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OVERVIEW OF SOME NEW REGULATIONS IN TAX AND ESTATE PLANNING



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SUMMARY

- The EU Succession Regulation – Brussels IV
 - A new conflict of law rule on cross-border successions in Europe having large impact outside Europe!
 - But conflicts with other laws will still remain...
- Taxation rules: what's new in France?
 - No impact of the EU Regulation on French taxes
 - Double tax treaties : tax exemption excludes the domicile rules (CE November 9th, 2015)
 - Art 792 0 bis II 2 last paragraph of the French tax code : when a trust has been set up after May 11th, 2011 by a settlor French resident....
 - Income taxation: Social contributions not applicable to non French residents on the income deriving from French real properties (De Ruyter case, ECJ Feb. 26, 2015)

EU SUCCESSION REGULATION

- The EU Succession Regulation – Brussels IV – harmonizes the conflict-of-law rules on cross-border successions of 24 EU Member States except the United Kingdom, Denmark and Ireland, and is directly applicable to deaths occurring after 17 August 2015 in these Member States.
- It answers two main questions:
 - Which court is competent to deal with a cross-border succession,
 - Which law governs a cross-border succession.

In this presentation we will focus on this second aspect.

EU SUCCESSION REGULATION

- **What was the situation in France prior to The EU Succession Regulation?**

For succession purposes, the conflict-of-law rules were the same in France and in the US :

The succession was divided between moveable properties subject to the law of the domicile of the deceased and immoveable properties subject to the law of the country where they are located.

Therefore, French real properties owned by US residents were subject to the French succession rules and the forced heirship. The only way to avoid the forced heirship rules was the use of corporate structures (French SCI...) or a change in the matrimonial status.



EU SUCCESSION REGULATION

- **After the EU Succession Regulation :**
- only one single criterion for determining the jurisdiction and the law applicable to cross-border successions, namely the « *last habitual residence of the deceased* »,
- Unless,
 - The deceased was manifestly more closely associated with another State or,
 - The deceased elected in a will or a similar instrument for its own national law to apply.
- Key elements :
 - Last habitual residence (regardless of where the assets in the estate are situated and whether moveable or immoveable):
 - No definition of the last habitual residence in the EU Succession Regulation
 - Need to take into account all factual elements such as the duration and regularity of the presence in one State, i.e. close and stable connection with the State concerned.

EU SUCCESSION REGULATION

- Manifestly closer connection to another State:
 - Once again the time spent in the country of the domicile at the time of the death is an important factor, as well as the place where the main investments are located or the family links.
 - This exception was introduced to stop EU nationals moving to another jurisdiction just before their death (avoidance of the forced heirship rules for example)
 - There is clearly an uncertainty between these two criteria of last habitual residence and close connection to another State.



EU SUCCESSION REGULATION

- Choice of law: optio juris
 - Testators can elect in a will or a similar instrument for another law than the one of their habitual residence,
 - The choice is restricted to the law of the nationality (i) at the time of making the choice or (ii) at the time of the death,
 - This choice can result from a will drafted prior to 17 August 2015.

EU SUCCESSION REGULATION - CONSEQUENCES

- **No choice of law**
 - Habitual residence in the US – US law will apply to the succession.
 - Then, following to the US conflict-of-law rules, the estate is governed by:
 - The law of the domicile for all moveable properties
 - The law of their location for immoveable properties
 - Consequence: French properties are subject to French law and the forced heirship rules apply.
- **No choice of law**
 - US citizen with an habitual residence in France. French law will apply to the succession.
 - Considering the single criterion applicable, French law will govern the entire estate including real properties located in the US. But under US law, a US real property is subject to US law.
 - Consequence: potential conflict and French law not applicable to US immoveable assets.

EU SUCCESSION REGULATION - CONSEQUENCES

- **Will and choice of law**
 - Habitual residence in the US – Choice of US law (law of the citizenship) made into a will (if permitted by the laws of the State of the domicile) – US law will apply to the entire succession.
 - But, following to the US conflict-of-law rules, the estate should be governed by:
 - The law of the domicile for all moveable properties
 - The law of the situation for immoveable properties
 - However, France will recognize that only US law will apply to all the assets, whether moveable or immoveable and wherever located. The choice made excludes the application of French rules.
- **Will and choice of law**
 - US citizen with an habitual residence in France. Election to US succession law made into a will.
 - Considering the optio juris, US law will govern the entire estate including the French properties.
 - Consequence: French forced heirship rules will not apply.
 - Question: When you elect for the application of the law of your nationality and you are a US citizen, the law of what State can you choose?

EU SUCCESSION REGULATION DIFFICULTIES

- The main difficulties will arise from the optio juris :
- Examples:
 - A Saudi citizen residing in France makes a French will in which he declares that the law of his nationality will apply to his succession. This will and the option are perfectly valid. However, his national law will refer to the Sharia succession rules which are considered as discriminatory under French public order rules. Then, the option may not be valid in some cases (when the heirs are a son and daughters of the deceased), but Sharia could apply if the heirs are only daughters of the deceased (even if they don't inherit the entire succession under the Sharia rules).
 - A UK citizen residing in France chooses UK law in his will. His French real properties will therefore be subject to UK law, excluding the French forced heirship. The question here is not of the French public order but of a fraudulent intention in making such a choice.

EU SUCCESSION REGULATION DIFFICULTIES

- A US citizen living in France chooses US law in his will. His entire estate including his French real properties will therefore be subject to US law. But let's imagine that all his assets are transferred into a testamentary trust. We clearly don't know today in France how the title on the French properties could be transferred to the trust and published at the Mortgage Registry (could it be done directly into the name of the trustee?).
- Last but not least, how a French notary will apply a foreign law? French and American rules are completely different. For a US citizen, he will have to consider the powers granted to the administrator or executor of the Estate and not the heirs directly.
 - Estate rules vs Civil law
 - Probate proceeding...

FRENCH TAXATION: LATEST NEWS

- **EU Succession Regulation and French succession taxes**
 - The fiscal aspects of successions are not affected by the EU Succession Regulation
 - The rules provided for by French tax law and the US-French double tax treaty on gift and succession will still apply
 - French rules on territoriality of tax are as follows (art. 750ter of the French tax code):
 - If the deceased is a French resident (following the criteria of art 4B of the FTC), the worldwide assets are subject to taxation in France
 - If the deceased is not French resident, only the French assets are taxable in France
 - If the deceased is not French resident but the heirs or one of them are French residents at the time of the death and resided in France for more than 6 years during the past 10 years, the entire share received is subject to French succession taxes (rule excluded by the US-French double tax treaty)

FRENCH TAXATION: LATEST NEWS

- As a reminder, the French tax rates are as following:
 - Transfer between spouses and civil partners: full exemption.
 - Transfer between parents and descendants: deduction of 100 000€ per share,

Taxable share		Tax rate
Not exceeding	8 072€	5%
between	8 072€ and 12 109€	10%
	12 109 € and 15 932€	15%
	15 932 € and 552 324€	20%
	552 324€ and 902 838€	30%
	902 838€ et 1 805 677€	40%
More than	1 805 677€	45%

FRENCH TAXATION LATEST NEWS

- Transfer between collaterals:

Taxable share	Tax rate
Under 24 430€	35%
Above 24 430€	45%

- Other relatives to the 4th degree : 55%
- More remote and non-relatives : 60%

FRENCH TAXATION – LATEST NEWS

- **Decisions of the French Conseil d'Etat of 9 November 2015 :**
 - Decisions rendered in the context of the French-Spanish and the French-German double tax treaties on income taxation,
 - When a tax exemption is granted to an individual or a corporation in one State, this individual or corporation is not considered domiciled in such country for the purpose of the application of the double tax treaty. Therefore, the treaty rules will not apply to the income deriving from the other country where the exemption is not granted.
 - These decisions may have a large impact for the situation of new Israeli residents benefiting of the Olim status (Oleh Hadash) : general tax exemption during 10 years for all income and wealth of non Israeli sources or location. They might be considered as having keeping a French domicile if they fulfil one of the criteria of art. 4B of the FTC.

FRENCH TAXATION – LATEST NEWS

- De Ruyter case ECJ 26 February 2015:
 - Further to the decision rendered by the European Court of Justice on Feb. 26, 2015, France cannot ask for the payment of the social contributions (rate of 15,5%) on French rental income received by non-French residents.
- Trust taxation in France:
 - Under the terms of art. 792 0 bis II 2 last paragraph of the FTC, when the transfer of the trust assets is not considered as a transfer by way of a gift or a succession (which will be the case when the assets remain into the trust after the death of the settlor) and if the trust has been set up after May 11, 2011 and the settlor is a French resident, then the trust assets are subject to taxation in France at a rate of 60%, whoever the beneficiaries could be.

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