

APPLICABLE INHERITANCE LAW TO ESTATE LOCATED IN SPAIN

The significant number of foreigner owners of property in Spain and what happens to their property after their death has caused some debate in the past, in particular where law in the testator's home country and Spanish law have conflicting dispositions.

This is of great relevance for property owners as Spanish inheritance rules specify that a **part of the inheritance (two thirds of it) will have to be offered to the so-called compulsory inheritors**, which are primarily children and spouse and who may not be the preferred choice of the testator.

What the Spanish Civil Code Says

Under Article 9.8 of the preliminary title to the Spanish Civil Code, **succession to all property**, whether movable or immovable and wherever situated is determined by the **law of the deceased's nationality**. In addition to this, the personal law of natural persons shall be that determined by their nationality, and will as well govern capacity and civil status, family rights and duties and succession by reason of death.

By remitting the matter to a foreign law Spanish legislators' intentions were to protect as much as possible the cultures and traditions embodied in foreign legislations governing their nationals. There seems to be no room for misinterpretations and confusion, but one cannot say this is straightforward for UK citizens, who precisely conform the biggest foreign community in Spain.

English Law versus Spanish Law

By applying the above Spanish disposition **English law** takes relevance but to the surprise of many, it conversely stipulates that for **property located abroad it will be the laws where the property is located which are to be applied**.

This legal situation, known as double remission ('*eenvio de retorno*' in Spanish), has caused many to litigate endlessly in Spanish courts (Denney v. Denney-Royde-Smith Case/ Supreme Court judgment 21 May 1999), as well as in UK Courts (Adams Case/ Sentence of the High Court of Justice Chancery Division, Vice Chancellor Court, 31 July 1985), thus creating legal uncertainty in many thousands of British property owners when filling out their will questionnaires before their lawyers. By virtue of the above rulings, however, the situation was to be clarified to the effect that the remission of Spanish law was to be only to the UK domestic law and not to their conflict of law rules which would invariably refer back to the Spanish restrictive inheritance rules.

Freedom of testamentary disposition for UK nationals and wills done in Spain

The guiding principle of English law on the subject of succession is the freedom to make a will, which is a declaration of the freedom to determine ones own wishes for after death (certain reservations are applicable in case of a situation of intestate death). **This interpretation is now prevalent and is uniformly accepted in Spain**, allowing British property owners to **avoid the appointment of**

forcible heirs and eliminating the likelihood of the testament being challenged by forcible heirs under Spanish law.

The most popular form of will in Spain, the so called 'open will', signed before a Notary Public, is the most recommended format to give to the will as it is directly enforceable without the requirement of grant of probate. The contents of the will are printed out in notarial paper, observing certain solemnities so far as respects the execution and attestation of it, and will be signed in the presence of any Spanish Notary Public. This will can be made in a double barrel column format, in English and Spanish.

Finally, when deciding on the disposition of one's asset it will important to take into account certain parameters in order to minimise the inheritance tax liability. Without prejudice to the proposed elimination of inheritance tax between relatives in some autonomous regions in Spain, consideration will have to be given to the following: age of inheritor, relationship of inheritor with testator, pre-existing wealth of inheritor, fiscal residency status of inheritor, status of habitual domicile of property being bequeathed and number of inheritors.

Conclusion

British property owners are free to determine who their heirs will be and avoid the appointment of forcible heirs, by means of a valid Will. Although foreign wills are valid in Spanish inheritance cases, it is always recommendable to draw up a Spanish will before a Notary public, to ease the inheritance process for our beloved ones upon our death.