PSG Wealth

The impact of the EU Succession Regulation on the SA testator with assets in an EU jurisdiction

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Introduction

- Tens of thousands of South Africans have established geographically diversified estates, particularly in the form of real estate, shares and financial instruments
- Fiduciary advisors should not under-estimate the complexities of this on wealth, estate and succession planning
- There are annually 450 000 cross-border successions within the EU, representing value in excess of 120 billion euros
- With different countries recognising different concepts and connecting factors, such as **domicile, habitual residence, nationality, and place of marriage celebration**, succession planning may become complex and challenging

Intro continues

- When dealing with an estate exposed to multiple jurisdictions, a single will may not achieve the testator's objectives
- The different legal requirements between the jurisdiction where the asset is located, the domicile of the testator, and the law the will is designed to be in compliance with, must be considered
- The EU Succession Regulation (Brussels IV), is aimed at simplifying it for European Union citizens to deal with the legalities and consequences of multi-jurisdictional wills and succession matters
- The Regulation became effective on 17 August 2015
- The UK, Ireland and Denmark have opted out of the Regulation
- The Regulation is relevant to any testator with assets in the EU

Applicable laws for estates

* General principles in civil law and common-law jurisdictions: the *lex situs* of fixed property governs its disposition, while the law of the testator's *lex domicilium* governs personal property ("movables follow the person, immovables follow their locality"), but with the *intent of the testator* usually trumping

* The main factors used to determine the applicable law: **domicile** ("permanent home"), **habitual residence** ("regular physical presence which must endure for some time"), **nationality** and ***situs***

Applicable law continues

- The presence of forced-heirship rules in many civil-law jurisdictions, places an extra burden on testators domiciled in common-law jurisdictions
- Domicile has become a very prominent connecting factor in spite of a lack of clarity on its exact interpretation
- The Regulation makes use of the concept of “habitual residence” as determining the default law in cases of succession
- The testator may in a Will choose his own national law to govern his estate, in which case the substantive validity of that Will shall also be governed by the same law

The EU Regulation (Brussels IV)

- The Regulation deals with jurisdiction, the validity and admissibility of Wills and succession agreements, as well as the European Certificate of Succession (instrument issued by public notary, to manage cross-border succession)
- All EU states, except for the UK, Denmark and Ireland, are subject to the Regulation
- Both the EU citizen and the non-EU citizen, may choose the law of his country or nationality to apply to his estate
- The default position is that the governing law of the state in which the deceased was **habitually resident** at his death will be utilised for the distribution of the deceased's estate

EU Regulation continues

- A SA national may, therefore, specify in his Will that SA law is to apply to his assets situated in an EU state, which will prevent interpretive uncertainty, and exclude unintended results, such as forced heirship laws and potential clawback provisions, applicable in the *situs* state
- The Regulation unfortunately excludes aspects such as community property regimes, life insurance, pension plans, joint ownership, trusts and double tax issues
- The Regulation does simplify some planning exercises for persons domiciled in third party states, with property located in one or more EU jurisdictions

EU Regulation continues

The **national law** applicable to your inheritance will govern the inheritance of all your assets, regardless of their location and will determine the following:

- who **the beneficiaries** of your inheritance are
- **whether you can disinherit** a family member or not
- whether some parts of your estate should be **reserved** for certain persons
- whether any **gifts** you made during your life should be restored to your estate
- the **transfer of ownership** of your assets to your heirs
- the **powers** of your heirs, of the executors and/or administrators of the estate (including conditions regarding the sale of property and payment of creditors)
- who should be **liable for any debts** you leave behind
- how your assets should be **shared** among your heirs

Choice of law and *renvoi*

- In case of a conflict of law, private international law dictates that the choice of law in matters of conflict regarding succession, points to the ***lex situs*** in the case of **immovables**, and the **domicile** of the testator in the case of **movables**
- The concept of *renvoi* is present where the law of one jurisdiction stipulates that the law of another jurisdiction is to apply, with that jurisdiction referring it back to the first jurisdiction or onwards to a third jurisdiction
- *Renvoi* is possible under the Regulation when the law of succession is determined by habitual residence outside the EU, and the private international law of such jurisdiction uses *renvoi* to apply the law of an EU jurisdiction
- To avoid the risk of *renvoi*, the best option to the testator is to make a proper election of law in his will and prevent reliance on the habitual residency test

Choice of law and *renvoi* continues

- As a general rule will the jurisdiction whose succession laws apply, also have the power to administer the estate of the deceased
- The result of the Regulation is that, if the testator makes an election for a particular law to apply, the potential application of *renvoi* is eliminated
- In case of intestate succession, *renvoi* shall still apply
- Election does not only eliminate *renvoi*, but it also effectively change the applicable law
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Case study

- Peter is a South African citizen, working for a Swiss company, with offices in all major cities in Europe. He resided in Germany for a number of years, and became domiciled there, during which time he purchases a house in Germany as well as a small flatlet on the French Riviera. He also owns a car and other movables in Germany. He inherited a flatlet and household contents in Port Elizabeth and visited South Africa regularly for family holidays.

Prior to 17 August 2015

- Germany would apply SA law to the German property as it applied the law of the deceased's nationality
- SA conflict-of-law rules generally apply the law of the deceased's domicile to all movable assets, which is Germany
- As Germany has *renvoi* under its private international law, it would then apply German law to all German assets as well as to all movable assets in SA
- The SA property will be dealt with in terms of the *lex situs*
- France, however, will apply its own law to the French property, irrespective of the above
- Rules regarding lifetime gifts, unequal inheritances to his children, or assets bequeathed to a trust, may all jeopardise Peter's wishes

After August 2015 without election

- As Peter was habitually resident in Germany, both Germany and France would apply German domestic law to the assets in their jurisdictions
- SA conflict-of-law rules generally apply the law of the deceased's domicile to all movable assets, which is Germany
- As Germany has *renvoi* under its private international law, it would then apply German law to all movable assets

After August 2015 with election

- If Peter elected SA law to apply to his whole estate, the estate will be wound-up in terms of SA law, as Germany would reject *renvoi* in terms of the Regulation and France will have to comply with the Regulation in cases of election
- Peter will thus be protected against forced heirship rules in France and possible clawback provisions, and he would be able to benefit a trust, which has no recognition in French law

Conclusion

- Consider whether it is necessary to draft a separate will for each jurisdiction where assets are located
- Consider whether different advisers within the separate jurisdictions should be involved
- Always do estate planning holistically
- The applicability of each separate will must be clearly defined as well as the scope and the execution date
- Make sure that one Will does not unintentionally revoke another
- Address inconsistencies between the separate Wills

Conclusion continues

- Consider the *nexus* with a particular jurisdiction, the potential tax consequences, forced heirship rules, the existence of applicable double tax agreements and the legal requirements and consequences of the applicable jurisdiction
- It may be necessary for a separate debts and taxes clause in each will to address the tax liabilities
- Due to the many uncertainties linked to the EU Succession Regulation, it provides estate planners with some opportunities to plan their international estates more conclusively, as the uncertainty also creates potential flexibility in evaluating the factual circumstances

Conclusion continues

- Unfortunately does the Regulation not deal with important aspects, such as taxation and *inter vivos* trusts
- An advantage of the Regulation is the simplification of probate in cases of cross-border deceased estate administration
- The law of the *situs* may often place limitations on who may serve as executor or administrator and what powers such an appointee has
- The individual entitled to administer the particular estate under the applicable law, has to be appointed by a member state, if such appointment was mandatory in that jurisdiction

Conclusion continues

- Irrespective of the limitations and powers of the courts of the member state, is an executor in a non-member state, in general, in a stronger position than he or she was before the introduction of the Regulation
- The exclusion of in-community property regimes, life insurance aspects, pension plans, joint ownership and trusts, limit the potential of the Regulation to ensure uniformity
- The Regulation does to some extent simplify estate planning exercises for persons domiciled in third party states, with property located in one or more EU member jurisdictions

What to consider in the Will(s)

- Make a separate will for each and every jurisdiction
- Alternatively, a will for South African assets and another will for offshore assets
- Stipulate in each will which jurisdiction is covered by it
- State in each will what is excluded
- State the limitation of revocation or variation intended by the will
- Elect domicile
- Elect the particular law to be applicable for interpretive purposes
- Elect the particular law to be applicable to the wishes
- Nominate an executor in each will
- Grant the power to nominate an offshore attorney or agent to assist
- Specify which debts, costs and expenses may be discharged from each estate
- Indicate in which jurisdiction each will is signed

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