

Back To Basics

59



Nicole Gallop Mildon is a partner and diplômée notaire at Druces LLP.

Alvaro Aznar Azcárate is a solicitor and Spanish abogado at Child & Child



European cross-border estates

P rivate client solicitors are increasingly dealing with estate administrations with an international element. This can be anything from shares or bank accounts to immovable property.

Some clients may have a separate will for their foreign assets; others may have a UK will for their worldwide estate. You may be an executor, wondering where to start.

As a rule of thumb, do not assume that the law of or the internal formalities in a foreign country will be remotely similar to those in England and Wales.

We have both dealt with cross-border estates for some time. It's common to be contacted by foreign lawyers panicking and asking why this person called an "executor" is controlling the estate and is not accepting the beneficiary's instructions; or by UK solicitors having problems with banks in a foreign jurisdiction, saying that they have provided the grant of representation to the bank, but the monies have not reached their client account.

We have prepared a series of questions and answers for English solicitors interacting with their overseas counterparts. We have chosen France, Spain, Italy and Portugal, as these are the European destinations where British nationals are most likely to acquire a second home or investments.

1 Is there a deadline to pay the death duties? What are the penalties for late filing?

France

Death duties must be paid within six months of the death if the death occurs in France, or 12 months if the death was outside France. Late payment will incur a penalty and interest will run.

Spain

Death duties must be paid within six months of the date of death. However, it is possible to request an extension of six months before the five-month anniversary of the death. The Spanish tax authorities are notorious for their late payment surcharges, which range from 5% to 20%. Interest is also payable.

Italy

You must file the inheritance tax (IHT)

return within 12 months, and pay within 60 days of filing (article 37§1 of the Consolidated Tax Code for Inheritance Tax (TUS)). Minor penalties are payable if a return is filed late (article 50 of the TUS).

Portugal

The death should be communicated to the tax department before the end of the third month following the death. Failure to do so may lead to a fine. You can request a 60-day extension to the deadline to the head of the tax office, if there is a justification for doing so.

2 What death duties apply?

France

IHT rates are set on a national basis in France. Each beneficiary is taxed on their share of the estate. The rate of taxation depends on the relationship between the deceased and the beneficiaries, ranging from 0% for a surviving spouse or PACS partner, to 60% for unrelated parties. Other close relatives are taxed incrementally, at the relevant rate for each category.

Each type of beneficiary also has a tax-free allowance based on their relationship with the deceased, ranging from €1,594 to €100,000 (this allowance can be reduced by a lifetime gift made within the last 15 years). There are specific allowances for certain types of beneficiaries (such as a disabled person) and for certain assets (such as forest land).

Whether French IHT is payable on assets depends on the tax residency of the deceased and beneficiaries, the location of the assets and double tax treaties.

Spain

Each region in Spain has its own IHT legislation. The tax is charged in accordance with a tariff; there are a series of credits and deductions that will be applied, depending on the relationship between the deceased and the beneficiaries. The allowances vary substantially between regions.

Beneficiaries are divided into four groups for IHT purposes:

- I (descendants under the age of 21)
- II (spouse, ascendants and descendants)
- III (siblings, uncles, aunts, nephews, nieces)

- IV (cousins, more distant relatives and unrelated parties).

Groups I and II benefit from the highest tax allowances, whereas III has a much lower tax allowance and IV has no reduction or allowance at all. The tax payable for groups III and IV will be substantially higher.

If the deceased had immoveable property in Spain, a *plusvalía* tax is payable. This tax has been quite controversial, since it is charged on the deemed increase in the value of the land since the last transfer. It is calculated by the local authority and due within six months from the date of death, although a six-month extension can be requested.

If the beneficiary is a non-tax-resident, they will only pay IHT on the assets in Spain. However, if the beneficiary is tax-resident in Spain, they will have to pay Spanish IHT on the share of the worldwide estate they are receiving.

Italy

IHT rules are the same across Italy. According to article 2 of the TUS, IHT is due on a worldwide basis for resident taxpayers. For non-tax-residents, IHT is due on a territorial basis.

Taxation is set at a rate of 4%, 6% or 8%, depending on the beneficiary's relationship with the deceased. The 4% rate applies to descendants, spouses and ascendants; 6% to cousins and siblings; and 8% for any other people. The tax base may differ on assets (for example, real estate is based on its cadastral value, financial assets are based on their nominal value, and so on). The law sets a no-tax threshold of €1m for each heir within the 4% band and a €1,000 threshold among siblings. A specific rule for beneficiaries with serious disabilities is set with a threshold of €1.5m.

Portugal

In Portugal, there is no IHT, but stamp duty is payable at a fixed rate of 10% for gifts and transfers upon death. There is an exemption for transfers between spouses, parents, children, grandparents and grandchildren. If the deceased is non-tax-resident, the stamp duty is levied only on assets located in Portugal.

3 Is the estate administered by a personal representative, or are the assets transferred to the beneficiaries, who will have full control of the estate?

France

Generally, the estate passes directly to the

beneficiaries; in law, this is retroactively instant, but requires various formalities to take place and for each beneficiary to accept the estate. The beneficiaries acting unanimously can control the estate assets from the date of death.

It is possible for the testator to appoint an executor, but only to deal with moveable assets that do not form part of a reserved share of the estate (where there are reserved / forced heirs). Their powers last for two years from the date of death, or three years with the court's permission. Their powers are far more restricted than those of an executor under English law.

Spain

In most cases, the beneficiaries will have full control of the estate once they execute the deed of acceptance of inheritance. In Spain, there are *albaceas*, who have very restricted powers compared to those of an executor under English law. *Albaceas* are frequently used when the testator believes disputes may arise between the beneficiaries.

Italy

It is possible for the testator to nominate an inheritance administrator in their will.

Portugal

There is a "head of household" (*cabeça de casal*), who administers the estate. The order of persons who fulfil this position is set out in the law.

4 Are beneficiaries or personal representatives appointed by court order, or can a notary or another professional intervene?

France

In practice, a *notaire* will administer the estate on behalf of the beneficiaries.

The *notaire* will establish the composition of the deceased's family (to comply with reserved heirship rules, where applicable), and deal with institutions. Banks may release funds to the *notaire* when they will not release funds to the beneficiaries.

The intervention of a *notaire* is not a legal requirement, but they are required for the transfer of any immoveable property, and it is very rare for one not to be involved, even when an estate does not include any immoveable assets. Where there are minor beneficiaries, a family judge's authorisation is normally required. Generally, the *notaire* prepares the following documents:

- an *acte de notoriété* (which sets out

the composition of the family)

- an *acte de dépôt de testament* (a notarial deed describing the will (if one has been made), which is placed in the *notaire's* archive)
- an *acte de partage* (which divides the assets in the estate between the beneficiaries)
- an *attestation immobilière* (which transfers each immoveable asset into the name of the new owner(s)).

The *notaire* may also prepare a *déclaration de succession* (the IHT return), if instructed to do so by the estate.

Spain

In Spain, the beneficiaries execute a deed of acceptance of inheritance, before a *notario*, who assesses and verifies the capacity in which the beneficiaries are acting.

Italy

Although not compulsory, the administrator is usually a professional (such as an *avvocato* or *commercialista*). Where minor heirs under the age of 18 are involved, it is compulsory to involve a specific judge in order to protect the minors' rights and let them accept the inheritance.

Portugal

A deed of entitlement of heirs is signed by the *cabeça de casal*, or three witnesses. The deed indicates who the heirs are and who the *cabeça de casal* is. This is signed in front of a notary, or at a specific office of the Public Registry (*Balcão das Heranças*).

For this deed, it is necessary to file a copy of the death certificate, will (if there is one), and marriage and birth certificates, depending on who the heirs are.

5 Do notaries have an important role in the administration of the estate? Are other professionals involved?

France

In France, the *notaire* plays a central role in the administration of estates. Other professionals who may be involved include an *avocat*, particularly for a procedure called *envoi en possession*, where a beneficiary (either distantly related or unrelated to the deceased) is confirmed in their rights by a court. For minor children, a family judge will need to oversee their entitlement to the estate and potential acceptance.

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Spain

Notarios have a very important role in estate administration. In Spain, lawyers are not officers of the court, and many transactions must take place before a *notario*, who executes the document as a public deed. Spanish lawyers are also involved in the winding up of the estate.

Italy

In Italy, there is no estate to administer. According to the Italian civil code, heirs may or may not accept the inheritance. It is common to have an acceptance with reserve, and heirs will eventually consider whether to take over the estate. Under article 528 of the civil code, where no one has accepted the inheritance, an executor must be called for, under the control of a judge, to give legal protection to the estate.

Portugal

As mentioned in (4) above, the deed of entitlement of heirs is signed in front of a notary or at a specific office of the *Balcão das Heranças*. The tax department also needs to be informed of the death. If there is immovable property or any assets subject to registration (such as cars or shares in companies), the change in ownership must also be registered at the relevant entity.

6 **If there is immovable property in an estate, is the registration of the new owners required prior to selling the property?**

France

Yes, this is required.

Spain

This is essential. The beneficiaries must register their new title at the relevant land registry in order to dispose of the property. Beneficiaries should not enter

into any private sales agreement until the property is registered in their name.

Italy

Generally, yes. According to the Italian civil code, an estate must be transferred to the heirs. If no heirs accept the inheritance, the property is transferred to the state. This means the new owner purchases the property from whoever inherited it. For every change in property ownership, a copy of the deed must be registered in the Italian land register. It is not possible to purchase a property from a deceased person.

Portugal

If there is only one heir, the registration is mandatory. If there are multiple heirs and the asset is held in common, it's not necessary to register the immovable asset in the name of the heirs; the deed of entitlement of heirs is enough.

7 **Which law applies to the assets that the deceased had in your jurisdiction, if the deceased was a British national?**

France

If the deceased died after 17 August 2015, EC Regulation 650/2012 (Brussels IV) will apply. If no election to the national law was made, the law of their habitual residence will apply. If French law applies as a result of the habitual residence or applicable law being applied to the estate, then the reserved heirship provisions will apply for the French assets.

Spain

If the deceased died after 17 August 2015, Brussels IV will apply. If no election to the national law was made, the law of their habitual residence will apply. If Spanish law applies, then the reserved heirship provisions will apply for the Spanish assets.

Italy

Italy applies unity of law (if the deceased died after 17 August 2015), and therefore the relevant British law will apply to a British national to all properties and goods situated in Italy. No forced heirship rules exist in English law, contrary to the Italian position.

Italian taxation laws apply for assets within the Italian territory, according to article 2 of the TUS (see (2), above). In 1966, Italy and the UK signed a convention to avoid double taxation between the countries (see (2), above).

Portugal

This depends on whether the deceased left a will with a choice of law clause. If not, then we would look to the law of the last habitual residence, in accordance with Brussels IV.

8 **Does your jurisdiction accept a will made in England or Wales to deal with the estate in your jurisdiction?**

France

Yes. Most *notaires* will require a sealed and certified copy of the will and the grant, and deposit these in their archive in lieu of the original in the *acte de dépôt de testament*. There may an interpretation of the will in the same deed. Where the will is not being proved at the probate registry in England or Wales, it is possible to deposit the original will in the *acte de dépôt de testament*, often along with a legal opinion of a solicitor in England or Wales confirming that it is correctly executed under English law.

Spain

Yes, if the will is valid in England and Wales and a grant of representation has been issued.

Italy

Generally, yes. We usually recommend British nationals living in Italy make an Italian will or structure their estate (for example, with a trust).

Portugal

An English or Welsh will is acceptable, as long as it complies with English and Welsh law, and has a solemn form (that is, a grant of probate has been obtained).

9 **How long does it take on average to wind up an estate?**

France

It usually takes between six and

12 months to wind up a domestic estate with no international element. International estates often take between 12 to 24 months, or even longer; this can be managed by using a *notaire* with good international experience. Any dispute between beneficiaries will add further time to the process.

Spain

It can take anything from three months to a year. It can be much longer if disputes arise between the parties, or the title to the property is not in order.

Italy

Everything is generally wound up within two months, but we have seen cases where it has taken 30 days or less. A winding up may take longer (for example, if there are disagreements between heirs).

Portugal

It is difficult to state an 'average' timeframe, as it will depend on whether there is a will, if it's possible to obtain all the documents required, whether the estate has an international element, and so on.

10 Are there matrimonial property regimes in your jurisdiction? Could these apply to a UK national who owns immovable property in your jurisdiction?

France

France has matrimonial property regimes (MPRs) and deems that every married couple has one. Where a couple have not chosen a regime, a default one is applied. The default British MPR is deemed to be separation of assets. The French default regime is a form of community of assets, limited to assets acquired onerously (that is, not by means of a gift or inheritance) during the marriage.

As France has signed the Hague Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes, many British couples purchasing French property adopt a regime of universal community, with transfer to the surviving spouse on death, to apply only to their French immovable property.

Spain

There is no marriage in Spain without an MPR. In Spain, when two British nationals with no existing connections to Spain acquire a property, the notary will refer to the fact there are no MPRs in England and Wales, but the Spanish equivalent will be that of

separation of assets (see our article 'Regime change' in the February 2019 edition of *PS* (tinyurl.com/y8rom6oe)). Spain has signed up to EU Regulations 2016/1103 on MPRs and 2016/1104 on the property consequences of registered partnerships.

Italy

The default MPR in Italy is universal community of assets, but many couples elect for a separation of assets regime. For taxation purposes, land is valued according to its cadastral value. On average, the cadastral value is one-third of the land's market value. A slightly different valuation system is applied in the area close to Austria. Usually, the purchase of an immovable property for a couple is set within the notary deed necessary to become owners.

Italy recognises EC Regulations 2016/1103 and 2016/1104 as applicable since 29 January 2019. Some countries (including the UK) do not recognise EU principles for married (or similarly linked) international couples. This means that the Italian rules must be followed for assets territorially related to Italy.

Portugal

There are three MPRs in Portugal:

- separation of assets – where the assets are held separately by the spouses and do not communicate automatically to each other
- community of acquired assets (accrual system) – assets that are acquired after the marriage are common to both spouses
- general community of assets – all assets, whether acquired prior to or after the marriage, are common to both spouses.

It's also possible to sign a prenuptial agreement and opt for a mixture of all three regimes. When purchasing immovable property in Portugal, you must indicate an MPR and register it at the land registry to determine the ownership of the asset.

11 Does your jurisdiction recognise UK trusts?

France

Generally, not for legal purposes; the trust is likely to be looked through. Trusts do not exist in domestic civil legislation; the most similar vehicle would be a *fiducie*, which is more like a bare trust. However, for tax purposes, France recognises trusts and those taxes with any connection to France (as the residence of the settlor or any

beneficiary (even if only potential)) or any asset.

Spain

No: Spain is not a signatory of the Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition. The use of trusts in Spain is not advisable. If the client wishes to have an English will dealing with assets in Spain, we suggest that a specific legacy clause for the Spanish assets is drafted in the English will and supervised by a Spanish lawyer.

Italy

Trusts are recognised in Italy and Italy is a signatory of the Hague Convention. This is applicable not only to English trusts, but also all foreign-regulated trusts as far as they fulfil the Convention. Trusts are commonly used in Italy, in particular with the option to have them fiscally resident in Italy.

Portugal

Trusts are not recognised as a legal entity in Portugal, and this is one of the great difficulties in implementing UK wills that create a trust in relation to assets located in Portugal. Where possible, we advise clients to simplify their bequests in terms of Portuguese assets and avoid using trusts.

Conclusion

It's essential when dealing with estates with an international element to act fast and instruct a professional who can deal with the estate in that jurisdiction from the beginning. It's a mistake to only deal with those assets once you've dealt with the English estate, as it will only create delays and leave the estate open to tax penalties that are avoidable.

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