

## 52<sup>nd</sup> AIJA Annual Congress: Movement of High Net-worth Individuals

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## CASE STUDY: MEET LA FAMIGLIA MONTI

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**GLORIA**



**ROBERTA and PAUL**



**JUSTIN and THOMAS**

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## CASE STUDY: THE FACTS

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- Gloria is in her 70's
- Roberta (Gloria's daughter) is 40. Roberta is Brazilian and Paul (45) is Mexican
- Timeline:
  - 2008: Roberta and Paul married in the Netherlands
  - 2010: Twin boys are born
  - 2011: Roberta, an IT specialist, was offered a job with Pear Inc. in Silicon Valley and she and Paul moved to California (USA)
- Gloria wants to live with Roberta (her only child) and Paul so she can spend more time with her grandchildren (now aged 4)
- Roberta, Paul and Gloria are considering moving the family to somewhere exotic (and to acquire second passports)

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## IMMIGRATION AND NATIONALITY

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- *Roberta and Paul are exceptionally wealthy. What immigration categories (e.g. investor type programmes) might apply to HNWI's such as Roberta and Paul?*
- *Are there any long term requirements that the family should be aware of in order to maintain their immigration status in your country?*
- *Will any of the members of the family be able to acquire citizenship?*



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## THE IMPACT OF TAXATION: CITIZENSHIP FOR SALE (1)

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- Needs to be thought about at an early stage in the estate planning process
- Consider interaction between:
  - Tax on a worldwide basis imposed by country of residence / habitual residence / domicile / nationality
  - Tax on a domestic basis imposed by country in which assets situated (especially real estate)
- Watch for tax asymmetries giving rise to successive (non-creditable) tax charges on the same wealth
- May be large discrepancies between tax regimes even just within Europe (e.g. is there a spouse exemption? Penalty rate for generation-skipping legacies? Legacies to charities tax-free or taxed at highest rates?)
- Watch for characterisation issues / mismatches in treatment of tax planning tools e.g. trusts, foundations, usufructs, life insurance products
- Reporting obligations for representatives/heirs and duties to pay tax

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## THE IMPACT OF TAXATION: PRACTICAL APPLICATION (2)

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- Factor in taxation at all levels
- Take advantage of lifetime planning opportunities
- Put in place the best possible Will(s)
- Consider the appropriateness of other planning opportunities
- Ensure coordination and cooperation between the advisors



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## THE IMPACT OF TAXATION : PRE-ARRIVAL TAX PLANNING

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**Roberta is offered a directorship with Pear Inc (with a significant share incentive) and the family is to relocate to the UK or the Netherlands. Roberta and Paul want to take tax and estate planning advice from an AIJA specialist**

- *What pre-arrival tax planning opportunities would you advise with respect to the:*
  - *UK?*
  - *Netherlands?*
- *What are the tax, residence or other reporting obligations upon becoming resident in the:*
  - *UK?*
  - *Netherlands?*



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## PERSONAL TAXATION AND COMPLIANCE

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Paul tells you that his grandfather died in 2013 and that he (together with his 3 cousins) inherited a bank account and is a beneficiary of a trust structure in a sun kissed jurisdiction. Neither have been reported in his tax return and he now wonders whether they should have been

- **As to the unreported trust structure:**
  - *What would you advise Paul?*
  - *What are the trustee's reporting obligations in your country?*
- **As to the unreported bank account:**
  - *What would you advise Paul?*





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## MULTI-JURISDICTIONAL ASSETS – MENTAL INCAPACITY (1)

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**Paul's father has been diagnosed with a degenerative medical condition, which may lead to a loss of mental capacity. Paul has been told that the condition is likely to be hereditary**

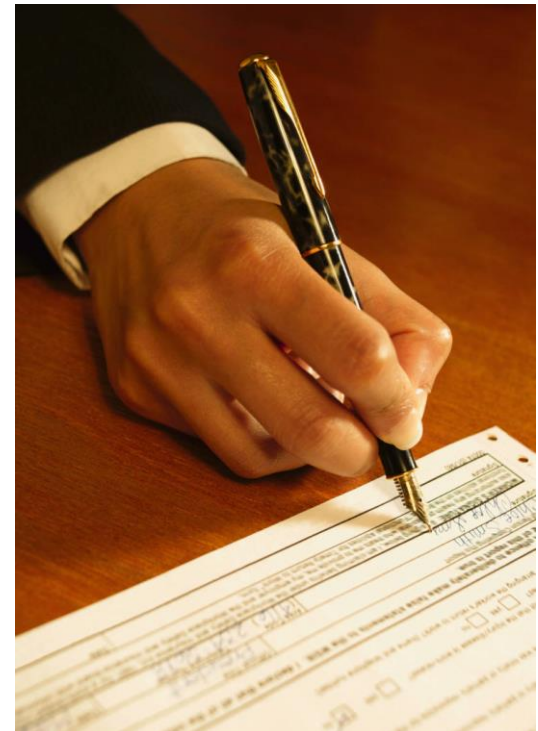
- Lasting powers of attorney, mandat de protection future or vorsorgevollmacht
- The Hague Convention XXXV on the International Protection of Adults
- So far the Convention has:
  - Only been ratified by Austria, the Czech Republic, Finland, France, Germany, Switzerland, the United Kingdom (for Scotland only) and Estonia
  - Been signed (but not yet ratified) by Cyprus, Greece, Ireland, Italy, Luxembourg, the Netherlands and Poland

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## MULTI-JURISDICTIONAL ASSETS – MENTAL INCAPACITY (2)

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- The value of an 'Article 38 Certificate' among State Parties
- The realities of recognition when faced with a non-Convention state
- The wider picture: domicile
- Legalisation and the apostille



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## MENTAL INCAPACITY - PRACTICAL STEPS (3)

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- It is desirable to prepare a LPA (and/or healthcare directives) and add a designation that the laws of England and Wales (personal law) are to apply to it. Consider whatever local equivalent to an LPA may exist in key jurisdictions
- Coordinate the international approach and be careful of revocation (divorce / marriage may revoke a LPA in certain jurisdictions)
- If the LPA (or equivalent) can be registered, do so
- Always consider substitute attorneys
- Always consider the apostille - that passport to authenticity across the world - and execution before a notary
- Promote the ratification of the Hague Convention
- For trusts and foundations, consider a definition of mental incapacity

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## TAX AND ESTATE PLANNING OBJECTIVES

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**Roberta is likely to inherit family assets - principally family heirlooms, artwork and antiques of significant value - from Gloria. The family want to ensure that upon Gloria's death, the family assets will not be considered a "matrimonial asset" and that the assets, to the extent possible, can pass to the grandchildren**

- Roberta and Paul wish to:
  - provide for the survivor during his or her lifetime and then for the estate to pass to the children in equal shares
  - keep information and matters relating to family finances private (for all the right reasons)
  - keep things simple...
- Gloria wants her assets to pass to Justin and Tomas

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## CROSS-BORDER SUCCESSION PLANNING (1)

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### From a UK perspective:

- Freedom of testamentary disposition
- Formal validity of will
  - Hague Convention 1961
- Inheritance (Provision for Family and Dependents) Act 1975
  - Domicile?
  - Reasonable financial provision
- Forced heirship claim
  - Material validity
- Private International Law issues
  - Immovables – law of situs
  - Movables – law of domicile

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## CROSS- BORDER SUCCESSION PLANNING (2)

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### From a Japanese perspective:

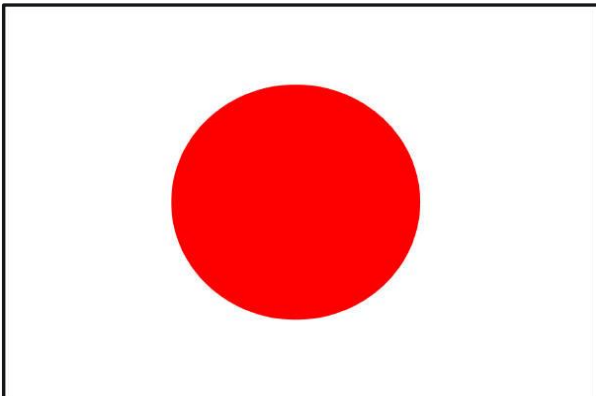
- Paul should make a notarised will at a notary office in Japan and in Japanese language which states that only Roberta will inherit his share of the house
- Probation in Japan – not necessary if a notarised will is made
  - Roberta will be able to register the change of ownership of the house in Japan
- Making a will without a notary
  - Mexican law - national law
  - Japanese law - the law of the place where the house is situate
- Governing law on inheritance
  - Art. 36 of “Act on General Rules for Application of Laws” in Japan, Mexican law should be applied

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## CROSS- BORDER SUCCESSION PLANNING (3)

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- If Mexican law stipulates that the law of the situs should be applied, Japanese law should be applied again as renvoi
- Under Japanese law, Roberta may inherit Paul's share of the house in accordance with his will
- If Mexican law stipulates that the national law of Paul should be applied, renvoi does not occur, so it depends on Mexican inheritance law



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## CROSS- BORDER SUCCESSION PLANNING AND MARITAL CONTRACTS (1)

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- According to Art. 754 of the Japanese Civil Code:

“Either husband or wife may at any time during marriage rescind a contract between husband and wife; provided, however, that this may not harm the rights of a third party.”
- However, Japanese Supreme Court does not allow that husband or wife rescind such a contract after their relationship becomes irreconcilable



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## CROSS-BORDER SUCCESSION PLANNING AND MARITAL CONTRACTS (2)

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**Paul gifts the Japanese house to Wanda, his mistress. In this situation, what rights does Roberta have on the house?**

- Roberta can claim one-half of the right to the house against Wanda
- Art. 13-1 of Act on General Rules for Application of Laws:
  - A right to immovable shall be governed by the law of situs
  - The right to the house in Japan shall be governed by Japanese law
- Art. 762-1 of the Japanese Civil Code:
  - Property owned by one party before marriage and property obtained in the name of that party during marriage shall be separate property. Property owned by Paul before marriage and property obtained in Paul's name during marriage shall be Paul's separate property
  - However, property that does not clearly belong to either husband or wife shall be presumed to be held in co-ownership (Art. 762-2 of the Japanese Civil Code)

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## CROSS-BORDER SUCCESSION PLANNING AND MARITAL CONTRACTS (3)

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### Therefore:

- If the house was obtained by Paul and Roberta during marriage, Roberta also has one-half of the right to the house and she may claim her share of the house against Wanda
- In particular, Roberta may submit a demand for partition of the house to the court. Seeking to divide the house physically (if possible) or seeking payment in accordance with Roberta's share of the house are examples of partition
- Also if only Wanda lives in the house, Roberta may submit a demand for damage against Wanda in Japan. This is because Wanda has harmed Roberta's right to the house

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## EU SUCCESSION REGULATION?

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- **Applicable law**
  - Article 21: the default position = habitual residence
  - Article 22: choice of law of nationality
- **Renvoi**
  - Article 34 (by implication) abolishes where the applicable law is that of a 'Member State'
  - Where the applicable law is the law of a non member state (a 'third state'), the renvoi from that law to the law of a member state would be accepted
- **Public policy exception – Article 35**

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## SUCCESSION PLANNING: ISSUES FOR CONSIDERATION (1)

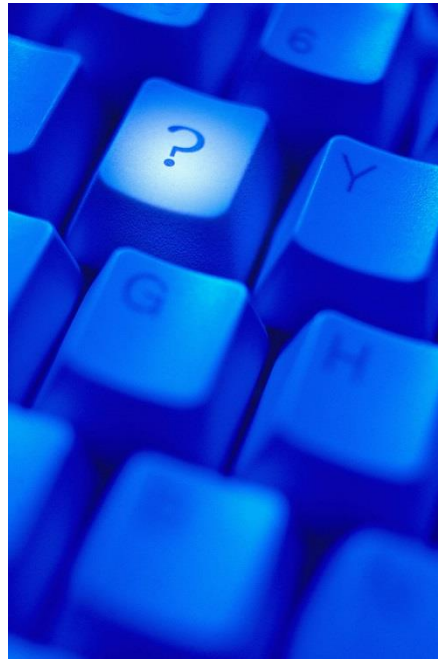
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- **What should Gloria be thinking about?**
  - Lifetime gifts
  - Will planning
  - Trusts, foundations
  - Conversion of immovable to moveable assets?
- **What should Roberta and Paul be thinking about?**
  - Joint property
  - Matrimonial domicile/ MPR in relation to moveable assets
  - Will planning
  - Trusts, foundations

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## QUESTIONS & ANSWERS

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## FURTHER INFORMATION

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