

## NEW LEGISLATION ON INHERITANCE FOR NON-RESIDENTS

### The new European Regulation on inheritance

A growing number of people own property in different countries within the European Union, and more European citizens and of other nationalities move their residence to Spain, especially when approaching the age of retirement. This has generated many conflicts in determining the law applicable to the hereditary succession of those who at the time of death had links with different jurisdictions. So far these conflicts were regulated as per the rules of Private International Law.

As from 17 August 2015, the Regulation 650/2012 of the European Union is in force, concerning matters such as the jurisdiction, the applicable law, the acceptance and enforcement of public instruments in matters of “mortis causa” inheritance, and the creation of a European Certificate of Inheritance (European Regulation on Inheritance).

#### ***Territorial scope***

The Regulation is applicable to all international successions, regardless of whether the deceased is a citizen of a EU member state or not, provided that the inheritance occurs **within the territory of the EU**. It does not apply in Denmark, UK and Ireland (although it applies to citizens of these countries if they are resident in another EU member state).

#### ***Choosing the Applicable Law***

In Spain, prior to the European Regulation on Inheritance, the law applicable to the succession was regulated in Article 9 of the Civil Code, establishing that the succession “mortis causa” was subject to the national law of the deceased at the time of death. If the deceased had Spanish nationality, the Spanish law would apply to all aspects related to the inheritance, and to all assets comprising the same, irrespective of whether these were movable or real estate assets, and regardless of the country where said properties were located. On the contrary, if the deceased had foreign nationality, the law of his nationality would apply to the inheritance, and considering that some foreign laws, such as the British, establishes a different regime for movable property -that is governed either by the law of his nationality or by the law of the last permanent residence of the deceased (so when the last habitual residence of a British citizen is in Spain, the Spanish law applies in matters of inheritance)-, while for real estate assets, the governing law is that where the property is located.

These confusing rules of Private International Law to determine the applicable legislation to the inheritance, with references to national legislation or other, and sometimes to two different laws for the same inheritance -depending on the location of the estate-, have been greatly simplified with the entry into force of the European Regulation on Inheritance. **Generally**, the law applicable to the whole inheritance shall be the law of the state in which the deceased had his **permanent residence at the time of death**.

However, anyone with various nationalities may choose the law of any of the states whose nationality he holds at the time of making the choice, but **the choice of his national law should be expressly made, as a disposition “mortis causa”**.



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For example, the legacy of a British citizen residing in Spain, shall be governed by Spanish law, being subject to the rules of the reserved portions in inheritance, according to what is established in Spanish common law (where it is mandatory that two-thirds of the inheritance should go to the descendants, and one third equally among all the heirs). However, with the new Probate Rules, a British citizen may dispose in the will that his succession is to be governed by his national law. We must not forget that this should be expressly stated in the will, otherwise the Spanish legislation shall be applicable.

The applicable law -either determined by the deceased in his will, or by his last permanent residence in the case of lack of choice- is applicable to all aspects of the succession; how and when to start the inheritance process, determination of heirs, reserved portions, donations made in life by the deceased, acceptance and resignation, disinheritance, responsibility for debts, etc.

**Tax matters** are an exception to the above; we have to take into account the characteristics of our legal and tax system, in which several legal systems converge, such as the European, the State, the Regional and even the Local, and the wide diversity existing in matters of regulation among Autonomous Regions (Andalusia, Madrid, etc). In this sense, the Inheritance and Gift tax constitutes a **personal obligation** for taxpayers that are ordinarily **residents in Spain** (according to the rules of the income tax), who will be required to pay the tax as a personal liability, irrespective of where the assets -estate- are located. This same tax, burdens the **non-residents by real obligation**, for the acquisition of goods and rights, whatever their nature, that are located or that must be exercised or fulfilled within Spanish territory.

#### ***European Certificate of Inheritance***

It is a form created by the referred EU Regulation, so that heirs, executors and administrators, can prove their ability and interest, in all countries in which the regulation is applicable. With the European Certificate of Inheritance, it can be proven outside the state where it has been issued, the status as heir, legatee, executor or administrator. Each member state is entitled to determine the competent authority for issuing the certificate; in **Spain, judges and notaries** are competent.

This reform, that is aimed to ensuring the free movement of persons, and allow European citizens to arrange for their hereditary succession and protect beneficiaries -either by choosing the law of the State with which they have a link, either by residence or by their nationality-, is particularly important in Spain, due to the huge amount of foreigners it hosts.

#### **News on the Inheritance Tax for Non-residents**

Since January 2015, the last tax reform in the matter of Inheritance Tax for non-residents is in force. At last, the European Court of Justice has forced Spain to put an end to the discriminatory treatment suffered in Spain by non-residents with respect to residents, in respect to the application of this tax.



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In fact, prior to the entry into force of Law 26/2014, of November 27, the following situation, which was clearly contrary to the freedom of movement of people and capital -provided by Article 63 of the EU Treaty-, had occurred:

In Spain, the inheritance and gift tax was determined by the state -with a progressive tax rate ranging from 7.65% to 34%-. However, these taxes were assigned to the Autonomous Regions, and some of these introduced significant tax benefits, applicable only to its residents.

The problem was that the assignment of the tax to the Regulation of Autonomous Region was applied only to Spanish residents. On the contrary, when the heir, donor or deceased was a **non-resident in Spain**, the tax was not assigned to the Autonomous Region, but instead, it had to be paid to the state, and it was exclusively subject to the state regulation, without being entitled to enjoy any regional advantage (deduction).

As an example, in the Community of Madrid, Cantabria, Navarra and the Balearic Islands, bonuses on the Inheritance Tax reach 99%; in Castilla La Mancha 95%; in Valencia 75%.

In Andalusia, except for some deductions for permanent residence, family business and some other cases, an abusive tax rate was still applied, in comparison to the laws of the rest of Spain, and the laws of the European framework, with a tax rate of 36,50% for taxable bases exceeding 797,555 euros.

Here lies the discriminatory treatment; in the same inheritance, two heirs of the same property in Mallorca, one of them resident in the Balearic Islands, could consequently enjoy the deductions of the autonomous region -paying the inheritance tax at a rate of 1%-, while the other heir, resident in the United Kingdom, and therefore non-resident in Spain, when receiving the remaining 50% of the same property, could expect to pay up to 34% of the property value.

**The amendment made by the aforementioned Law 26/2014 on the Inheritance Tax, allows non-residents in Spain to enjoy the tax advantages laid down by the Autonomous Region, in which most of the assets inherited are located, or where the deceased had his residence, although the authority for the tax collection falls in the state.**

It is convenient to clarify that in the amendment of the Inheritance Tax for Non-Residents, introduced by Law 26/2014, there is no express statement of retroactivity, so it would only apply to taxable transactions that are produced after its entry into force, i.e. from 1 January 2015. Concerning all the taxable events prior to that time (applying prescription rules), which are already settled, a full refund plus legal interest of sums paid in excess could be claimed, for failing to implement the regional tax advantages. This is so according to the resolution issued by the European Court of Justice on 3<sup>rd</sup> September 2014, which forced the government of Spain to adapt legislatively the Inheritance Tax for Non-Residents to the European Regulation.

In the same way, this tax reform only applies to non-residents in Spain -either the deceased or the heir-, but residing in a member state of the European Union, or in any country in the scope of the EEA. Therefore, non-residents in Spain (although Spanish national) who are residing in a state that does not belong to the scope of the EEA, will be taxed for their assets in Spain according to the rules, and under the state jurisdiction.



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To our knowledge, the discriminatory treatment has not ended yet and, since, as Martin Luther said "*the thought is tax-free*", we venture to give an example:

As an example; an Indonesian national living in London dies leaving a property in the Balearic Islands to his British son; the competence in the tax collection falls in the Spanish State, but he can enjoy the deductions of the Community of the Balearic Islands up to 99%. In the same scenario, if a Spanish national, residing in Mexico, dies leaving a property in the Balearic Islands to his son, resident in Andalusia, the competence in the tax collection falls in the state, and the regulation applicable is also the one of the state, not being entitled to enjoy the tax benefits of the community where the property is located.

This tax reform could have been used to tackle the discriminatory treatment caused by the existence of very high tax rates in the regulation of some Autonomous Regions (i.e. Andalusia), and to unify the different regional laws of inheritance tax, into a flat tax less burdensome and consistent with the rest of the European Regulations.

As *Jean Baptiste Colbert*, Minister of King Louis XIV of France already said: "*The art of taxation consists in so plucking the goose as to obtain the largest amount of feathers with the least possible amount of hissing*".

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