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Complex Issues Regarding International Estate Administration

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Introduction

Dealing with a sizeable and complex estate can be a great challenge even if the assets are concentrated within one country. However, globalization and the mobility of individuals have opened up a whole new dimension in that regard. More often clients move from one country to another and own assets, in particular real estate, throughout the world. As a consequence, estates left behind by decedents are more likely to be spread amongst different countries. This can make the task of an executor or administrator a difficult one and in particular requires the navigation through a maze of different legal systems. The compass for such navigation is reflected in the various conflict of law rules. However, these rules are numerous, sometimes difficult to understand and often conflicting. Depending on where an inheritance action is filed, the outcome may be very different, as each jurisdiction potentially applies diverging rules. The choice of the right jurisdiction to obtain probate, for example, can already be a crucial decision when it comes to the release and transfer of estate assets, provided there are several options available in a given case. It is of particular importance in that respect, that some jurisdictions apply one and the same law to the administration and division of an estate, while other jurisdictions distinguish between rules governing the formal administration and rules governing succession.

In light of the above described challenges, this article aims at giving an overview on issues regarding international estate administration. The aim is to highlight certain principles relevant when dealing with cross-border estates and to point at differences between non-uniform legal systems.

Fundamental Differences between Civil Law and Common Law

US succession law – which derives from British succession law (common law) - differs fundamentally from continental European law which is based on the Roman judicial system. Each US state distinguishes between *succession* (substantive succession law) and *administration* (formal handling of an estate).

Thereby, the administrator collects the estate, pays the debts of the decedent and distributes the balance of the assets to the heirs. If a will exists, the probate court examines the formal validity of such will in a probate proceeding before it takes effect. While administration is handled similarly in most US states,

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substantive succession law is organized very differently across the states. The situation is similar in the UK where the role of the deceased's personal representative (who is accountable to the heirs) is to collect in any assets, pay any debts and – to the extent that there is a surplus – pay over the net estate to the heirs in accordance with the provisions of the will (if any) or the rule on intestacy.[2]

The continental European succession law follows generally the principle of *universal succession* according to which the estate passes automatically to the heirs. US law, by contrast, follows the principle of *special succession*. The estate is divided into immoveable property and moveable property, the latter being transferred to an administrator, the personal representative, who is under judicial supervision and responsible for payment of the decedent's debt and distribution of the estate assets. The immoveable property of the decedent, however, descends directly to the heirs, but may be under the care of the administrator under certain circumstances.

In contrast to Switzerland and other continental European succession laws, which follow the principle of *unity of the estate*, US laws and English laws[3] provide different legal frameworks for moveable and immoveable property. The *succession rules* are determined according to the *lex rei sitae* for immoveable property while movable property is subject to the law of the last domicile of the decedent, which leads to a *scission of the estate*.

Role of an Executor or Administrator

The personal representative is called in the US or UK executor if he is named in the last will, in all other cases (especially in case of intestate administration) the personal representative needs to be appointed by the court and is called administrator. The tasks of an executor and of an administrator in common law jurisdictions are generally identical to a large extent.

In Switzerland (and many other civil law jurisdictions), the appointment of an executor is not a legal requirement. However, it is advisable to appoint an executor particularly in the case of large or complex estates. Absent such appointment, the estate is administered by all heirs jointly (so called community of heirs) or upon request of an heir by a so called administrator designated by the court.

Generally speaking, the role of an executor is to carry out the instructions of the testator in his or her last will or as provided by the governing succession law or in agreement with the heirs in case of intestate succession (administrator). However, the way this task can or must be performed heavily depends on the law governing the administration of the estate. While in the US and other common law systems the executor becomes the owner of the estate assets and is liable for the debts, in Switzerland (and most other civil law jurisdictions), the devolution of the testator's assets to the heirs does not follow the common law

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2 The Swiss-English Succession, Tina Wüstemann/Daniel Bader/Filippo Noseda, successio 3/15, p. 247 *et sequ.*

3 Unless explicitly mentioned, this article will cover only the jurisdiction and laws of England and Wales.

concept of probate procedure. The entire estate vests in the heirs by force of law. All assets and liabilities automatically pass *eo ipso* directly to the heirs. Hence, the executor under Swiss law does not inherit or become the owner of the estate himself. He rather occupies a special position, which allows him to take possession of the estate assets and to exclusively administer and deal with the estate. Typically, where there are several heirs, all rights and obligations comprised in the inheritance constitute an undivided community among the heirs until partition. Heirs are joint owners of all estate assets and may deal with them jointly, subject to the rights of representation and administration conferred by agreement or by law. In line with this, the question as to who is liable for liabilities of the estate is in such jurisdictions generally a matter of the applicable succession law and not the law governing the administration of the estate, which often does not even exist as a separate area of law. Under Swiss law, the heirs become automatically (personally) and jointly liable for all debts of the estate, including their own personal assets, unless they renounce their inheritance or ask for a public inventory in which case they are only liable for estate debts to the extent they receive estate assets.

Scope of Succession and Administration

Administration is governed by US procedural law and many issues are considered to be procedural while Swiss law (and other continental European succession laws) considers them to be part of substantive succession such as the right and duties of the executor or claims of creditors. During probate proceedings, compliance with formal requirements, testamentary capacity of the decedent as well as possible absence of intent of the decedent are verified. In general, these are all questions which e.g. Swiss law subjects to succession, which can at times lead to conflicts in practice when dealing with US-Swiss cross-border estates.

The same applies for the UK. For example, if a deceased dies last domiciled in Switzerland and encumbered his/her English real estate property with a mortgage, the question as to who is liable for such debt is from an English perspective subject to English law as the executor is exclusively competent to deal with the UK real estate including the mortgage liability as a matter of administration law. The mortgage liability would thus not pass on to the heirs but to the personal representative as legal owner of the estate according to English law at the place of administration where the real estate property is located. This corresponds with the qualification under English law that a mortgage is considered to be immoveable property. Where a deceased specifically leaves his English real estate to a certain beneficiary, it is likely that such beneficiary is solely liable for the mortgage on the relevant UK real estate but the mortgage would look to the executor for e.g. payment of interest during the administration phase. On the contrary, from a Swiss conflict of law perspective, it is arguable that the mortgage would be considered as a moveable asset and hence be subject to Swiss law (as the law at the last domicile of the deceased) and therefore passing to the heirs, who would be jointly liable. It is in such case therefore recommended to

state in the last will who should be responsible for the mortgage – e.g. the beneficiary ultimately receiving the UK real estate or all heirs jointly.

One of the advantages of the common law systems is that it avoids the emergence of a "community of heirs", which may be difficult to administer (as the heirs have to agree) and in addition in the absence of the concept of "universality of succession" the final heirs are not exposed to unlimited personal liability in relation to the deceased's debt. Instead if the estate is insolvent, the administration phase ends and the beneficiaries do not inherit anything.

Duties and Powers of an Executor/Administrator

The powers of an executor under common law are generally very extensive and include all administration matters of an estate. The laws of all US states make a distinction between domiciliary administration and ancillary administration. The domiciliary administration consists of the principal estate proceedings at the last US domicile of the deceased. The rights of the personal representative appointed by the US domiciliary court are limited to the moveable assets and immoveable assets located in the respective US state of the last domicile. Separate administration proceedings are necessary if immoveable estate assets are located outside the domiciliary state (ancillary administration). Ancillary administration may also be needed in cases where the decedent was last domiciled outside of the US and left assets in the US (e.g an US bank account).

The powers of the executor under Swiss law extend to the worldwide assets and liabilities of the testator, wherever they are located, except for directly held real estate abroad in relation to which the respective foreign state claims exclusive jurisdiction. Unless provided otherwise by the testator, the Swiss executor appointed by last will has similar rights and duties as an executor in the US or UK, namely to administer the estate and safeguard the estate assets, to settle outstanding debts of the testator and pay outstanding taxes[4]. The main difference between a Swiss and an UK or US executor is that the English or US executor is the legal owner of the estate whereas under the Swiss principle of universality of succession (and generally in other civil law jurisdictions), the heirs are the legal owners. As a consequence, unlike under Swiss law and other civil law jurisdictions, the beneficiaries of an US or English estate are not personally liable for any estate liabilities as the executor is obliged to settle such debts before distributing the estate assets.

While a Swiss executor has also the duty to partition the estate in accordance with the testator's instructions as set out in his last will, the heirs can deviate from such instructions provided all agree.

[4] Under Swiss law, the executor is, generally, jointly liable with the heirs for the deceased's income and wealth taxes (limited by the amount of estate assets and only for the unpaid taxes assessed until the deceased's demise) and in some cases also for inheritance taxes.

Absent any provisions of the testator, the heirs have to agree upon the partition. The executor has no final say in this regard.

In cross-border estates, matters can get complex when an executor has to act in relation to estate assets located abroad given in particular the different concepts and roles of an executor under common law and civil law. An UK grant of probate or letters of administration can also extend the personal representative's powers outside England and Wales. The English executor may claim estate assets outside of English jurisdiction if the law where the estate assets are located accepts such powers. Generally, an UK executor does not have a duty to collect in assets from abroad, although in certain circumstances he or she may need to claim estate assets outside of England and Wales, e.g. to pay estate expenses and liabilities. Similarly, even though an US executor has only limited authority depending on the US state, most US letters are issued for the worldwide assets (except foreign real property).

If an UK or US executor needs to act with regard to Swiss assets, Swiss authorities ask for a copy of the last will, the grant of probate and an affidavit in which the English executor needs to provide for the same confirmation as an administrator in case of intestate succession, e.g. he or she has to provide the names of the beneficiaries and also to confirm to the Swiss authorities that there are no pending claims against their entitlement.

Depending on the various jurisdictions involved, the executor is required to deal with a number of different legal and administrative frameworks and the rights and duties imposed on an executor can be manifold. Such duties may comprise the notification of heirs and governmental bodies, the establishment of an estate inventory or the undertaking of provisional measures such as the sealing of the estate, the release and transfer of estate assets to the beneficiaries or the filing of tax declarations, just to name a few. The laws of some countries impose a personal or joint liability on executors (e.g. for unfulfilled tax obligations), which is one reason to treat the relevant duties with the necessary prudence. Again, the rights and duties of an executor can either be governed by separate rules on the administration of an estate or they can be regarded as part of succession law. This is potentially raising conflicts, as one and the same point may be governed by two different laws.

Conflicts between different duties of an executor can however not only arise as a consequence of multiple laws governing the same matter. Specific problems can occur in cases, in which a person does not only act as executor but also performs other functions that are closely related to the estate of the deceased. For instance, a person may be the executor of an estate and at the same time the trustee of a trust settled by the deceased or he or she may be a shareholder or member of the board of a corporation in which the deceased had a major stake. While such conflict of interest constellations may in a given jurisdiction not necessarily disqualify an executor, care must be taken in such case and the executor has to be aware of the applicable rules to avoid potential liability.

Succession Regimes

Conflict of law rules as navigation tools

a) General

Conflict of law rules determine the jurisdiction and applicable law in cases that have ties to a number of different countries. Aside from bilateral and multilateral international agreements which may be relevant in a cross-border estate, the conflict of law rules of each country are somewhat different.

In particular, countries make use of different connecting factors in order to determine the jurisdiction of the local courts and authorities as well as the applicable succession law. In inheritance matters, the conflict of law rules of many countries refer to the last residence or the habitual residence of the deceased person to determine jurisdiction and applicable law of a succession. This is also the approach of the EU Succession Regulation, [5] which since 2015 serves as a uniform conflict of law framework in succession matters for most EU countries (see below). Prior to the entry into force of the EU Succession Regulation, some countries (e.g. Italy, Spain and Germany) chose nationality as their primary connecting factors whilst others (e.g. France, Belgium and the Netherlands) applied the concept of last residence or habitual residence at least for part of the estate. The term used in Switzerland, which is not a member state of the EU Succession Regulation, is "domicile". Domicile is also a fundamental connecting factor for English succession purposes, even though very different from the Swiss concept of domicile, and it is perhaps unfortunate that it is linguistically very close to the Swiss "domicile" (it being noted that the UK opted out of the EU Succession Regulations, see below).

Next to the mentioned connecting factors of (habitual) residence, domicile or nationality, there is a variety of other factors that could apply. For Indian residents, for instance, succession rules seem to depend on the "community" or religion to which an individual belongs. For individuals not of Indian origin, we understand that the law of their nationality applies.

b) The UK concept of "domicile" in particular

The English concept of domicile is generally very different from the concept of last or habitual residence. The resident status of the deceased at the time of death is irrelevant both for determining the jurisdiction of the English authorities in relation to the administration of UK estate assets and in determining the applicable succession law. Instead, one has to consider whether there are assets in the English jurisdiction and whether the deceased was domiciled (in the English sense of the term) in England.

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[5] Regulation (EU) No 650/2012 of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession.

England makes a distinction between domicile of origin and domicile of choice. The domicile of origin is acquired at the time of birth either from the father or from the mother and thus relates to a connection between an individual and a certain place without necessarily depending on the transient concept of habitual residence as center of vital interests. For this reason, it is relatively difficult for an individual to shed his domicile of origin. Accordingly, it is possible for a person to move his residence whilst maintaining his or her domicile of origin. Nevertheless, a domicile of origin may be replaced by a domicile of choice if a person takes residence in a jurisdiction and the person intends to reside there permanently or indefinitely. While these requirements for a domicile of choice appear on their face to be similar to the concept of last or habitual residence, English courts interpret the requirement "intention" very strictly, as a person may live in England for decades and still not establish a domicile in England. There is thus considerable potential for conflicts when it comes to succession planning with a UK nexus given the specific definition of domicile in the UK.

c) Unity of estate vs. scission of estate

A fundamental distinction is made between conflict of law rules which follow the principle of "unity of the estate" and rules that lead to a "scission of estate" or "splitting of the estate". Some countries, such as Switzerland or Italy (outside the scope of the EU Succession Regulation), have conflict of law rules providing for a single law to govern the entire estate (unity of the estate). Other countries, most prominent the United Kingdom and the US but also civil law countries such as France (outside the scope of the EU Succession Regulation), have different legal frameworks for the succession of real estate and moveable property (so called splitting or scission of the estate). The succession law of the *situs* applies to real property (or "immoveables"), whereas personal property (or "moveables") is subject to the law of the last domicile of the decedent. The different connecting factors can consequently have the result that the succession with regard to one and the same estate asset is governed by a different succession law, depending on the jurisdiction concerned with the matter and the conflict of law rules applied by this jurisdiction in case more than one jurisdiction considers itself competent (so called "conflict of estate"). As follows from the described differences in connecting factors, clashes do not only arise between common law and civil law jurisdictions but also between jurisdictions which operate under the same system or also when religious laws play a role, such as Sharia law.

d) Renvoi

Most continental European lawyers will be familiar with the concept of "renvoi ", i.e. with the question as to whether – in determining the relevant applicable law – one has to take into account the conflict of law rules of the target jurisdiction, and if so, to what extent.

For illustration purposes, let's look at the following example: X is a national of country A but lives in country B, where he dies. The conflict of laws rules of country B (country of residence) provide that the estate of the deceased should be governed by the laws of the country of which he was a national at the

time of his death (in our case, country A). However, A would apply the rules of the deceased's country of residence (in our case, country B). Should country B accept the "renvoi" to its law operated by country A?

The main rationale for the doctrine of *renvoi* is to promote harmony in international cross-border estate cases. Thus, in the example above, by accepting a *renvoi* to its own rules country B would ensure that both jurisdictions (i.e. country A and country B) would apply the same law to a set of facts (in our case, the law of country B). But is this really the case? Imagine that, in our example, the rules of country A (country of citizenship) look primarily at the rules of the country of residence (in our case, country B), but like country B it also applies the doctrine of *renvoi*. As country B would apply the law of country A in the first instance (see the example above), country A would end up applying its own law to the facts, which is the exact opposite of what country B would do.

In order to prevent this from happening, some countries apply the doctrine of "*double renvoi*" or "*foreign court doctrine*" under which the court dealing with the matter considers what the foreign court would decide in such instance and adjudicates the matter as the foreign court would.

e) EU Succession Regulation

As indicated above, the EU Succession Regulation was adopted in 2015 providing uniform conflict of law rules for all EU Member States other than the United Kingdom, Denmark and Ireland ("Member States"), which have opted out. It is by operation of law directly applicable to all estates of individuals who pass away on or after 17 August 2015 and has direct binding legal force in the Member States. Under the EU Succession Regulation, the courts of the Member State where the deceased had his *last habitual residence* have jurisdiction with regard to the *entire estate*, thereby applying the law of that state both as regards *administration and succession* (unless the deceased choose the law of his nationality; see below). The EU Succession Regulation does not contain a definition of the term "last habitual residence", but specifies that the life circumstances of the deceased person in the years before and at the time of his death must be considered, in particular the duration and regularity of the deceased's presence in the state concerned and the conditions and reasons for that presence. The definition of "last habitual residence" under the EU Succession Regulation and the term "last domicile" under Swiss conflict of law rules are different which may result in a conflict of competences. Whereas the term "last habitual residence" focuses on the circumstances at the time of death and the years just before death, the term "last domicile" under Swiss law focuses on where a person resides at the time of death with the intention of staying there permanently, thus containing a future element.

Beyond the general rule on jurisdiction (based on last habitual residence), the EU Succession Regulation contains subsidiary jurisdictional provisions, allowing the courts of a Member State to adjudicate an inheritance matter under certain circumstances as well. Not least because these provisions are rather wide-ranging, the EU Succession Regulation has a considerable impact on successions in cross-border estates, even if the deceased did not have a direct relation to a Member State, e.g. by means of his habitual

residence. In cases where the deceased had no residence in an EU Member State but left assets in such state, the respective EU Member State has jurisdiction to rule on the *worldwide succession as a whole* if (i) the deceased had the nationality of that Member State at the time of death; or, failing that, (ii) the deceased had his previous habitual residence in the respective Member State, provided that, at the time the court is seized, a period of not more than five years has elapsed since the habitual residence changed (article 10 EU Succession Regulation). Further, an EU Member State also has jurisdiction in cases where the deceased was not EU citizen and did not have his last habitual residence in an EU Member State, but left assets in a Member State. In such case, the EU courts and authorities have limited jurisdiction: They are entitled to rule on the assets located in the respective EU Member State.

With respect to the general rule that the law of the state of the last habitual residence of the deceased governs both administration and succession, the EU Succession Regulation provides for an exception if the deceased, at the time of death, was manifestly closer connected with a state other than the state of his last habitual residence. In such cases, the law of that other state applies. Besides that, the EU Succession Regulation provides for a limited choice of law possibility: Testators may subject their estate to their national law (at the time of making the choice or at the time of death). The choice of law must be made expressly or implicitly by way of a testamentary disposition. Persons with dual or multiple nationalities may choose the law of any of the countries of which they are nationals at the time of making the choice or at the time of death and regardless of whether this is a Member State or not. Nevertheless, it is not yet clear whether all EU Member States will accept a choice of law, which does not provide for *forced heirship* rights, in case the testator died with last habitual residence in a Member State with *forced heirship* rights. In the event that the deceased has made a valid choice of law in favor of a Member State, the EU Succession Regulation allows the parties (heirs, legatees but not the testator) to agree that a court or the courts of that Member State shall have exclusive jurisdiction to rule on any succession matter.

By providing uniform rules on jurisdiction and the applicable inheritance law, the Regulation will facilitate EU cross-border successions and brings significant improvement for the heirs of an EU cross-border estate. In relation to third states, however, the EU Succession Regulation also contains ambiguities and uncertainties (in particular regarding jurisdiction, but also regarding the applicable law), at least until sufficient case law has evolved. There is e.g. uncertainty as to what counts as a "Member State" when applying the *renvoi* provision (article 34 EU Succession Regulation) e.g. with regard to states who have opted out of the Regulation e.g. the UK. It is in any event advisable that in case of connections to any EU Member State, existing estate planning is reviewed and adjusted to the new EU Succession Regulation, if necessary.

Differences in succession laws

An extensive knowledge of the relevant conflict of law rules affecting a cross-border estate, is particularly relevant in light of the differences in substance as regards national succession laws. While in common law

jurisdictions such as the USA and the UK a wide testamentary freedom applies, most European and also South American countries have *forced heirship* regimes, broadly based on the same civil law model.

While the details of the *forced heirship* regimes of different countries may vary, they are all built on the same principles. Generally, a testator is required to leave a certain (and often very substantial) portion of his estate to a specified group of heirs with protected *forced heirship* rights, typically the relatives of the testator such as children, spouse or parents. When calculating the value of the entire estate and the portion reserved for *forced heirship* heirs, it is not uncommon to include certain assets, which the testator has disposed of already during his or her lifetime (e.g. within a certain time-limit prior to his or her death). Assuming this was not the case, it would be too easy for a testator to circumvent the restrictions on his testamentary freedom. Depending on the jurisdiction, a testator is thus not only restricted in his or her freedom to dispose of assets at the time of death, but up to a certain extent also during his or her lifetime.

The consequences of a violation of the *forced heirship* rights by a testator also differ between the various jurisdictions with *forced heirship* regimes. However, testamentary dispositions infringing *forced heirship* rights are not necessarily invalid from the outset, but may be given effect unless a protected heir challenges such dispositions (this is the position adopted e.g. in Switzerland). In case a protected heir wants to claim his forced share and the remaining estate assets are not sufficient to satisfy such share, the respective heir may file a monetary claim against the recipient(s) of such lifetime gift(s) of the testator to restore his or her *forced heirship* share, provided the relevant requirements are fulfilled.

As indicated above, the succession laws of common law countries such as the US states, the UK or Australia, allow in principle for testamentary freedom. A testator is thus in general free to decide about the distribution of his or her estate upon death. However, even if not directly part of succession law, there might be provisions restricting this freedom up to some extent (e.g. the UK Inheritance (Provisions for Family and Dependents) Act 1975). This law applies to UK domiciliaries and allows the UK judge to allocate part of a deceased person's estate to any spouse, children or other dependents of the deceased, in case the deceased has failed to make reasonable financial provision to such persons. Similarly to the compensation mechanism of *forced heirship* regimes, we understand that such provisions may be derived not only from assets forming part of the estate, but also from assets which have been disposed of within six years prior to the testator's death. The UK court has, however, discretion to make a financial award out of the deceased's estate in certain circumstances.

Often US courts do not recognize the *forced heirship* rights of the descendants arising under the laws of another jurisdiction because these rights would contradict the principle of testamentary freedom. Only the surviving spouse is entitled to a statutory minimum amount from the estate. The descendants, however, are not entitled to a forced heirship share (except in the state of Louisiana whose laws are heavily influenced by French law). So-called family allowances may, however, restrict the testamentary freedom of the testator.

Marital property regimes

Conflict of law rules

An area of law which can also be of relevance in the context of a cross-border estate administration, is matrimonial property law, particularly because it might affect the distribution of the estate assets to the designated beneficiaries. Unlike in the area of succession law, there are hardly any significant multilateral agreements that provide for conflict of law rules in the context of matrimonial property regimes (the EU Succession Regulation does not cover matrimonial property). The Hague Convention on the Law Applicable to Matrimonial Property Regimes entered into force on 1 September 1992, for example, has by now only been ratified by three states (France, Luxembourg and the Netherlands) and signed by another two (Austria and Portugal). The EU's Brussels II Regulation[6] does not cover matters of matrimonial property. However, there is an ongoing initiative in the EU with the aim to adopt a new regulation relating to jurisdiction, applicable law and recognition and enforcement of decisions in matters of matrimonial property regimes.[7] In the absence of a general conflict of law framework, it is necessary to evaluate on a case by case basis which matrimonial property law is applicable and how such law may interfere with the applicable succession law.

Differences in matrimonial property laws

Not only do matrimonial property laws of different countries vary substantially, but some jurisdictions like e.g. England do not know the concept of marital property at all, which may lead to complications and disputes in cross-border successions. However, as previously noted, although there is under English law no direct, mathematical correlation between matrimonial property and inheritance, the Inheritance (Provisions for Family and Dependents) Act 1975 allows the judge to consider what the spouse would have received if the marriage had ended in divorce, rather than death. This is different in countries with specific matrimonial property regimes, which in case of death of a spouse, typically grant the surviving spouse a fixed share in the matrimonial property. After such share is accounted for, the remaining assets constitute the estate and are to be divided among the heirs. However, often the spouses may choose between a number of different marital property regimes under a given jurisdiction, which then influences the way the spouses' assets are divided upon divorce or death of one spouse. For example, the spouses may also opt for a complete separation of property, if provided for in the respective national law. When agreeing upon a certain matrimonial property regime, spouses need to be aware that some jurisdictions do not recognize prenuptial agreements as binding and jurisdictions vary significantly in the bases upon which prenuptials may be invalidated or restricted. For example, while a prenuptial agreement dealing with the spouses' matrimonial property rights in case of death may be fully recognized in one jurisdiction,

6 Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000.

7 See "Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes" of the European Commission dated 2 March 2016.

it may be rather reluctantly considered by the courts of another jurisdiction. This can also be relevant for an executor of a cross-border estate. Problems can be prevented by careful drafting of the prenuptial agreements or the last will, thereby considering all potentially relevant jurisdictions where the division of the spouses' assets may become an issue.

Transfers during lifetime into trusts

General

When dealing with an estate with ties to a common law country, an executor may be confronted with trust structures set up by the deceased settlor or of which the deceased was a beneficiary. With increasing mobility of individuals in a shrinking world, trusts are no longer confined to the Anglo-Saxon world but are also often used in civil law jurisdictions. Trusts have gained wide international recognition, in particular since the ratification of the Hague Trust Convention[8] (the "Convention" or "HTC"). Trusts are for example often "imported" into civil law jurisdictions in connection with a relocation of a settlor and his family.

So far, 12 countries have ratified the Convention, including some civil law jurisdictions like Italy, the Netherlands, Liechtenstein and Switzerland, but also the UK and 12 British Overseas Territories such as the BVI, Bermuda, Guernsey and Jersey. The Hague Trust Convention contains conflict of law rules for trusts with a cross-border element. Aspects such as whether the settlor had the capacity to create a trust, what requirements a married settlor must meet to establish a trust, the protection of minor parties, the protection of creditors in matters of insolvency or *succession and forced heirship rights* are *not governed* by the Convention. In so far as the Convention excludes these aspects, the law designated by the conflict of law rules of the respective forum is applicable. According to article 15 Hague Trust Convention, the succession rights and in particular the *forced heirship rights* take precedence over trust law.

For example, if a settlor dies with last domicile in Switzerland, the Swiss court will look at Swiss *forced heirship* law to determine to which extent trust assets can be attacked. Likewise, Swiss matrimonial law is in principle relevant whether trust assets are subject to division in case of Swiss divorce proceedings. Since the trustee of a discretionary trust has generally significant discretion as regards the distribution of trust assets to a beneficiary, the heir of an estate governed by Swiss *forced heirship* law who is at the same time a beneficiary of an irrevocable discretionary trust would need to consider claiming his forced share outright against the trustee. In case that the heir is not a trust beneficiary, the heir will most likely envisage a claim against the trustee and/or the trust beneficiaries for violation of his or her *forced heirship* share.

If a foreign trustee is the target of a (Swiss) *forced heirship* claim, the foreign trustee could be sued in Switzerland (e.g. because the testator died in Switzerland or a Swiss living abroad subjected his entire or (Swiss) estate to (Swiss) law in accordance with Swiss conflict of law rules). The same holds true for a

[8] Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition.

(Swiss) trustee of course. Firewall provisions under the respective trust law would not be taken into account by a (Swiss) court in accordance with article 15 of the Hague Trust Convention.

One of the big hurdles for an heir to attack an offshore trust set up by the testator on the basis of a *forced heirship claim* is to obtain the necessary trust information to assess the violation of his forced heirship right and eventually file a claim in court. The procurement of trust information from the trustee can become difficult because the heirs often might not even know the identity of the trustee (unless the trustee is at the same time executor of the Swiss estate in which case he may have to disclose such information under the applicable Swiss inheritance law). However, an heir may in certain cases obtain some of the relevant trust information from the Swiss tax authorities, i.e. if the trust is considered for fiscal purposes as transparent and therefore included in the settlor's/deceased's tax return. Since the heirs are the successors of the deceased's/settlor's tax obligations, the heirs may in such case obtain information on the trust assets and eventually also its location from the settlor's tax return documentation. The enforcement of a Swiss judgment based on Swiss *forced heirship* law in the typical offshore trust jurisdictions with their firewall provisions may, however, be a difficult undertaking.

With regard to cross-border estates with links to jurisdictions which don't recognize the concept of the trust, relevant conflict of law rules must be consulted to assess how trust assets must be treated.

Under the EU Succession Regulation

Possible "claw back" claims concerning lifetime transactions into trusts are considered under the EU Succession Regulation as part of the law applicable to a succession to the extent they are based on *forced heirship* rights (article 23(2)(i)). This was apparently a reason for the UK to opt out: Under English law, lifetime transfers of assets to trusts are not considered a matter of succession law. To the extent an EU member state does not recognize trusts and the trust is appointed as an heir or legatee under the will, article 31 of the EU Succession Regulation requests that the state adapts respective proprietary rights into its local law. Such implementation is based on the national conflict of law rules.

Conclusion

When planning for clients in an international context, all potentially relevant jurisdictions and related conflict of law rules must be carefully taken into account to avoid conflicts in the applicable succession laws and to ensure a smooth implementation of the estate plan. The administration of a cross-border estate provides similar challenges. Acting as an executor or administrator of an international estate can be a risky task. It is crucial that the executor is acquainted with the law(s) governing the administration of the estate and additionally he must also be aware of the relevant succession laws, matrimonial property laws and tax laws, as they can all have a substantial impact on the administration of the estate and its partition among the designated beneficiaries. The advice of local experts where estate assets are located is thereby indispensable.

Administering an estate with links to common and civil law jurisdictions may be even more challenging, as the same questions - e.g. the authorization of an executor or who is liable for liabilities of the estate - may be treated in one jurisdiction as a matter of administration (typically in common law jurisdictions) and in another jurisdiction (typically a civil law jurisdiction) as a matter of succession. Depending on the location of the estate assets, the nationality of the testator and/or the residence of the deceased, it may well be that different rules apply as to what an executor or administrator of a given estate should and should not do and what his (personal) liability is, e.g. with regard to estate liabilities, including estate taxes.