

Thursday, October 25, 2012 by **Christian Pisani**

Trusts in German-Maltese property succession cases

Trusts are an often used vehicle in estate planning. This holds true namely in cross-border situations. By setting up a trust, the settlor can minimise potential conflicts among heirs and safeguard the integrity of the patrimony for the family. At the same time, the international dimension has to be borne in mind when setting up a trust. This is particularly important when German-based assets are involved. In principle, the Hague Trust Convention caters for the respective rules on the recognition of trusts in an international setting. However, Germany is not party to the convention. As soon as a German court has jurisdiction, German private international law determines the governing law on the validity of the trust.

The trustee will require a certificate of succession issued by a German probate court to demonstrate his or her position once assets are based in Germany. This is the case as banks or the land registry will require such evidence before transferring the assets to the trustee. As a rule, foreign certificates are not recognised in Germany. This may change when the EU Directive on Succession Law is enforced in 2015 providing for a Certificate of Succession at a European Level. To what extent the Directive applies to trusts at all appears, however, not to be settled in Germany so far. It remains to be seen to what extent the legal situation will change for trusts in the future.

Under German private international law rules, it is for the law of the deceased to rule on the recognition of the trust. Hence, in the case of a Maltese citizen, Maltese law would apply; in the case of a German national, German law. In principle, in both cases the trustee – being an individual or a legal entity – can be heir. However, in the case of German-based assets, the so-called *lex situs* comes into play. Accordingly, it is for German law to determine whether the property can indeed be transferred to the trustee.

In this regard, the German Supreme Court ruled in an old case that the notion of trust is alien to German property law as trust law provides for split-ownership between the trustee and the beneficiary. Accordingly, it would not be possible to transfer German-based property to the trustee. The court's reasoning is not convincing as even common-law trusts do not necessarily provide for split ownership. In the case of trusts under Maltese law, the arguments put forward do not bite. Maltese trust law explicitly provides for the trustee's full ownership of the trust property. Nevertheless, a trustee will have to be prepared to argue accordingly before a German probate court.

Against this background, a prudent settlor should seek German counsel at an early stage to mitigate the risk of non-recognition of the trust in Germany. We have seen cases where, due to the ambiguity of the language employed in the will, the German probate court did not issue a certificate of succession for the benefit of the trustee.

Under certain circumstances, it might be advisable to convert the composition of the estate to be transferred to the trust. The German *lex situs* comes into play only in the case of German-based immovable property and bank deposits. To overcome these problems, these assets can be transferred beforehand to a non-German legal entity. It is for the law at the seat of the legal entity to govern the validity of the transfer of ownership to the trust.

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