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Succession in an international context since 17 August 2015, trust funds

Regulation (EU) No. 650/2012 of the European Parliament and the Council, on the jurisdiction, applicable law, recognition and enforcement of decisions and the acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (hereinafter referred to as the "Regulation") came into effect on 17 August 2015. The Regulation applies in all Member States of the European Union with the exception of the United Kingdom, Ireland and Denmark. The Regulation's objective is to eliminate obstacles to organising international succession (if, for example, the deceased's estate is located in different countries, at least one of them being an EU Member State).

Jurisdiction of the courts of Member States

Generally, only a court of the one Member State determined by the Regulation has jurisdiction to deal with and rule on the succession as a whole even if the deceased's estate is spread across different Member States, or, as the case may be, in third countries. As set out in Article 4 of the Regulation, the main criterion for determining the jurisdiction of a court to rule on the succession is in which Member State the deceased had his habitual residence at the time of his death. Since the Regulation does not provide an explicit definition of what constitutes a habitual residence, the determination of the place of habitual residence should be based on the Preamble to the Regulation according to which the authority dealing with the succession 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 into account all the relevant facts, in particular the duration and regularity of the deceased person'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 with the state concerned. If the place of deceased person's habitual residence is not located in any EU Member State at the time of his death, the location of the deceased person's assets shall become a subsidiary criterion. The Regulation also enables a choice of the courts having jurisdiction.

Choice of applicable law

The Regulation allows the deceased to choose the applicable law before his death. The choice of applicable law is not limited to EU Member States but the deceased may choose the law of any state of which he is a national at the time of choice or at the time of death. The deceased makes the choice of law in a "disposition of property upon death", that is, a will, a joint will or an inheritance agreement, either expressly or by an indirect mention (such as a reference to the provisions of a specific law). The choice of applicable law can only be changed or revoked by changing or revoking the disposition. Although deceased persons did not thus choose applicable laws in those dispositions upon death made prior 17 August 2015, the applicable law may be taken into account if the deceased could have chosen such a law under the Regulation. The possibility of choosing the court to have jurisdiction is closely related to the choice of applicable law. Parties to inheritance proceedings may agree, in writing, that the succession case is to be resolved by a court of the Member State whose law the deceased has chosen. However, the jurisdiction of a court is determined by domestic laws. The jurisdiction of third countries' courts cannot be established by a choice of the applicable law.

European Certificate of Succession

The European Certificate of Succession is issued for use in another Member State where it shall have a direct effect. The certificate is issued on the basis of an application submitted by the heir, legatee, executor of the will or administrator of the estate in order that the aforementioned persons are able to prove their status or to exercise their rights arising from this status in another Member State. The Certificate is issued in the form of a certified copy and is limited to 6 months or a longer period of time, where appropriate.

Trust Fund

In the event of death, proprietary rights can also be regulated otherwise than by a will or an inheritance agreement. The deceased can set up a trust fund.

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A trust fund is a relatively new institute connected with the new Civil Code (i.e. coming into force as of 1 January 2014). A trust fund can be set up in the event of death (arising upon the deceased's death) or during the deceased's lifetime (arising at the moment the care of estate is entrusted to the trustee). A selected part of the settlor's assets (house, land, bank account, etc.) is allocated to the trust fund. The settlor (a person or a legal entity) chooses how the fund will dispose of the property, in particular who will be the trustee and who the beneficiary that will receive the benefits from the trust. Upon establishing the trust fund, the settlor loses all ownership rights in the property concerned. Such rights are exercised by the trustee based on non-discretionary rules set out in the so-called Trust Fund Statutes. The Statutes are a public instrument that contain all the necessary information and rules (such as the name of the fund, designation of the property, specification of its purpose, etc.). Benefits from the trust fund can be in the form of the granting of the fruits, revenues or profits from the trust fund or a share therein or the release of the trust fund estate or a share therein upon its dissolution.

Although the trust fund has no legal personality and is legally not the new owner of the allocated property, it is considered to be the owner of the property from a tax and accounting point of view. The fund is an accounting unit, it keeps accounts and is a taxpayer. The fund is, for instance, allowed to depreciate long-term assets allocated to the fund for tax and accounting purposes.

Allocated assets are protected from potential creditors who otherwise may claim the settlor's assets. Another advantage is a reduction of the tax base and, consequently, lower tax payments. A further considerable advantage is that the settlor's identity is concealed since all assets are kept in official registers (such as the Land Registry) only under the name of the trustee with the suffix “trustee”. If the settlor does not wish to disclose his identity, it is very difficult and sometimes even impossible to trace it.

Further advantages:

- Avoidance of inheritance proceedings
- Reduction of investment risks
- Prevention of ill-advised spending of inherited money
- Provision for the settlors and their close family members
- A Trust fund is an alternative to a prenuptial agreement

The main role of the trustee is to fulfil the purpose which may be private, charitable, or, as the case may be, profit-oriented. Trust funds may be managed by more than one trustee. In such a case, the settlor may also be a trustee. Trustee activities may be monitored by the settlor, beneficiary or any other person designated so to do. The trustee is obliged to care for and increase the trust fund estate, pursue its purpose and to respect the beneficiaries' rights.

The beneficiary can be designated by the settlor or, subsequently, by the trustee in accordance with the Statutes. The beneficiary may be a particular person or persons specially designated in the Statutes. When a beneficiary fulfils all the conditions defined by the settlor, he is eligible to receive a benefit. The conditions of such are laid down in the Fund Statutes. These conditions may be, for example, having reached a certain age, graduating from school, caring for parents, etc. Any conditions may be stipulated, provided that they are realistically achievable.

The trust fund terminates upon the expiry of the period for which it was set up, in achieving its purpose, through a court decision, or by waiver of the right to receive benefits from the trust fund by all the beneficiaries.

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