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Which country's law applies?

Ireland

1 Sources of the rules in force

1.1 National rules

The conflict of law rules in Ireland have their source primarily within the common law and, as such, are subject to change and evolution. However, as case law in this area is relatively sparse, it is difficult to be conclusive as to the state of the prevailing law in a number of areas. This is particularly so in relation to family law. As with the laws governing jurisdiction, the traditional laws governing choice of law are gradually being superseded by international conventions and by EU legislation.

1.2 Multilateral international conventions

Hague Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions 1961

Rome Convention 1980 on the Law Applicable to Contractual Obligations

1.3 Principal bilateral conventions

We are not aware of any bilateral conventions containing choice of law provisions to which Ireland is a party.

2 Implementation of conflict of law rules

2.1 Obligation of the judge to apply conflict of law rules on his own initiative

The general position is that the conflict of laws' rules are only applied if at least one of the parties has argued that they be applied.

2.2 Renvoi

Cases requiring consideration of the doctrine seldom arise before the Irish courts.

2.3 Change of connecting factor

No single approach has been adopted in this jurisdiction.

2.4 Exceptions to the normal application of the conflict rules

While there is a lack of case law on this point, it is unlikely that Ireland would apply a foreign law which is contrary to Irish public policy.

2.5 Proof of foreign law

The Irish courts require that the content of foreign law be proved as if it were a fact. The party seeking to rely on it is required to plead it and to prove the content of foreign law as a fact to the satisfaction of the judge. In the event of conflict between the evidence submitted by the parties, the judge may assess the credibility of the experts and may then consider the primary evidence (e.g. foreign statutes and cases), especially where they apply concepts that are familiar to an Irish judge. If Irish choice of law rules indicate that foreign law is to be applied, but if neither party produces evidence of what that law is, the court will usually presume it to be the same as Irish law unless the contrary is proved.

Expert evidence is usually adduced to prove the content of foreign law and it is not sufficient for the parties to put the text of a foreign statute, case, or authority before the court. Any person who is qualified as a lawyer in a foreign legal system, or who has sufficient experience of that system in practice, may give evidence of the foreign law. The court will not normally conduct its own researches into the foreign law.

3 Conflict of law rules

3.1 Contractual obligations and legal acts

Ireland is a signatory to the Rome Convention 1980 on the Law Applicable to Contractual Obligations. Ireland has implemented this Convention by legislation, the Contractual Obligations (Applicable Law) Act, 1991. The rules of the Convention apply to contractual obligations in any situation involving a choice between the laws of different countries. However, certain types of contracts such as contractual obligations arising out of a family relationship are not subject to the Convention.

It should be noted that Regulation 593/2008 on the Law Applicable to Contractual Obligations ("Rome I") is directly applicable in Ireland. However, Ireland has not agreed to the implementation of Regulation 1259/2010 ("Rome III"), which implements enhanced cooperation in the area of law applicable to divorce and legal separation in participating Member States' jurisdictions.

3.2 Non-contractual obligations

In family law or divorce applications the Irish courts regard *lex fori* as an appropriate principle because it provides certainty. There has been no legislation in Ireland on conflict of laws in tort cases and there is very little case law. The Irish courts have regard to the *lex fori* principle which argues that the law of the forum should apply, and also to the *lex loci delicti* principle which suggests that the law of the place where the tort was committed should apply. The courts may also have regard to the proper law of tort which recommends a flexible approach, allowing the court to consider all the different connecting factors and deciding the jurisdictional issue accordingly.

It should be noted that Regulation 864/2007 on the Law Applicable to Non-Contractual Obligations ("Rome II") is directly applicable in Ireland.

3.3 The personal status, its aspects relating to the civil status (name, domicile, capacity)

A child takes the domicile of his / her father if his / her parents were married to each other at the time of the child's birth. If the child's parents were not married to each other at the time of the child's birth, or if the father is dead at the time of birth, the child's domicile is the same as that of his / her mother. This rule continues to apply until the child is 18 at which time the child attains majority and has legal capacity to adopt a domicile of choice.

A person can only adopt a domicile of choice by actually residing in the relevant jurisdiction with the intention of residing there indefinitely or permanently. If either of these elements ceases to apply the person reverts to his / her domicile of origin. A married woman acquires her own domicile independently of her husband.

3.4 Establishment of parent-child relationship, including adoption

The Status of Children Act 1987 abolished the concept of illegitimacy. Under that Act, the relationship between every person and his / her father and mother is to be determined irrespective of whether the father and mother are or have been married to each other.

Despite this, where the parents of a child are not married to one another either at the child's date of birth or at the time of conception, the child is not regarded as legitimate. However, a child may be legitimated by the subsequent marriage of their parents. There is no difference between the constitutional position of the legitimate child and the legitimated child. There is also no difference between the rights of a child to be maintained by his or her parents or to inherit from either parent, whether or not the parents are ever married to each other.

Once the Irish courts exercise jurisdiction in a case on the basis of Regulation 2201/2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and the matters of parental responsibility ("Brussels II bis") they will generally apply Irish law.

Where the Irish courts have jurisdiction in relation to an adoption case, Irish law will also be applied.

It should be noted that the superior courts have an inherent jurisdiction, to make orders which will enforce an Irish citizen child's constitutional rights regardless of the child's place of habitual residence. Any decision by the court to exercise its jurisdiction will be guided by whether it is appropriate or proper in the circumstances for the court to do so bearing in mind the private international law rule of the comity of courts.

3.5 Marriage, unmarried/cohabiting couples, partnerships, divorce, judicial separation, maintenance obligations

In relation to marriage, under Irish law, the 34th Amendment to the Constitution, passed on 22nd May 2015, provides that any two persons may enter into a marriage in accordance with law regardless of their sex. Accordingly, persons having capacity to marry and who are free to marry will be able to do so regardless of their biological genders when the Marriage Bill 2015 is enacted and commenced. A marriage will not be deemed valid in Ireland where one of the parties is a transsexual and marries in a newly acquired gender. Under the rules of Private International Law, a marriage contracted abroad will be recognised only if a number of conditions are satisfied. The parties must have complied with the formalities applicable in the jurisdiction in which the marriage ceremony takes place (*lex loci celebrationis*). The parties must have the legal capacity to marry according to the rules of the jurisdiction in which they were domiciled. The marriage celebrated abroad must be analogous to what is generally understood to be a marriage in Ireland. If a marriage is potentially polygamous, for example, it will not be recognised.

Orders made under Section 5 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 provide for recognition of certain categories of foreign registered relationships as entitled and obliged to receive the same treatment in Irish law as a civil partnership registered in Ireland, provided the couple concerned would have had the legal capacity to register a civil partnership in Ireland.

In relation to jurisdiction in divorce, legal separation or annulment proceedings, Regulation 2201/2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and the matters of parental responsibility ("Brussels II bis") is directly applicable in Ireland. In cases where no other Member State has jurisdiction pursuant to Brussels II bis the Irish courts can take jurisdiction where at least one of the parties is domiciled in the State at the time of the institution of the proceedings.

Once an Irish court has jurisdiction in divorce proceedings, it will then apply its own law to the family law proceedings and to any ancillary or related issues.

In cases where Brussels II bis does not apply, a foreign divorce will be recognised if granted in a country where either spouse was domiciled at the date of the institution of the divorce proceedings.

3.5.1 Maintenance Obligations

Maintenance claims are currently dealt with under Council Regulation 4/2009 on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Cooperation in Matters Relating to Maintenance Obligations.

In essence, the aim of the Maintenance Regulation is to provide a set of common rules relating to jurisdiction, applicable law, recognition, enforcement, co-operation and standardised documents to facilitate the effective recovery of maintenance within the European Union. Given that one of the primary aims of the Regulation is to ensure that a maintenance creditor can easily obtain in a Member State a decision which will be automatically enforceable in another Member State without further formalities, the Maintenance Regulation includes measures relating to jurisdiction, conflict of laws, recognition and enforceability, enforcement, and legal aid, and is designed to bring about co-operation between central authorities. The obligation for the terms of the original order to be enforced without modification is very definite within the terms of the Regulation, and under no circumstances may a decision given in a Member State be reviewed as to its substance in the Member State in which recognition and enforcement is subsequently sought. Thus the net effect of the Regulation is to bar the ability of the court of a Member State not seised of the action from making new or associated orders.

3.6 Matrimonial property regimes

In the absence of a contrary intention, a marriage settlement (contract) between the parties will be construed according to the law of the matrimonial domicile. Where there is no such settlement, the applicable law will also be determined by the matrimonial domicile. Where the spouses share a domicile, this equates to the matrimonial domicile. Where they do not, it is likely that the matrimonial domicile will be determined according to the applicable law with which the parties and the marriage have the closest connection.

3.7 Wills and successions

As a general principle, the law governing succession to immovables is the law of the place where the property is located while the law of the country in which the deceased was domiciled at the time of his death governs the distribution and the succession to his movables.

The capacity of the testator is determined by the law of his or her domicile although there is a view that, in the case of immovable property, the *lex situs* should apply.

Where the testator's domicile changes between the date of the making of the will and the date of death, there are divided views as to whether capacity should be tested by the law of domicile at the time of the making of the will or at the time of death.

A will is formally valid under the Succession Act 1965 if its form complies with any one of the following laws: the law of the place where the testator made the testamentary disposition; the law of a nationality, domicile or habitual residence of the testator either at the time when the disposition was made or at the time of the testator's death; or, insofar as immovables are concerned, the law of the place where they are situated.

3.8 Real property

Irish law distinguishes between movable and immovable property and applies the law of the country in which the property is located to determine whether the interest in question is in a movable or an immovable property.

As a general rule, the applicable law in the case of immovable property is the law of the place where the property is situated.

3.9 Insolvency

Regulation No. 1346/2000 on Insolvency Proceedings (the "Insolvency Regulation") provides jurisdictional rules for insolvency proceedings within the EU^[1].

Article 3 of the Insolvency Regulation provides that the courts within the Member State where the debtor's centre of main interest is located have jurisdiction to open insolvency proceedings. Therefore, insolvency proceedings opened in Ireland will be determined by the Irish courts in accordance with the Irish law governing the lodging, verification and admission of claims in insolvency proceedings. The main relevant legislation is the Companies Act 2014, the Personal Insolvency Acts 2012-2015 and the Bankruptcy Act 1988.

Useful links

<http://www.irishstatutebook.ie/1995/en/act/pub/0026/sec0027.html>

[1] Replaced, with effect from 26 June 2017, by the recast EU Regulation 2015/848 on insolvency proceedings

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