lady in the south-west of England, who is English, her brother is English but died living in Germany and because he was in Germany and had German assets he had a German grant of probate. Germany law says that because he was a UK citizen it was UK law that applied. English law says that because he died domiciled in Germany, German law should apply. Germany accepted that, so on the German certificate it said, “Thomas,” whatever his name was, “died a British citizen under British law,” that German law applied and the heirs are his sisters.

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One of his sisters took this along to the local probate registry and tried to get access to the £50,000 in the building society and cannot do so. She has to come to somebody like me to help her draft an application to the registrar and a certificate of German law when actually the German certificate says everything that it needs to say. It is one of the few cases when we all agree the same applicable law, but even then she cannot do it. I think the Regulation ought to be making provision for ordinary folk like that. If you have complex lives and have lots of money and assets in different jurisdictions you can afford to come to people like me and Professor Matthews and spend lots of money for us to worry about it, but I think the Regulation should be helping the ordinary folk move around Europe and deal with these things.

Q54 Lord Renton of Mount Harry: Do you think it really could do that?

Mr Frimston: Yes, I do.

Q55 Chairman: Following on from that, it seems to me that the answer to Lord Renton's question which you gave is an argument for an acceptable and recognised European Certificate of Succession, but could the proposal be limited to practical measures of that kind without getting into some of the more complex areas, or at least as we perceive them to be?

Mr Frimston: My Lord, I gave the example I gave because in that particular case both Germany and England agreed the same applicable law. That is very, very rare and usually one has got mismatches that there is never an answer to. There is no answer and the only solutions are practical ones about saying, "What do we do in this jurisdiction, and what do we do in that jurisdiction?" So I think for this to work it has to deal with applicable law. I think jurisdiction and enforcement is more difficult and certainly the Law Society's and STEP's response to the Green Paper was that it would have been much better if the Regulations dealt with applicable law first and we got that working and then we tried to deal with other things later, but the Commission has not taken that view.

Chairman: Thank you.

Q56 Lord Blackwell: Can I ask Mr Frimston about the impact on national laws and the question of subsidiarity? The Commission says that the Regulation will not replace national laws on succession and property, but as we have just been discussing there are many situations where different national laws conflict, different legal traditions. How likely is it that over time actually a new body of law will develop which will inevitably impact on national law, and in the light of that how do you view this proposal against the criteria for subsidiarity? Finally,

although I can guess the answer to this, whether you think the UK should opt in?

Mr Frimston: My Lord, I think the difficulty with this area is that however hard anybody tries to make the Regulation not affect national law and although the Regulation is only dealing with private international law, inevitably it will have an effect on national law. So it will not necessarily change national law, but I think national law will have to change. So, for example, in the United Kingdom and in particular in England and Wales, which is my jurisdiction, personal representatives are not obliged to administer any assets outside England and Wales. Under the Regulation, if we opted in, then unless we change our law so that English personal representatives are under an obligation to administer the EU-wide assets, then there will be a hole. So we will have to put an obligation on personal representatives to administer the assets throughout the EU if it is to work. That does not mean that we necessarily have to, but if we want the Regulation to work effectively then we will have to think about the changes to our national law. Similarly, we protect personal representatives in that under the Trustee Act if they put an advert in the London Gazette then anybody coming along afterwards cannot sue them personally for distributions. I do not know that people in Estonia read the London Gazette a lot, but that may be something we have to think about! Similarly, our 1975 Act provision to protect dependants currently only applies if the deceased died domiciled in England and Wales. It does not matter where he was habitually resident. So again we really ought to be changing the 1975 Act. These are things we do not have to do, but if we want the thing to work then we are going to have to look at our national legislation.

Q57 Lord Blackwell: If this directive comes into effect we would have to pass a law, or it would be advisable, you think, to pass a law to conform our UK law to the requirements of this directive. I guess the question then is, are any of those things we might do to conform our law things which would also impact on somebody whose estate was entirely in the UK who would otherwise have been unaffected by this?

Mr Frimston: My Lord, I do not think so. The question of claw back I am sure we will come back to, so we can talk about claw back perhaps slightly separately, but I think the Regulation is designed to effect private international law and I think it has been designed as well as it can be to have as little effect locally—there are debates as to whether it has any effect on land rights and I think Professor Matthews thinks that it might do. I think that is quite an academic position. I think the intention is that it should not and therefore if it does it needs changing

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to make sure that it does not. But I do think that the changes that are necessary, some of them we need to do anyway. We ought to change the 1975 Act anyway. The Law Commission is currently looking at it and thinking that it is going to recommend that it ought to be changed anyway. It affects people outside the European Union. My English client who is married to a Lebanese gentleman, although she lives in the London house she has got no protection if he dies, and that is not right. So I think the 1975 Act should be changed anyway. So I do not think that the Regulation itself means that we would have to have changes to our law which would affect internal issues.

Q58 Lord Blackwell: What is your view on subsidiarity?

Mr Frimston: I think one of the things that I find interesting is the changes between England and Scotland since devolution. Scotland has changed the definition of "domicile" but we have not changed it in England and we have got no particular mechanism yet for thinking about how we deal with that clash between Scottish law and English law. Personally, I think it is unlikely that we would be able to have a sensible debate within the United Kingdom trying to reconcile those things. Certainly the only way of harmonising private international law through Europe is by regulation. There is no other way of doing it.

Q59 Chairman: So whatever one's views about the proposal, you are saying really it does not offend against subsidiarity because you could not achieve it in any other way. Can I ask about opt-in then and just follow up that point as to what your opinion is, whether we should opt in? Should we opt in now or should we wait and see?

Mr Frimston: That, I think, is a political question in that all the constituencies that I talk to would say that the idea of the Regulation is right. The question is, how do you end up with a regulation which is workable and the best that is achievable? The question there is the political one of, do you achieve a better result by opting in and forming alliances, or do you achieve a better result by not opting in and hoping that people want you to? So I think that is a political question. My personal view is that I am an alliance man, so I am into talking to the Austrians and the Dutch and seeing what we can do to find alliances to smooth down some of the rough edges. I know that others are perhaps not alliance men and think that we should stand clear and hope that by doing so we can have another look at the end result and see whether we like it or not.

Q60 Lord Blackwell: Are there any proposals that might be included in this that if they were concluded might lead you to believe that we should not opt in, or that we should opt out?

Mr Frimston: My Lord, I think if there was any question that there was not any choice of law then I think we should not opt in. I think if there was not an element of party autonomy, if it was just habitual residence without any choice, then I think we should not opt in, and if civilians got to the position where they thought that protection of their reserve was a matter of public policy, then again I think that would be difficult. If you got to the situation where the French law said that English succession law was in breach of French public policy, then I think that would be a regulation which would not work within the European Union.

Q61 Baroness O'Cathain: Can I just ask, following on from what you actually said, about alliances? Do you think the likelihood of alliances is stronger than the likelihood of not having alliances, and also the timescale?

Mr Frimston: My information on this is probably no better than yours. In terms of timescale, I presume that it is going to take two years to negotiate. I think it is going to be a very long and tedious process. There are an awful lot of difficulties. I think the differences between this side of the Channel and the other side of the Channel do look different once you cross the Channel. I think the difference between the Netherlands and France is as significant for them as it is between us and France. If Austria has a two year limit on claw back, they are going to be as worried as we are about the idea of French law having no time limits on claw back. So I think personally we would do better by opting in and finding friends to find solutions to some of the problems.

Q62 Lord Kerr of Kinlochard: That is a sort of irrevocable choice, is it not? You are gambling at that point and you can be outvoted. The argument the other way is that if you make it clear that you are interested in the principle of the legislation, not opposed in principle to it but you do not know if it is going to come out in a way that will be appropriate to our national circumstances and laws, is it not the case that you are more likely to extract concessions than if you are in a minority which can be voted down?

Mr Frimston: My Lord, these are political questions and it is a political answer. My personal view is that if we are not in there, having opted in, then although the Rome I experience was satisfactory for the United Kingdom, I am not sure that playing the same card again may necessarily produce the same result. This is a very complex subject and if there are solutions which can be found between Member States that

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have opted in we may be excluded from that. They may not be so bothered about whether we opt in or not. It is such a difficult subject that finding a solution between France and Germany and others may mean that it does become a very mainland Europe document. The whole position, perhaps, in relation to personal representatives is one that personally I think is pretty satisfactory at the moment under the draft Regulation. If we do not opt in, there will be less need to have that in the Regulation. But as I say, these are political questions and I am glad I am sitting this side of the table.

Q63 Chairman: I think we ought to move on to the question of applicable law, but can I just ask you this: the Committee, I think, is very grateful for examples that are given. You mentioned the English lady married to a Lebanese gentleman and he died and she had no protection for the house. Can you just expand upon that example? What is the protection anybody in those circumstances is going to get out of this? It may be obvious, but I think it would be quite helpful if you could expand on that for us as an example.

Mr Frimston: The example I gave was of the 1975 Act not giving protection at the moment. The situation there is that if you have got an English domiciled UK national resident in a house in London but married to somebody not domiciled in England, then the 1975 Act does not apply to his estate when he dies. English immovable property is subject to English law but with no protection. The difficulty with this Regulation is that it has to have a rough and ready solution. The rough and ready solution it has is to use the law of habitual residence. If he dies habitually resident in England and we change the 1975 Act, then the 1975 Act will give her protection. If he dies not habitually resident in England, then it would not. So the question will be whether he dies habitually resident in England or not, as to whether English law will give her some protection.

Q64 Lord Kerr of Kinlochard: I understand the answer on subsidiarity and personally I agree with it. I am more concerned about whether this proposed Regulation passes the proportionality test. On subsidiarity, if you want to do this you need some sort of EU-wide instrument, but do you need as heavy an instrument as this and does it all have to be normative? Could some of it be *facultatif*? Could it set out options, provide for choosing? You mentioned the choice of jurisdiction as well as a choice of law. Why not? The Certificate of Succession, as I understand it, is an optional add-on. Could not the whole thing be options, a menu which would simplify people's choices but not predetermine their choices, simply make their choices easier for them to take and for their executors to fulfil?

Mr Frimston: My Lord, the question of choice is always a question of whose choice is it? I started by saying that many of us would have preferred the Regulation just to deal with applicable law only and certainly there are many questions of how one puts into force or how one interprets the Regulation locally that might have been better dealt with by a directive rather than a regulation. So I would entirely agree if the process could be persuaded that the Regulation should only deal with applicable law, but that does seem a bit tricky. Questions as to choice, as I understand the European Certificate of Succession it is going to be really a choice for a Member State as to how to operate it, it is not going to be a choice for an individual as to how to operate it. So the question will be, France will say, "Yes, we will operate European Certificates of Succession and will recognise an Italian Certificate of Succession," and England may say, "No, we need a grant of probate." It will not be up to an individual to say, "This is what I want to do." So I think there will be questions as to who makes the choice. If once could have options where individuals had more choice, then I would generally be in favour of them, but I cannot see that working. I think the whole question of jurisdiction and enforcement is what makes the Regulation in practice quite difficult because it is so novel. We have never ever enforced or recognised succession issues between Member States before and the effect of that change is what is so dramatic.

Q65 Chairman: Thank you. We have started to go into applicable law and the Commission has chosen the habitual residence test to determine the law that should apply. Do you think that is the correct approach? We had some questions raised about the whole definition or the lack of definition of "habitual residence". Could you expand on all that, please?

Mr Frimston: Yes, my Lord. In the experts' group the starting point was the Hague Succession Convention, which has been remarkably unsuccessful in that it is only the Netherlands that have ever signed up to it and that has got a very long, detailed and complex definition of the connecting factor. You have got to be resident for five years, but if you move then it is two years, and there are all sorts of different things, and we discussed that at great length. I think one of the difficulties is finding a connecting factor which is straightforward. What I find difficult is that habitual residence seems to be the test for virtually everything else these days, whether it is the mental incapacity of adults, which uses habitual residence, Brussels I and Brussels II uses habitual residence. I am not saying that I know what it means, but at least it seems to be a fairly universal connecting factor and in practice amongst the majority of my clients I usually know where they are habitually resident. I often do not know where they are domiciled. So personally I do

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not find it a difficult connecting factor. I think where the trickiness is is that there are a number of people, especially on the borders of Member States, who live in one Member State, work in another Member State and have a weekend home in a different Member State. A number of my clients work in London but their families live in France, and those are the difficult questions as to quite where they are habitually resident. It would have been better if the connecting factor could have had a bit more definition and could have had a tie-breaker clause, or something like that, but I can see why that is quite tricky. So personally I think "habitual residence" is better than "domicile". I do not know what "domicile" means usually.

Q66 Lord Renton of Mount Harry: You say you do not know what "domicile" means usually?

Mr Frimston: Well, "domicile" is usually a question of choice. If you say to your clients, "Where are you domiciled?" they immediately tell you where they are habitually resident. Large numbers of my clients are actually domiciled in India but they do not know it because when they were born their parents were in Kenya or Uganda and they were certainly still domiciled, their father was still domiciled, in India at that time. So their domicile of origin is India and they are still thinking about going back to India. As I say, the definition of "domicile" under Scottish law changed in 2006 and their definition is different from ours. So whether somebody is domiciled in England under Scottish law or under English law will have a different answer.

Q67 Lord Wright of Richmond: My Lord Chairman, could I just remind the Committee that Professor Matthews told us the one thing "domicile" did not mean was "domicile".

Mr Frimston: My Lord, the French and the English systems are surprisingly the same. The French "domicile" is probably closer to "domicile" than anything else there is in the civil law, and Professor Matthews is, of course, right that they are different. It is much more like "habitual residence". But similarly, "domicile" in America, "domicile" in Australia, "domicile" in South Africa, "domicile" in India all mean slightly different things, so it is a complex connecting factor which nobody really understands very well.

Q68 Lord Renton of Mount Harry: Declaring an interest, what is the difference in "domicile" between Scotland and England?

Mr Frimston: It is a question of the domicile of origin. There was a very good Law Commission report in 1985 which recommended we should change the definition of "domicile" but due to various lobbies at the time it did not get changed. The Scottish Parliament dusted down the report and passed a bit

of it under a Family Law Act in 2006. Under English law your domicile of origin is that of your father at the time you were born. Under Scottish law it is the domicile of your parents if they had the same domicile. If they did not have the same domicile, then it is the country with which you are most closely connected. So for a lot of my clients the definition is different.

Q69 Chairman: Can I just ask you about the exceptions to the proposal? Having decided the applicable law, then there are the exceptions for the special succession regimes in Article 22 and the payment of taxes and public policy. Does this not upset the whole apple-cart?

Mr Frimston: My Lord, I could not agree more in that it is a very loosely defined provision, but equally I presume that on any regulation there does need to be a bit of wriggle room. The question is, what are the borders of that wriggle room? I think in relation to tax it is inevitable. I think public policy is much more difficult. So there may be bits in the negotiation in relation to the special succession regimes which might be helpful to us. I think in due course, as and when this Regulation comes in, the European Court will get round to putting some limits on this. Whether the provision of the house in the Tyrol should be allowed a special succession regime or not, or whether the farmhouse in Ireland should be allowed that, I do not know, but I can see that nationally each state will have particular things they say are important for particular reasons.

Q70 Chairman: Can I ask you perhaps an obvious question? If this is drafted in such a way that it is all going to depend on how the court interpret it, whether it is the ECJ or any other court, does that not of itself make it somewhat unsatisfactory? We spend hours debating in other parts of this building whether something is certain and we know what it means, and trying to amend it so that it is specific.

Mr Frimston: Yes, my Lord, I entirely agree that the Regulation will be much better if Article 22 was not there, but again it is a political question, I think, as to the extent to which one will be able to negotiate a regulation without something in there.

Q71 Baroness O'Cathain: We are talking about all these laws and all these people getting their sticky hands on the farmhouse in Ireland and the ranch wherever. How much choice should a testator have as to the law to be applied to his or her succession?

Mr Frimston: I think that is something which does divide this side of the Channel from the other side of the Channel in that I think our general starting point is that testators come first, whereas I think the other side of the Channel the starting point is that perhaps the heirs come first. Certainly in our responses we

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have suggested that testators should be able to choose not only the law of their nationality but also the law of their habitual residence at the time of their choice so that they can have some certainty and can plan their affairs properly. One can see that from a French perspective the idea that French nationals could come over to London, work here and put everything under English law and then go back to France is more difficult for them. I can see that. It is the balance between testamentary freedom and the reserve, but equally we have our own ways of protecting dependents. We make spouses and ex-spouses people who can always make a claim on an estate. We make dependents people who can make a claim on an estate, which is a different perspective if you go to France, where it is only the children who are forced heirs. The spouse is not a forced heir. So we all have very different perspectives about what succession law should or should not say.

Q72 Chairman: Can I just interrupt you? You were talking about France there. Somewhere along the line it was suggested to us that most countries have the sort of provision we have, enabling former wives or current wives or children to claim if they can prove a past dependency and need. How correct is that, that most regimes in Europe have that provision in law so far as you are aware?

Mr Frimston: All countries within the European Union have a law of some sort or another. The civilian perspective is to give forced heirship shares to give a reserve to particular people and each country has different rules. So generally the spouse and the children are forced heirs. Normally they are entitled to one half of what they would have received on intestacy. Some countries increase that. I think that somewhere like Finland it may be that five-sixths of the estate has to go in particular different ways. France is unusual in that the spouse is not a forced heir, it is only the children who are forced heirs. In France, if you have got one child one half of your estate must go to that child and if you have got two it is two-thirds; if you have got three or more it is three-quarters that must be divided between the children.

Baroness O'Cathain: It makes a nonsense of the idea that it is called a will, does it not, because no will at all is applied? The will of the testator does not seem to be worth a row of beans, does it? Why do we want to opt in? I have just finished the whole rigmarole of updating my will and I will be jolly furious if some clerk in France or something had anything to do with it!

Lord Renton of Mount Harry: Long live the European Union!

Baroness O'Cathain: If it is as stupid as that, no. The fact is, you have said, unless I have completely misunderstood you, that each country seems to have different laws. Let them get on with it. Why does the

European Union as a whole want to go and muck up with each one of us as individuals? We have perfectly well managed for all this time in our own separate ways. I think this is a nonsense.

Q73 Chairman: That is, of course, a point of view. The object of the exercise was not to muck up everybody's will but to try and solve some problems. I think the question for us is, is it going to solve any problems? Is it going to solve problems or create more problems?

Mr Frimston: My Lord, perhaps I could just put in at this stage, for my clients who own a house in France, which is subject to French law whatever they want to do, this Regulation is ideal. They can choose English law to apply to all of their things, including their French house and take the French house out of the French reserve. The difficulty at the moment is the conflicts between the various laws. If we could find an applicable law on a choice of law which meant that your estate was dealt with under one law, life would be a lot more simple. It is true that if you are domiciled in England and Wales and you only live in England and Wales and you only have assets in England and Wales, and you make sure that your children never leave England and Wales, then you do not need this Regulation, but I do find it increasingly difficult to find people who fall into that category.

Q74 Lord Wright of Richmond: Can I just very briefly take you back to allowances? You have not mentioned Ireland, which is another government which will have to take the decision whether to opt in or not. How similar are Ireland's problems to ours with this Regulation?

Mr Frimston: My understanding is that Ireland has its own particular concerns about the Regulation, although if you go back to the 19th century a lot of Irish law was very similar to ours. It has moved on and changed over the years and there are provision in Irish law protecting spouses in a particular way and the Irish farmhouse, and I understand the concern at the moment is that the Irish Government think that there are a number of spouses who are left in Ireland on their own and their husbands may have left Ireland and that if the Regulation came in, some of the provisions protecting those spouses might be overridden. So I think Ireland has its own particular concerns. I am not an Irish lawyer, so I do not know the extent to which those are realistic or otherwise.

Q75 Lord Wright of Richmond: I wondered the extent to which in your discussions with the Commission an Irish view has appeared to make it likely that they might be an ally or not?

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Mr Frimston: My understanding is that the Irish Constitution is such that the Irish Parliament has to agree to an opt in and my understanding is that they are unlikely to do so.

Lord Wright of Richmond: Thank you very much.

Q76 Lord Rosser: Listening to what you had to say, to what extent is this really about the law and to what extent is it about a clash of culture that is causing the difficulty?

Mr Frimston: I am a lawyer, so I am good at giving legal answers but I do not know that I am good at giving cultural answers. I think it is true that succession law is seen as part of the inherent culture of a state and certainly a state such as Poland, which for a long time felt itself governed from Moscow, wanted to escape from that and has been busy dusting down its own law and developing its own personality and I suspect that it is nervous about the idea that some of that might be taken away from it. So I think that certainly succession law does have a very big cultural impact. The trouble is that the current position does not protect that. At the moment if a Polish person wants to escape Polish law they buy a house in London, which is subject to English law, and they can do what they want with it, though the trouble always is that however much a particular Member State might have strong views about its culture and its law, individuals can find ways around that and ordinary folk are still left with a mess which they have got to try and sort out.

Q77 Baroness O'Cathain: How will the proposal affect the UK system of using personal representatives to administer a succession?

Mr Frimston: I think it is one part of the Regulation which I think has got it fairly well done really. It says very clearly in Article 21 that even if French is to be the applicable law, we can insist upon the use of personal representatives in relation to the administration of assets in England and Wales. So I think we have got an excellent current solution whereby we can still insist on personal representatives and, the other way round, if English law applies the personal representatives can go and administer the estate in France.

Q78 Chairman: Does it apply *vice versa*? Is there a sort of *quid pro quo* for that whereby heirs, where they have not got PRs, can administer the estate in England?

Mr Frimston: No, my Lord. Article 21 specifically says that although French law might be the law applicable to the succession, nothing stops us insisting upon the appointment of personal representatives. So I think it has got it right. I think the elephant in the room on the whole Regulation, of course, is tax and the tax effect of some of that may

be quite interesting. Therefore, that may be a bit of a dampener, but that is not something which I think the Regulation can do anything about.

Q79 Lord Renton of Mount Harry: The point there being that the tax is very different in different countries, is that right?

Mr Frimston: My Lord, yes. The way it works is very different.

Q80 Lord Renton of Mount Harry: I meant in a percentage sense?

Mr Frimston: That is also true, my Lord. For example, in Italy Inheritance Tax is a maximum of eight per cent, whereas in France Inheritance Tax is a maximum of 60 per cent. So there are very different positions, but the general position is that the United Kingdom is the last place which still has an estate duty, where it is the personal representatives who have to pay a tax out of the estate. In every other country which has a tax on death it is an Inheritance Tax and it is the heirs who pay tax on what they inherit. That is the position in Ireland as well. So the difficulty for France, for example, is that if the English personal representatives go to France, because they have never really had those animals before how are they going to be taxed? If the heirs claim their inheritance intact in France they might only pay 20 per cent tax. In France if strangers inherit assets they pay 60 per cent tax. So the tax effect of what this Regulation is going to do may be interesting.

Chairman: Tax is probably a good time for us to go to the Earl of Sandwich to ask about claw back.

Q81 Earl of Sandwich: You have already touched on this through Lady O'Cathain's questions. I am fairly new to this, but if I have understood it claw back is going to be a horrifying prospect and we are not going to go anywhere near it, but what I think would be interesting to the Committee is what is the impact of it on those who are opting in and those who are contemplating opting in? So if you could look at the Community first and then come back to what sort of impact you think it would have here, but I think we can all guess that. We want to know how others are suffering from it.

Mr Frimston: My Lord, claw back, I think, is a tricky topic and I think one needs to distinguish between rearrangements between heirs and rearrangements not between heirs, so that in general terms in the European Union rearrangements between heirs often have no time limit, whereas rearrangements between people who are not heirs usually have a time limit. So if the deceased gave money to a child, then that child has got to bring that back into account when the estate is distributed, and in many ways that is similar to the existing position in England. We have that law

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ourselves. We have the rule against double portions. In general, of course, it is true that existing cultures know their own law and therefore behaviour is changed by the knowledge of that law. In England we make wills for clients and advise them about the 1975 Act and that affects the way they make their wills. In many European States people say, "I won't bother making a will because it is all going to get divided equally between the children anyway," or if they make gifts then they divide them between the children equally so that it is not an issue. I think the tricky question is claw back between non-heirs and certainly I know that charities in this country are very worried about it, but if one looks at European Union Member States, Austria, for example, has got a two year time limit on claw back, the Netherlands five years and Germany ten years with a sliding scale going down ten per cent every year. It is France and Italy that are the problem, where they have lifetime claw back. That is why I say I think countries like Austria and the Netherlands will regard this as as much of a problem as we do and will need to find some solutions. It is not true that we do not have claw back in this country. Under the 1975 Act if the deceased made gifts with the intention of defeating the 1975 Act the court can override those and claw those back. We are used to claw back in all sorts of ways, whether it is on insolvency, where if somebody has gone bankrupt and tried to give things away and hide them then the court can go after them and get them back. We are quite used in divorce proceedings, in the divorce courts, to make orders in relation to trusts that have been created and take the money back, so we are not completely unused to the idea of claw back. It is a question of the way it works. So I think in practice there are some examples, for example the case in Northallerton recently of Dr Gill, whose mother left everything to the RSPCA and they spent £2.5 million, or whatever it was, on legal fees. It might well have been a good case for everybody to sit down and try and work things out whilst they were alive. I think if the Regulation came in and if we had a limitation period, that charity would ask responsible questions: "If you are giving me a million pounds, are there any heirs who might be involved? Shouldn't we be sitting down and having a contract?" So I think it puts a little more onus on donees to say, "Where's this money coming from?" In the days of money laundering regulations it is the sort of question we are all used to asking.

Baroness O'Cathain: But is it not surely the duty of the lawyers who draw up the will in the first place with the person who is going to leave this money to bring these points to their attention and to avoid £2.5 million pounds being spent on lawyers?

Lord Renton of Mount Harry: Yes.

Chairman: Nobody wants to answer that question!

Baroness O'Cathain: I just think we need a bit of common sense in this, do we not? We are getting all tied up like those knitting balls that cats play with!

Q82 Earl of Sandwich: I am just surprised at the way in which Mr Frimston has described the implications for the UK as though we are going to simply be developing good things. The avoidance legislation that we are used to, money laundering legislation. We do not want any more of that, I do not think. I do not think anyone is going to want it, but you seem really to be in favour of this as a benefit to our own economy, if you like?

Mr Frimston: My Lord, as I say, I think it is the ordinary folk who need this Regulation and they will not be troubled by claw back. They will not be giving a million pounds to somebody or other, and those who do want to give a million pounds can spend money with lawyers like me or Professor Matthews and we can discuss the issues and find solutions for them.

Q83 Chairman: Can I move on to this section which deals with jurisdiction, Mr Frimston? I have to say I find that all really rather confusing, whether these Articles on jurisdiction are a good idea and how do they fit with applicable law. It seems that Member States have got a sort of residual jurisdiction to deal with the estates of people who die in other countries. Can you expand a little on all that? Is it going to lead to all sorts of conflict, or could we go forward without any of this?

Mr Frimston: My Lord, as I say, I think if the Regulation just dealt with applicable law then a lot of people would be very happy. If it is to include jurisdiction and the idea is that one has one court that can think about all of these things, the question is which court should it be? As I say, a number of us have thought that it should be the court whose law is going to apply and that if somebody makes a valid will choosing the law of their nationality then it would be much more sensible if the court of the nationality that is going to apply its own law should have jurisdiction. That was not accepted in the Regulation and we are stuck with this position that it is still the jurisdiction of the habitual residence. The idea that English people dying in Spain make a will choosing English law but it is still going to be the courts of Spain that have got jurisdiction does seem rather foolish. I think the residual jurisdiction is less of an issue in that clearly if somebody dies domiciled in Florida, is resident in Florida but leaves property within the European Union, some court within the European Union must have jurisdiction to deal with it and there is a hierarchy of places, so I think it is a fairly sensible sort of position.

Q84 Lord Blackwell: In the situation you gave where an English person dies in Spain but chooses English law, would the Spanish Court therefore be in the position of having to interpret and make a judgment on English law?

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Mr Frimston: Yes, my Lord. There is provision in Article 5 for the Spanish Court to say, "Since English law applies, we want to refer it to England," but it is within the discretion of the Spanish Court as to whether to do that or not. So it says it may pass it over to England, it does not say it has to, and the idea that, for example, if some of the children were in Spain the Spanish Court might well feel that it wanted to hang on to jurisdiction and would not have to pass over, but would still then have to be interpreting English law. So it would mean that English lawyers like me would have to be flown over to Marbella to tell them what English law might or might not mean.

Q85 Lord Blackwell: If it were appealed, in which court system would the appeals be heard?

Mr Frimston: My Lord, it would go through the Spanish Court system.

Q86 Lord Rosser: As a Committee and as a general statement, we do favour mutual recognition and the facilitation of cross-border enforcement, but having made that statement can I ask, do you see any policy or technical or practical problems in connection with the recognition and enforcement that we have been talking about either of decisions or of authentic instruments? Are there any red lights to flash up?

Mr Frimston: My Lord, I would again say that if the Regulation only dealt with applicable law I would be not unhappy. It is the fact that at the moment we do not recognise the decisions of other succession laws and that the Regulation proposes that we should that makes it all quite difficult. Issues about recognition are really quite tricky. Malta does not have divorce, so does that mean that Malta will not recognise the divorce of a spouse and therefore there will be succession issues as to whether they are married or not. Greece does not recognise civil partnerships. Will there be difficulties about recognition of a civil partner under Greek law? So there are going to be all sorts of problems in relation to recognition. Whether it is realistic to say that it might be excluded now, I would have thought it is not. If one is going to have private international law that applies across Europe, then recognition is necessary. We do need to have one court making the decision about the law and then that being recognised across Europe. Recognition is about recognising a grant of probate. That is what the politicians in Brussels, I think, have been asking for. It is the idea that there is the European Certificate of Succession, that an ordinary citizen can carry around Europe hoovering up their bank accounts. It is more complex than that, but that is where the requirement for recognition has come from. Certainly authentic instruments is another problem and another issue and the fact that we have different systems of probate, so that in Italy or France it will be the notaire who produces a notarial certificate,

whereas in the UK, Germany or Austria it will be a court document does produce its own complications.

Q87 Chairman: I think that leads us on to the question of the European Certificate of Succession. I think the Committee understands in practical terms how something that is acceptable everywhere would be of use to people, but do you see any difficulties with what is proposed and how it is proposed in the sense that it is actually quite a complex document?

Mr Frimston: My Lord, I think it is a more complex document than it looks in that if there is an English personal representative going to France, explaining to France what the powers of a personal representative are can be quite tricky. The question always one gets from a civilian is, "Who are the heirs?" Really what they are asking you is, "Who is entitled to take hold of this asset and deal with it?" and therefore for us that is the job of the personal representatives. So I think the certificate could be helpful. In my case of my lady whose brother died in Germany, the German certificate of succession would have been really useful. She could have brought that, the Probate Registry would have seen it and would have produced an English grant of probate without any difficulty. So I think it will have value. It will have more value in some cases than others.

Q88 Chairman: It is interesting that you say that. You say you would envisage that she would bring the certificate of succession from Germany which she would then take to the Probate Court?

Mr Frimston: Yes.

Q89 Chairman: You would not expect it to be done in such a way that the certificate was acceptable without the additional grant?

Mr Frimston: No, my Lord, and that would be the case in many jurisdictions because most jurisdictions do depend upon a local procedure in order to collect the tax. That is not just a UK position, that is true in France and in other jurisdictions. So there is certainly no way that France is going to be very happy about somebody turning up with an Estonian certificate, taking the money and running off with it without the tax position being checked first, and that will be the same for us. The reference to the European certificate does very clearly say, in Article 36(2), that the use of the certificate "shall not be obligatory and shall not be a substitute for internal procedures", and my understanding of the meaning of that is that it will be a state's decision as to whether it is obligatory, and therefore it will be for the United Kingdom to say, "Yes, do come here with the European Certificate of Succession and that will help you get a grant of probate." It will not remove the need for the grant of probate. As I say, it may well be that between France and Italy they are very happy to accept each other's

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notarial certificates without anything further, but that will be, I think, a question for each state to decide. But it would still be helpful, even though you still have the internal procedures, because you would have a document which enables an ordinary person to take it to the probate registry or the notaire with the relevant information and enable them to get the certificate locally that they need easily.

Q90 Chairman: You are satisfied, are you, that the Regulation makes that certificate conclusive to whomsoever it is produced?

Mr Frimston: I think there is some tidying up that is needed in the Regulation. The effects of the certificate in Article 42 say that anybody who pays out to the bearer is protected and anyone who acquires property from the bearer is protected.

Q91 Chairman: Forgive me, if in fact you are saying that somebody has one of these certificates that have been produced in Germany and trots along to the Probate Court and gets probate, people will pay after the probate, will they not? So in a sense Article 42 and the effects of it are neither here nor there, are they, because nobody here is going to pay out other than on a grant from the Court?

Mr Frimston: Absolutely, my Lord. That is why I am saying it is going to be an optional matter for each State. So if a State wants to use it, it can do, but it will still be useful between European Member States. I do not regard it as something of huge significance.

Chairman: I think at one stage we thought it was the only thing that was useful, but never mind! At the very early stages. Are there any other questions?

Q92 Lord Rosser: Could I just come back, because you have said on more than one occasion that these proposals would help—and I think I use your words when you say “the ordinary folk”. I am not quite sure what your definition of “ordinary folk” is in this context. You said particularly in relation to the applicable law issue it would help, and then when you were responding to questions on claw back your answer was, “Well, as far as ‘the ordinary folk’ are concerned, they wouldn’t be worried about that since they are not the ones who are making million pound gifts.” So when you put this emphasis on “the ordinary folk” and the proposals helping them, are you saying that you would regard 90, 95 per cent of the people concerned being within your definition of “ordinary folk” or is it 51 per cent?

Mr Frimston: My Lord, I think it is nearer towards 95 per cent.

Chairman: Have any other Members any questions?

Q93 Lord Renton of Mount Harry: I do not feel greatly encouraged. Am I wrong?

Mr Frimston: My Lord, I think the whole thing is very, very difficult.

Q94 Chairman: Thank you. Is there anything you would like to add or if you think we are not comprehending something correctly?

Mr Frimston: My Lord, I think you have understood the measure of the difficulty.

Chairman: That could be the level of our understanding, that we do not understand it! Thank you very much indeed, Mr Frimston, for your assistance.

WEDNESDAY 9 DECEMBER 2009

Present:	Blackwell, L	Renton of Mount Harry, L
	Bowness, L (Chairman)	Rosser, L
	Burnett, L	Sandwich, E of
	Maclennan of Rogart, L	Wright of Richmond, L

Examination of Witnesses

Witnesses: MR JONATHAN FAULL, Director-General, DG Justice, Freedom and Security, and Ms CLAUDIA HAHN, Assistant to the Director-General, European Commission, examined via video link.

Q95 Chairman: Mr Faull, as you know this is a meeting of the Law and Institutions Sub-Committee of the European Union Select Committee that is conducting an inquiry into the proposed Regulation on wills and succession. We are particularly grateful that you are prepared to give evidence to the Committee and answer our questions. I understand that you have already been advised of the interests that have been declared by members. For the record, I declare my interest as a practising solicitor and notary public. As you know, because you have done this before, the session is on the record. You will be sent a transcript which will give you the opportunity to make any corrections that you wish. It is being broadcast live and eventually will be on the parliamentary website. I would be grateful if you could begin, for the record, by stating your name and official title and your position. In so doing, I do not know whether you want to make an opening statement or go straight to questions. Mr Faull, please address us now.

Mr Faull: Thank you very much. Good afternoon. My name is Jonathan Faull. I am, and remain for the next few months, Director-General of Freedom, Security and Justice at the European Commission. I am assisted today by my Assistant, Claudia Hahn, who is sitting next to me. I am very grateful to you for taking this evidence by video conference.

Q96 Chairman: Thank you. I take it that you do not want to make an opening statement on the proposal?

Mr Faull: No, I am happy to go ahead with questions.

Q97 Chairman: Perhaps I could just ask you this in opening. In the Commission's Impact Assessment you refer to the number of cases where there is a cross-border issue involving wills and succession and have made an estimate, I think 450,000, and ten per cent of those cause problems. I have to say that our previous witnesses have all indicated that it is very difficult to put a figure on the number of cases. Perhaps you could give us an indication of what you have based your figures on and how robust you believe those figures to be.

Mr Faull: Thank you. It is difficult to find precise data on which to base estimates in this area. We do not claim to be doing more than making the best possible estimate that we can based on studies, impact assessments, Green Papers, consultations, all of which led up to the proposal. The figure that we have given is not a scientific claim, but it seems to us to be the closest possible to a reasonable estimate of the size and magnitude of the problem. I can explain the methodology which went into calculating that figure, which I believe is contained in the Impact Assessment, if you wish.

Q98 Chairman: It might be helpful if briefly you could give us an indication of how that figure was arrived at.

Mr Faull: With pleasure. We start by estimating that roughly eight million Europeans live in a Member State other than the one in which they were born. That is in itself an estimate because there are no reliable figures kept for that purpose, but it is usually said that there are about eight million. I think we can assume that perhaps most of those people will own property in more than one European country, either immovable property or bank accounts, investments, and things of that sort. We also estimate that about 4.5 million people die each year in the European Union and that the value of the average estate, about 5.5 times the average per capita gross national income, is around €137,000. That means that the total value of estates per year would be €646 billion and we estimate that around ten per cent of the number of successions involves some international dimension and that leads us to the figure of roughly 450,000. The average value of estates we estimate would be around €274,000, making a total, again according to the Impact Assessment, of some €123 billion per year.

Q99 Chairman: Thank you. Also referring to previous witnesses, Mr Faull, they have indicated to us, as I think we recognise for ourselves, just how complex is this subject and how great the differences between the laws of succession and property are in the different Member States. There seems to be a

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feeling that this could all have an unintended consequence and the situation made worse, in a way, by some of the proposals in the Regulation on recognition and enforcement and perhaps it would have been better to limit the proposal to deciding upon the applicable law rather than being as ambitious as you have been in the proposal. Can I have your reaction to that?

Mr Faull: Certainly. We do not deny the complexity of the subject. If it were not complex it would not cause problems and we would not have to deal with it. There are many aspects of the subject which are not covered in the proposal. We thought, and still do think, that we had been reasonably modest and circumspect in dealing with the set of issues we have. We hope that in the subsequent legislative process we can persuade Council and Parliament that is indeed the case.

Chairman: Thank you.

Q100 Lord MacLennan of Rogart: We have had evidence, Mr Faull, from a number of people that the differences between the legal systems in different States of the Union are not just confined to classically the civil law and the common law, but also between civil law jurisdictions. In particular we have heard about the problem of claw back, which is a major issue dividing the systems between those who have assets given to them who can hold on to them and those who are not able to hold on to them because of the Napoleonic type of legislation. Can you give us some indication as to what is the extent of concern in countries other than our own, that is to say the United Kingdom? Have you had indications of comparable concerns?

Mr Faull: Yes. This has been a subject of considerable discussion and will continue to be so. It is certainly not simply a matter which divides common law jurisdictions from civil law jurisdictions, there are differences between civil law jurisdictions, there are differences between common law jurisdictions and, if I may say so, there are even differences within the United Kingdom. The legal situation is remarkably complex and we are well aware of the difficulties, once again, that arise because we are seeking to address them in this proposal. If the situation were less complicated it would be less necessary to deal with it. Yes, the differences between legal systems are very relevant in this regard and the issue of reduction, or claw back, is very much a matter of debate in the legislative process now underway in the Council of Ministers and the European Parliament. I am quite sure that there will be further debate on this and I hope very much that the proposal at the end of the day, when enacted as legislation, will provide answers satisfactory to all jurisdictions in all Member States.

Q101 Lord Wright of Richmond: Director-General, it is very nice to be in contact again. I remember with gratitude the evidence you gave several times to Subcommittee F when I was Chairman. Can you tell us, why did the Commission not define “habitual residence”, particularly as the European Court of Justice indicates that the meaning of the phrase depends on its particular legislative context?

Mr Faull: With great respect to the Court of Justice, that is true but not the whole picture because it depends certainly on the legislative context and it also depends very much on the factual situation in the case under consideration. Our legal advisers here in the Commission told us that it would not be useful, even if it were possible, to provide a general definition of “habitual residence” because it would almost certainly be too vague to be of much use to the persons called upon to use and interpret it. It is obviously an expression very widely used in different contexts in many of the legal systems of the European Union’s Member States, but we have taken the view that rather than seek to provide in advance a legislative definition it would be better to leave that to assessment of the particular circumstances of cases.

Q102 Lord Wright of Richmond: My second question is, in a sense, the reverse of that. It goes back to the discussion of whether the Regulation could not have been less ambitious. Could the scope of the applicable law provisions have been limited to determining who gets what?

Mr Faull: They could have been, but it seemed to us that would make it a rather inadequate proposal and would leave the debate in the legislature a little devoid of content because so many other issues would arise, would be discussed, and the proposal before the Council and Parliament would not offer any suggestions. Who gets what is obviously a very important question, but so is who does what in the sense of administration and execution. There were many other issues which we felt should be dealt with at this stage. We will see in the process of legislation precisely where the scope ends up, but we thought in order to start the legislative process it was a service to the legislative institutions of the Union that we set our ambitions a little higher.

Lord Wright of Richmond: Thank you very much.

Lord Burnett: Mr Faull, you have very kindly given evidence to us before and I am extremely grateful to you. I wanted to go back to Lord MacLennan’s question. He talked about claw back, and I would include with that the freedom to dispose at the testator or testatrix’s option.

Chairman: Lord Burnett, forgive me interrupting you but could we deal with this later on. We specifically deal with claw back later.

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Q103 Lord Burnett: My question is not to do with that actually. What I would like to know is what is the philosophy of the proposed change? Is it uniform succession rules? Is it swift understanding of applicable law on movables and immovables? Is it to ensure that individuals can choose within limits as to which law is available? It is that fundamental underlying philosophy behind the proposed changes.
Mr Faull: In simple terms it is that there should be one legal system applicable and that within the constraints to which you referred there should be a choice made available to a person making a will or making provision for succession more generally. Those are the underlying principles. Of course, however complex the issue, as I think we all agree it is, at the end of the day we would also like to provide legislation which is understandable for the general public.

Q104 Chairman: Carrying on with the applicable law for a moment, Article 22 includes some very wide derogations from the basic principle that the choice of law follows habitual residence. What impact is that going to have on the proposal? Does it not inevitably detract from any benefit which citizens would otherwise derive from this? In answer to Lord Burnett you talked about a common legal system. There is a paper that has been circulated of questions and answers from the Commission in which there is a statement that says it has no significant effect on the legal systems of Member States. I just wondered how you reconciled that part of your answer to the question in that guide.

Mr Faull: I think there may be a misunderstanding. Obviously each Member State has its legal system, or systems, and what we are saying is that the individual should be able to choose one, and in most circumstances only one, applicable to his or her succession on the basis of freedom of choice within the constraints which we have discussed. I do not think there is any contradiction between the choice of the individual and the maintenance of each Member State's separate system. This is not a harmonisation measure setting up a European law of succession; it is providing Europeans with clearer rules about which one to choose. On your question about what are said to be in the question I have seen as broadly drafted derogations, we rather hoped they were narrowly drafted and deal with specific circumstances which are enumerated in Articles 22 and following. No doubt in the discussions in the Council and the Parliament there will be further issues of possible derogation to be considered, but these are ones which we were able to foresee at the stage following the consultation process to which I referred earlier and it seemed to us appropriate to put them in. If the language is not as tight as it could be we will certainly

look at that again in the process in the Parliament and the Council.

Q105 Chairman: Just as a last question on applicable law, Mr Faull, the question is posed why not give the testator more choice as to the law to be applied to the estate by making available the possibility to choose the applicable law of habitual residence at the time he makes the will?

Mr Faull: We start from a position in which in most countries most of the time people have no choice at all. Looking at it from that end of the argument, this is already quite a radical proposal. Frankly, I do not think we would have got very far if we had gone the whole hog, as you suggest, and allowed people to choose even more freely. Most of the criticism we are hearing is that we have created too much choice.

Q106 Earl of Sandwich: Mr Faull, I am a very new member of the Committee. Good afternoon. I was one of those quite horrified to read about claw back in the Impact Assessment and I think many people in this country are going to be appalled by this prospect. I then was mollified a little by Professor Kerridge's evidence that we have had in the last few days and he seems to think there is common ground if you take, for example, family provision law in the 1975 Act in the UK and you can find examples of not forced heirship but something of that kind. Do you feel there is more common ground than is made out in the Impact Assessment, in particular with reference to lifetime gifts? I think what worries people is that they are now built into our law. Then the question of charitable gifts as well will cause great alarm.

Mr Faull: We are certainly aware of the sensitivity and importance of this issue and there has been a lengthy process of discussion. In the various consultation proceedings we have conducted with British lawyers, British Government officials and others on this, so we are not underestimating the issue at all. It is indeed heartening, at least at a philosophical level, to know that in all of our countries, but to widely differing degrees, there are limits placed on the absolute freedom to dispose of one's estate as one wishes. We cannot hide the fact that the circumstances which you describe as having mollified you a little are very different from the very strict rules in force in some other countries. There is a difficult issue and it is one which has to be dealt with. It is one which will, of course, play a big part in the United Kingdom's ultimate decision whether or not to be part of this legislation; we are aware of that. We tried to craft our proposal in a way which was most likely to meet the support of most Member States in the legislative process, but that process is now underway and it is going to be time for the hard decisions about where precisely balances should be struck. This is a process, by the way, to which your

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Committee is contributing. We still hope that we can come to some satisfactory conclusion which will allow all Member States to be part of this legislation when it is ready for adoption. This is, indeed, a very difficult and sensitive issue for all sides.

Q107 Lord Burnett: I suppose, Director-General, we are, are we not, in Britain out on a limb or are there any who have similar regimes to us? For example, the Earl of Sandwich mentioned the Provision for Family and Dependants Act. In my experience that does assist widows but not many others. What other countries have similar regimes and allow testators and testatrices effectively pretty considerable freedom to dispose of their assets as they will?

Mr Faull: There is no Member State, or part of a Member State, which does exactly what England and Wales do. In saying that, I am indirectly pointing out that the situation in Scotland, as we understand it, is different and closer to the situation in the continental Member States. You English and Welsh are a little bit out on a limb in the sense that you have the most liberal—if that is the word to use in this context—system. The others share a range of restrictions far in excess of the ones present in English and Welsh law.

Q108 Lord Burnett: Thank you. That relates to the position of trusts. Do you see these Regulations having any impact whatever on UK trust law, or are the provisions contained in these Regulations intended to have any knock-on effects, effects on any other matters, other than those relating strictly to succession?

Mr Faull: No. We believe after lots of discussion and lots of reflection that we do not have a problem with trusts in this proposal. That was a widely debated issue and many of my colleagues learnt a great deal about the law of trusts and, I hope, satisfied British officials and British lawyers we came into contact with that this proposal would leave the law of trusts untouched. I think the claw back is the main issue. Even though the law of England and Wales is very different from the others, the reason why so much effort has already gone into, and will continue to go into, finding solutions which can be satisfactory for all parties is quite simply that there are many foreigners living in England and Wales and there are many Britons living in other jurisdictions of the European Union, large numbers, and we believe among our eight million people living in other countries those people too deserve attention. Nobody ever thought that we needed to do something simple and surgical and craft something for 26 countries and allow the United Kingdom not to opt in, it seemed to us that would be unfortunate for foreigners living in the United Kingdom and for Britons living abroad and, by the way, for the Scots.

Q109 Lord Burnett: Could I just ask for a reply to the second limb of my question. Is this paper supposed to deal only with succession matters and is it intended to have any other consequence whatever outside the law of succession?

Mr Faull: I do not mean this to be in any way an evasive answer. In a broad sense of what is meant by succession matters and the law of succession the answer is definitely yes, but I cannot deny that what is considered to be the law of succession in some countries and their languages may not be exactly the same as in others. I know that there has already been considerable debate about whether some of this proposal goes beyond what some legal systems consider to be the law of succession *stricto sensu*. We do not think that we have done that. We have certainly not done it deliberately. I know there is concern about unintended consequences and we have spent a long time trying to foresee all the consequences that we can and, of course, the legislative process is far from over and we expect national parliaments such as your own, the European Parliament and the Council of Ministers to continue this debate probably for some time to come.

Q110 Lord Rosser: Mr Faull, we have heard evidence that where a testator has chosen an applicable law other than his or her habitual residence there is a significant possibility of the courts of the Member State of habitual residence retaining jurisdiction. I would have thought that could create complications. Should not the link between applicable law and jurisdiction be mandatory?

Mr Faull: I do not think we would stand much chance of persuading most Member States that there should be a mandatory link. The link between applicable law and jurisdiction is, indeed, as you say, not mandatory and the courts of the habitual residence may apply the applicable law chosen by the testator or the testatrix. The proposal does provide for the possibility of referral to a court of a Member State, the law of which has been chosen, if that court is better placed to rule on the succession. In our proposal we have chosen a flexible rule which would allow for the two to come together but would not force them to come together.

Q111 Lord Rosser: You do not feel it has any downsides?

Mr Faull: No doubt it would be neater and more convenient for courts to apply the law with which they are most familiar, and so bring together choice of court and choice of law, but frequently that does not happen in private international law, these are usually considered to be two separate issues. Frankly, that may come at a later stage of development of European law in this area, but at this stage where we are starting out on what—I repeat—is considered by

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many to be a rather radical proposal, that is probably a step too far at this stage.

Q112 Lord Rosser: As I understand it, the proposal would confer on the courts of a Member State a broad residual jurisdiction to deal with the succession of those who die habitually resident in a third country and would combine that with only a limited facility for the transfer of jurisdiction. If that is right, will that not cause potential difficulties? For example, would it not be a recipe for forum shopping?

Mr Faull: We are aware of that danger, of course, which is why we hoped in the proposals, Article 6, to have provided for circumscribed circumstances in which that residual jurisdiction rule would apply. Once again, the test of how good the drafting is, perhaps among things, certainly has to involve an assessment of whether it invites or facilitates forum shopping and we have to make sure that is not one of the unintended consequences. Looking at Article 6, it seems to us that we have a sufficiently clear set of rules in (a), (b), (c) and (d) to substantiate the residual jurisdiction provision.

Q113 Lord Burnett: Why should there not be forum shopping? Why should people not have the ability to elect to have their estates administered by any law within the EU? What is the reason for that?

Mr Faull: Any law within the constraints of having to show some reasonable link is what we are trying to do. People should be allowed to choose the law most relevant to their circumstances, but we want to avoid forum shopping which would mean looking for the country and its courts where the most suitable result might be obtained.

Q114 Lord Burnett: What do you mean by "suitable result"?

Mr Faull: Whatever the result sought. People forum shop with a certain set of objectives in their mind and forum shopping means going where you think you have the greatest chance of having those objectives satisfied.

Q115 Lord Burnett: What is wrong with that?

Mr Faull: Because there should be a real link between the forum and the matter being considered that would be in the interests of the heirs, the creditors, all the people concerned in the case of a succession, some of who might find it more onerous and expensive to have to follow someone's forum shopping than others.

Q116 Lord Burnett: Have you taken soundings from the treasuries of individual Member States? I am talking about inheritance tax now, taxation matters.

Mr Faull: We have deliberately excluded taxation matters from the scope of this proposal. It is absolutely neutral in tax terms. Each Member State has its tax system which will apply to successions covered by its taxation law. This is not about tax.

Q117 Lord Burnett: That is not quite correct because if the assets are not available to be obtained in an individual jurisdiction by a treasury, an Inland Revenue, or whatever, it is going to make things more difficult for them anyway.

Mr Faull: Yes, but I do not see how the Regulation as we have drafted the proposal contributes to making that more difficult than it would be otherwise.

Lord Burnett: I probably might not agree with that but, nevertheless, that is it, I have made the point.

Q118 Chairman: Mr Faull, this Committee has generally favoured mutual recognition and the facilitation of cross-border enforcement in a variety of different areas, but it has been suggested it would be going too far to treat authentic instruments drawn up by notaries as if they were court decisions. Have you any comment on that?

Mr Faull: They do play an important part in practice in succession matters and we have provided four specific safeguards, including recourse to the courts and an appeal, if there is doubt about the enforcement of an authentic instrument. Given the important role they play in the law of succession, we thought it necessary that the basic principles should be of mutual recognition and enforcement.

Q119 Chairman: Thank you. Going on to the European Certificate of Succession, this again was something which the Committee was quite enthusiastic about to begin with but one of our witnesses has interpreted Article 36 to mean the UK could retain an obligation for the holder of a Certificate to secure the appointment of personal representatives by a UK court in order to deal with property in the United Kingdom. Do you think that is correct? If it is correct, does it not somewhat undermine the perceived usefulness of the European Succession Certificate?

Mr Faull: First of all, I think it is important to record that the European Certificate would not be compulsory, that its effect should be recognised in the Member State where it was issued, and that the law applicable to the succession should not be an obstacle to the application of the law of the Member State in which property is located where it is subject to the administration and liquidation of the succession to the appointment of an administrator or executor of the will. Under our understanding of the rule and laws applicable in the United Kingdom there could be the appointment of an administrator under English law, and here I have to concede that there is

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a tax relevant issue, in particular where there is a taxation issue to be considered, but that would be at the discretion of the British authorities in this case. We have looked carefully at the suggested interpretation of Article 36 and are consulting our lawyers on this because it is not an interpretation which immediately came to our minds or one that we had intended. We will provide you with a written statement on that as soon as we get advice from our Legal Service.

Q120 Chairman: Thank you. Carrying on with the question of the Certificate and, again, suggestions that have been made to us in evidence. It has been suggested that because successions can be so complex it is too much of a risk to create a presumption that the contents of an ECS are correct and to give third parties absolute protection on the back of that Certificate. Do you share that concern?

Mr Faull: I understand it. It strikes me a little as a counsel of despair. We want to make the Certificates effective and Article 40, which deals with the Certificates, provides the courts may carry out their own inquiries and consider all matters of evidence brought before them on the Certificate. It is not a blank cheque. It will reflect a genuine understanding of the situation and can be the subject of further consideration by the court.

Q121 Chairman: Our understanding also is if there is an error in the Certificate it has got to go back to the original issuer to correct it. Is this not going to be a somewhat cumbersome procedure?

Mr Faull: It could be, but I hope not and I hope it will not be necessary very often. To go back to the source seems to be the most sensible way of dealing with an error when it is established.

Q122 Chairman: Do you see maybe not so much difficulty if the issuer is a court, but more difficulty if the issuer is a notary on the basis that notaries are mortal?

Mr Faull: Courts are made up of men and women as well, but they are institutions. Notaries in the countries where they are very firmly established as an indispensable part of the system are pretty institutional as well. In my personal experience, they even tend to be passed on from parent to child, so they have their own succession issues as well, and they take on a permanence which I think deserves some respect.

Q123 Lord Wright of Richmond: Can I ask, are you aware of any other parliamentary chamber taking evidence on this subject at the moment?

Mr Faull: No, not at this stage, which is a compliment to you, if I may say so.

Lord Wright of Richmond: Thank you.

Q124 Lord Renton of Mount Harry: Mr Faull, might I ask you a rather basic question, not being a lawyer. I have two pieces of paper in front of me. One is from *The Economist* of 15 October which is headed, "Where there's a will, there's a row", and it then follows, "What inheritance laws tell you about Europe and why Britain is the odd man out". The second is from the *Guardian* of 28 November and it is headed, "Spanish bank still won't free my deceased mum's account. An agonising battle to sort out a relative's estate remains unresolved a year after their death". From your very expert position, are you optimistic that you will be able to reach a solution to this succession story which will make it easier when people's relatives die with properties scattered over Europe than it is now?

Mr Faull: Yes, I am very confident. I think that this legislation, if enacted, will not solve all problems but will solve some problems. Once we all get used to having European law in this area I think that some of the remaining problems may prove to be easier to address in due course. I hope very much that the United Kingdom will end up joining in this legislation because I think of not only the foreigners living in the UK but also of the Britons living elsewhere and the sorts of issues to which the *Guardian* and *The Economist* articles you mentioned refer. The current situation is extremely complicated at a very difficult time in people's lives. It is complicated anyway within our countries, but it is considerably more complicated from one country to another, to which one has to add, of course, the bewildering variety of court systems, languages and so on. We believe that we can make a contribution to making the lives of Europeans moving around their Union a little easier at a very difficult time. I do not make exorbitant claims for this proposal. It is not as modest as some would wish and it is not as ambitious as it might have been, but it does deal with some of the main problems and, above all, within limits gives people the right to choose a legal system with which they have a real connection and, therefore, with which they are likely to be familiar and is likely to be expressed in a language and in terms which they can understand readily.

Lord Renton of Mount Harry: Thank you. That was an interesting reply.

Q125 Chairman: Have members any other questions for Mr Faull? Mr Faull, is there anything that you would like to add to your evidence that we have not

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covered in questions or where you think we may be misunderstanding the position and you want to correct us?

Mr Faull: No, not at all, just to repeat that I will write to you as soon as possible on the Article 36 point and, once again, to thank you and your Committee for leading the way among national parliaments in

making a telling contribution to our consideration of an important subject.

Chairman: Thank you, Mr Faull. May I thank you on behalf of the Committee for giving us your time this afternoon. It has been very helpful indeed and we are very grateful to you. Thank you for agreeing to take up the outstanding issue and write to us. Thank you.

WEDNESDAY 16 DECEMBER 2009

Present:	Bowness, L (Chairman) Maclennan of Rogart, L O'Cathain, B Renton of Mount Harry, L	Rosser, L Wedderburn of Charlton, L Wright of Richmond, L
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Examination of Witnesses

Witnesses: LORD BACH, a Member of the House, Parliamentary Under Secretary of State, and MR OLIVER PARKER, Ministry of Justice, gave evidence.

Q126 Chairman: Lord Bach, good afternoon. Thank you very much for coming. Could I just say at the outset that two of our Members, Lord Renton and Baroness O'Cathain are involved in the debate which is just about to finish, so I am hopeful that they will be joining us. For the record, can I just state that you have got on the table a list of the interests which have been declared by Members. I declare my interest as a solicitor and notary public. The session, as you know, is on record. It is being broadcast and it will be available on the website. As you know all too well, you will get a transcript which you can correct if necessary. Perhaps I could ask you to introduce your officials, and I understand you would like to make an opening statement as well.

Lord Bach: If I may, thank you very much, my Lord Chairman, a very brief one. Thank you for the invitation to come here today. We are delighted that the Committee has focused on what is a very complex and important dossier. We look forward very much to seeing the results of your inquiry and the help you can give us. Can I introduce Oliver Parker. He is a senior lawyer in the Ministry of Justice with particular responsibility for private international law matters and so will be the main legal adviser in relation to this dossier and someone who will negotiate for this country in the negotiations. Both he and I have been before this Committee together before, as I think some Members will remember. I will be asking, with your permission, my Lord Chairman, to ask Oliver to respond not just on some of the more technical matters but clearly on those. I think that would be much more use to the Committee than if I were to hold forth on those. My Lord Chairman, the Government did earlier today announce by way of written ministerial statement that the UK will not be opting in to this dossier at this stage, which means, of course, that the UK will not be bound by it. The eight week period from publication of the decision, of the document, has passed. It passed last Wednesday, on 9 December. Officials had been given to understand that the Committee would not in fact be expressing an opinion as to opt in or opt out. Certainly there was no intent at all, as I think you know, to pre-judge the Committee's view, but I have to tell the Committee

that given the level of interest expressed on this proposal, as demonstrated by the very high response to our consultation—which I know you may ask me about in a minute—and having regard to the possibility of what we consider might be very unhelpful media speculation over the quite quiet Christmas and New Year period, we did think there were some advantages in making an announcement in Parliament before the recess. What we would very much like to do, though, is to take the Committee's opinion in its report into account during what will undoubtedly be incredibly difficult and complex negotiations. My Lord Chairman, hundreds of thousands of UK citizens, as the Committee knows well, live and work in other EU Member States and millions of others enjoy holidays in the EU. The diversity of rules and the systems that apply to succession in different Member States can make for considerable complications where a person owns property across borders. In principle, therefore, efforts to simplify and clarify the rules which apply to international successions we feel could produce benefits, huge benefits even, for UK citizens and we are supportive of the project in principle, but there are potentially significant problems, as the Committee has heard in evidence, identified with the proposal which the Commission has published. These were set out in the public consultation. The consultation document highlighted two key problems. The first and most difficult of these was, of course, claw back. We believe the introduction of this into the UK could create major practical difficulties, particularly for the recipients of such gifts, including charities. The second key concern was the proposal's reliance on habitual residence as the sole connecting factor. This, we feel, could lead to unforeseen and unfair outcomes. I know we will be discussing both of these issues today. I should tell the Committee now that there are other issues of concern and at this early stage of deliberation there may be issues which emerge only later, but these two issues are clearly major concerns and that view was confirmed by our public consultation. So in summary, the Government has concluded that the potential benefits of this proposal are outweighed by the risks and has decided

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that the best course of action is not to opt into the proposal and not to be bound by the outcome. We do intend—and I hope the Committee agrees with this when it comes to write its report—to engage fully with the forthcoming negotiations between Member States on this proposal with the aim of removing the points which currently cause concern and to deliver further improvements for citizens with links and assets in more than one country. If that can be achieved, the Government could then decide to seek to adopt the final regulation. This will obviously be consulted upon and considered as appropriate at that time. As I have already said, our negotiating strategy will be informed and influenced by the conclusions of this Committee's inquiry. Thank you for letting me make that statement.

Q127 Chairman: Thank you very much indeed. Can I say that I am sure we understand the position, Minister, and I think we are all learning this new opt-in procedure, as outlined by Baroness Ashton when she was Leader of the House, and of course we understand the decision. It may be that we have not got the date right. We are grateful to you for telling us, in any event, of your decision and that you are going to participate in the negotiations. Can I ask you, have you a view about how many other Member States are likely to prove to be allies of ours in dealing with matters which are of principal concern to the UK? You have already highlighted claw back as one of them.

Lord Bach: I think that is a very difficult question, my Lord Chairman, to answer with certainty at this very early stage. Obviously the proposal is not long published and the working group of national experts in Brussels has not yet concluded a first reading of the text of the regulation. I believe the working group meets on January 4, the day before we come back, for its second meeting. Mr Parker will be there. The great majority of the Member States which do not have to form a view against the deadline of the opt in process, unlike us, are still consulting on and considering the detail of the proposal. Then we will be able to have a clearer view on the many issues. It is not possible to assess with any accuracy the extent to which Member States will be prepared to take flexible positions, particularly on claw back, and accordingly be accommodating in relation to our difficulties. What is clear—and you have heard this in the expert evidence—is that most Member States start from a very different position from us and claw back is well-established in their own laws and cultures even though, as I understand it, it is practised in different ways under different legal systems. The Committee will have seen, I think, the Comparative Law Report commissioned from Professor Paisley of the University of Aberdeen on the claw back regimes. We shared that report with the Member States in the

hope that it will help a debate begin about the significant differences between those claw back regimes themselves and we hope that may set up an atmosphere in which helpful compromise may more easily emerge, but I am afraid the reality is likely to be that many Member States will be reluctant to see claw back removed from the proposal since they will want their own claw back regimes to be applied by other Member States. At this point I would not expect them to show their hands or to give any clear indications as to what they might in the last resort be prepared to accept. Finally, as to the extent to which the stance of the Member States is likely to be affected by our decision not to opt in at the outset of the negotiations, again no clear answer, although a positive opt in would have secured us a vote in the Council and demonstrated our commitment to the outcome. I am also conscious that given the fact that we would be automatically bound no matter what the final outcome was, that fact could well have operated perhaps so as to reduce the incentive for other Member States to show the necessary flexibility to resolve our concerns, particularly about claw back, and so secure our participation in the adopted instrument. The fact that the voting arrangements in relation to this proposal will be on the basis of a qualified majority is also perhaps relevant too. I do not think anyone is in any doubt that it is in all Member States' interests, their own interests and the collective interest, to have the UK participate fully in the regulation and I am confident other EU governments share that view. We hope that is a factor that will be persuasive in helping us to find what we are looking for, which is an acceptable solution on our issues of concern. The shared interests for all of us in UK participation is clear to see, but alas as things stand at the moment we have no choice but not to opt in to this proposal.

Chairman: Thank you.

Q128 Lord Rosser: If a unitary system of applicable law is desirable—that is one of the many things which have been said to us—why is it not found in our present domestic law?

Lord Bach: I am going to ask Mr Parker to deal with this particular question, if I may.

Mr Parker: It is true that under the current rules of private international law in the United Kingdom a distinction is drawn between movable and immovable property. Foreign succession law will be applied to property of the former kind if the deceased died domiciled abroad. However, regardless of the deceased's domicile at death, only the succession law of the country where the immovable property is situated will be applied to that property. This means that only English succession law is currently applied to immovable property situated in England and Wales. The basis for this long-established distinction

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is historical and as regards immovable property appears to reflect the law before 1926 when intestate succession to land was subject to rules different from intestate succession to movable property. It also appears to have its basis in the fact that in the eighteenth century the English courts of common law possessed exclusive jurisdiction to determine the title to English law and their practice was, with few exceptions, to administer English law and only that law. The current distinction, known as scission, has been widely criticised by academic commentators as a “historical anomaly” and by the judiciary in some decided cases on the basis that it constitutes an unjustified complexity which can give rise to artificial and inappropriate results. None of the consultation which we have recently received on the Commission’s proposal has sought to defend this aspect of our current system and the Government’s view is that in principle its removal in favour of a unified system of rules on applicable law would constitute an improvement in our law. It is also fair to say that the practical problems associated with a scission-based approach to applicable law, one which makes a distinction depending on the type of property, have not arisen with sufficient frequency to prompt the necessary law reform at the national level within the United Kingdom. Perhaps I could say that of course if we do not eventually apply the regulation within the United Kingdom it would be open to us to make that law reform at the national level should we choose to do so.

Q129 Lord Rosser: What you are saying is that the pressure has never been there up to now for us to make the change as far as our domestic law is concerned?

Mr Parker: Not entirely. I think you will find amongst all the learned commentators on private international law this distinction is widely criticised and there is a number of cases, not many, three or four I think, where judges have criticised the way in which the distinction can operate in practice. It can mean that in certain cases an heir can be entitled to more than he should get, or less, depending on the facts of the particular case. So although this is not an area where the popular voice is engaged, I think it is true to say there is a wide degree of criticism amongst commentators.

Q130 Lord Wright of Richmond: Minister, you said rightly that most of our colleagues do not have the option of not opting in, but the Irish do. Do we know what the Irish have decided?

Lord Bach: I do not think we know for sure what the Irish have decided, no.

Q131 Lord Wright of Richmond: My second question is, if ultimately we remain opted out, to what extent are the thousands of English and Welsh nationals living elsewhere protected by our opt out?

Lord Bach: That is an extremely good question, but again it is an extraordinarily difficult one to answer at this stage. I think it will depend very much on how any agreement is reached after negotiations. It is because of the uncertainties associated with that that we would actually much rather there was a serious negotiation and that we could in the end opt in because, as I said, we do see with Europe as it is at the present time that there is a need for some measure like this. The problem with this measure is that it would affect British citizens, we think, so adversely and just take away our traditions in terms of succession and wills, which of course should not be defended just because they are traditions but should be defended because they work pretty well for us.

Lord Wright of Richmond: Thank you.

Q132 Lord MacLennan of Rogart: As a Scot with immovables in Scotland, movables in London and uncertain about domicile and residence, I can see that there are some difficulties in our present domestic situation. This is a historical question: have those problems been referred to our two Law Commissions in Scotland and England for consideration or have they suggested anything about it?

Mr Parker: I am not aware that the Law Commission in either jurisdiction has considered this point.

Q133 Lord MacLennan of Rogart: Is that, do you think, because there has not been pressure to do so?

Mr Parker: Sufficient pressure.

Q134 Lord Wedderburn of Charlton: This cuts across the boundaries of what we have already discussed in asking questions, but I think it is perhaps a way of achieving a little brevity on what has been said. Habitual residence obviously is a test of great importance. We prefer “domicile” at the moment in England, having not taken the step of making “domicile” simpler to understand, which our Scottish cousins, or brothers in my case, have achieved. How far would a definition of “habitual residence” be able to solve the problems with the question of habitual residence? I may say that we had some chartered accountants’ evidence, which you may have seen, setting a list of exam questions on habitual residence which I found as difficult to answer as problems on domicile, which is saying a lot! How far would a definition of “habitual residence” solve our problems? I have moved on opt out.

Mr Parker: Lord Wedderburn, there are a number of difficult issues connected to the connecting factor and how it should feature in the regulation. What I was proposing to do was to give an overall answer which

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embraced all those difficulties. Would you prefer me to do that or just to answer your specific question?

Lord MacLennan of Rogart: I apologise if I have taken the answers off course.

Q135 Chairman: No. Please give the answer to the question.

Mr Parker: Perhaps I could begin by saying that under English law the connecting factor of habitual residence does not currently apply in the succession context. In broad terms we assess that it operates satisfactorily in the family law context but, as I shall explain, the latter context cannot easily and satisfactorily be transposed in relation to succession. Domicile is a well-established concept in the laws of the United Kingdom. Although its practical application in English law is perhaps not entirely without difficulty, its underlying basis, namely a concern to identify the country where an individual intends to settle permanently, seems correct and any problems should not be overstated, in our view. Over the years a significant and broadly helpful body of jurisprudence has developed to guide practitioners in the context of international succession cases. The primary reason for the Government's concern that the regulation uses the undefined connecting factor of habitual residence is that the deployment of such a concept on its own would be liable to subject the estates of individuals, either on short-term employment secondments overseas or otherwise without an adequately substantial connection of a particular legal system to that system's law of succession. An example might be a British diplomat who is posted abroad for two or three years but who would inevitably expect to be posted another country or to return to this country at the end of his secondment. If he unexpectedly dies during his relatively brief secondment, the concern is that the succession law of the country to which he was seconded might be held to govern the distribution of his estate. The Government considers that outcomes of this kind would be inappropriate and would not accord with the reasonable expectations of individuals and their families. This contrasts with the underlying rationale behind the currently applied connecting factor in the UK, namely where an individual is domiciled at the time of his death. As I have already noted, the purpose of this connecting factor is broadly to identify the jurisdiction where an individual intends to settle on a permanent basis. The Government's view is that this concept correctly requires a substantial degree of connection and would therefore exclude individuals on short-term work secondments or in analogously transitory situations. We are open to exploring different ways in which the connecting factor could be made fit for purpose. I should observe now that we accept that domicile could not be retained under the regulation

as the main connecting factor for the UK and other common law countries. It could not be applied to other Member States and its retention for a minority would therefore fail to secure the high degree of uniformity of application which is considered to be essential under the regulation. So "domicile" in the common law sense is a non-starter, I am afraid. Other options are likely to stand a better chance of securing agreement. One is that "habitual residence" could be defined in some way to require a substantial degree of connection. However, we are aware that such an approach might encounter significant opposition among other Member States on the basis that any such detailed definition could have undesirable repercussions in other areas of the law, for example in the area of international child custody where "habitual residence" plays a pivotal role and where a less substantial degree of connection is generally thought appropriate. Another possible approach to the connecting factor would be to leave the concept of "habitual residence" undefined but to use it in combination with other requirements such as a minimum period of actual factual residence by the deceased. This was the underlying basis of the solution adopted in the 1989 Hague Succession Convention and it may not be likely to provoke the degree of opposition which the first approach could well encounter. However, it must be accepted that the actual provision adopted in that Hague agreement was undoubtedly very complex and we would be seeking a more straightforward solution. Another potentially useful component in any satisfactory connecting factor would be some fall-back rule to cater for certain difficult borderline cases, for example where an individual divides his time more or less equally between two countries, for example in the case where a retired person from the United Kingdom retreats to southern Europe for the winter months or where he has such a peripatetic way of life that it is impossible to determine with any ease where he is habitually resident. Finally, the Government also has concerns in this context with the lack of legal certainty inherent in any freestanding connecting factor which is undefined in any way. We accept that this is the position under regulation 2201 of 2003, the so-called Brussels II bis regulation where undefined habitual residence plays a crucial role in resolving international child custody disputes within the Community. However, in one important respect such family disputes differ from the succession context. The former will often and inevitably involve highly emotional litigation between parties, particularly parents, who are unable to agree on the outcome. This will necessarily involve determinations by senior judges who are experienced in applying the concept. However, the great majority of succession cases are, and surely should continue to be, non-contentious in nature. It is vital to the success of the regulation, so

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we believe, that that should remain the case and that solicitors on the high street should be able to provide the necessary advice with a high degree of confidence on the application of the connecting factor on the facts of the great majority of cases.

Chairman: That has taken us deeply into domicile and habitual residence.

Lord Wedderburn of Charlton: I think actually my fox has been shot!

Chairman: Is there anything further you want to ask?

Lord Wedderburn of Charlton: No, I think not.

Q136 Chairman: Can I then go on to this question of personal representatives? Some witnesses have attached great importance to that and perhaps you could indicate, Minister, how you think the proposal would affect the UK system of using PRs to administer a succession rather than heirs, which seems to be the alternative?

Lord Bach: Yes. I am going to, with your permission, again hand over to Mr Parker on this. Just to open up the discussion, it would be a substantial change for us in the United Kingdom which would have quite considerable consequences, it seems to us, on our use of the personal representative.

Q137 Chairman: Perhaps when Mr Parker is answering, are there other countries which have got the same system, having drawn our system from history, Ireland presumably, Malta maybe, Cyprus maybe?

Mr Parker: Cyprus, certainly; Malta, I think not. There are some other countries, Scandinavian countries, which use the concept of personal representatives but in a slightly different way. They are more representatives of the heirs rather than temporary owners. It is slightly different.

Lord Bach: But it is our personal representatives who have the obligation to deal with what is left. That is, I think, substantially unique.

Q138 Chairman: I suppose I ask that really in addition to the question to try and get an idea of what somebody in another country which has got the same system is going to have to cope with because they have not got the benefit of being able to opt out.

Lord Bach: We have spoken, as you can imagine, my Lord Chairman, with a number of other countries, not least other countries which touch on the common law—it is not always possible to call them common law countries—about issues of this particular kind and I have no doubt we will be doing that again very shortly.

Mr Parker: My reply is slightly more technical in nature, so please bear with me. I will be referring to one or two provisions in the regulation. To open, the Government generally welcomes the effect of Article 21.2 of the proposed regulation, which provides that

the application of a foreign law of succession is to be no obstacle to the application of the law of the Member State in which the property is located where the latter “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.” So we understand the broad effect of this is in principle to preserve the institution of personal representatives in this country. The effect should be to preserve the UK’s current arrangements which are based on the routine transfer of the deceased’s property to personal representatives pending the administration of the estate and the eventual distribution of the assets to creditors and those entitled under the will. This is significant because under the succession laws of many Member States the property of a deceased person transfers directly to his or her heirs. Any importation to the United Kingdom of such a system of direct transmission of property would undoubtedly cause major problems for us, not least in the area of taxation and in particular the collection of Inheritance Tax which is currently payable by the personal representatives on behalf of the estate. We will be returning to this later on, I think. However, Article 21.2 (the provision I have already referred to) also provides that, “The law applicable to the succession shall govern the determination of the person, such as the heirs, legatees or administrators of the will, who are likely to be appointed to administer and liquidate the succession.” The effect of this provision seems to be that where particular personal representatives are nominated to act under the law applicable, then such nominations must automatically be recognised in other Member States, such as the UK, where estate property is located. This is not currently the general position in the United Kingdom, where such individuals must be approved to act as personal representatives in order to deal with UK located assets. While we are still assessing the acceptability of this proposal, we are at least at first glance cautious given that under the regulation the succession law of any country in the world could be applicable. There appear to be concerns about situations where, for example, under the law applicable an executor could be validly appointed who would not, for some reason, be regarded under our law as being qualified to act in that capacity within the United Kingdom. Although in principle foreign appointments of personal representatives could be accepted here, it may well be that those appointments should also have to be valid under our law in order to be effective in our jurisdiction. Finally, I must refer to another provision here. This is Article 19.2(g) of the regulation. The applicable law is stated to include “the powers of the heirs, the executors of the will and other administrators of the succession, in particular the sale of property and the payment of

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creditors.” We understand this to mean that although the existence of personal representatives will remain a requirement in relation to UK located property, their powers are to be determined in accordance with the applicable foreign law rather than the law of the place where the assets are located. This is not the position under English law. We are still assessing the acceptability of this proposal. Once again, in view of the fact that this regulation will have universal application we must, I think, be cautious about the potential of this rule to create problems in some cases. We are also concerned about potential problems for creditors and others who deal with English property on the secure basis that the latter are operating in accordance with English law. The fact that they may in future be operating in accordance with some foreign law, the contents of which creditors, et cetera, would be unfamiliar with, would appear to have the potential to cause some confusion and could disrupt the smooth administration of estates in some cases.

Q139 Lord MacLennan of Rogart: May I come back, Minister, to the issue of claw back, which you have already alluded to? In a wider general statement you indicated that you could see that there is an ideal, if you like, to which we might strive with this area of the law because of the mobility of people, British subjects and citizens, in the European Union and other examples you gave. You singled out for particular concern the issue of claw back and said there were historical reasons why it was so deeply involved in our present domestic law and would be very difficult. Many other countries in the European Union have claw back, different systems in different countries, different situations. Why should it be that in this country it is peculiarly difficult to deal with that? Claw back in a sense is rather clear on what the consequences will be for those who are heirs and as clarity would seem to be very much in the general interest I am slightly puzzled by this reluctance to tackle the problem frontally.

Lord Bach: It would mean, if we were to accept claw back—and I am afraid of using the title because it is probably used in different ways in every different system employed by our EU partners—that the cultural difference there clearly is, which is the basis of all this, and historic difference too would be completely abolished and that would not be easily done, I do not think, in this country. There is one common thread in whatever claw back system there is, namely that the laws of succession require that a usually substantial portion of the deceased’s estate should be available for distribution to that individual’s family heirs. Details vary from country to country. All these systems prevent the so-called “forced heirship” provision from being circumvented by the terms of the deceased’s will. It goes further than merely limiting freedom of testamentary

disposition. They also limit by means of claw back procedure the ability of an individual—and this is crucial in English law—to give away his or her assets during their lifetime, or at least significant periods leading up to their death, with the certainty (particularly from those who receive those assets) that they could not be challenged at a later time when the deceased died. That is one of the reasons why, in the Consultation Paper I have referred to, of the 99 responses we have so far opened all but two were against us opting in and many dealt with the issue of claw back. You will not be surprised to hear that many of those were charities, who are the recipients under our system of these, while living, *inter vivos* gifts. The amount of uncertainty there would be for these charities and other donees if we were to go to some kind of claw back system would be profound. Why does that not happen in other European countries, I think is what you are hinting at, my Lord MacLennan. We have asked that question and I think there is more research to be done on it, but the answer is that charitable giving does seem to play a larger part in our cultural heritage than it does for some of our European partners. I think in some other countries the state actually provides some of the role that charitable giving provides in this country and that is why there is this first basic difficulty in accepting claw back as the basis of succession and wills. There are, we think, possible ways in which it may be possible to find a compromise with our European partners on this issue. Unfortunately, the “compromise” proposal put forward by the Commission—and both Jack Straw and I as a junior minister have discussed this with the present Commissioner, M. Barrot—is one that I think is called party autonomy. It is an element of choice for individuals, who can decide at the time they make their wills under which system of law they want their wills to be adopted. The problem with that, as I think the Committee has already heard from other witnesses, is that there are only 30 per cent in general terms of UK citizens who make wills at all, and of course if there is no will made then depending on where the deceased dies it will be completely up to the law of the country in which they die. That is why that is not a satisfactory solution for us. There may be others that will develop, but I do not think any British Government could accept the concept of claw back as being a change that was worth making in terms of our own historical laws on succession and wills. That is some kind of answer, I hope.

Q140 Lord MacLennan of Rogart: Our culture then, would you say, is really to prioritise not the interests of the heirs but the wishes of the testator or the person who died intestate?

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Lord Bach: You have said in one sentence what I took about five minutes to say! It is exactly that. The wishes of the testator, as I understand it, historically in English law have always been paramount and it gives a degree of certainty to the donees, whether charities or anyone else.

Q141 Lord MacLennan of Rogart: Whereas if the testator is completely gaga and leaves it to some bizarre organisation there can be injustice?

Lord Bach: Of course, but our system is, if I may say so, practical enough to be able to deal with that situation, as I think recent court cases have shown, but it is the exception rather than the rule.

Q142 Baroness O'Cathain: I do apologise for coming in so late. I have been lobbied very strongly by colleagues of mine who operate in charities. I also have to declare that I personally was in the forefront of trying to get charities to say to donors, "Have you made a will?" The rate was 30 per cent. I am told it is 35 per cent and I think the five per cent are those who have been lobbied by charities. There was a time when charities just would not even talk about legacies to donors, but the problem with the charities now is that there is a reduction in the amount that is going into charities, for obvious reasons, and that they do not feel they have got a double whammy here with this problem. I took a lot of heart from the fact that you said you did not think the British Government would actually get involved in this, because of that, I guess, but the uncertainty is there, Minister. I just wonder outwith this, or as part of this whole thing, can we just make the very strong recommendation that we just do not touch it?

Lord Bach: It is for the Committee to decide.

Chairman: The Minister did tell us when he arrived that the decision has already been made not to opt in at this stage.

Q143 Baroness O'Cathain: Oh, great! Thank you.

Lord Bach: I am grateful that Baroness O'Cathain has asked me, but it is not just charities, of course, it is any donee and that effectively can be a third party, who again will, as it were, have this uncertainty over the asset they have been given. I do not know if Mr Parker wants to add to that?

Mr Parker: At the moment we share all your concerns about the legal uncertainty that could be introduced into the law if we were to import claw back. I think at the moment we start from the position where we would regard claw back claims as being suitable for excluding from the scope of the regulation altogether. That would be effectively the status quo, so for those Member States which already enforce each other's claw back claims that would remain the case, but of course it would not apply to us. I have to say, I do not think the issue of claw back will be resolved in any

way early in the negotiations. I am sure that this will be very much part of the final bundle of issues which have to be resolved before the final adoption.

Q144 Lord Wright of Richmond: At the risk of going back on something you have already answered, I just want to get my mind around the extent to which this is really a British problem and not a problem for any of our allies or colleagues. We asked about the likelihood of getting allies in the negotiations. To what extent have you either at ministerial or official level so far sensed that there is a degree of unease among our colleagues, partners, at the claw back provisions?

Lord Bach: Again, it is difficult to be precise. I think there is an understanding among some of our European partners that this is a real issue for us, because they, too, have long legal traditions which are different, quite, quite different, and do involve claw back, but I think they realise, because a lot of effort has gone in already before the negotiations begin to try and put our position, that this is an important matter for us and hopefully I can put it this way: it is in their interests as much as it is in ours to find a way through it.

Lord Wright of Richmond: I cannot remember the exact quote, but in the regulation there is a reference to the fact that this will not affect national laws, or words to that effect. It seems to me very unlikely that it would not affect our national laws.

Q145 Baroness O'Cathain: You mean it is very likely that it would?

Lord Bach: It would be wonderful if it was not to affect our national law.

Lord Wright of Richmond: I think I probably misquoted the regulation.

Q146 Chairman: I think Lord Wright is referring to a piece of paper which was produced by the Commission for information and the question was posed, "Would it replace or amend national laws?" and the categorical answer would be "No."

Mr Parker: I think it was very much a kind of private international law type of answer. This is a regulation which will operate at the international level, so it will not directly affect substantive domestic laws on succession; not directly, but of course by extending the rules of applicable law throughout the European Union it will indirectly have effects, of course. What we are aware of—and that was thrown up by the comparative law study—is that there is a huge variety of claw back regimes and there are some countries like the Netherlands and Austria, for example, which have it but only have it on a very restricted basis and what we are hoping is that this study will draw their attention to what they may be facing from certain other countries and perhaps make them more

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susceptible to our blandishments for a compromise. We think there is a chance of that and of course the other thing is that when this regulation comes into force it will greatly enhance the profile of this whole area of the law. It will encourage lawyers, I think much more actively than they do at the moment, to regard this as an area where they can sell their services.

Q147 Lord Wright of Richmond: We did ask Director General Faull last week whether any other parliaments were engaging in a similar inquiry and were told "No." I just wonder whether that reflects a lack of interest or concern among our partners?

Mr Parker: We certainly know that those systems in the Member States that rely upon notaries, particularly in the succession context, are very, very keen on this because it is an important way in which their influence can be extended throughout the Union.

Q148 Lord Renton of Mount Harry: I apologise, like Baroness O'Cathain and for the same reason, for arriving late. I heard you say, Minister, that you felt that Ireland is going to opt out not opt in at the moment?

Lord Bach: I was actually very careful to say I do not know what the position was and I think that is very important.

Q149 Lord Renton of Mount Harry: I apologise. Do you know about other countries? Do you know what other countries are going to do?

Lord Bach: We do not know, but –

Mr Parker: The opt in does not apply to them. We are the only ones.

Q150 Lord Renton of Mount Harry: We are the only ones who positively are not opting in?

Mr Parker: The Danes are automatically excluded.

Lord Bach: So they are out and then it is Ireland and us.

Q151 Lord Maclean of Rogart: Still on the subject of claw back, we did have evidence from Professor Matthews about the possibility of claw back affecting transactions undertaken in the City of London. Has that been a consideration? Have you had any of those points made?

Lord Bach: The proposal as it stands would certainly be likely to make less attractive the creation of lifetime trusts, the contents of which might subsequently be rendered subject to claw back. Many of these trusts, of course, are drafted by law firms in the City of London and we do not know for sure but we feel that that aspect of their legal business could be prejudiced with the likelihood of it transferring elsewhere, offshore, to the Channel Islands or

elsewhere. That is the first point to make. The second is that of course claw back could have far more reaching and perhaps another word I think is "chilling" effects on the functioning of trusts within the City. This was not raised in the consultation, let me make that clear, as far as we are aware but we are live to the possibilities of broader problems arising here. As I think you know, Professor Matthews has been advising us as well as advising you, the Committee, and we are going to go on consulting with him on this issue.

Q152 Lord Wedderburn of Charlton: I have not a document available, at least I have not found it, but my recollection is in reading the very detailed descriptions of various claw back systems, some of which go back decades, to bring assets into what we would call the estate, that none of them has produced the bona fide purchase of a value without notice, although one edged up to it, but in fact the problem relates to him particularly, does it not, with claw back, as they see it? It is not just the donee but the third party who takes from the donee?

Mr Parker: That is right. I think again this demonstrates the very wide variety of claw back systems and some are only, as it were, focused on the original donee but some absolutely, as you say, do enable property to be clawed back from third party recipients and that, of course, makes them even more threatening from our point of view.

Lord Wedderburn of Charlton: Yes. Thank you.

Q153 Chairman: Minister, I asked you about the effect on personal representatives and I think you have possibly answered this, but you may want to add to it, the impact of the proposals on the payment of tax and the protection of creditors. Is there anything you want to add? You have already told us that is the responsibility of the personal representatives.

Mr Parker: Yes, to pay off the creditors, including the tax creditor, indeed.

Q154 Chairman: We just never quite see the taxman the same as the other creditors, I suppose!

Mr Parker: I am sure he takes the same view.

Q155 Chairman: Leaving that, are there any issues particularly in relation to registered property, such as land or shares, which give rise to concerns?

Mr Parker: The main problem which arises in relation to registered property relates to registered land and the application of claw back to land situated in the United Kingdom. The potential problems in relation to share registers are under consideration but they would not appear to be of such a serious nature. The essential problem is that the possibility of claw back is inconsistent with the guarantee of title

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currently afforded by UK Land Registries in relation to registered land. This problem arises both in relation to land registered in the name of the original donee of the property or in the name of some third party recipient of the property, or some legal interest in it. The latter situation can arise. For example, in the claw back regimes in certain Member States claims can be raised in relation to property which has been transferred or charged by the original donee in favour of a third party. There are two possible outcomes to this difficulty. Neither of them would be satisfactory. The first would be to exclude the potential effect of claw back from the Land Registry's guarantee of title. This would create significant legal uncertainty in relation to the title, which in turn would be likely to inflate the costs of conveyancing. This is because of the perceived need to purchase insurance to cover such a risk. Because of the uncertainty inherent in risks of this kind, the necessary insurance might well be difficult and expensive to obtain. Additional costs would also be likely to be generated by the additional research which might need to be undertaken in order to assess the degree of risk inherent in the particular transaction. The second alternative outcome would be to leave the Land Registry's indemnity budget to bear the increased costs of claw back. Because this indemnity is financed out of the Registry's fee income, this would inevitably push up the general cost of registration, which would have to be borne by all those who used the Registry's services. So we see this as a serious problem. It is an aspect of the claw back difficulties.

Q156 Chairman: Have you any assessment of how much?

Mr Parker: Not yet, but certainly it is likely to be significant.

Q157 Lord Rosser: Evidence we have heard from two of our previous witnesses has been that the Commission should in fact have taken a step by step approach, i.e. not done as much as they are proposing at the moment and started with a single rule of applicable law. Do you think that would have been the better approach?

Lord Bach: Being frank, yes, we do. We do think this was something that would have been better done on a step by step basis and it is that very comprehensive solution which the Commission has put forward which has caused us the difficulties we have tried to outline today.

Mr Parker: Sadly, I think the possibility of a more limited solution really is now history and that we have to work with what we have got. Although it would have been more manageable, I think, just to deal with applicable law, we could, I think, still get to

a satisfactory result with a very comprehensive solution, but it just makes the task more difficult.

Q158 Lord Rosser: Do you actually think rules on the conflict of jurisdiction are necessary or desirable?

Mr Parker: I think certainly not essential. One principle which is guiding our thinking on this at the moment is as a starting point to try and align jurisdiction with the law applicable so that the court upon which jurisdiction is conferred under the regulation should in principle be applying its own national law.

Q159 Lord Rosser: What should jurisdiction follow then?

Mr Parker: The two should be aligned in principle. We think in this very technical area that is likely to be a good starting point and in fact one of the provisions which deals with the transfer of cases, Article 5, is an instance where we think we should try and increase the degree of alignment so that where a deceased individual has validly chosen a particular law, the law of his nationality, and a court is seised under Article 4, the law of his habitual residence—so there is a distinction there between jurisdiction and choice of law—we think in that situation it would be better to bring them together and it should be possible for the court with jurisdiction to be required to transfer the case to the country whose law had been chosen in order to produce this helpful alignment.

Q160 Chairman: In a sense it is easy to say, is it not, that it would all be better if we had only applied for applicable law, but would we not still be stuck with all the problems about habitual residence, or whatever, that we talked about earlier? Are there not still an awful lot of problems?

Mr Parker: You would still have the problems of claw back and the connecting factor. What you would not have is the clash of legal cultures depending on whether the system in question depends upon notaries. That is a problem which really only arises when you deal with jurisdiction and recognition and enforcement.

Q161 Chairman: Before we pass on to that area, perhaps we could just talk about the special succession regimes and the number of exceptions that there appear to be under Article 22, because that seems to have the potential to drive a coach and horses through whatever you decide?

Mr Parker: Yes, indeed. We understand the need for that provision was suggested by the existence of certain special agricultural property regimes in various southern European countries. It is a provision which did appear, I have to say, in the Hague Succession Convention, so it was not completely dreamt up just by the Commission. But

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you are right, of course, it would be a big exception to the generally prevailing choice of law regime, and there is a degree of uncertainty about what it actually means. The only thing perhaps to be said in favour of it is that it may open up the prospect of perhaps a special deal for those countries which do not have claw back. Here some special regime is being created in choice of law terms. It is being created for certain Member States. Maybe we could have a slice of a slightly different cake to help us.

Q162 Chairman: Thank you. Can we go on to Chapter V in the Article about authentic instruments and the European Certificate of Succession, and perhaps you could help us with the specific issues as you see them regarding the recognition and enforcement of the authentic instruments and what are the problems?

Lord Bach: Again, this is a very important matter and also quite a deeply technical one. We do feel, as I said at the start, there are other issues apart from claw back and habitual residence which concern us a great deal. This is certainly one of them.

Mr Parker: Perhaps I could say at a recent meeting, in fact a meeting last week of the Brussels Working Group, it became apparent for the first time that there was a major problem for us in the area of authentic instruments. The Commission confirmed that none of the rules relating to jurisdiction would apply to notaries and therefore to the regulation of competence as regards authentic instruments. This was contrary to our previous understanding of Article 3 of the regulation and its reference to “non-judicial authorities”. The proposal’s rules on jurisdiction are closely modelled on those in the Brussels I regulation and their overall effect is to regulate strictly the jurisdiction of national courts in the area of succession. However, the failure to provide any equivalent rules in relation to notaries would create a situation which would, in our view, heavily discriminate in favour of notarial legal systems as against other systems such as the systems in the British Isles, Scandinavia and Cyprus, which operate without notaries in this context. The overall effect would, we believe, be to damage significantly the degree of mutual trust between the different legal systems in the EU, which is an essential pre-condition to establishing machinery for the recognition and enforcement of authentic instruments. Our concern about the un-level nature of the playing field is not merely a matter of principled objection but rather reflects its worrying potential for creating serious problems in practice. This may be illustrated by an example; others could certainly be envisaged. My case is that there are contested succession proceedings taking place in London, in a court properly seised with jurisdiction under the regulation. A disgruntled party to those proceedings

could seek an authentic instrument from a notary in another Member State. Under the regulation that notary would be entirely at liberty to deal with the case. For example, the fact that the London proceedings may be at an advanced stage would be irrelevant. Under the regulation he would not have to concern himself in any way with the issue of jurisdiction. It would, of course, be for the notary to make his own decision also on the issue of applicable law. He might not even be made aware of the contested succession proceedings in London. The likelihood is that any resulting authentic instrument would issue quickly before any judgment could be delivered by the London Court, and the effect of that would be to ensure the circulation of that instrument around the EU in such a way as to disable to a great extent the effect of any subsequent London judgment. This is because successful challenges to the validity and applicability of an authentic instrument must be brought in the instrument’s home Member State. Recognition and enforcement of an authentic instrument is automatic in all the other Member States unless it can be proved to be a breach of public policy in the enforcing state. This is likely to be very difficult to achieve in practice in the great majority of cases. In conclusion, our assessment is that this problem on its own is of the same general order of importance as those already identified in relation to claw back and the connecting factor.

Q163 Chairman: As they say, we will read Hansard and come back to it tomorrow. The Certificate of Succession. One of our witnesses interpreted Article 36 as meaning that if you have a European Certificate of Succession you would still have to obtain a grant of probate before being able to deal with the UK property. I do not want to put any words into the mouths of the Members of the Committee, but I think it is fair to say that when we first looked at all this we thought this might be something which would be advantageous to people in the ordinary course of their business, in that they could have something they could use precisely without doing what Mr Frimston suggested. Do you agree that if you have got an ECS you would need a grant of probate here to deal with the UK property?

Mr Parker: I think the truthful answer at the moment is that we do not know. We have not yet discussed this chapter in the Brussels working group. This end of the regulation I think is particularly obscurely drafted and there are, as we see it, conflicting indications in different provisions as to whether or not Richard Frimston is right. In any event, whatever is desired needs to be, I think, explained more clearly in the text. So we will certainly be seeking greater clarity. For our part, we think the retention of probate is very important. We think it is important generally and it should not be able to be

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circumvented on the production of a certificate from another Member State. Just to give you one example, to return to the question of taxation, it is most important, I think, that tax should be payable by the estate before probate is granted and the assets then distributed to the heirs abroad. If that requirement can be got around on the production of a certificate, then I think we would be into major tax problems. In any event, I think the smooth administration of estates in this country depends upon retaining probate, but there are many other obscurities about exactly what the certificate means in terms of national procedural arrangements on succession and we still have to get to the bottom of all these and iron them out.

Q164 Chairman: So the same would apply to other Member States really as to what procedures were needed?

Mr Parker: I think so.

Q165 Chairman: Have you any view about what should be in that Certificate of Succession to make it practical?

Mr Parker: I think this is still very much a work in progress. I hope you will bear with us. It is only that we have not yet worked out exactly how the certificate might be best used. I think in any event it will need to reflect the relative complexity of English law, particularly English land law, and it will need to require the listing only of those assets which it is appropriate to list. It is important, for example, that if we get a compromise on claw back it should not be possible to circumvent that by means of the certificate listing assets which would otherwise fall outside the scope of a succession in this country. So there are all kinds of issues which I think still need to be nailed down.

Q166 Lord Maclean of Rogart: This is not on this issue. Really two related questions. To what extent has this process involved representatives of the Scottish legal system and will it continue to do so? Secondly, you mentioned, I think, Minister, that you have had 99 responses to the consultation. I wonder if the consumer interests could be said to have been consulted. I can understand that very many specialists, experts, and so on, have given indications of difficulties but I wonder if the consumer voice has been heard in all of this. By that I do not mean necessarily the consumers' legal representatives because, as you point out, a very small number of people actually make wills. I would like to know, for example, if the Consumer Association has given any current response and whether they were consulted, because it does seem to me that the difficulties of the present situation are to some extent underestimated and that it is worth considering in our continuing

negotiations whether we can address some of those problems which an ever more mobile society faces?

Lord Bach: Yes. As far as Scotland is concerned, I do not know the details but I know that Professor Beaumont of Aberdeen University, who is an expert in this field, has been advising both us here, the UK Government, and also the Scottish Executive as well.

Mr Parker: Our consultation paper went very widely in Scotland and although it was issued down here it went to Scottish interests and quite a lot of them responded and in fact the Scottish Government organised a day where interested people were brought together to discuss the proposal. They did a good job in this, respect.

Lord Bach: Your second question is a very interesting one. I do not know whether you would count charities, who are the donees of quite a lot of those deeply affected by this proposal, whether you would count them as part of the consumer interest here or not. If so, they were very widely represented in terms of their response to the consultation. As to consumer organisations as such, I do not think we have. The magazine *Which?* was consulted. We can give more information about this in our response to the consultation, which I think is due out in the New Year, and will do so, but I take your point very much. It would be a great mistake for those outside the Committee—I am sure the Committee will not make this mistake—to see the fact that we are not opting in at the present time as somehow hiding our faces away from the fact that there is a real issue here with two and a half million citizens of the United Kingdom living in EU countries and many, many—what do they say? -- that London is the fifth largest French city. So the Government is well aware that these are issues which, if we can resolve, we need to resolve but we are also certain that at the present time not to opt in to this is the right thing to do for the British people.

Q167 Chairman: We would probably also quite like to know at some time your views about the Commission's estimate of the number of cases that have caused a problem, which was in their impact assessment, and just how robust that is.

Lord Bach: We did notice your questioning of Mr Faull last week on that issue and I think we have our own views on that, and perhaps we could let you know on that.

Chairman: Thank you.

Q168 Lord Renton of Mount Harry: You have half answered my question, Minister. I was really going to say, what actually do you think is going to happen next and over what sort of period of time?

Lord Bach: The working party will get together again on January 4th, with Mr Parker representing our interests, and presumably the working party will have—Mr Parker can probably answer this better

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than me—many, many sessions. How long the negotiating process will take is a very good question. I have heard an estimate of at least two years being bandied about. Who knows? Of course, the Members of the European Parliament themselves are, at committee level, I believe, going to be discussing in detail this proposal. I have had some conversations with some Members of the European Parliament actually on different sides of the political fence on this issue, UK MEPs, and they are starting the detailed work on this in committee in the New Year too, but Mr Parker can probably give you a better timescale than I can.

Mr Parker: I think it is very hard to tell at this point. As I say, issues are still emerging and I think there may be some important disagreements between the Council of Ministers and the European Parliament, and of course that would delay matters, but I think two years sounds about right as an overall timescale for the negotiations.

Q169 Lord Renton of Mount Harry: From your point of view and from the work you have to do, it goes on almost as if we had opted in?

Mr Parker: Well, we hope so. We hope that, as happened, for example, with the negotiations on the Rome I regulation, representatives in other Member States will park the fact that we have not opted in, will accept our contribution and the full role we play and will judge our arguments on the bases of their merits rather than the fact that we did not opt in at the beginning. We hope we can achieve that again.

Q170 Lord Rosser: Can I just ask, in light of an answer you gave a moment ago, to comment on a view expressed by one of our witnesses who said he thought it was the ordinary folk who needed this regulation and they would not be troubled by claw back because they are not giving millions of pounds to somebody or other. What is your comment on that?

Lord Bach: I am sure it is ordinary folk, whatever that expression actually means, who could gain by a proper agreement on this, but I think those same ordinary folk, even if they had not got very much to give to charity, if they had given something to charity during their lives, for example, their relatives might well resent the fact that what they wanted to do when they were alive was somehow taken away from them once they were dead. I think that, of course, it does not matter in the end about us, or academics, discussing the merits of this, but it does matter how this will actually work out for ordinary people across Europe. I do not think we should say that the principles of succession and wills that we have had for many, many years should just be thrown away, because I think ordinary people have gained from them as well as those who are better off.

Mr Parker: Yes, and of course claw back applies on the basis of a proportion of the total estate. It does not have to be a particularly large estate. If there is enough to be worth litigating about, then you are into these problems.

Baroness O’Cathain: That is right.

Q171 Lord Wright of Richmond: One of our witnesses, in fact probably the only witness who actually was in favour of opting in, used the argument that it would strengthen our hand in negotiations. Perhaps I can particularly ask Mr Parker, in your discussions in the Brussels group to what extent do you actually think your hand has been weakened by the decision to opt out?

Mr Parker: Of course, nobody knows that yet in Brussels because it has only been taken today. We were in an ambiguous situation last week, but when it is known I hope that they will not react badly, that they will regard this as a genuine clash of legal cultures and it is always much more difficult to harmonise private international law rules where the substantive law rules are so different. It is much easier in an area like contract or tort because there is much more congruence of the substantive laws underlying the agreement. So I hope it will be seen not as a kind of knee-jerk or Eurosceptic reaction but an understandable one.

Lord Wright of Richmond: The clash of cultures may lead our partners to say, “Well, you would say that, wouldn’t you?” and really ignore your arguments?

Baroness O’Cathain: They probably do anyway!

Q172 Lord Wright of Richmond: Perhaps I am too negative.

Mr Parker: We just have to hope that over time the value of our arguments and the value of the compromises that we offer will be sufficient to get us home, but we are under no illusions. This is going to be very difficult, more difficult than the Rome I dossier, I think.

Lord Wright of Richmond: If I may speak on behalf of the Committee, I think we wish him good luck.

Q173 Chairman: Deep sympathy! If there are no other questions, Minister, is there anything you want to add?

Lord Bach: Just to thank the Committee for the work it is doing, if I may say so, and that we really do want to go on working with you and we hope your Committee will have this on its agenda in the months ahead because we really do need to have your input in these negotiations.

Chairman: Thank you very much, Minister. Thank you for your evidence. Thank you, too, Mr Parker, for your answers. We are grateful to you for your assistance, particularly on the last day of—not term—

Baroness O’Cathain: Session.

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Chairman: Not even the last day of the session.**Baroness O'Cathain:** The last day before Christmas and we wish you a Happy Christmas!**Chairman:** Thank you so much, the last day before the commencement of the recess and we wish you a Happy Christmas!

Written Evidence

Memorandum by the Chancery Bar Association¹

The Chancery Bar Association (ChBA) is one of the longest established Specialist Bar Associations and represents the interests of some 1,050 members handling the full breadth of Chancery work, both in London and throughout the country. Membership of the Association is restricted to those barristers whose practice consists primarily of Chancery work. It is recognised by the Bar Council as a Specialist Bar Association.

The ChBA operates through a Committee of some 17 members, covering all levels of seniority. It is also represented on the Bar Council and on various other bodies including the Chancery Division Court Users' Committee and various Bar Council committees.

It is anticipated that the European Committee of the Bar Council will also adopt this Response.

These submissions begin with our responses to questions raised by the Ministry of Justice.

Is it in the national interest for the Government, in accordance with Article 4 of the UK's protocol on title IV measures, to seek to opt in to the Regulation?

It is not in the national interest to opt in as the draft Regulation stands.

There are serious difficulties about "clawback", jurisdiction and the proposed European certificate of succession. There is an unacceptable risk that if the UK opted in now it would found itself bound by a Regulation that does not resolve those difficulties.

However, there are also good things in the draft Regulation and the UK should seek to negotiate to remove or reduce the difficulties to an extent allowing the UK to opt in.

Nevertheless it would be most unwise for the UK to opt in at the outset, thereby committing itself to whatever might ultimately be agreed by qualified majority vote, in the hope that it would be possible to eliminate the objectionable features in the course of the negotiations.

Should the proposed Regulation apply throughout the UK if the UK opts in to the Regulation?

We are of the opinion that the whole of the UK should not be subject to the Regulation. If the UK opts in, a partial opt in makes little sense.

It is true that the Scottish legal system is in some ways closer to continental systems than that of England and Wales, but as regards the areas where the proposed Regulation is most objectionable, we believe that the objections are as strong for the Scots as they are for the English and Welsh.

The law of Northern Ireland is in this area of the law much the same as that of England and Wales, and it is difficult to see any reason for opting in for one and not for the other.

Do you agree with the Ministry of Justice's Partial Impact Assessment (dated 27 October 2009) made on the Regulation?

Yes: if anything it perhaps understates the impact of what is proposed. We agree with the concerns which the Assessment has about habitual residence and clawback, and also believe that there are other matters for concern, in particular the provisions about jurisdiction and Certificates of Succession.

MORE GENERAL COMMENTS ON THE DRAFT REGULATION

Clawback

The succession law of most civil law countries includes forced heirship under which members of the family or a deceased person are entitled to compulsory shares in the deceased's estate. This is a matter upon which the ordinary people of those countries often have strong feelings, and before dealing with clawback we wish to emphasise that there is no objection to the recognition of forced heirship as such. They have long been recognised in this country.

¹ This Response has been prepared by the members of the ChBA European Committee and in particular by Robert Ham, QC, Francis Barlow, QC, and Richard Wallington.

What is however of considerable concern is the recognition of rights to “claw back” gifts and other lifetime transactions. Under our private international law, gifts and other lifetime transactions by deceased persons are not characterised as matters of succession and there is therefore no question of their being “clawed back” on death. This would change under the draft Regulation.

Indeed, the most objectionable feature of the draft Regulation proposed by the EU Commission in our view is that, if adopted in its present form, it would lead to the recognition of clawback in the UK.

The potentially adverse consequences of such a fundamental change in the law are listed in Professor Paisley's Report. There is no need to repeat these consequences in detail, but we would draw particular attention to the following factors:

- (1) In principle clawback is objectionable on the grounds that:
 - (a) it would unsettle title to property, including property the title to which is registered in HM Land Registry or other registers—there could be claims for compensation against the Registry;
 - (b) it would introduce uncertainty as to the effect of *inter vivos* gifts, including gifts in settlement and charitable gifts;
 - (c) Article 50 of the draft Regulation provides no adequate transitional provisions with the consequence that “clawback” would apply on the death of persons after the date on which it comes into force in relation to *inter vivos* gifts made *before* that date.
- (2) In practice the doctrine of “clawback” would be difficult to apply. It is apparent from Professor Paisley's Report that the operation of “clawback” differs significantly from jurisdiction to jurisdiction. A particular worry is that in certain cases the remedy appears to attach to the property itself into whosoever's hands it may, even if that person is a purchaser for value without notice. Further it seems that in the case of a significant number of jurisdictions it has been impossible for Professor Paisley to ascertain exactly what the law relating to clawback actually is.

It is the distinct impression of common lawyers who attended meetings of the Group of Experts in Brussels on the Commission's proposals for the harmonisation of the law relating to succession that the lawyers representing the principal civil law jurisdictions regarded it as an important matter of principle that the law relating to clawback should be incorporated in the Regulation; the fact that the common law does not already recognise and enforce clawback was a source of resentment.

To opt in to negotiations in the hope that a sufficient number of Member States would be persuaded to exclude clawback from the Regulation would in our view be a very high-risk strategy. If the Government were to opt in, it would in our view be more than likely that the proposal to include clawback would be adopted by qualified majority vote.

Jurisdiction

The provisions as to jurisdiction and certificates of succession are in our view unacceptable.

This is largely because even where a deceased person has validly chosen a law governing succession to his estate other than that of the Member State in which he was habitually resident at death, jurisdiction over the succession and the power to issue a Certificate of Succession are still primarily that of the courts or other authorised persons or institutions of the Member State in which he is habitually resident at death. The courts etc of the Member State whose law he has chosen only acquire jurisdiction if the courts of the Member State where he was habitually resident decide to cede it to them.

Under English conflict rules as they now stand, succession in relation to the estates of UK citizens who go to live elsewhere in the EU and die there, but retain English domicile, are subject to English law except in relation to immovable property outside England, and the English courts would have complete jurisdiction over property in their estates situated in England.

If the UK opted in to the Regulation, the choice of habitual residence as the test for applicable law (Article 16) and jurisdiction (Article 4) means that such persons will be subject to the local law of succession, as determined by the local courts, on their worldwide estate, unless they have chosen, in accordance with Article 17, the law of their nationality. However, even if they have successfully chosen English law, jurisdiction would remain with the courts of the State in which they were habitually resident. Article 4 provides that those courts have the primary jurisdiction, and Article 5 empowers those courts to invite the parties to start proceedings in the courts of the country of which the law has been chosen to govern the succession. However, Article 5 is a discretionary power only, and the courts of the place of habitual residence are not obliged to do this.

Furthermore it seems fairly clear that the courts of the Member State of which the law has been chosen as the law governing the succession do not have jurisdiction over the succession unless and until the courts of the Member State in which the deceased had habitual residence refer the matter to them. This is not made very explicit, but it seems to us to be a clear inference from Article 4, the fact that there are specific provisions as to jurisdiction of the courts other than that of the place of habitual residence in Articles 6, 9, 15 and 21, which would not be needed if there was concurrent jurisdiction, and also from Article 11, which provides that where a court of a Member State is seised of a case over which it has no jurisdiction under the Regulation, it shall declare of its own motion that it has no jurisdiction.

Article 10 and 13 provide for what happens if there is a race between different persons interested in the succession bringing proceedings in different countries. The effect is that the court seised of the matter pursuant to the claim of whoever manages to start proceedings first is left to decide whether it has jurisdiction with the courts in any other country staying proceedings until the court first seised makes its decision. However, it seems to us that this does not override the principle that the courts of the Member State where the deceased had habitual residence have the primary jurisdiction. If a UK citizen who dies habitually resident in another Member State has chosen English law, even if his heirs start proceedings in England before anyone can start proceedings in the Member State where he died, the English courts would have to decline jurisdiction unless and until the courts of the Member State in which he died decided that the English courts were appropriate.

Articles 10 and 13 also have the implication that if someone dies in circumstances where there is doubt as to which of several Member States he was habitually resident in, or there is a question as to whether the law of nationality has been successfully chosen under Article 17, the final decision on this question would be exclusive to the courts of the Member State in which proceedings were first started, in a manner binding throughout the Member States to which the Regulation applies (for which see Articles 29 and 31).

The provisions of Chapters V and VI, as to authentic instruments and Certificates of Succession, show a similar pattern. The Certificate of Succession will be binding throughout the Member States, and can only be overturned or rectified by proceedings in the Member State in which it was issued (Articles 42 and 43). Although Articles 36 and 37 refer to issue of the Certificates of Succession by a court, it seems clear from the definition of "court" in Article 2 that it will be possible for notaries to be authorised by the internal law of any Member State to issue these. Although the Certificates of Succession are to be in accordance with the applicable law (Article 36), the effect of Article 37 in combination with Articles 4 and 5 is that a Certificate of Succession issued by a notary or court in the country in which the deceased had, or arguably had, habitual residence will be binding throughout the Member States to which the Regulation applies unless proceedings are brought in the Member State of issue to overturn or rectify it. The Certificate of Succession will be obtainable without necessarily informing other beneficiaries or potential beneficiaries (Article 40).

In our view the primary jurisdiction should be that of the courts and other authorities of the Member State whose law has been chosen under Article 17, where that is different from the Member State of habitual residence.

An illustrative example:

If the UK opts into the Regulation as it now stands, problems like the following will be possible.

Suppose a UK national with English origins retired to live in Spain and dies there.

He has left with English solicitors a will that expressly chooses English law to govern his succession, and divides his property between his third wife and his children, who are children of his first marriage. There is a later will made in Spain very shortly before he died which leaves his entire estate to his third wife, which also expressly chooses English law. He has been habitually resident in Spain. He has left assets in both Spain and England. His third wife is living with him at death. His children by his first marriage live in England. There are questions as to the validity of the later will. The third wife obtains a certificate of succession from a Spanish notary that she is entitled to the entire estate before telling the children that their father has died. That certificate will be non-justiciable in England.

The only remedy of the children would be to start proceedings in Spain for the certificate of inheritance to be revoked, and they would have to move very fast to prevent the wife going off with the assets (see articles 42 and 43). Even if court proceedings are resorted to, the English courts would probably not be able to adjudicate on the matter unless and until the Spanish courts decided that the English courts would be more appropriate (articles 4, 5, 11), and this would plainly be so if the widow managed to start proceedings in Spain before the children managed to start proceedings in England (Articles 10 and 13).

Applicable law

Apart from the problem of “clawback”, we consider that the proposals in the draft Regulation would be an improvement on the existing English choice of law rules in some respects, though there are some unsatisfactory features in the draft as it now stands.

The so-called scission principle with different choice of law rules for movable and immovable property is hard for lay people to understand and introduces into the law an unnecessary complication, which can lead to curious results. See, for instance, *Re Collens deceased* [1986] Ch 505 where a widow took both a statutory legacy charged on English land and her share in the movable estate governed by the foreign law. Sir Nicolas Browne-Wilkinson V-C endorsed the criticism in Dicey & Morris on the Conflict of Laws of the illogicality of requiring the English immovable property to be regulated for the purpose of succession by the *lex situs* rather than the law of the domicile.

One of the concerns (which we shared) about the green paper preceding the proposed Regulation was that the Regulation might allow testators to create interests in English land that are unknown to English law. But Article 1(3)(f) appears to meet that concern—though the wording could be clearer.

The introduction of a right to select the law governing the succession (*professio iuris*) would also be welcome.

The consultation paper raises issues about lack of certainty in relation to the proposed connecting factor—habitual residence. This is undefined, and the fear is expressed that national courts may interpret it differently pending a decision of the ECJ. We share that concern though in the vast majority of cases there will be no doubt, and it is only fair to acknowledge that there can be similar doubts about the acquisition of a domicile of choice. The defects in the law of domicile are, moreover, well known.

There are two areas identified in the MoJ consultation paper about which we have real concern. The first relates to people working temporarily outside their home countries. We are concerned that such a person might be found to be habitually resident where they are working if they have for the time being given up residence in the home country. Secondly, we are concerned about the position of people who have retired abroad and who inadvertently find themselves subject to an unfamiliar succession regime.

In both cases the Regulation provides a remedy in the form of the liberty to make a will choosing the law of nationality in Article 17, but it might take some time for this to become common knowledge, and there are always likely to be some to whom the news does not get through. The Regulation would operate in a particularly unsatisfactory manner in relation to those who have already moved to other EU countries when the Regulation comes into force, and who die within the next few years without knowing about the effect of the Regulation. Many will die intestate. With respect to those who have made wills, it is unlikely that many existing wills will satisfy the requirements of Article 17 as to choice of law “to govern the succession as a whole”, as the standard advice has been for testators who have property in more than one country to make separate wills for the property in each country and only elect for the law of that country to apply to the succession in relation to the property in that country.

A drafting point is that Article 17 does not make it completely clear that what is permitted is a choice of law according to nationality at the time of executing the document which makes the choice, irrespective of nationality at death.

February 2010

Letter from Professor Elizabeth Crawford, Professor of International Private Law, and Dr Janeen Carruthers, Reader in Conflict of Laws, University of Glasgow

GENERAL REMARKS

Having considered the terms of the proposed Regulation, and having studied the Ministry of Justice Consultation Paper (CP41/09), our position is that it is not in the national interest for the Government to seek to opt in to the proposed Regulation.

We have arrived at this decision having weighed the alleged benefits and perceived drawbacks outlined in the Consultation Paper, and elsewhere. Our position, sustained since 2005, has been one of scepticism with regard to the alleged benefits of harmonisation in the area of wills and succession, and we are convinced that such benefits as are suggested would accrue to the UK in opting-in, either are unpersuasive in themselves, or, while having some merit (or being neutral) from the UK point of view, nevertheless are outweighed by the drawbacks.

The options available to the UK seem to be three-fold, viz:

- (a) adhere to the status quo;
- (b) opt-in to the proposed Regulation;
- (c) refrain from opting-in to the proposed Regulation, but actively participate in the negotiations.

We are strongly opposed to option (b). We remain extremely doubtful about the need for, and merits, of this proposal, and of the wisdom of UK participation. The advantages appear to us to be outweighed by the disadvantages. There is a danger that we shall be carried along by the impetus of a scheme which is at odds with existing UK procedures and rules, and which in itself is flawed, and as yet vague as to the matter of crucial importance, viz. identification of a satisfactory and closely defined connecting factor.

The crucial exercise must be a measured assessment of the advantages for the UK legal systems and populace of harmonisation of laws, as against the drawbacks for individual citizens of applying to the distribution of their entire estate a new and different regime based upon an inherently unsatisfactory connecting factor. On the basis of the "major" issues set out in the Consultation Paper, we are in no doubt that the principal area of concern for the UK is the lack of definition of the pivotal connecting factor of habitual residence of the deceased. On this basis alone, we think that the interests of UK citizens are not best served, indeed would be jeopardised, by the UK opting-in to the proposed Regulation at this stage.

We infer from the manner in which Question 1 of the Consultation Paper is drafted (i.e. the onus upon consultees to explain why it is not in the national interest to opt in; and not an onus to explain why it is in the national interest to opt in), that the Government's default position, or preference, is one of opt-in, and we recognise that option (b) is a political *via media*. However, as between options (a) and (c), since we are not convinced of the scale of the problem described, or of the alleged benefits, we support option (a).

PARTICULAR ISSUES

The potential benefits

1. Increasing mobility of citizens

Taking as read increased mobility and an increase in ownership of property situated elsewhere than in the State of nationality, the question which must be answered is whether the formulation of "uniform rules of private international law across the EU would contribute significantly to greater simplicity and legal certainty in this field." (Consultation Paper, para.4)

A number of questions are begged in this claim. The first is the *extent* of alleged contribution/improvement. Not only may it be doubted how many estates, in their administration, would be benefited by harmonisation of rules, but also the obverse aspect must be faced, namely, how many estates will be needlessly complicated, or unjustifiably altered by the harmonisation process.

With regard to stakeholders, the class of individuals to be affected comprises not only those persons who do or do not make a will and who own property abroad (Consultation Paper, p.3), but also persons who happen to reside abroad in the short- or medium-term; potentially a very sizeable group.

The assumption that uniformity would increase simplicity and legal certainty must be subjected to examination. It cannot be accepted without query. Much will depend upon the quality of the conflict rules decided upon, in particular the central issue of the *lex successiois* (q.v.).

Further, arguably, there is a higher aim than simplicity and certainty (if indeed these can be achieved), namely, appropriateness. It is clear that opinions nationally and internationally will vary widely, on the preferred connecting factor, and so it might be better to approach the subject from the perspective of bearing in mind that the chosen connecting factor will govern all matters of substance, directing attention to the question of which law is *appropriate*, rather than superficially attractive or seemingly convenient or lowest common denominator on which international agreement can be achieved.

2. Unified system of choice of law

A unitary choice of law rule commonly is found. We do not accept that, for estate planning purposes, a change to a unitary system necessarily would produce greater certainty, as that presupposes that the connecting factor chosen would be capable of definite ascertainment by the testator. With regard to immovable property, the connecting factor of habitual residence certainly will be subject to more doubt (i.e. will be inevitably less predictable) than the *lex situs*. While it may be more apparently straightforward to have a single *lex causae* to govern substantive matters, in reality it will not necessarily produce more certainty for the owner/testator. Currently, British nationals buying property abroad require expert local advice for the purchase, and we

venture the opinion that such individuals will be aware that in formal and essential terms their testamentary dispositions with regard to houses abroad must comply with the *lex situs*.

Giving support to a unified choice of law rule appears to be part and parcel of participating in the harmonisation exercise. This may entail sacrifices on the part of Scots/English law *qua lex situs*. However, ultimately, the *lex situs* rule is based on the incontrovertible fact that the *situs* must be satisfied, and so any unified rule rests on the presumption that the *lex situs* will acquiesce in recognising title conferred by some other law, and will permit the registration etc processes necessary in accordance with the formalities of the *lex situs*. To some extent the existence of Art.1.3.j acknowledges the necessary function of the *lex situs*, and so, while it is welcome, it is a significant concession. In foreseeing and deflecting a potential clash between *lex causae/successionis* and *lex situs*, it acknowledges the superior position of the *situs*, and demonstrates the limits of the unitary principle.

In principle, we can see the argument in favour of the unitary rule. Given that a unitary rule obtains in a number of EU Member States, it must be workable. However, the workability of such a rule depends upon the quality of the connecting factor (q.v.).

3. Freedom to choose the applicable law

The fact that party autonomy is a recognized tool of choice of law (Rome II; and Rome I) does not mean that it should necessarily be included in a succession instrument. However, against the background of the general rule set out in the Proposal, perhaps it is understandable that parties would wish to exercise such a choice in order to align themselves with a point of permanence in their lives such as nationality, or from a UK perspective, domicile. Thus, a peripatetic academic of British nationality and Scottish domicile, whose work resulted in his spending three years in Italy, followed by three years in the Hague, nevertheless could assure himself that Scots law (*qua* “law of nationality”) would regulate the succession to his estate.

Therefore, insofar as, under current drafting, the connecting factor of habitual residence appears to us to be unsatisfactory, we have some sympathy with a person’s desire to inject certainty by means of choice, i.e. using party autonomy in a “positive” fashion. If the primary choice of law rule is as ambiguous as “habitual residence” in an undefined manner, then we favour the concept of freedom of choice of law.

This has downsides for potential beneficiaries as the testator might exercise choice in such a way as deliberately to disinherit potential beneficiaries. Art.27.2 forbids a forum from disapplying a rule of the *lex successionis* on the sole ground that its provisions on reserved portions differ from those in the forum. Party autonomy, increasingly permitted, normally is accompanied by mandatory rules in order to safeguard certain interests. However, to offset the lack of policing by way of mandatory rules, the testator’s choice is limited to the law of his nationality.

Looking at Art.17 from a technical perspective, choice of nationality, while certain, would need to be refined from a UK point of view. Perhaps this is supposed to have been done by virtue of Art.28.1. If, for a UK citizen, Art.17 were deemed to point to the legal system of “habitual residence”, that would render the alleged choice by the testator meaningless (the point of Art.17 being to provide a real choice, i.e. a choice other than the habitual residence). On this reasoning, for a UK citizen, the only satisfactory alternative to habitual residence must be domicile in some sense. It is not clear, and it ought to be clear, what option is available to the UK citizen.

There is also a lack of guidance upon temporal issues. Art.17.1 permits a testator to choose the law of the state whose nationality he possesses. One would think that this choice should fall only upon the nationality of the testator at the time of testing, rather than his nationality, as it happens to be, at the time of death, but certainty in drafting is important if certainty is the aim of the process. The meaning of Art.17.4 is not clear; presumably modification or revocation of such a choice of applicable law must mean either a reversion by the testator to the general rule contained in Art.16 or a revision in light of a change in nationality.

Freedom to choose the applicable law is restricted to the law to govern the succession “as a whole”. Therefore, a testator could not use the Regulation to subvert the Regulation, by choosing the law of his nationality (or in the case of a UK citizen, his domicile) to govern the succession to immovable property situated there, and the law of his habitual residence to regulate succession to moveables wherever situated. It is noted that in every case the reference is to the law of a state in its internal sense (Art.26).

Our view on these points is that:

- Freedom of choice is a sensible counterbalance to a poorly constructed general rule.
- The drafting of Art.17 as it stands has technical defects.
- Though it is not surprising that the operation of *renvoi* and of *dépeçage* has been excluded, there might have been advantage in the latter being available.

THE POTENTIAL PROBLEMS

1. The problem of clawback

Clawback as a domestic principle is seen to a limited extent in Scots law in the doctrine of *collation inter liberos*, i.e. the equalisation of succession rights among siblings. In general, however, Scots domestic law belongs to that family of laws in which, although there is compulsory family provision, it operates as a claim to a proportion of the estate available at death. Where the monetary amount is specified, as in prior rights of the surviving spouse (in cases of intestacy), the effect is often to exhaust the estate.

The absolute terms of para.15 (and para 16) of the Consultation Paper suggest that a particular problem has arisen in a particular area (e.g. large *inter vivos* donations to trusts or charities in circumstances which render the validity of the lifetime gift questionable and possibly reducible in that it conflicts with the substantive succession law applicable to the deceased's estate, being that of an offshore jurisdiction). The authority cited in Dicey, Morris & Collins with regard to English law is old, and single judge (para. 29-041).

The problem is not one which has presented in reported case law in Scotland. We are not aware, in Scots conflict of laws, of any instances in which the clawback provision of a foreign *lex successions* has caused a problem. We note in passing *Re Korvine's Trust* [1921] 1 Ch 343, in which the validity of a deathbed transfer was characterised as a matter of property (not succession), to be determined by English law. However, in general, or as a matter of principle, we think that the operation of clawback provisions is a substantive matter, for decision by the *lex causae* (*lex successions*). There is a problem of competing innocents (the actual recipient, and the arguably deprived beneficiary); the policy issues are akin to the question whether, in cases of transfers of moveable property, preference should be given to security of transaction or protection of original title.

Following this through, the important question is what law shall determine the extent of the deceased's estate at death. It appears that the English preference will be to exclude from the estate property validly disposed of *inter vivos*. Certainly, it can be seen that there could be a clash of characterisation, the (English) *lex fori* insisting *qua lex situs* that a valid disposal, even shortly before death, has been made, according to the property rules of English law, whereas the opposing argument could be made that the clawback rules form part of the substantive succession law of the *lex successions*.

The inclusion of Art.19.2.j as a matter within the scope of the applicable law, and hence a matter for the putatively harmonised rules of succession (as opposed to the unharmonised rules of title to moveable property) detracts from the ability of the forum to draw a distinction between *inter vivos* gifts and matters of succession. The extent and seriousness of this loss of judicial discretion is most profitably commented on by practitioners in the field. The principle does not appear to have caused problems in Scots conflict rules viewed historically. On the basis of there being no reported cases to date on this issue in Scots law, we cannot think that the incidence of this type of problem in our jurisdiction would be high.

2. Lack of certainty in relation to the connecting factor

We have grave doubts about the wisdom of moving to such an ambiguous connecting factor. It is notorious within conflict of laws scholarship that "habitual residence" is a weasel factor, which does not live up to its reputation as a common sense factual criterion.

If habitual residence is to be chosen as the connecting factor, we should have preferred that a definition be included in the instrument, at least for the purpose of this instrument.

The Proposal does not address the usual problem of multiplicity of residences. This is a serious flaw given that the impetus for this proposed instrument is said to be the need to meet the requirements of "international persons".

We are by no means convinced that this connecting factor is the best that can be found for such an important matter. The lack of definition of the key concept of the scheme of rules has the potential to cause significant uncertainty, and to result in inappropriate outcomes in a significant number of cases.

It is imperative that the connecting factor fixed upon be identifiable in principle, and appropriate in the circumstances in ensuring that there is a strong connection between the deceased and the legal system in question.

In assessing the advantage which the current UK choice of law rules have over what is proposed, one should compare “domicile” with “habitual residence”. The connecting factor of habitual residence has proved notoriously productive of disputation and litigation. The case law in the UK and elsewhere on the meaning of habitual residence does not inspire confidence. One can be without an habitual residence; one can have two such residences (for some purposes, but not for others); one can have a different habitual residence for different purposes; one can have a different habitual residence for EU and non-EU purposes (and for specifically intra-UK purposes). Opinions diverge among the judiciary in one legal system, even in the same area of law, as to its meaning; and among the judiciary across legal systems. In contrast, one cannot be without a domicile; one can have, at any one time, only one domicile; domicile is a unitary concept. But it has to be admitted that, although the rules of domicile are fixed, the outcome of a domicile determination may not be easily predictable to lawyer or to layperson.

The connecting factor chosen in this context should not, in our view, be one which could be established on proof of relatively transient connection, e.g. a connection based upon residence for a relatively short period of time.

It is true that, in our rules, a domicile of choice can be acquired in a day, assuming *factum* and sufficient *animus*. Such a finding by a court would be unusual, and obviously would rely heavily on inferences as to intention to remain so far as can be seen ahead in the new legal system; this can be contrasted with short or long residence in a legal system where there is no intention to change domicile so as to adopt that country as the law governing all personal matters, including succession. Domicile is the only connecting factor which takes fully “intention” into account (leaving aside for the moment party choice of applicable law).

Domicile, in the main, yields an appropriate connecting factor. Habitual residence has the potential to be a very fragile connecting factor, and one which may be raised to prominence through the happenstance of the occurrence of death in a country which, it was clear from the surrounding circumstances, the deceased had intended in the short- or medium-term future to leave.

Therefore, we have serious doubts about the sufficiency of “habitual residence”, as baldly used in the Proposal, to fulfil satisfactorily the pivotal function allocated to the connecting factor in this framework of rules.

OVERALL STRUCTURE

The Proposal follows the usual structure of considering *separatim* jurisdiction, choice of law, and recognition. It seems to us strained to use the term jurisdiction in relation to succession. It is rather the case, according to current rules in Scotland, that if there are assets of the deceased situated in Scotland, the Scots court (which we are accustomed to call the *lex fori* in this situation) is charged with the administration of those portions of the estate there situate, and with distribution thereof in accordance with the *lex causae*. This seems a convenient and practical system. The merits of drafting new rules with the aim of conferring “jurisdiction” on a single court are not immediately obvious. The key here is administrative ease and convenience; most successions are non-contentious, and to elevate as subjects of particular concern “jurisdiction” and “recognition” seems unnecessary in this area. We have no objection, in principle, to the drafting of provisions which facilitate mutual co-operation and recognition of appointment, intromissions and discharge of personal representatives (though existing procedures, in our view, suffice).

With regard to recognition and enforcement, we have no fundamental objection to re-modelling this for special application within the EU if benefits of ease and speed can be achieved. As elsewhere in the instrument, it is clear that the form and content of the provisions in Chapter IV have been lifted from other instruments concerning recognition and enforcement of judgments. We cannot see that these provisions are necessary or even appropriate; but they are unlikely to be troublesome.

Whilst a more streamlined system of recognition of administration procedures in principle clearly is not objectionable, with regard to the proposed European Certificate of Inheritance, we do not consider that the introduction of such a certificate would help to remove or reduce formalities. Currently the Scots forum administering an estate has the option of distributing it in accordance with the *lex causae*, or of remitting it to lawyers in the jurisdiction of the *lex causae* to carry out the distribution. If the proposed Certificate is to be of help in terms of ease and speed, it would have to be authoritative. Why should such a document, which purports to be in its nature administrative, be unassailable as regards the substance of what it contains? How would the heir acquire such a Certificate? Which Member State, and which organ of that State, would have the power to grant it? Presumably it would be intended that the document be conclusive, i.e. both as to the law to be applied, and the substance of that law as applied to the individual case.

CLOSING REMARKS

In short, our main concern is with the inadequacy, in terms of uncertainty and possibly inappropriateness, of “habitual residence” as a connecting factor in succession to moveable and immoveable estate. Insofar as an enlarged and re-cast Art.17 might allow potentially affected UK citizens to escape the principal rule (if that is what they should wish to do) through choice of a law equivalent to nationality (perhaps domicile, whether or not so-called), the dangers of habitual residence might be avoided. However, this would not improve the position in respect of intestacy. Moreover, it seems ill-advised to sign up to a set of rules on the basis that circumvention thereof is possible.

9 December 2009

Memorandum by Andrew Francis, Serle Court, Lincoln's Inn

1. INTRODUCTION

(i) I am a barrister in private practice at the Chancery Bar in practice at the above named Chambers. I have been in practice since 1979. I am a Bencher of Lincoln's Inn.

(ii) Part of my practice concerns the estates of deceased persons; both as to the law of testate and intestate succession and family provision out of such estates under the Inheritance (Provision for Family and Dependants) Act 1975—“the 1975 Act”. My experience relates only to the law of England and Wales as I have very little experience of the succession law of Scotland (which is very different) or Northern Ireland (which is broadly the same). So my comments below relate only to the law of England and Wales.

(iii) I am an active member of the Chancery Bar Association and of the Association of Contentious Trusts and Probate Specialists.

(iv) I am the Author of “Inheritance Act Claims—Law Practice and Procedure” (pub. Jordans; looseleaf). This is the only looseleaf and continuously updated work on this subject and I believe it is generally accepted as the leading book in the field. It may also be accessed online (for subscribers) at www.jordansonlineservices.com. I am also the co-author (with Hedley Marten of counsel) of “Contentious Probate Claims” (Sweet & Maxwell 2004).

(v) My experience in the law of succession is therefore extensive, both as counsel advising in this field, as an advocate in Court and as an author, lecturer and broadcaster in it.

(vi) From this standpoint I am concerned to show in outline below some of the issues which arise in the context of the proposed Succession Directive if fully implemented and not the subject of any opt-out. Unfortunately notice of the deadline for responses came to me late so what I say below is an outline only. If requested I can expand on any points made orally, or further in writing. Pressure of time and work has meant that I have not been able to answer the specific questions raised, but I trust this short response will be accepted as sufficient.

2. COMMENTS ON THE DIRECTIVE

(i) I have considered the Directive, the explanatory memorandum to it and the public consultation paper prepared by the MoJ; the latter being published on 21 October 2009.

(ii) I have also considered the Law Commission's Consultation Paper (No. 191) on the reform of Intestacy and Family Provision Claims on Death; 29 October 2009. As I observe below, no mention of this exercise appears to have been made in any of the papers connected with the Directive. If I am wrong about that I apologise and if there is a reason for any non-reference I would be interested to know what that is.

(iii) I have identified the following comments and issues which emerge from what is proposed by the Directive.

- (a) In this day and age a number of estates contain assets outside the jurisdiction of the UK, or England and Wales. Thus any proposal to simplify the law which relates to the administration of those assets and the enforcement of judgments affecting estates in the EU is to be welcomed.
- (b) The adoption of “habitual residence” is to be welcomed as governing the choice of law and accords with other jurisdictions such as divorce and related claims. (However that phrase may still cause problems in certain cases, as the MoJ paper para. 21ff shows and I support those comments.)
- (c) However, the effect of adopting such an applicable law may cause problems to arise under Art. 19 (2) where the current law of England and Wales governing succession to assets to which Art 21 does not apply; e.g. moveables.

- (d) The terms as to the recognition of judgments is also to be welcomed, subject to the comments in the MoJ paper at paras 39ff.
- (e) The major concern which I have is in relation to the provisions as to clawback, the payment of debts and the operation of rules such as survivorship, all of which are affected by Art 19(2). I share the concerns expressed in the MoJ paper at paras. 13ff. On clawback I endorse the summary of Prof. Paisley's concerns at Annex 1 to the MoJ paper.
- (f) One specific concern relating to the matters at (e) above is that in 1975 Act claims the key factor (apart from the merits of the claim generally) is what is the value and composition of the "net estate" of the deceased; see ss. 3(1)(e) and 25(1) of the 1975 Act. Apart from problems which can bedevil the ascertainment of the value of the net estate (see Francis, *supra*, at Chap. 9) if the Directive is implemented there may be a great deal of uncertainty about what will, or will not be the value, or composition of the net estate at any given time; crucially at any settlement, or hearing of the claim. This is in respect not only of lifetime gifts made by the deceased (which are assumed not to be within the anti avoidance sections of the 1975 Act—ss. 10–13) and Annex 1 to the MoJ paper demonstrates the widely varying local laws within the EU which could impact on 1975 Act claims here.
- (g) I am also concerned at the effect which the Directive at Art 19 may have on the present need to commence proceedings within six months of the date of the grant (section 4 1975 Act) and how this time limit will be affected by the new Certificate of Succession under Chap. VI of the Directive.
- (h) Finally, in addition to endorsing all the concerns (not so far mentioned) in the MoJ paper, as stated above, there seems to be no mention anywhere of the impact of the Directive on the current Law Commission's consultation proposals referred to above in Paper No. 191. Whether mentioned or not, it seems to me to be vital that the proposals of the Law Commission (when finally published in a Report in, I believe, 2010) are taken into account in the context of the Directive and (most importantly) *vice versa*. (I should add that I am on the working group of the Chancery Bar Association looking at the Law Commission Paper and will be advising the Association on its response to that paper by 28 February 2010.)

3. CONCLUSION

(i) As stated in the introduction, I am sorry that shortness of time and pressure of work has prevented me from responding at greater length and in more detail.

(ii) However, as the author of the leading book on 1975 Act claims and with huge experience as counsel in succession matters I believe that I can assist in identifying many points at which the Directive (if HMG opts into it) may cause issues to arise.

(iii) I would make one final point. This is a plea for clarity where in 30 years of practice I have seen so many lives and estates blighted by complexity and costs following a death. The general law of England and Wales allows freedom of testamentary succession in estates which are solvent, subject only to fiscal charges and the 1975 Act. This is unique within the EU. Most people in this country accept that and understand that if they do not make a will the law of intestacy will make provision for defined classes of survivors; albeit in many cases (under the present law) rather badly. The aim of the Directive is to make the law of succession more reflective of modern life in the EU and to simply certain procedures within the EU; e.g. grants of representation and enforcement of judgments. But the Directive will not achieve its aims if, for example, an estate in England and Wales is to be subject to the difficulties of clawback summarised in the MoJ paper para. 13 and at Annex 1. It would be detrimental if the administration of estates (which can often be a fraught process) is made more troublesome by the adoption of the Directive in its entirety. The bereaved parties, whose emotions will already have been strained by the death of a partner, child, parent or other relative or friend, will not be served by another layer of complication. In many cases such additional complexity will hinder the final distribution of the estate and cost money to resolve, thus reducing the amount to be distributed, or cause assets (e.g. the matrimonial home) to have to be sold.

(iv) I will be more than happy to supplement my comments further, either in writing or by attendance at a meeting, or in conference call.

27 November 2009

Letter from the Hon. Mr Justice David Hayton

1. I am writing to your committee as an individual who, as a barrister and as a professor, advised and published in the field of the private international law of succession. I also headed the UK Delegation to The Hague Conference preparing the Convention on the Law Applicable to Succession to the Estates of Deceased Persons 1989. Although becoming a judge of the Caribbean Court of Justice as from 1st July, 2005, I have both before and after that date been involved in giving some advice to the Law Society, STEP and the Ministry of Justice in its existing and former incarnations on matters leading to the proposed EU Regulation.
2. I am most disappointed that, despite UK pressure, no attempt was made to restrict the scope of the Regulation to property within the deceased's estate at death, so as to exclude property given away earlier by valid *inter vivos* gifts and thereby exclude civilian "claw-back" succession rules that would wholly undermine the security of UK *inter vivos* gifts and defeat UK donees' legitimate expectations if applied in the UK.
3. I am also disappointed that in default of the *lex successionis* being the deceased's habitual residence at death, the only choice of law available to a testator at the time he makes his will is that of his nationality at that time and not also that of his habitual residence at that time (as permitted currently by The Netherlands and Belgium and as recommended by the Irish Law Reform Commission in its [1991] IELRC 3 Report recommending implementation of The Hague Succession Convention 1989).
4. The proposed Regulation reflects a hardening of the stance of those involved in its preparation. I suspect that this may well have been caused by the traditional nationalist approach of most of the 12 newest EU member-states whose economic and political circumstances over the last 40 years have not allowed the time for development of the more liberal approach of the western EU member-states.

Do not opt in to the Regulation

5. In my firm view it is clearly not in the national interest for the British Government to opt in to the Regulation.
6. In helping to draft The Hague Succession Convention I ensured that the Article 2(d) exclusion of "property rights, interests or assets created or transferred otherwise than by succession, such as in joint ownership with right of survival, pension plans, insurance contracts, or arrangements of a similar nature" e.g. *inter vivos* trusts (as made clear in the Waters' Report on the Convention para 46), was absolute so that the reference in Article 7 (2) (d) to the *lex successionis* governing "any obligation to restore or account for gifts, advancements or legacies when determining the shares of heirs, devisees or legatees" covered only the hotchpot or collation rules (e.g. under ss. 47 and 49 of the Administration of Estates Act 1925, now repealed, and the English equitable presumption against double portions, and ss. 63 and 116 of the Irish Succession Act 1965). It was left to civilian forced heirship jurisdictions with "claw-back" rules to utilize Article 7(3) to extend the *lex successionis* to those rules except in regard to property that had been the subject of a valid gift unimpeachable by succession law according to the governing *lex situs* eg English or Irish law.
7. Under the proposed Regulation the exclusionary Article 1.3 (f) thereof is virtually identical with the above Article 2(d) except for the key addition "notwithstanding Article 19(2)(j)" which covers "any obligation to restore or account for gifts and the taking of them into account when determining the shares of heirs", viz the "claw-back" rules as well as hotchpot rules. I treat "notwithstanding" as meaning "without prejudice to" or "without derogating from".
8. It seems to me that, despite the British Government's very clear repeated insistence on the need to exempt from the Regulation a deceased's earlier gifts that were unimpeachably valid by the English (or Scots or Northern Irish) *lex situs*, the EU is determined to make no allowance for this even though some State "claw-back" rules extend to gifts up to 30 years old. Whether a "claw-back" claim is a proprietary claim requiring return of gifted property or, as more commonly is the case, it is a personal monetary claim for the value of the gifted property, it would, if accepted, wholly undermine the security of UK property transfers (even to offshore trustees where the property—like stocks and shares or immovables—remains in the UK) and the expectations of transferees. It has far too many significant detrimental effects as set out in paragraph 17 and 18 of the Ministry of Justice's Consultation Paper 41-09 (the "CP"), in paragraph 19 of Professor Paisley's impressive Report and in the Impact Assessment, so that the British Government should certainly not opt in to the Regulation. This is even assuming that recipients of gifted property before the date the Regulation comes into force would be protected and even if for gifts made, say, three years thereafter a donee might, perhaps, be permitted a defence of change of position if ignorant of the Regulation, while query if trustees could be afforded some protection after distributing property to beneficiaries along the lines of the protection in s. 13 of the Inheritance (Provision for Family and Dependents) Act 1975 where a court has made an order in respect of a lifetime disposition made by the deceased to the trustee within six years of his death with intent to defeat an application under the Act.

9. The uncertainties created by the absence of any definition of the deceased's "habitual residence" at death as the default *lex successionis*, in the absence of a valid choice of nationality law, strengthen the case for not opting in to the Regulation. It is however, a little easier to get by without defining "habitual residence" where one is concerned with the position at D's death rather than the date at which D made his will, because there is much less chance of artificial manipulation of the position. I suspect this is the reason why there is no longer the possibility of a choice of one's habitual residence at the time of making one's will—though it would have been possible to provide e.g. for habitual residence to be conclusively presumed (in the absence of fraud) if some official (e.g. a notary or for England an officer of HMRC) certified that the individual had been resident in the jurisdiction for at least five [query three] years so that that individual could then safely proceed to make a will governed by the law of that jurisdiction.

10. Since the courts of the member-State where D had his habitual residence at his death have jurisdiction under Article 4, it is very likely that the courts of the State where D resided at his death will find him habitually resident in that State. This will have the result that a significant number of English-domiciled persons with postings outside England, though intending to return to England in due course, will be found to have died habitually resident outside England and so subject to a foreign *lex successionis* (not permitting freedom of testation) instead of an English one, unless they had sensibly chosen to make a will choosing their nationality law, assuming that they were British and chose a jurisdiction therein in which they had last (or at some stage) habitually resided, rather than, say, a fifty-eight year old foreign national who had been brought to England at two years of age, but who could not choose English law as not a British national.

11. From the viewpoint of "nationality" States—as opposed to common law "domicile" States—though both are brave enough and modern enough to move away from nationality or domicile at death as the *lex successionis*, there is also the worry that their nationals with postings abroad will be found to have died habitually resident elsewhere. To avoid this problem, "nationality" and "domicile" States could work together to have a definition of "habitual residence" concerned not just with objective facts but also with the intent of the *de cuius*, so that a person is habitually resident in the jurisdiction which is the main centre of his personal, social and economic interests except where he intends this to be for a temporary period, in which case EITHER [he is habitually resident in the last jurisdiction where previously in his adult life he had had the main centre of such interests without any such temporary intent, though if there is no such centre he will conclusively be deemed to have been habitually resident in the State of his nationality] OR [he is conclusively deemed to have been habitually resident in the State of his nationality]. The former of these alternatives is to be preferred to the latter.

12. It will be seen that even the possibility of choosing one's national law creates problems where one is a national of a State, like the UK or Spain having different legal jurisdictions within it. How is a testator who in his will foolishly chose British or Spanish law to be allocated to such a jurisdiction? Can a British or Spanish citizen choose any British or Spanish jurisdiction or just such a jurisdiction he or she last habitually resided in or any such jurisdiction in which he or she resided at some stage after attaining the age of majority. There is also the problem that a person might have dual nationality. Can s/he choose either or just the "dominant" nationality (e.g. if a national of the jurisdiction of residence) or is it that s/he cannot choose the law of a nationality purchased to acquire greater freedom of testation? Can one choose nationality law to govern a specified fraction of one's estate or specified assets within one's estate, leaving one's habitual residence at death to govern the rest of the estate?

13. The last possibility is excluded by Arts 16 and 17 while Art 28 addresses some of the other problems (though contrast how Art 19 of The Hague Succession Convention deals with them). These problems, however, can be ironed out and it will be advantageous to have available an express choice of law at the date of making a will and entering into associated estate-planning arrangements involving gifts to individuals, trustees or foundations, and also for there only to be one *lex successionis* for the whole estate (not differentiating immovables from movables).

14. Thus, while I strongly recommend not opting in to the Regulation, once it becomes law in the other EU States I would strongly recommend changing English (and Scots and Northern Irish law) so that one law governs the whole estate of a deceased and so that a valid choice of the *lex successionis* can be made at the date of making the will by choosing the law of the State of one's then nationality or, if there are different jurisdictions within that State, the law of a jurisdiction in which one had habitually resided as an adult at some stage.

15. The idea is to fit in with the Regulation so as to produce efficiencies and cost-savings, while avoiding all "claw-back" problems as indicated below. Indeed, if a satisfactory definition is produced for the default *lex successionis* at death, namely "habitual residence", I would recommend using this to replace the "domicile" at death that currently is the UK connecting factor to establish the *lex successionis*. I very much suspect, however, that a satisfactory definition of "habitual residence" will not be forthcoming. As a compromise it is too easy

to say that no definition is needed as “We know habitual residence when we see it”, and any problems over grey areas, will, anyhow, be resolved by the European Court of Justice when it is proving impossible for those round the table to reach a satisfactory compromise. Examples produced in the Report on the Regulation will be the key for developing the meaning of “habitual residence.”

Should the UK participate further as observer without a vote?

16. This depends upon an evaluation of the likelihood of being able to improve the proposed Regulation sufficiently enough to make it worthwhile becoming bound by the Regulation in the end of the day or, if not, improving it enough so as to make it worthwhile changing UK domestic law to bring it into line with EU law to a significant extent. The Inheritance (Provision for Family and Dependents) Act 1975 s 1(1) already needs to be amended as a matter of urgency to enable discretionary provision to be made thereunder not just in respect of the estate of a person “who dies domiciled in England & Wales” (so that English law is his *lex successionis*) but in respect of the estate of a person whose *lex successionis* is the law of England & Wales because dying domiciled in England or because the British testator chose English law to be his *lex successionis* though dying domiciled or habitually resident elsewhere—as already permitted by some States e.g. The Netherlands, Belgium, Switzerland.

17. I very much doubt that we will be able to have the proposed Regulation amended to tackle our major concerns as to “claw-back” and the definition of “habitual residence”, although there might be some movement on the minor issues referred to in the CP at paragraphs twenty-eight onwards.

18. It is clear that the civilian systems are very happy with their “claw-back” culture and are adamant that the Regulation must cover this. The only hope for the UK Government is for an exception to be made to cover the interests of common law States like the UK and Ireland e.g. by adding to the end of Article 19 (2) (j) “except where the subject-matter of the gift was situated in a jurisdiction which does not permit such gift to be undermined by the law applicable to succession to the donor’s estate”. This is vital to protect well-established fundamental property principles that make a clear distinction between *inter vivos* property rights and testamentary property rights, though this common law bright-line does not exist in civilian States.

19. Perhaps when made aware that the UK cannot possibly accept the Regulation without this exception the civilian States may reluctantly allow this crucial exception. I suspect there will be much made of this allowing those in civilian States to evade their obligations by simply buying UK property and giving it to favoured donees or to trustees for such—though they will, anyhow, be able to do this if the UK does not accept the Regulation.

20. Negotiating a definition of “habitual residence” will be very difficult indeed. In drafting The Hague Succession Convention discussions went on and on and on in circles until our frustrations led us to abandon any definition and develop a cascade approach in Article 3.

21. I note that a cascade or hierarchical approach, but of a more certain character, was proposed in paragraph nine of the UK September 2008 Comments on EU Commission Draft Preliminary Proposal. I assume that this must have been discussed but dismissed in preparing the proposed Regulation. Whoever represented the UK at these discussions can give the best guidance as to whether or not there is a sensible, as opposed to fanciful, possibility of any agreement on a satisfactory definition.

22. Because there clearly are very significant advantages if throughout the EU the rules are:

- (i) one *lex successionis* for the whole of a deceased’s estate, movable and immovable;
- (ii) a testator on making his will can choose his then nationality law as the *lex successionis* so that he knows that later changes of his habitual residence or even, his nationality cannot adversely affect the impact of his will and associated gifts made at the time of the will as part of his overall estate planning;
- (iii) in default of such choice of nationality law, the deceased’s habitual residence at death determines his *lex successionis*;

it follows that it is in the UK national interest to try to have these rules apply in the UK as well as the rest of the EU.

23. Clearly, the UK will not be prepared to move from “domicile” at death being the *lex successionis* to “habitual residence” at death as at (iii) above unless a relatively satisfactory definition of “habitual residence” can be achieved, testators having it within their own power to make a choice of law for special circumstances because no definition will be perfect for everyone unless allowing far too much flexibility e.g. for the “law of closest connection”. I very much doubt that this will be possible, but perhaps examples provided in the Report on the Regulation could adequately provide satisfactory signposts to tease out the meaning of “habitual residence.” Steps could also be taken to make those moving abroad for employment on a temporary—but

lengthy—basis become aware of the need to make their *lex successionis* certain by making a will expressly choosing their relevant nationality law jurisdiction.

24. Clearly, the UK can—and should—unilaterally change its laws so as to achieve the EU positions (i) and (ii) above but with a specific exception from the “claw-back” rules where the subject-matter of a deceased’s *inter vivos* gift was situated in a jurisdiction (e.g. England and Ireland) the law of which does not permit such gift to be undermined by the law applicable to succession to the deceased’s estate: technically, the common law characterisation of the *inter vivos* gift as exclusively of an *inter vivos* non-testamentary nature must prevail.

25. There clearly is much scope to improve the proposed Regulation, the drafting of which, to my mind, reveals a vast preponderance of civilian impact. The UK should, in my opinion, participate as an observer in finalising the Regulation and providing some common law input to restrain or reduce the civilian impact.

26. I am not very hopeful that this will enable enough changes to be made to enable the UK accept the finalised Regulation. Even so, I do, however, hope that the UK will unilaterally move so as to achieve the EU positions (i) and (ii) as mentioned in paragraph [24] above, having helped to refine the requirements as to the choice of nationality law, especially where there are several jurisdictions within that nationality, and having helped to produce some sort of definition of “habitual residence” or some helpful examples to go into the Report to provide guidance as to “habitual residence”.

9 November 2009

Memorandum by the Institute of Chartered Accountants in England and Wales

INTRODUCTION

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

WHO WE ARE

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

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

MAJOR POINTS

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

5. We have read the joint position paper dated 30 November of the Society of Tax & Estate Practitioners, The Law Society and The Notaries Society. We broadly endorse their approach and would emphasise the points below:

- Habitual residence (“HR”) needs to be clearly defined in the Regulation.
- The removal of domicile as a criterion will make the administration of estates uncertain.
- HR, and the ability to choose the relevant law of nationality, will make the administration of estates uncertain.
- There is no mechanism to prevent, or even resolve, “intermeddling” by heirs from those countries that permit direct claiming of assets by heirs without the involvement of executors, etc.
- Freedom to “cherry pick” HR by some may result in a reduction in IHT payable.

- Succession rules dependent upon HR would impose alien legal systems, for example forced heirship, on the UK, restricting the UK's tradition of lifetime and testamentary unfettered freedom to dispose of assets (subject to Inheritance (Provision for Family and Dependents) Act and claims to legitim in Scotland).
- Clawback will destroy the fundamental right of an individual to alienate himself from his property in lifetime and on death.
- Clawback is likely to result in donees who are expected to return the gifts objecting on the grounds that under human rights law they are being deprived of the right to enjoy their property.
- The exclusion of trusts will mean that common involuntarily-created trusts such as constructive trusts (e.g. where property held by more than one person), statutory trusts (which arise on intestacy) and bare trusts will be excluded from the new regime.
- Definitions of family relationships, e.g. spouses and civil partnerships, are inconsistent between Member States. Changes in family relationships could lead to inconsistencies between jurisdictions as to how such family relationships are recognised.
- It is not clear how the Channel Islands and Isle of Man will fit within the new Regulation given that they are not Member States of the EU.

COMMENTS

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

Habitual residence

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

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

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

Uncertainty owing to domicile not being a criterion

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

"Intermeddling", or jurisdictional disputes

11. We are concerned about the absence of any mechanism to prevent, or even resolve, disputes between beneficiaries. We think that the draft Regulation will give rise to jurisdictional disputes, or intermeddling, where individuals die with relations and assets in more than two Member States particularly where some beneficiaries are in civil law jurisdictions. For example, a UK-domiciled individual dies and he is living in France and has assets in England, France and Germany. Despite having specified in his Will governed by English law (because of habitual residence) to whom his German assets should devolve, by the time the UK executors obtain probate, the beneficiaries in France may well have obtained title to the assets in Germany because they have

obtained from the French authorities, and presented to the German authorities, a European Certificate of Succession (“ECS”). We should welcome clarification as to how this conflict would be resolved.

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

Protection of the UK tax base

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

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

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

Knock-on effects on UK succession laws

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

Clawback

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

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

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

Exclusion of trusts

20. Trusts are specifically excluded from the Regulation (Article 1.3(i)). This will mean that the existing rules will have to remain in order to deal with, inter alia:

- (i) trusts under which the English legal system enables real property, including an individual’s main residence, to be held jointly as joint tenant or tenant in common;
- (ii) statutory trusts, which arise under intestacy; and
- (iii) bare trusts, which arise for example where land or savings are held for a minor or incapacitated person.

Minors inheriting land

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

Definitions of family relationships

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

Jurisdiction

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

Right of appeal

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

RESPONSES TO QUESTIONS

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

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

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

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

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

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

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

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

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

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

- 3.32 Different Member States have different definitions of what the UK calls “civil partners”. Some are not mutually recognised, for example it is understood that the UK recognises the French provisions for same sex couples but that France does not recognise the UK provisions.
- 3.52 We find it a matter of concern that the UK government and courts will need the permission of the Commission and the Council.
- 4.5 The Regulation will contravene human rights about quiet enjoyment and non-confiscation of private property. Recipients of gifts will now never know if they may have to refund when donor comes to die.
- 4.8 We suggest that a health assessment may be appropriate of the anxiety and stress of donees of lifetime gifts who will now be worried about clawback of such gifts, whenever made.
- 5 We would have thought that some UK legislation will be required (see para 36 of consultation document and para 3.31 of impact assessment).

3 December 2009

Annex

HABITUAL RESIDENCE CASE STUDIES

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

1. Mr A

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

2. Miss B

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

3. Princess C

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

4. Mrs D

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

5. R (also known as P)

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

6. Mr W

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

7. Mr K

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

8. Mr and Mrs S

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

9. Mr F

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

10. Baby Y

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

11. Mrs Z

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

12. Mr I

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

13. Mr G

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

14. Mr and Mrs V

Mr and Mrs V are British born and bred and have lived and worked in England all their lives. They have had for over 20 years a second home and euro bank account in France and since their retirement 10 years ago have lived there from May to September every year and the rest of the year at home in England. One summer, Mr V becomes ill and, after a spell in hospital in France, dies in France.

Memorandum by Roger Kerridge, Professor of Law, University of Bristol

1. I have never studied EU Law and last studied Private International Law a long time ago, so this is not quite my field. I am an ordinary domestic, academic Succession lawyer.

2. But, it seems to me to be obvious that there would be significant advantages to be gained from the adoption of a Regulation along the lines of that now proposed.

Looking at paragraph 3.32 in the Impact Assessment, I do not see any particular advantage in relation to “economically disadvantaged people” or in relation to “individuals who are party to a civil partnership” (why are they given special status?) but there appear to be significant advantages to most people who die leaving property in more than one jurisdiction, and/or who live in countries of which they are not nationals.

I do not want to rehearse the advantages—they appear to me to be obvious.

3. The problems lie with the so-called “areas of concern”; and there appear to be two principal ones—the connecting factor (habitual residence) and “clawback”.

4. FIRST AREA OF CONCERN—HABITUAL RESIDENCE AS A CONNECTING FACTOR

As I said above, Private International Law is not my field but I do not see a problem here. Or, put it another way, I do not see why habitual residence as a connecting factor creates more problems than domicile as a connecting factor.

There are some lawyers in this country who always assume that we (in the United Kingdom in general, or in England and Wales in particular) do things better than the foreigners. I do not share that assumption. Yes, there are problems with habitual residence as a connecting factor, but no more than with domicile.

As I understand it (and I have discussed this with someone who knows a lot more about Private International Law than I do) the alleged problem with habitual residence is that someone may have more than one habitual residence: but that is, itself, largely a problem created in England. English lawyers assume that someone may have more than one habitual residence, the European Court is moving towards the view that an individual may have only one habitual residence. Once you overcome the problems associated with multiple habitual residences, habitual residence is at least as good a connecting factor as domicile. So it would seem to me to be wrong in principle to place any emphasis on any problem linked with habitual residence as a connecting factor. We can accept it. It will be non-negotiable and we should not waste our time attempting to re-negotiate the non-negotiable.

5. What I have just said, in the paragraph above, does not imply that I want (at this stage) to do away with domicile as a factor in (say) the field of Tax. But that, I believe, is a separate matter, and there is no reason why the two should be confused.

6. SECOND AREA OF CONCERN—CLAWBACK

The Consultation Paper and the Impact Assessment both contain a number of passages which I find confusing. These passages make it hard to identify the real problem. For example:

- (a) Paragraph 2.3 of the Impact Assessment begins with the words “In the UK, the common law tradition has focussed principally on the wishes of the testator—the person making the will. This is generally termed ‘the principle of testamentary freedom’”. Then, later on, paragraph 2.5 begins “some countries, such as Scotland and Ireland, mix the common and civil law systems”. I don’t follow any of this. Scotland mixes the common and civil law systems, but Ireland does not. And the UK does not have a “common law tradition”. England and Wales have a common law tradition.
- (b) The so-called “principle of testamentary freedom” which does exist in England and Wales is a good deal less clear, historically, than some of the more simplistic accounts appear to imply. The reality is that, in England and Wales, it was, until the end of the nineteenth century, usual for most property to be held either in strict settlements or in marriage settlements. So-called “freedom of testation” is a relatively recent phenomenon. Anyway, although England and Wales do not have “forced heirship” they have, since the 1930s, had Family Provision legislation. All this talk about “testamentary freedom” is potentially misleading. What is surprising, and very sad, is how little history most people who look at the Law of Succession actually know. All this talk about “the freedom of the individual to decide what to do with their assets” (this is a quotation from paragraph 2.4) is not only poor English, but very doubtful history.
- (c) Professor Paisley, in Annex 1 to the Consultation Paper, contrasts clawback with something in English law to which he refers as “hotchpotch”. There is no such thing in the English Law of Succession as “hotchpotch”. What we have is something called “hotchpot”. Calling it “hotchpotch” does make English law sound a lot sillier than it really is.
- (d) The reality, as I see it, is this. The Law of England and the Law of Scotland are completely different in two respects. Scots law does have a form of forced heirship but (very oddly, or so it seems to a lawyer brought up in the English tradition) it has no, or virtually no, anti-avoidance provisions.

By contrast, English law does not have forced heirship, but it has Family Provision legislation and it does have anti-avoidance provisions.

- (e) At the end of the day, the contrast between English law, which has Family Provision legislation and anti-avoidance rules, and the continental systems, which have forced heirship and “clawback”, is much less significant than the Consultation Paper and the Impact Assessment make it seem. Forced heirship and Family Provision are two different ways of restricting testamentary freedom. Which is the more brutal depends on the detail. The Consultation Paper and Impact Assessment make it sound as though the continental systems of forced heirship are more brutal, more restrictive of testamentary freedom, than the Family Provision legislation which exists in this country. But they may not be. Someone domiciled in England and Wales who wants to disinherit his wife may well find it harder to do so than he would if he were within the jurisdiction of one of the continental systems. A quick reading of the Consultation Paper gives the impression that the continental systems are all much the same. That is not the case. It all depends on the detail. “Clawback” is word which covers different rules from a number of different systems.

- (f) As I see it, the significant question in relation to clawback is this: does it apply only to the original donee, or does it apply to persons who take from the original donee?

Take the following example. Let it be supposed that I am not (as I really am) a poor academic, but that I am rich. Let it also be supposed that, because I am rich (and not politically correct) I have a mistress. Let it be supposed that, because of my Calvinist upbringing (I was raised as a bad Calvinist) I feel guilty about my lifestyle. Because of my lifestyle, my wife and children criticise me and, being a man, and politically incorrect, I resent criticism. So, when I die, I leave half my estate to my mistress, and half to charity; nothing to my wife or children. So, in relation to any particular jurisdiction, there are two questions.

- (i) Would the devises and bequests to my mistress and/or to charity be undone in favour of my wife and children?
- (ii) If the answer is “yes” would someone who had received all or part of the proceeds of my gifts from my mistress and/or the charities have to disgorge such proceeds?

And what is the answer to these questions?

The answer to the first question is that almost any system will, potentially, oblige my mistress and/or the charities to disgorge. Continental systems will do so under the forced heirship provisions and English law will do so under the Family Provision legislation. That is not a distinction. The significant distinction is that (if I follow Professor Paisley's paper correctly) some continental systems may sometimes oblige third parties to disgorge property transferred to them by those who have received it from the original legatees (in my example, the mistress and the charities). But, as I see it, the only countries where this may happen are Belgium, possibly France, possibly Italy, Malta and Spain. Third parties will not have to disgorge in (as I understand it) Bulgaria, Cyprus, Germany (why is Germany referred to as “Deutschland”?) Greece, the Netherlands, Austria (why is Austria referred to as “Oesterreich”?) Poland and Portugal. In fact, I very much suspect that, even in the countries where action against third parties may, theoretically, be possible, it is unlikely to occur very often. My overall view of the dangers flowing from so-called “clawback” is that they are greatly exaggerated.

7. All in all, it seems to me that the Impact Assessment and the Consultation Paper both give the impression that “clawback” is some kind of terrifying Continental invention which is completely different from anything we know in “the United Kingdom”. I don't think it is. In most continental jurisdictions, the effect of clawback will be much the same as the anti-avoidance provisions which exist under the English Family Provision legislation. The fact that Scotland does not have anti-avoidance provisions seems to me to be very odd and a gap in Scottish law. That is a problem for Scotland, not one for England and Wales. I cannot comment on Northern Ireland.

There is, in the Consultation Paper and Impact Assessment, a good deal of talk about charities having to disgorge property and about charities somehow being adversely affected by “clawback”. But, as I say above, charities in England will have to disgorge property if it has been transferred to them in such a way as (say) to leave a widow penniless. Whether that is a good thing, or a bad thing, depends on one's view of the relative standing of widows and of charities, but it is not a distinction between continental systems and English law.

8. OK, all in all, I see precious few problems with habitual residence and I also believe that the alleged problems connected with “clawback” are nothing like as significant as they are made to seem to be in the papers in front of me. On this basis, if it were my decision, I would favour opting into this Regulation from the outset. This would mean that we would have to accept habitual residence as the connecting factor. So be it. But it would also mean that we would be in a position to discuss the position over clawback and, almost certainly, to obtain clarification and amendment of the rules in those small number of jurisdictions where clawback could affect third parties. That is the only real problem, and it would be overcome by opting in from the outset and then discussing the matter properly, rather than standing on the sidelines and pretending that “we do things better here”. I don't think that we do.

By the way, maybe I should, at this stage, declare an interest. I happen to be married to someone who is a national of another EU state—Italy. And that brings us back to history. When Macaulay was writing his History of England, in about 1840, he compared the position of Scotland and Italy and was able to say, quite reasonably, that Scotland, which lacked all the natural advantages, had somehow developed in a way which was much more advanced than Italy. That was 1840. He was right then. He would not be right now. If we go on pretending that “we do things our way because we do things better”, then we simply make ourselves ridiculous in the eyes of the rest of the world. We ought to get stuck into this, and not keep looking for excuses to stand on the sidelines.

9. RECOGNITION AND ENFORCEMENT ISSUE—CHAPTER V (ARTICLES 34 AND 35)

Paragraph 40 of the Consultation Paper seeks views as to whether there is sufficient mutual trust in this area to justify the proposed circulation of “such instruments which are not drawn up by courts”. I am not clear as to who, it is suggested, is not going to trust whom. It seems to me that one of the most serious weaknesses in the English Law of Succession (and there are others) is the ease with which beneficiary-made wills (i.e. wills in the preparation of which beneficiaries have played a part) may obtain probate. Two recent English examples of wills obtaining probate, when the documents in question should, in my view, never have seen the light of day, were the will in the case of *Fuller v Strum* [2002] 1 WLR 1097 and the will in *Sherrington v Sherrington* [2005] 3 FCR 538. The “will” in *Fuller v Strum* came before a court in Israel, after it had been granted probate in England, and in Israel it was held to be void. This was because Israeli law follows the same approach as Roman law and will refuse probate to any will in the preparation of which a beneficiary has played a part. That seems to me to be an eminently sensible rule. In fact, the rule in Roman law was not only that the will was void, but that the beneficiary who took part in its making would have been liable to the penalties for forgery under the *Lex Cornelia de Falsis*. The penalties varied according to the status of the defendant and according to date when the incident occurred, but those who were sentenced to spend the remainder of their lives in the saltmines were the lucky ones. The top-of-the-range punishment was crucifixion. That may have been slightly excessive, but English law goes far too far in the opposite direction. There are, in effect, no penalties for a beneficiary who gets involved in the will-making process and I believe that the approach taken in England today in this kind of case is seriously defective. One way of dealing with the problem would be to insist that all wills need to be executed in front of a notary (or the equivalent). Anyway, my point is that if there is a problem over recognition in this kind of case, this would not be something of which we ought to complain, it ought to be a cause of our seeking to put our house in order.

December 2009

Memorandum by The Law Society of England and Wales, the Society of Trust and Estate Practitioners and The Notaries Society of England and Wales

1. This joint position is on the proposed Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession dated 14 October 2009.²
2. The joint position has been prepared by the Law Society of England and Wales (the Law Society), the England and Wales branch of the Society of Trust and Estate Practitioners (STEP) and the Notaries Society of England and Wales. The Law Society represents 120,000 solicitors in England and Wales. The Notaries Society represents the 900 Notaries Public practising in England and Wales. STEP is the leading cross-disciplinary professional body for practitioners in the fields of trusts, estates and related issues with over 14,000 members worldwide including in civil jurisdictions. Branches of STEP outside England and Wales may well have differing views and have been encouraged to make their own representations.
3. The joint position is presented in response to the public consultation launched by the Ministry of Justice³ and the inquiry currently underway in the House of Lords Sub-Committee E (Law and Institutions).⁴

GENERAL: THE OPT-IN

4. We welcome and support moves to simplify cross-border rules and resolve disputes over which laws prevail on death. We consider that it would be beneficial for UK citizens for the UK Government to opt-in to this draft Regulation at some point. Particular advantages of the proposed reforms include greater legal certainty and the introduction of party autonomy. However there are a number of significant concerns, set out below, that would need to be addressed. One issue is that of “claw-back” in relation to life-time gifts.
5. With these concerns in mind we understand that the UK Government may decide not to opt-in at the outset within the three month period but to take part in the negotiations with a view to opting-in at a later date. If this approach is adopted we would urge the Government to play an active role in the negotiations with a clearly stated intention of opting-in at the end of the negotiations if the concerns have been met. It is clear that a number of Member States may support the UK's inclusion within the Regulation due to the high number of other European citizens in the UK.

² COM 2009 154 (Final) <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0154:FIN:EN:PDF>

³ <http://www.justice.gov.uk/consultations/ec-succession-wills.htm>

⁴ http://www.parliament.uk/parliamentary_committees/lords_s_comm_e.cfm

A UNIFIED SYSTEM OF CHOICE OF LAWS

6. We welcome the introduction of uniform rules of applicable law, making no distinction between different types of property. A unified choice of law approach to different types of property is of great benefit applying choice of law to the whole estate with no division between immovables and movables. It has the benefit of simplicity and legal certainty.

FREEDOM TO CHOOSE APPLICABLE LAW AND THE CONNECTING FACTORS

7. *Welcome party autonomy:* We welcome freedom for individuals to choose the law which should apply to their estate. The principle of party autonomy in choice of law is consistent with our support for the principle of testamentary freedom. It has the benefit of enabling individuals to succession plan.

8. *Call for greater freedom of choice:* We are concerned that the freedom of choice envisaged does not go far enough. A person may choose applicable law of the State of nationality (Article 17). If they have not done so, the applicable law will be that of the State in which they had their habitual residence at the time of their death (Article 16). We support habitual residence as a fall back position. However, we believe that a person should also be able to choose the applicable law of the State in which they have their habitual residence at the time of choice. We note in this regard that choosing on the basis of habitual residence is available for inheritance contracts (see Article 18(1)). The validity of wills under the 1961 Hague Convention also gives a wider range of connecting factors. It is inequitable and inconsistent for the choice of law to be so restricted.

9. Some commentators are of the view that a person should also be able to choose the applicable law on the basis of domicile. This would deal with the situation in the UK, one Member State with three territorial jurisdictions, in which domicile in its various forms is the connecting factor. On the other hand the concept of domicile is not necessarily easily understood and this may lead to further conflict, confusion and uncertainty.

10. *Define habitual residence:* In the interests of legal certainty, habitual residence should be defined as per other regulations and as interpreted by the courts. The lack of clarity in this regard could undermine the benefits the proposal otherwise introduces.

11. *Clarify disposition:* The term “disposition of property upon death” (Article 17(2)) should be clarified.

12. *Call to include formal validity:* According to Article 26 (Referral), where the Regulation provides for the application of the law of a State, it means the rules of law in force in that State other than its rules of private international law. It therefore excludes renvoi. Therefore, if a person wants to choose the law of England and Wales as the applicable law, they must do so under the law of England and Wales. However, the Regulation does not cover the formal validity of a will (Article 19.2(k)). We believe that the formal validity of the will should be governed by the applicable law including its private international law rules. Furthermore, not covering the formal validity of wills is inconsistent with the coverage of revocation (Article 19.2(k)). This inconsistency will lead to different results where formal validity is governed by one choice of law and revocation by another. The Regulation should deal with validity and revocation as a whole and therefore deal with formal validity and as a consequence revocation.

13. *Call for reciprocity:* Article 18 (Agreements as to succession) is an example of facilitating the mutual recognition of succession agreements that are used in other Member States by including tailor made provisions. Similarly, the Regulation should facilitate the mutual recognition of valid gifts under the law of England and Wales as well as concepts such as mutual wills and proprietary estoppel.

14. *Claw-back:* Article 19(2)(j) (Scope of applicable law) includes any obligation to restore or account for gifts and the taking of them into account when determining the shares of heirs in the scope of applicable law. As set out in our previous positions, claw-back is of considerable concern. For example, where there is a change in habitual residence between the lifetime gift, and the death, the applicable law rules would change bringing with it unintended results for the donor.

15. Example 1: The problem of claw-back can be seen in relation to trusts. There are many social reasons for setting up trusts and they should not be dismantled retrospectively merely because a person exercises his free movement rights. Consider, for example, a trust set up in the interests of providing for a disabled person or protecting the interests of a child.

16. Example 2: The problem of claw-back can be seen in relation to the charity sector. Charities rely on donations and legacies for their income, which they are then able to apply to their charitable objects. If they have to wait for many years in order to know whether any particular gift might be subject to claw-back rules, this would have an irreparable impact on the sector and those it serves. There would be a potentially significant time lag between when the donation is made and when the charity could confidently utilise the donation.

17. Claw-back is not just a UK problem as Austria, the Netherlands and Germany have a two year, five year and 10 year limitation period on claw-back, respectively, albeit in relation to non-heirs only. Moreover, in some jurisdictions claw-back is a monetary claim while in others any claim can also attach to assets. The draft Regulation may offer the opportunity to interpret provisions in order to take into account the system in the UK (see paragraph 25 below on special succession regimes). A number of options mooted to deal with the issue of claw-back are set out below.

18. One compromise suggested to resolve the issue over claw-back springing up retrospectively is for a provision where claw-back would only apply in respect of actions from the moment the testator elects for the relevant local law under which claw-back exists to apply to his estate. For example, a UK individual moving to France would therefore not find that his past actions, which were irreversible and secure on their own terms at the time they were taken, become reversible the moment he retires to France and elects for French succession law to apply to his will. He would, however, be within the French claw-back rules in respect of actions from the moment he chooses to elect for French succession law to apply. It might even be possible to include a "shadow" concept, as in the case for example of deemed domicile in the UK, in order to prevent people from seeking to take advantage of the system through short periods of residence.

19. An alternative compromise could be to recognise that it may be possible that limited claw-back may be workable if, for example, it were only applicable to gifts made less than six years before death to tie in with the Inheritance (Provision for Family & Dependents) Act 1975 and were limited to a monetary claim rather than a claim *in rem* to the thing itself.

20. *Consider trusts:* It will be important to consider the extent to which different types of trusts, including for example constructive trusts, fall within Article 19 (Scope of applicable law).

21. *Consider effect on executors:* It will also be important to consider the extent to which including the powers of the heirs and the executors of wills in the scope will mean that executors in England and Wales will be obliged to administer an estate outside England and Wales and whether this obligation should be limited to assets within the EU and how personal representatives might be suitably protected.

22. *Remove validity discrepancy:* It is inappropriate for the laws of the State in which the heir or legatee has their place of habitual residence to determine the validity of an acceptance or waiver of the succession or a legacy or a declaration made to limit liability of the heir or legatee (Article 20 Validity of the form of the acceptance or waiver).

23. *Welcome preserving personal representatives and enabling citizens to have them:* Article 21 (Application of the law of the State in the place in which the property is located) preserves the application of the law of the Member State in which property is situated in cases where that law "subjects the administration and liquidation of the succession to the appointment or executor of the will via an authority located in this Member State". We welcome the preservation of personal representatives and the related national procedures on death which currently operate in the UK and Ireland. Such recognition throughout Europe will be of great benefit. Indeed, it enables citizens to choose the law of England and Wales in order to have a personal representative dealing with the whole estate. Therefore it is of vital importance to retain this provision in the interests of citizens. It must be considered whether this provision would remain if the UK were not to opt-in.

24. *Remove location in a Member State requirement for executor:* The appointment of an administrator or executor via an authority "located" in a Member State requirement should be removed. For example a will governed by the law of England and Wales may appoint a US executor, not an executor appointed via an authority located in England and Wales. The location in a Member State of an executor should not be a requirement.

25. *Consider using special succession regime to protect gifts:* It will be interesting to consider the extent to which Article 22 (Special succession regimes) can be used to protect for example the social purpose of giving in light of the pre-succession regime on gifts in England and Wales.

26. *Consider implications of public policy exception:* It will be important to consider the potential implications of the public policy exception. For example, under the law of England and Wales it is possible to make a will in accordance with Sharia law. If a person does so then dies habitually resident in another Member State, could that Member State invoke a public policy exception and make the will void on the basis that it was discriminatory. Furthermore, consideration should also be given to the extent to which time limits may also be considered a matter of public policy.

JURISDICTION ISSUES

27. *Jurisdiction should follow applicable law:* We believe that jurisdiction should follow applicable law. If a person makes a valid choice of applicable law of a Member State, the jurisdiction of that Member State should apply.

28. *Transfer provisions too narrow and race to jurisdiction:* The transfer provisions in Article 5 are therefore too narrow. They make transfer subject to whether the transferring court considers the courts of the Member State whose law has been chosen better placed to rule. Pursuing a claim in the courts of one Member State could have a very different outcome in the courts of another Member State. A race to jurisdiction will arise if jurisdiction does not follow applicable law.

29. *Third countries:* The provisions on residual jurisdiction (Article 6) are appropriate to the extent that they are merely a statement of fact.

30. *Remove heir/legatee discrepancy:* Article 8 (Jurisdiction to accept or waive succession) enables an heir or legatee to go to the court in their Member State where the court of habitual residence of the deceased in another Member State is the one with jurisdiction. We believe that there should instead be one court, one law and one jurisdiction to deal with the whole estate.

31. *Support local execution but amend application to non-judicial authorities:* Article 9 (Competence of courts in the place in which the property is located) enables local execution in relation to property transfer by the courts of that Member State. Local execution makes sense. However, Article 3 provides that the provisions on jurisdiction apply to all courts in the Member States and to non-judicial authorities "where necessary". It is not specified who it should be necessary to or regarded as necessary by. We believe that the term "where necessary" should be replaced with the term "where essential." Otherwise, a Member State may, for example, insist that local execution has to be dealt with by a notary in that Member State.

EUROPEAN CERTIFICATE OF SUCCESSION

32. *Support ECS subject to local procedures in Member State of recognition:* We support moves to develop an ECS in principle. However, it should be subject to local procedures in the Member State of recognition. Indeed, automatic recognition and affording protection to anyone who pays money over in accordance with an ECS could have considerable adverse consequences. For example, if a bank in England and Wales pays over money to the bearer of an ECS they would be released from any obligation even though there may be no grant of probate and no tax paid. An ECS should be subject to local procedures in the State of recognition. An ECS may, for example, be useful to take to the probate registry to get a grant of probate in the bearer's name. However it will be important to consider how the probate registry will be in a position to verify such documents, not least to mitigate the risk of fraud.

33. It will also be important to consider the extent to which the ECS can accommodate different national systems including, for example, life interests and discretionary trusts.

34. In creating the ECS other practical aspects must also be taken into consideration, particularly as regards identity. For example, the following details should be included: date and place of birth of the deceased; passport details; and date of birth of the heirs.

APPLICATION THROUGHOUT THE UK

35. If the Regulation applies in one UK jurisdiction, it should apply throughout the UK to all three jurisdictions and between the jurisdictions. Otherwise, it would create legal uncertainty and complications within the UK, where for example, habitual residence would apply in one jurisdiction and domicile in another. It will be important for the UK itself to consider how to define which jurisdiction a person is a national of (Article 28 States with more than one legal system).

DEFINITIONS

36. It will be important: to clarify that the term "legal transfer" does not exclude equitable transfer and that the definition of "authentic instruments" should encompass equivalent acts in the UK. It will be important to bear in mind the consequences of the wide definition of a court to include a "notary" and the implications for recognition and enforcement of documents which have not been the subject of due process in a court.

30 November 2009

Memorandum by The Notaries Society of England and Wales

1. A paper has already been delivered setting out the joint position of The Law Society, The Notaries Society and the Society of Trust & Estate Practitioners ("STEP") on the proposed Regulation ("Regulation") on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession ("ECS") as published on 14 October 2009.
2. This paper conveys the position of The Notaries Society ("TNS") in respect of Chapter V and related sections of the Regulation in relation to Authentic Instruments. It is felt that this section of the Regulation has particular relevance to Notaries in England & Wales in connection with the creation of the ECS for the reasons explained below.
3. It is presented in response to the public consultation launched by the Ministry of Justice ("MOJ") and the inquiry currently underway in the House of Lords Sub-Committee E (Law and Institutions).
4. Notaries in England and Wales prepare Authentic Acts and Instruments as part of their daily work contrary to the view stated in paragraph 40 of the MOJ's consultation paper. See Brooke's Notary 13th Edition page 232:

"...it is necessary to bear in mind the distinction between notarial acts which verify the execution of private documents and notarial acts in the public (or authentic) form. ...In some cases the English Notary's act will have to be in authentic form. ...In most civil law countries it is obligatory by law for a wide range of legal acts to be drawn up by a Notary in the form of a public instrument".

5. Notarial Acts are prepared to address a wide range of legal issues including succession matters. For example, it is not uncommon for English Notaries to prepare documents in public form for use in a different jurisdiction certifying who is entitled to benefit under the law of England & Wales from the estate of deceased person who died domiciled in England and Wales (whether by way of explication of the Will and the Grant of Probate in a testate succession or by way of explaining the intestacy rules and Grants of Administration in an intestate succession) who owned not only property in England and Wales but also abroad. Whilst such acts and instruments are not directly enforceable in England and Wales (although they do have probative force here) they are accepted and relied upon throughout the world, including the EU. Indeed the Faculty issued to each Notary to enable him to commence in practice states:

...“full faith ought to be given as well in judgment as thereout to the Instruments to be from this time made by you...”

6. The definition of Authentic Instruments contained in the Regulation requires that such an instrument is an Authentic Instrument, the authenticity of which relates to the signing and content of the Instrument and that such authenticity is established by an authority empowered for that purpose in the member state in which it originates. We do not believe there can be any doubt that an Instrument in public authentic form prepared by an English Notary meets these criteria.
7. It would appear from the proposed regulation that in order for an ECS to be recognised in another member state, it will need to be prepared as an Authentic Instrument.

TNS notes that Article 21 is to take into account the specific features of *common law* legal systems, such as the English legal system, where the heirs do not directly acquire the rights of the deceased immediately on death and that is only through a Grant of Representation issued by The Probate Registry (which is a branch of The Family Division of The High Court of Justice) that the rights of administrators/executors to administer the estate are recognised.

It is also noted that this system will still apply as it is not the intention to change the Internal Law. However, the Regulation fails to consider that the Notary is uniquely placed to issue Acts in Public (Authentic) and Private form for use throughout the world. See Halsbury's Laws of England Vol 66 (2009) 5th Edition para 1412 as to the meaning of "Notary":

"A notary public is a legal officer appointed by the Court of Faculties, whose general role it is, amongst other matters, to draw, attest or certify, under an official seal, documents which are intended for use in other jurisdictions."

It would seem logical to make use of the Notary's existing role to prepare under an official seal the ECS intended for use in the EU. Notaries could in this way continue to serve the public in the winding up and administration of an estate of a Deceased person containing assets in more than one jurisdiction subject to the laws of England and Wales or some other law. In particular of course whilst the ECS will apply to EU law, it will not apply to, for example, USA law both at State and Federal levels. Because of their high levels of legal skills and knowledge, Notaries are well placed to deal with conflicts of laws in a wide range of succession matters.

8. A motion for a European Parliament Resolution which can be found at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=//EP//TEXT+REPORT+A6-2008-0451+0+DOC+XML+V0//EN> and which was passed on 18 December 2008 in relation to the proposed European Authentic Act (“EAA”), suggested (wrongly in our submission) that Notaries in common law jurisdictions within the EU should not be permitted to participate in the creation of EAA’s because such Notaries do not create Authentic Acts. TNS has vigorously opposed this view and is concerned that the regulation relating to the ECS may have the same effect but by a different approach. If so, this could mean that an English Notary could not prepare a ECS even though currently a public form Authentic Instrument prepared by an English Notary certifying the distribution of the assets of a deceased person’s estate is accepted at face value within the EU and indeed throughout the world.

9. The concern of TNS therefore is that this Regulation could have the effect of restricting those entitled to prepare the ECS to those Notaries in the EU who are regarded as carrying on a civil law practice, although the Regulation clearly includes Notaries in England & Wales.

TNS think the definition of Authentic Instruments should make it clear that Notarial Acts in Public (Authentic) Form should be included—just as Article 21 emphasises that the English legal system is different and thus Article 34 could have a sub-clause along the following lines:

“The issue of an ECS as a Notarial Act in England & Wales in Public/Authentic Form is an Authentic Instrument.”

10. Whilst not directly on the ECS issue, it is important to consider at this stage the EAA. TNS is concerned that a level playing field will not be created nor will the English legal system be respected and TNS believes that by seeking to deny this right to EAA’s, it may have serious financial effects on the provision of financial, property and other commercial services, particularly in the City and central London and result in financial work being lost to other regions of Europe. It is important to consider the full possible impact of any regulation relating to Authentic Instruments as even though this Regulation relates only to ECS’s, it could be used as a powerful precedent for the future.

TNS is concerned that not only may valuable work be lost from the City of London which could result in financial firms relocating to other countries within the EU, but also the citizens of the UK might be at a disadvantage and their freedom of movement and freedom to move capital (which the European Court has repeatedly ruled are fundamental principles which must be respected in the formulation of European Regulations) might be restricted as, if adopted, this Regulation could have the result that no Notary in England, Wales, Scotland, Northern Ireland or Eire could participate in the creation of the EAA or the ECS.

The implications extend beyond the EU; if certain areas of work are no longer effectively done by service providers within the EU, the relocation of lawyers, bankers and other providers is likely to lose similar work to other areas of the world. We might also see English-speaking persons from the UK and Commonwealth having to visit a French or Belgian notary to conclude their inheritance and other documentation.

11. Notaries in England and Wales are authorised by The Legal Services Act to carry on practice in the field of Wills and Probate and are therefore competent to advise on matters of succession in English and Welsh law. It is noted that the MOJ recognises that it would be necessary to amend the current procedures in England & Wales in order to permit ECS’s to be issued here.

12. TNS therefore believes that if a ECS may only be prepared as an Authentic Instrument, then clarification be sought (if necessary by amending the definition of “authentic instrument”) so that a ECS prepared in England and Wales by an English Notary will be recognised as a ECS for the purpose of the Regulation as proposed in paragraph 9 above. Failing this, how is it proposed that an ECS would be prepared in the UK and by whom? TNS suggests that English Notaries should be permitted to prepare and issue a ECS. Because of their special involvement in International law they are uniquely placed to carry out this work.

Even if the ECS is not adopted in the UK, it could still place English and Welsh Notaries and their clients at a distinct disadvantage. As virtually the whole of the work carried out by an English and Welsh Notary is for consumption in an overseas legal jurisdiction, this might have an adverse effect on international trade and might deny a UK citizen access to a professional person within England and Wales to assist in the preparation of a ECS (see paragraph 10 above.)

13. TNS notes and shares the MOJ’s concerns regarding the fact Authentic Acts might be given preferential treatment compared with the judgments of the Courts of England and Wales. TNS does not think that such preferential treatment is appropriate as a ECS relates to a very important event in family life when the citizen deserves a streamlined procedure at a time of grief; if an ECS in Authentic Form has been issued with an inaccuracy or an error, it must be possible for it to be challenged. Since this Regulation does not purport to change the Internal Laws of the Member States, perhaps the ECS should be contested under the Internal Laws of the State where it was issued, so that if there is an error in a French or Belgian ECS, it can also be challenged

on grounds available under Internal Laws of that State e.g. *inscription de faux* or, if a Spanish ECS, on grounds of *impugnación por falsedad* (See Brooke's Notary 13th Edition page 92).

14. TNS is also concerned that time limits for appealing are tight and that the ECS should make it clear in notes attached to the ECS in each individual case how an appeal can be made in each country and what the specific timescales are. TNS also suggests in the interests of fairness throughout the EU, the time limits should be the same in all Member States.

1 December 2009

ISBN 978-0-10-845975-7



Printed in the United Kingdom by The Stationery Office Limited
3/2010 443407/1822 19585