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Multiple wills and the impact of the EU Succession & Matrimonial Property Regulations on the SA testator with assets in an EU jurisdiction

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Dr Eben Nel FPSA®

Introduction 1

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

Introduction 2

When dealing with an estate exposed to multiple jurisdictions, a single will may not always achieve the testator's objectives

The different jurisdictional requirements must be considered:

- the jurisdiction where the asset is located
- the domicile and/or habitual residence of the testator
- the applicable matrimonial property regime
- the law the will is designed to be in compliance with
- the place where the marriage took place

Introduction 3

Various attempts have been made in the past to harmonize different domestic laws, without much success:

* The Hague Convention on testamentary disposition (1961). SA acceded to it and the majority of EU jurisdictions ratified it. It is too limited to have any substantial impact.

* The Hague Succession Convention on deceased estates (1989). It is not in force yet. SA never a party thereto. Too limited as it excluded matrimonial property regime matters.

* The Hague Convention on matrimonial property regimes (in force 1992). Only 3 states ratified it. SA not party thereto. It is too limited as it does not apply to the succession rights of surviving spouses.

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 for some time"); **nationality**; and ***situs***

Applicable laws 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 Regulations 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

EU Succession Regulation p 1

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:

* 25 EU states adopted the regulation (Ireland and Denmark opted out)
* It is applicable to any testator with assets in the EU
* It applies to all deaths on or after 17 August 2015
* It deals with jurisdiction, as well as the validity and admissibility of wills and succession agreements
* It created the European Certificate of Succession (issued by public notary, to manage cross-border succession)

The EU Succession Regulation p 2

- The Regulation unfortunately excludes aspects such as community property regimes, life insurance, pension plans, joint ownership, trusts and double tax issues

- 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

- Both the EU citizen and the non-EU citizen, may choose the law of his country of nationality to apply to his estate

EU Succession Regulation p 3

- The Regulation does simplify some planning exercises for persons domiciled in third party states, with property located in one or more EU jurisdictions

- A SA national may 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

EU Succession Regulation p 4

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** made during your life should be restored to estate
* the **transfer of ownership** of your assets to your heirs
* the **powers** of your heirs
* The powers of the executor/administrator of the estate
* who should be **liable for any debts** you leave behind
* how your assets should be **shared** among your heirs

EU Matrimonial Property Regulations p 1

The **EU Matrimonial Property Regulations** implemented enhanced cooperation in the area of jurisdiction, applicable law and recognision and enforcement of decisions in matters of matrimonial property regimes:

* It became effective on 29 January 2019
* 19 EU states have adopted it, with the non-participating member states continuing to apply their national law to cross-border situations relating to matrimonial property regimes
* It covers both marriages and registered partnerships in cases of death and divorce

EU Matrimonial Property Regulations p 2

* It provides international couples with some legal certainty regarding jurisdiction and facilitate the recognition and enforcement of decisions on property matters
* The parts on jurisdiction, recognition and enforceability shall apply only to authentic instruments (e.g. prenuptial or postnuptial agreements in member states) drafted on or after 29 January 2019, regardless of the date of the marriage
* Matters on the applicable law are applicable on marriages concluded on or after 29 January 2019, except if the spouses have made a choice of law applicable to their matrimonial property regime before 29 January 2019

EU Matrimonial Property Regulations p 3

* In matters of succession pursuant to the Succession Regulation, the same state shall have jurisdiction to rule on matters of the matrimonial property regime arising in connection with that succession case.
* When drafting wills for international clients, consider the habitual residence, nationality, *situs* and matrimonial property regime if entered into after 29 January 2019 within a member state. The content of such a contract, its applicable law and confirmation of registration should be determined.
* Where spouses have married in an EU member state, they may agree to change in writing the law applicable to their matrimonial property regime to their (or one of their) habitual residence(s) at the time of the agreement, or to the law of a state of nationality of either spouse at the time the agreement is concluded

EU Matrimonial Property Regulations p 4

Two principles applied by the Regulation are:
- Universal application: the designated law applies even if it is not the law of a member state.
- Unity of the applicable law: spouses may elect the law applicable to their regime, regardless of *situs* of the property, even a third state, as long as a close link there exist, such as habitual residence or nationality

The spouses may elect the applicable regime if it is either one of their habitual residences or nationality at the time. They cannot elect a future prospective jurisdiction, but can commit in the agreement that if they will subsequently habitually reside in another state they will choose that state's applicable law as their own for their matrimonial property regime *in another, later agreement*.

EU Matrimonial Property Regulations p 5

- The applicable matrimonial property regime agreement applies to all assets falling under the regime regardless of where they are situated.
- The intention of the Regulations are to enable couples to have their various related procedures handled by the courts of the same state.
- Ideally should couples seek to concentrate the jurisdiction on their matrimonial property regime in the same jurisdiction they have elected to deal with their respective successions in accordance with the Succession Regulation.

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 Succession 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 EU Regulations are 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

Case Study

Example:

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 South Africa 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

If Peter entered into a matrimonial property agreement after 29 January 2019, he could have elected SA law as being applicable to his matrimonial property regime

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

If Peter got married in Germany after 29 January 2019, without having elected SA law as being applicable to his matrimonial property regime, German law will be applicable as far as matrimonial property matters at death is applicable, although SA courts will still have jurisdiction on matrimonial property matters, applying German 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 Will
- Address inconsistencies between the separate Wills
- If EU assets, determine whether the parties entered into a matrimonial property agreement after 29 January 2019

Conclusion continues

- Always determine impact of matrimonial property regime
- 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 Succession Regulation not deal with important aspects, such as taxation and *inter vivos* trusts

An advantage of the Succession 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 Succession Regulation

The exclusion of in-community property regimes, life insurance aspects, pension plans, joint ownership and trusts, limit the potential of the Succession Regulation to ensure uniformity

The Succession 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 applicable Wills

Make a separate will for each and every jurisdiction (etc. EU, SA, other)
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
Consider the applicable matrimonial property regime
If possible, align the property regime with the succession jurisdiction
Consider the impact of the various *lex situses* in relation to the applicable property regime
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

Thank you