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Estate planning in German-Maltese succession cases

Germans were among the first to invest in Malta in the 1960s and 1970s. Besides this long standing history of good business relations, Maltese and Germans are also friendly at a personal level. Indeed, there are said to be approximately 2,000 Germans in Malta; some of them having acquired property and chosen Malta as their place to retire. Given the good reputation of the island's financial services industry coupled with a fully EU-compliant legal and fiscal regime, more and more Germans have interests in Malta.

Against this background, estate planning gains more and more importance as the domestic succession laws in the various member states are still not harmonised at a European level.

This is particularly true where forced heirship rules permit children and spouses to claim a share of the deceased's estate as of right, whatever a will may say. Indeed, both German and Maltese succession law limits the testator's capacity to dispose of his or her estate in whole and reserve parts of the patrimony to the surviving spouse and children.

As there are only very limited possibilities to chose the applicable succession law, a testator will have to adhere to the legal regimes potentially governing the estate.

In this regard, it is advisable to determine at an early stage what laws may eventually apply in order to comply with the respective compulsive rules both on the form of the will and its substance.

From a Maltese private international law perspective, the applicable law on succession depends on the domicile of the deceased irrespective of his or her nationality.

Hence, the succession to the estate of a German national having his or her domicile in Malta will be governed by Maltese law.

Maltese law differentiates in this respect between movable and immovable property. Whereas in the case of movables it is for the law of the domicile, i.e. Maltese law, to apply, in the case of immovables it is the law of the place where such immovable property is located (lex situs).

Accordingly, in the case of German-based immovable property the estate is divided into parts governed by German and parts governed by Maltese law.

At the same time, under German private international law the applicable law on succession is in principle determined by the nationality of the deceased.

However, in the case of immovable property German private international law recognises overriding stipulations of the lex situs. In consequence, the parts of the estate consisting of immovable property situated in Malta shall be governed by Maltese substantive succession law.

Due to this so called scission system it is likely that in a German-Maltese succession the estate will be divided into various parts depending on the nature of the assets and their

respective location. This should be considered when drafting a will in order to minimise potential conflicts arising from the interplay of the applicable laws.

Regarding the form of the will, German nationals may opt to testate in Malta universally also in respect of their German based assets.

This is possible as in a cross-border situation a will is valid as long as it complies with the law of the state where it was drawn up. In this regard, Maltese law stipulates for the following types of will: (1) public wills which are received by a civil law notary in the presence of two witnesses, or (2) secret wills which shall be delivered by the testator to a civil law notary in writing and signed by the testator. Such universal will should include a severability clause for circumstances where one of the applicable laws nullify the will.

Alternatively, it may be preferable under certain circumstances to draw up separate wills for the German and the Maltese patrimony respectively.

In any event, it is advisable to seek German counsel when drafting a will. This is namely the case where an heir needs a certificate of inheritance issued by a German probate court to demonstrate his or her position. Such certificates are usually required by German banks or the land registry as respective foreign certificates are not recognised in Germany. However, as a German certificate of inheritance is only drawn up in German, translation issues may eventually arise when the German court is to interpret a will drafted in English and against the background of Maltese legal concepts potentially alien to German law.

In this regard namely the notion of reserved portion under Maltese law may cause some difficulties. Whereas under Maltese law the surviving spouse and children become heirs, German law provides for a claim only in money against the estate.

This difference is to be considered in estate planning, whether during lifetime or on death. Indeed, whether and to what extent the legal position of such forced heirs can be restricted depends very much on the circumstances. In most cases, however, there will be only limited possibilities for the testator to reduce the rights of the surviving spouse or children. A testator may therefore introduce a penalty clause in the will making it more difficult for the forced heir to claim.

As Maltese law offers with its trust legislation instruments to minimise potential conflicts within a community of heirs this option should indeed be considered in German-Maltese cases. The set up of a trust may actually be an effective means to safe the integrity of the patrimony for the family whilst at the same time optimising the tax burden on the estate.

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