MAERKI BAUMANN & CO. AG

PRIVATE BANK

INVESTMENT THEME

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Bequests and gifts in Europe

Europe united? Not where gifts and bequests are concerned

The holiday home in Spain, the safekeeping account in Switzerland, the grandparents' house in Italy – these days many people have assets in several different countries. And significant portions of the population often have their roots in countries other than where they live. Parents, grandparents or siblings bequeath or gift assets to them.

When assets are transferred, whether in the happy event of a gift or the sad event of an inheritance, regulations and taxes in your home country can often be highly complicated. And if the transfer crosses borders, the situation becomes totally confusing. It is not just that the provisions governing the procedures for bequests and gifts differ widely from one European country to another. The regulations for the taxation of the asset transfer may conflict with each other, leading to an outcome that can sometimes look like unfair double taxation.

Within the European Union the EU Inheritance Law Directive, which creates a degree of harmonisation and standardisation, comes into force on 15 August 2015. Initially, however, it will not cover Great Britain, Ireland or Denmark. Nor do these regulations apply to bequests of EU nationals within Switzerland or with ties to Switzerland.

Differing foundations and traditions

In most European countries the law governing bequests and gifts is based on Roman law, and on the principle that bequests and gifts to and from blood relations (as well as spouses) are privileged. But even between countries with very close historical links such as Switzerland, Austria, and Germany, there are significant differences in the regulations. The way the heirs' statutory shares are determined, for example, differs from one country to another, just as the Swiss distinction between personal and jointly-acquired assets is unknown in this form in Germany and Austria.

By contrast, legal provisions in Great Britain draw a fundamental distinction between succession and administration of estates. As a result, estate administration is always subject to English law (which also applies in Wales) or to Scottish law if the testator leaves assets in those jurisdictions. Succession, in contrast, is governed by the provisions valid in the country where the testator was domiciled. Within Great Britain there is uniform taxation of bequests but there are differences between England and Wales on the one hand and Scotland on the other with regard to statutory shares and legal succession.

These few examples show how diverse the regulations can be. However, certain principles should be considered in all cases of cross-border bequests and gifts. There are basically three aspects: the

testator or donor, the heir or recipient, and the bequest or gift itself.

Testator / donor
As a rule, the applicable law of bequests and gifts depends on the testator or donor. It should be borne in mind that the deciding factor is in some countries the testator's domicile (Switzerland, France) and in others his nationality (Germany). So even in this basic respect there is potential for conflicting provisions. In the course of 2015 this contradiction between regulations based on domicile and nationality will be resolved within the European Union: domicile will take precedence. Even so, the testator will retain the option of drawing up his will either under the law of his country of residence or that of his nationality.

EU nationals, even if they live in Switzerland, therefore have a certain latitude when making a will: it can be subject either to Swiss law or to their national law. Further options are possible within the EU. A German living in Great Britain or Ireland who wishes to bequeath an existing trust will in future be able to do so by opting for English inheritance law. Under the inheritance law of his country of domicile (e.g. Great Britain) the testator can give his heirs living in Germany the benefits of the trust in terms of both inheritance law and taxation.

Where Swiss testators have lived abroad, their country of domicile is decisive. In principle, therefore, the Swiss authorities do not have jurisdiction in such cases. But there are two exceptions in which Swiss law applies. The first is when the foreign authorities do not involve themselves in the settlement of the estate of an expatriate Swiss national. And the second is when the testator, in his will or by a contract of inheritance, expressly declares that his estate is to be subject to Swiss law or that the Swiss courts are to have jurisdiction. In both cases the regulations in his country of origin apply.

For foreign nationals living in Switzerland, Swiss inheritance law also applies to bequests and gifts. Under the principle of unity of estate, the entire estate is subject to Swiss law, regardless of whether the assets are located in Switzerland or abroad. Restrictions apply to land held abroad, however. It is important to remember that foreign inheritance laws can apply if the testator opts for them in his will or contract of inheritance. People with dual nation-ality do not have this option, as they are not foreigners. If foreign authorities do not concern themselves with settling the estate of a person living abroad who has assets in Switzerland, the Swiss authorities do so instead. If the testator was married or in a civil partnership, the matrimonial property regime plays an important role in determining what is included in the estate and the size of the spouse's or partner's statutory share (see below).

Heir / recipient
The nationality and the domicile of the heir may both be relevant. Depending on the legal tradition, nationality may affect entitlement under inheritance law – the statutory shares of German nationals, for example. As a rule, however, the taxation of the bequest or gift depends primarily on the testator's country of residence or domicile.

Bequest / gift
Here a distinction must be drawn between the ownership of movable assets on the one hand and real estate on the other. Cash and other movable assets are generally taxed according to the arrangements arising from the situation of the testator or donor. Real estate, however, is always subject to the legislation in force where the land is located.

The complexities of cross-border marriage
Differing national regulations make marriage between people from different countries anything but simple. One example:

Every cross-border marriage raises the question of which rules apply to the couple's assets. In Germany the assets of each spouse normally remain separate during the marriage, and gains are not divided until it ends. In France assets acquired during the marriage belong jointly to both spouses ab initio. In practice these differences often lead to problems, because French rules are unknown in Germany and vice versa. Under a recent change, couples can now opt for a new matrimonial property regime that is fundamentally based on the German model but takes account of French specifics.

Relief opportunities for EU nationals
The European Inheritance Law Directive further standardizes the situation for EU nationals in several respects. It specifies, for example, which court has jurisdiction over matters of inheritance. It also governs the cross-border acceptance and enforcement of rulings and authentic instruments in inheritance matters. And finally, it introduces a Certificate of Succession – a certificate that is standardized throughout Europe. Among other things, this documents the applicable law, names the heirs and their inheritance quotas, and lists the assets to which the beneficiaries are entitled. However, purely domestic probate cases of EU nationals in Switzerland and in their various countries of origin are unaffected by these new regulations: here nothing is changing.

Taxation of gifts and bequests
In Switzerland the entire worldwide estate is liable to tax without limitation if the testator was last resident, or resident for tax purposes, in Switzerland (or if probate proceedings have been opened in Switzerland). If, for example, a German testator was last resident in Switzerland, his heirs are subject to tax in Switzerland or in the relevant canton on his entire worldwide estate. Transition periods apply following his departure from Germany, however, during which extended tax liability in Germany continues to exist.

Asset transfers by gift or bequest are normally taxed on a standard basis for the entire estate. There are some exceptions: for real estate where the situs principle applies; and for persons who have a fiscal connection with Great Britain, Ireland or Malta, where the domicile principle applies.

In the second case, if a person is domiciled in Great Britain but lives in Switzerland, for example, his assets in Great Britain are subject to local laws on inheritance and to local taxation. In this case the bequest may be taxed twice – under English and under Swiss law.

Asset transfers facilitated by double taxation agreements
Differing legal provisions on inheritance taxes can result in double taxation. This means that a single estate may be taxed in two countries.

Double taxation agreements provide for a tax liability to be offset by tax already paid abroad on assets located there, but this applies only to inheritance tax, not to gift tax. The countries with which Switzerland currently has valid agreements include Austria, Great Britain, Germany and the United States. These agreements determine which country is entitled to tax the various assets. The German-Swiss agreement also provides that after a person leaves Germany he may on certain conditions remain subject to taxation in Germany without limitation for a further five or even ten years. Germany itself has reached agreement on inheritance tax regulations with only a few countries (Denmark, France, Greece, Sweden and the United States).

The double taxation agreement between France and Switzerland was terminated with effect from 1 January 2015, and since that date national fiscal legislation in both countries has thus applied without limitation. Pursuant to Art. 750-3 of the French General Tax Code (Code Général des Impôts, CGI), bequests to heirs domiciled in France are taxed in France if the heir lived there for at least six of the ten years preceding the bequest. Property in France, including shares in real estate companies, is thus taxed in France even if the heir lives elsewhere. But there are two factors that keep double taxation within limits. Tax rates in the Swiss cantons are consistently low, and French tax law (Art. 784 A CGI) provides that French tax liability can be offset by taxes paid in Switzerland on assets located there.

What preparations can be made?
If your assets and/or potential heirs are located outside your country of residence, you are strongly recommended to consider the following points:

- Decide which assets should go to whom, and how your estate is to be divided.
- Consider whether you wish to make gifts or specify legacies. These may confer tax advantages, and in certain legal situations they may be easier to carry out than a later bequest.
- Talk to a specialist solicitor with experience of the law on cross-border gifts and inheritance.
- Make a will setting out your decisions. If the option is available to you, consider which national regulations (in your country of residence or origin) make most sense for you and your heirs. Take advice from an experienced solicitor to ensure that your will complies with the regulations in all the relevant countries.

INVESTMENT THEME: BEQUESTS AND GIFTS

Summary

- Give yourself plenty of time to think calmly about how you wish your assets to be divided. Consult a solicitor with international experience of the law on gifts and inheritance. We would be happy to refer you to competent solicitors in your country.
- In marriages between spouses of differing nationalities, different national regulations on inheritance can lead to conflicting legal claims.
- Bear in mind that if real estate is located abroad, it is subject to the inheritance and taxation laws of the country where it is located.
- Few countries have double taxation agreements that include pro visions on inheritance tax. You should consult a solicitor in good time to establish the tax impact of a bequest abroad or for heirs abroad.

MAERKI BAUMANN & CO. AG
PRIVATE BANK

EDITORIAL
Milko G. Hensel, Business Development & Tax

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ZURICH
Dreikönigstrasse 6
CH-8002 Zurich
Phone +41 44 286 25 25

LUGANO
Contrada di Sassello 2
CH-6900 Lugano
Phone +41 91 922 26 21

info@maerki-baumann.ch
www.maerki-baumann.ch