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by Christian Pisani

How new regulation impacts German-Maltese succession

Succession planning for families with a European outreach is complicated. This is the case once the deceased has assets in various countries, more than one nationality, domicile or residence.

Whereas the rules on the free movement of persons and capital within the EU facilitated life tremendously, conflicting principles of succession laws within the EU remained. Anything simplifying the position is therefore most welcome. The new European Succession Regulation No. 650/2012 (or Brussels IV) which applies to the succession of persons who die on or after August 17 promises that.

In light of the new regime, existing wills and estate-planning measures should be reviewed and new choices should be carefully considered together with any tax-planning opportunities and the effects of marriage contracts.

This also holds true for German-Maltese cases. Indeed, Brussels IV may offer Germans the opportunity to avoid the restrictions of Maltese succession law applicable for Malta-based immovable property. At the same time, it might be necessary in the future to draw up a will in cases where a German national relocates to Malta for professional purposes only for a limited period of time with no assets in Malta.

Succession laws differ from country to country. For example, in the case of a single deceased without children, both his parents and siblings would inherit under Maltese succession law in the absence of a will. Under German law, on the other hand, only his parents would be his legal heirs. At the same time, legal systems based on French succession law such as the laws of Malta substantially restrict the testamentary freedom. Indeed, depending on the number of children, up to one half of the estate is reserved by law to the testator's children and – alongside descendants – the surviving spouse is legally entitled to an additional quarter of the estate.

Accordingly, the scope for testamentary dispositions under Maltese law is very limited.

German succession law is much more liberal. In case of disinheritance, children and the surviving spouse are entitled only to half of the portion of the inheritance due under intestate succession.

Accordingly, it is crucial to determine which succession law governs. In the past, the application of both German and Maltese law was more or less inevitable once assets were located in both countries. To gain legal certainty, we therefore advised clients to draw up a will in such cases. Whereas for the time being two (or more) wills were indeed necessary to cover the various jurisdictions potentially involved, Brussels IV will change the legal situation entirely.

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The main aim of Brussels IV is to simplify matters both at the administrative and substantive level. Under the new EU regulation, the courts of a single jurisdiction will ideally apply a single law to the entire estate notwithstanding the location of the assets. As a general rule, jurisdiction and governing law will track each other and will be those of (1) the 'habitual residence' at the time of death, (2) unless there is a jurisdiction to which the deceased was more closely connected, provided that (3) the deceased did not elect the law of its nationality to apply. Furthermore, the regulation introduces a European Certificate of Succession (ECS) which parties interested in an estate may apply for at the courts in the relevant jurisdiction in order to evidence their rights to the estate. In cross-EU cases, an ECS may replace the usual national post-death certificates or instruments.

The notion of 'habitual residence' is key to Brussels IV. It has to be distinguished from the notion of domicile or residence under domestic Maltese law and is to be defined autonomously at EU level. Without providing for a binding definition, recitals 23 et seq. of the regulation stipulate that the competent authority should make an overall assessment of the circumstances of the life of the deceased during the years preceding his death and at the time of his death, taking account of all relevant factual elements, in particular the duration and regularity of the deceased's presence in the state concerned and the conditions and reasons for that presence.

The 'habitual residence' thus determined should reveal a close and stable connection. The regulation recognises that determining the deceased's 'habitual residence' may prove complex. This may be the case where the deceased for professional reasons had gone to live abroad to work, sometimes for a long time, but had maintained a close and stable connection with his state of origin. In such cases, the deceased could be considered still to have his 'habitual residence' in his state of origin, in which the centre of interests of his family and his social life were located.

Other complex cases may arise where the deceased lived in several states alternately or travelled from one to another without settling permanently in any of them. If the deceased was a national of one of those states or had all his main assets in one of those states, his nationality or the location of those assets could be a special factor in the overall assessment of all the factual circumstances. Given the lack of definition, determining 'habitual residence' may therefore become complex. This is namely the case for professionals working in an international environment, e.g. within the financial services sector or i-gaming, posted in Malta, or pensioners enjoying the Mediterranean sun in Malta while retaining links to their home country.

Brussels IV does not provide for the possibility to expressly choose the law of the 'habitual residence'. Indeed, it remains for the competent authorities to determine the respective factual circumstances and decide accordingly.

The regulation stipulates, however, in its article 22, that the testator may choose the law of its nationality to govern its succession as a whole. For the reasons above, it may indeed be advisable for German nationals to opt for German succession law. Such choice would, however, not predetermine the jurisdiction of German courts and a respective choice-of-court-agreement is only possible after the testator's death. This may create legal uncertainties in timely administrating the estate as a Maltese court will have to apply German law. We therefore advise to name an executor in the will who is entitled to apply for the jurisdiction of German courts should the (potential) heirs not agree accordingly. Once a German court has jurisdiction it is ensured that the court applies its own law which facilitates to predict the outcome. Such German court may then eventually issue a European Certificate of Succession also for the Malta-based assets.

Dr. Christian Pisani is a German-qualified lawyer based in Munich.