52nd AIJA Annual Congress

Prague, 26-30 August 2014

General Report

Private Client and Immigration Working Session

Movement of High Net Worth Individuals
Localisation et Délocalisation des Clients Privés Fortunés

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AIJA – GENERAL REPORT

Introduction

As certain governments around the world struggle with fiscal deficits, their attention has turned to international tax evasion (illegal) and the perceived shortcomings of the international tax system from the point of view of tax avoidance (legal). In other regions we have seen unsettled economies combined with civil unrest. Families are seeking safer, more stable jurisdictions not just for themselves but for future generations as they desire long term security and are increasingly looking overseas for a solution.

These realities beg a number of questions. How do our immigration, legal and tax systems cope with the realties and complexities of 21st century global family life and the demand for economic security and stability? What are the particular challenges for practitioners in assisting internationally mobile families? How does increased inter-governmental exchange of information and heightened compliance requirements affect their strategies for investment, tax planning and personal security and how does the global citizen navigate a world of overlapping (and often conflicting) regulation?

The two case studies of Roberta and Paul and of Bruce and Megan confront many of the issues facing the modern day internationally mobile family and were specifically designed to identify the law and local practices surrounding these issues, namely how to ensure that:

1. clients understand the immigration options available to them and what residency and citizenship requirements they may face in their newly adopted jurisdiction;
2. assets are invested and passed to the next generation in a tax efficient manner and, as far as possible, in accordance with the donor's wishes;
3. reporting obligations are fulfilled and meet requirements so that the family is tax compliant in both their native and adopted countries; and
4. authority to deal with assets and to take decisions is managed effectively and recognised by the relevant authority in the event of incapacity.

National reports

For the purposes of preparing this general report, a questionnaire was circulated to 18 national reporters. Twelve completed reports were received responding to the specific immigration and nationality questions as well as the private client focused questions. In addition to the responses to the questionnaire, other non-primary sources relied upon include publications and reports, journal articles and documents such as information sheets issued from public authorities. The General Reporters have not confirmed or corroborated the information produced in the national reports and therefore, where possible, we have quoted directly from a number of national reports submitted. We are very grateful to all our national reporters for all the input they provided us with. We also thank the Work Coordinators for their guidance and help.

This general report aims to give an overview of the issues that need to be addressed and to show how practitioners can work to assist individuals and their families to achieve their aims, minimise risks, and avoid unnecessary traps and pitfalls. The national reports contain an overview analysis of the ways in which different jurisdictions have sought to deal with challenges of 21st century life and illustrate that each jurisdiction faces similar concerns and issues when advising internationally mobile clients. While this report does not deal with contentious issues relating to the private client or to birth right nationality the General Reporters are aware that both of these themes are relevant. This general report seeks to identify the key themes emerging and to draw together some of the differences and the similarities between the jurisdictions covered by the national reports in the context of the following issues: (1) immigration and nationality, (2) cross-border succession; (3) personal taxation and compliance, and (4) mental capacity of adults.

KEY THEMES

1. IMMIGRATION AND NATIONALITY

Historically, there has always been some level of economic migration with entire families moving from one country to another in the hope of a better life, better jobs, better education for their children, better healthcare. There have also been significant movements during times of war or economic crises. There are also wealthy property investors who are now basing their property investment decisions on where they can obtain another citizenship or residency - "passport shopping" is a new hobby for some. We now see governments across the world actively courting the type of migrant they wish to attract whilst in some cases, balancing this against the need to protect the domestic population and their cultural heritage.

Immigration responses in response to this questionnaire have been received for the following jurisdictions:

Australia, Antigua & Barbuda, Austria, Belgium, Cyprus, Israel, Italy, Luxembourg, Malta, St Kitts & Nevis, Spain, Sri Lanka, UAE and the UK

Does a jurisdiction seek to attract HNWIs?

1.1 A number of the responding jurisdictions have some sort of programme in place to attract either high earners or those with significant sums to invest. The more notable exceptions are Italy and Austria.

1.2 Italy does not have any kind of scheme to attract HNWIs.

1.3 Austria does not officially have such a programme but does provide for an individual to be granted citizenship as a matter of state interest due to "exceptional achievements, which have been performed or are to be expected". In 2007, the Austrian courts confirmed that "exceptional achievements" does include significant financial investments.

1.4 Meanwhile in Israel, an "expert visa" may be obtained. But the right to settlement is limited to those HNWIs who may qualify for this visa and additionally either are Jewish or have Jewish relations, eg spouse.

1.5 Belgium and Luxembourg are far more open to HNWIs. Although the Belgian government does not have a clear policy in this regard, if an applicant can prove sufficient, stable and regular income, they may be granted a visa. The exact amount is not defined. Someone who may be earning around €1500 per month (or even €1000 per month if they do not have to pay for any accommodation) could be granted the visa.

1.6 Luxembourg has no formal HNWI programme. In Luxembourg it is sufficient to demonstrate that an applicant has sufficient means to live in order to be granted permission to remain under the "private reasons category". In other words, any person who can evidence that they have sufficient means to live may be granted a visa. As with Belgium, the amount required is not defined in legislation.

1.7 In November 2012, the Australian government launched the Significant Investor Visa. The Australian government website states that "the purpose of the visa is to provide a boost to the Australian economy and to compete effectively for high net worth individuals seeking investment migration.

1.8 The remaining jurisdictions have clear, defined immigration categories to encourage the migration of HNWIs to these countries. It is interesting to see the differences in the different schemes and to compare how open/restrictive they appear to be. The most open is perhaps the St Kitts & Nevis scheme as it provides for acquiring citizenship with relative ease. Whereas although the UAE are very open as a country, settlement and citizenship are far more protected as in Israel.

1.9 We should point out that the level of openness of a scheme can be misleading. Consider for example Luxembourg which, on the face of it freely welcomes individuals. However, when you consider that the cost of living in Luxembourg is higher than the US as well as being higher than the average within the EU, the cost of living does preclude a number of migrants from meeting the key requirement that they have sufficient means to live in. When one considers such economic factors, perhaps Luxembourg is not so open to just anyone.

Proposed changes to immigration categories aimed at HNWIs

1.10 The UAE appears to be the most settled in that the government there does not have any proposals to change its open door policy regarding migrants. Interestingly, similarly to the UK, the UAE immigration authorities have been known to change the process pertaining to the issuance of visas and residence permits without notice.

1.11 Luxembourg is currently in the process of considering a bill which was produced after a comparative analysis of similar legislation in eight countries. Two new visa categories have been proposed. The first will grant a visa to an individual who invests €500,000 in a small or medium sized Luxembourg company guaranteeing employment over five years or investing the same amount into a newly formed company creating at least two full time vacancies. The second proposed visa category will permit an individual to reside in Luxembourg if they invest at least €1 million in financial products linked to Luxembourg.

Is there a dichotomy between attracting HNWIs and protecting/preserving the native population?

1.12 Some governments, such as Israel, are considering whether more should be or could be done to attract foreign investment and HNWIs. Israel strategically offers businesses and individuals tax benefits and other financial incentives. But as mentioned above, these will not lead to settlement except in a few cases in order to protect the Israeli culture and its heritage. Israel is the designated homeland for the Jewish people and this is a right which the Israeli government will firmly protect.

1.13 Likewise, the UAE has a similar outlook to Israel in this regard. It has a very open policy of welcoming migrants from all over the world (with the current exception of nationals of Iran, Israel, Syria and Yemen). The result is that native Emiratis are now vastly outnumbered at a ratio of 11 to 1. Or to put it another way, 91% of the population are foreign migrants. The generous immigration policies are welcomed by the native population and it is very much a way of normal life to interact both professionally and personally with foreigners on a daily basis. But like Israel, the UAE, is very protective of its citizenship and it is very restrictive in relation to granting citizenship. The only route to becoming a citizen of UAE is to marry a UAE national but there are additional requirements that must be satisfied which are more exacting for non-Muslims.

1.14 Compare this to Austria which does not have an official programme to attract HNWIs. The Austrian national report mentions that the country's policies have been criticised by Deloitte as making Austria unattractive as a business location. Historically, the Austrian people seem to view migrants as coming to work and this does view does not appear to have changed.

1.15 The perceived view by many UK nationals is that migration is detrimental to them personally which is similar to Austria. The topic has become a political hot potato with inflammatory headlines such as "British Jobs for British Workers". Before the current party came into power, it stated that it intended to reduce net migration from the 100s of thousands to the 10s of thousands. Interestingly, once in power, the government realised this would be rather difficult (particularly with the UK still very much a part of the EU), and now refer to these figures as "aspirational". Many immigration categories have been overhauled or revoked in their entirety in the last eight years. The UK government states that it welcomes foreign business whilst at the same time publicising to the voters at home the ways in which migration into the UK is being limited.

1.16 A very different strategy to attract HNWIs is followed in some countries such as in Malta. In February of this year we have seen the introduction of the Individual Investor Programme in Malta. The programme has raised some controversy as Maltese citizenship can be granted within 1-2 years making this a relatively quick route to citizenship of an EU country with all the rights and privileges of any EU national. Given Maltese citizenship is made more attractive by opening up a gateway to the whole of the EU, the European Commission were not satisfied with the initial programme requirements. It was felt these were too easy to meet given the high value of citizenship of an EU country and the programme requirements were therefore felt to be against the spirit of the EU. After negotiations between the European Commission and the Maltese government, a new residency requirement of 12 months was imposed. The opposition party has stated that if it comes into power, any passports granted under this programme will be revoked.

2. CROSS-BORDER SUCCESSION

	BELGIUM	BRAZIL	CANADA (ONTARIO)	ENGLAND & WALES	GIBRALTAR	ITALY	JAPAN	LIECHTENSTEIN	LUXEMBOURG	NETHERLANDS	SRI LANKA	UAE
1.2.1 Is testamentary freedom a right recognised by national law or public policy? [See national reports for qualification and nuances]	(A) Yes	(B) No	(A) Yes	(A) Yes	(A) Yes	(A) Yes	(A) Yes	(A) Yes	(B) No	(A) Yes	(A) Yes	(A) Yes

	BELGIUM	BRAZIL	CANADA (ONTARIO)	ENGLAND & WALES	GIBRALTAR	ITALY	JAPAN	LIECHTENSTEIN	LUXEMBOURG	NETHERLANDS	SRI LANKA	UAE
1.2.2 Can those entitled to the reserved portion (heirship entitlement), during the life of the donor, waive their rights to a reserved share?	(B) No	(B) No	(C) N/A	(C) N/A	(A) Yes	(B) No	(B) No	(A) Yes	(B) No	(A) Yes	(C) N/A	(A+B) Yes & No Depending on religion
1.2.3 Can an individual resident in your country elect the law applicable to his/her succession? If relevant/applicable, please consider your answer in the context of Brussels IV (Regulation (EU) 650/2012) and/or the 1989 Hague Convention on the Law Applicable to the Estates of Deceased Persons	(A) Yes	(B) No	(B) No	(B) No	(B) No	(A) Yes Limited to B	(B) No	(A) Yes Limited to A & B	(B) No	(A) Yes Limited to A & B	(B) No	(A) Yes Limited to A

Cross-border succession

2.1 Cross-border succession is about regulating how a person's property is dealt with on their death - including the mechanism for paying taxes and other creditors, establishing who is entitled to inherit the deceased's property and how that property is to be transferred to those entitled to it. The law of succession is therefore about carving up an estate and determining who gets what. As the national reports note, this is not always a case of applying the provisions of a will, as these may conflict with what is allowed under the relevant succession laws and, if applicable, a matrimonial property regime.

2.2 The diversity of rules and systems that apply to successions in different states can make for considerable complications when addressing a cross-border succession. For many mobile families, there has long been a conflict between the principles of free movement on the one hand, and the consequential realities of expensive and complicated succession issues that this can give rise to on the other. The historic conflict stems from the entirely different succession laws that apply throughout the world. These differences do not simply boil down to the perennial clash between testamentary freedom (broadly applied in common law jurisdictions) and forced heirship (found in many civil law and Nordic jurisdictions). In fact, the differences are even more involved than that. As well as the difficulties of reconciling conflicting personal laws, there is the additional problem of agreeing a universal vocabulary and the procedural aspects relating to succession. Take the word "domicile": in the UK it refers to the place where an individual wishes to remain permanently or indefinitely - the place where their heart belongs; across much of Europe, on the other hand, it broadly means residence.

2.3 The upshot of this is that unless cross-border succession issues are addressed prior to death: there is a risk that the intended heirs will not in fact inherit because (a) the succession laws applicable in a particular country will override the provisions of any will so creating conflict within the family, causing delays and depleting the value of the estate as a result of professional and administrative costs; and (b) if the estate does not pass as intended, a higher level of inheritance tax or death duty might be payable. Clients who think that they have tax efficient estate planning in place may therefore be caught out.

Testamentary freedom and forced heirship

2.4 From the national reports submitted, it is clear that some countries are comfortable with testamentary freedom (being allowed to dispose of assets freely) while others have different variations on the concept of fixed inheritance shares for various classes of family members (forced heirship). Moving from one jurisdiction to the next can give rise to a clash between a person's wishes to make gifts with the effect of forced heirship rules on this right (or freedom) in a given country. This is particularly so for families moving from common-law countries (that do not have forced heirship rules) to civil law jurisdictions (which typically have forced heirship regimes), as the new residence can create an element of uncertainty. Such contradictions amongst jurisdictions is a matter which raises much debate, as one family's wishes with respect to passing its wealth on to the next generation may not accord with the reserved portions in place as protected by their country of residence (or nationality)'s legal system.

2.5 As summarised in the table at 1.2.1 above, it is interesting to note that among the national reports submitted, only three jurisdictions (**Canada (excluding Quebec), Sri Lanka and England and Wales**) do not have any kind of forced heirship rules that apply on death regardless of the deceased's circumstances, although certainly in the case of **England and Wales** the Inheritance (Provision for Family and Dependants) Act 1975 and its continued development suggests that the courts there are keen to ensure that provision can be made for those who may have depended on the deceased. The other research jurisdictions all have some system in place that potentially restricts the transfer of all or some assets on death (perhaps also during the lifetime) to a certain class of heirs. Each of these jurisdictions has its own unique concept of forced heirship and terminology; some interpret the 'reserved portion' as a credit against the estate, some as a share in part of the estate, and some as a lack of capacity of the parent (or spouse) to dispose of part of the estate.

2.6 Each jurisdiction where there are forced heirship rules provide for a percentage of the estate to pass to whomever the donor wishes. For example, in the **Netherlands** and in **Brazil** 50% of the estate is free from forced heirship whereas in **Luxembourg**, the reserved portion is not fixed as an individual percentage for each descendant but varies according to the number of surviving descendants. In most jurisdictions with some form of forced heirship, members of the donor's immediate family (typically the surviving spouse and children) are generally legally entitled to a certain

percentage of the estate without the need to take legal action. Children do not always inherit equally under the forced heirship rules - for example in the **UAE,** the Personal Affairs Law (which is a codification of the Sharia law), applies to Muslims and provides that in some circumstances a male heir inherits double the share of a female heir.

Jurisdiction and applicable law

2.7 The national reporters were asked to consider whether or not an individual can elect the law applicable to his or her succession in their jurisdiction. Again, whether a single law or multiple laws will govern one's estate (and which ones) is an important concern in today's internationally mobile world.

2.8 Due to the uncertainty that arises for global families moving from one jurisdiction to the next, and the conflict of laws that may arise as a result, we are seeing an increasing trend towards jurisdictions allowing its residents to elect the law that governs their estate so that only one law is applicable (and not many) depending on the deceased's habitual residence or nationality and where assets are located. Arguably, this trend is highlighted by the development of the EU project on succession, the EU Succession Regulation (Council Regulation 650/2012), commonly referred to as Brussels IV.

2.9 Brussels IV provides for a new general rule under which the distribution of a deceased's estate will be governed by the law of the state in which the deceased had his or her habitual residence at the time death. There is an option to elect for the law of nationality to apply instead of the law of habitual residence. The main purpose of Brussels IV is to ensure that there is one law and one law only that determines how the entire estate is dealt with. Brussels IV purports to make it clear whether the law of habitual residence, nationality or any other jurisdiction will govern succession to the entire estate that falls within the EU. It should be noted that the UK and Ireland opted out of the regulation and Denmark is not participating. Brussels IV becomes fully effective on 17 August 2015. Broadly speaking, Brussels IV applies to anyone living in a Brussels IV state, nationals of Brussels IV states or anyone (including UK or non-EU residents) with assets in a Brussels IV state.

Matrimonial Property Regimes (MPR)

2.10 A MPR can be summarised as the rules that determine who, of a spouse (or of civil partners, in some cases), owns which of the assets that they brought to the marriage or acquired during it. These rules are generally well developed in many civil law countries. Unless advance thought is given to them however, marital property regimes are themselves another area which may result in assets passing in an unexpected direction. A particular feature of this protection is that it may be organised - at least in most countries of continental Europe - on two levels, since those countries have structured matrimonial property regimes, which allow the surviving spouse to be protected even before the succession is divided. The vast majority of EU and European countries operate marital property regimes. These share three features: (i) one is that they are systems of rules for the division of property on bankruptcy, divorce or death; (ii) another is that they are not concerned with what is usually referred to in the European context as maintenance or income provision for spouses and children after divorce; and finally (ii) the third is that they all involve the facility for couples to opt for a change of regime, before or after the marriage, by contract. Formalities of doing so differ.

2.11 Structured matrimonial property regimes differ from country to country, even from the limited viewpoint of the rules governing the composition and the division of the common assets. But these factors determine the composition of the deceased spouse's estate and therefore the protection of the (other) members of the family. Regimes usually consist of the basic or primary regime defining the mutual rights and obligations of spouses and may include basic rules such as that the family home may not be sold without the other spouse's consent. The basic regime cannot be varied. The

secondary regime regulates the patrimonial aspects of marital life upon death or divorce or dissolution and will have some element of choice. Each state's system is different. The legal regimes of: community, separation of property or mixed/deferred. Thus, for example, all assets acquired before the marriage, may not be in the community assets acquired during the marriage by way of gift or inheritance, may not be in the community tools and other instruments needed for a profession, may not be in the community.

2.12 In some countries the statutory regime is imposed on every married couple. But where spouses are allowed, by entering into a marriage contract, to derogate - to a greater or lesser extent - from the statutory regime, they are at the same time able to reduce or increase the financial security and protection of the surviving spouse. In civil law jurisdictions marital contracts or elections are usually entered into before a notary and the parties can usually elect in relation to the secondary regime for either a matrimonial regime of community or of separation of assets. The regime will be effective both for the purposes of matrimonial law and of succession law (for example, **Italy** and **Belgium**). If, for example, the spouses extend the community of property so that it covers all their assets and in addition leave this community entirely to the surviving spouse, or postpone its division until his/her death, they reduce or indeed completely exhaust the estate of the first to die and therefore the protection of other members of the family. If on the other hand they are able to choose a regime of separate property, then their matrimonial property regime does not affect their estate.

2.13 It is possible to discern common themes across the different jurisdictions. The majority of countries have some type of marital property regime with the only true exception being **England and Wales**, which has no marital property regime per se. The rest of the jurisdictions provide for a marital property regime of some description and many have a default regime that will apply unless a married couple elects differently. For example, in **Italy** the regime of community of property and gains will apply by default so that property purchased during the marriage and income and gains arising during the course of the marriage will be divided equally on a divorce. However, property owned before the marriage and also property received during the course of marriage by way of gift or inheritance is not covered by the regime. The Italian married couple can however elect for a different regime to apply - either that of separate property or a limited community of property regime. This is the same in many other countries.

2.14 It is interesting to note the position in **England and Wales**, which will recognise a matrimonial property regime for succession purposes (even if not for divorce purposes) if valid in accordance with the law of the spouses' matrimonial domicile. The case law has supported the contention that there can only be one regime in relation to the spouses' entire matrimonial property, both movable and immovable. There is however some uncertainty as to whether England would recognise separate regimes in relation to movable and immovable property. It is also uncertain under English law as to whether a subsequent change in the spouses' matrimonial domicile, will have an effect on their matrimonial property regime; whether it is immutable or mutable, and whether it might be mutable only in relation to movables. The Supreme Court's judgment in the case of *Radmacher v Granatino* UKSC [2010] 42 has not clarified the private international law position of England and Wales in relation to succession.

2.15 The determination of the MPR is often essential when considering estate planning. The Hague Matrimonial Property Regimes Convention XXV of 14th March 1978 has been signed by Austria and Portugal and ratified by France, Luxemburg and the **Netherlands** and is, therefore, in force. The convention excludes succession rights. Article 3 gives persons to be married the right to choose, in their pre-nuptial contract or election, the law applicable to their matrimonial regime as being the law of any state of which either is a national or of which either, then, has their habitual residence or the first state where one of them establishes a new habitual residence after marriage.

2.16 Unsurprisingly, given the diversity of different default regimes, and the variations in the rights to make by contract different agreements, the European Commission has embarked on a project of harmonisation. Thus on 16 March 2011 a proposal was advanced for a Council Regulation on "jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes". This would allow spouses to choose the law applicable to all the property covered by their matrimonial property regime, regardless of the nature or location of the property. Where no applicable law is chosen the Regulation would introduce harmonised conflict-of-laws rules to establish the applicable law on the basis of a scale of connecting factors. The first criterion would be the first common habitual residence of the spouses after marriage; the second, the law of the spouses' common nationality at the time of their marriage; the third, the State with which the spouses have the closest links. Once the applicable law is established, this will apply even if it is not the law of a Member State in which the dispute is being heard.

Estate planning tools

2.17 If testamentary freedom is unavailable or restricted, and the succession rules (and MPR) do not accord with a family's intentions, the next step is to analyse how far it is possible to work within a given framework to achieve a family's goals. If the succession laws of the different states involved are taken in isolation, it may be difficult to achieve this without infringing the rules in one country and exposing the estate to a potential claim from other disappointed family members. Each national reporter was asked to consider estate planning opportunities in their respective jurisdiction. The following tools were identified.

Lifetime gifts

2.18 It is clear that there are few jurisdictions where it is possible to take lifetime action to avoid the rules concerning MPRs and forced heirship (**Canada, England and Wales and Sri Lanka** being notable exceptions). It is sometimes possible to make lifetime gifts to mitigate the application of forced heirship rules. Whether or not this is practicable will depend on the facts of the case. However, in some jurisdictions a lifetime gift may be made that will not be counted as part of the overall division of the donor's estate at the time of his or her death. In Switzerland, for example, gifts made more than five years before an individual's death will not be clawed back. More often, however, there is a concept of 'clawback', meaning that lifetime gifts notionally have to be added back to the estate before it is divided between the heirs. This is the case for gifts made within 5 years before death in Switzerland where the purpose of the gift was to avoid forced heirship rules; in **Belgium**, on the other hand, the reserved portion is calculated on the notional 'hereditary mass' that includes all lifetime gifts. So in countries with forced heirship rules, a lifetime gift, may not alter the way in which the estate is ultimately divided, depending on the precise nature of the clawback.

Waivers/disclaimers

2.19 In the national reports submitted that have forced heirship regimes, only 4 countries do allow for some form of waiver during the donor's lifetime (see summary table at 1.2.2 above) whereas others, such as **Italy or Belgium**, allow for waiver post death (often referred to as a disclaimer). Again, the procedures and technicalities vary from jurisdiction to jurisdiction. In **Liechtenstein**, it is possible to waive the reserved portion during the donor's lifetime. In **Belgium**, as a protective measure, heirs cannot waive their entitlement until after the death of the donor (to ensure that they are not unduly forced to make such a waiver). However, the waiver is drafted during the lifetime of the donor and is agreed to by the donor before his or her death. The donee can then either choose to accept or reject the waiver after the donor's death. In **Luxembourg**, the protection of heirs goes further where no waiver form is prepared in advance and heirs cannot renounce the reserved portion before the death of the deceased.

Succession or inheritance contracts

2.20 While few countries allow for lifetime action to avoid succession rules, contractual instruments have been introduced into the succession laws in some countries, such as **Italy and Belgium**. A number of national reporters made reference to the use of succession (or inheritance) agreements as estate planning tools. It would seem that an increasing number of statutory exceptions endeavour to ensure that clauses which represent the reasonable wishes of the deceased and which may sometimes afford better protection to certain members of the family are valid.

2.21 In **Italy**, there are two ways to protect family wealth and family business in international matters: the 'Fondo Patrimoniale' and the family business agreement ("patto di famiglia per l'impresa"). Family Business Agreements are possible where an entrepreneur is allowed to transfer business assets to specified heirs, provided that the remaining forced heirs are suitably compensated from other non-business assets in the estate. The patto di famiglia is a type of pact between the testator and his heirs that facilitates the anticipated succession of a business or shares in a business. The patto di famiglia is meant to further the continuity of businesses, thereby avoiding unwanted fragmentation. The rationale behind the renunciation is to indirectly strengthen the autonomy of the testator, for his own benefit and for the benefit of the family. By contrast, in **Belgium**, future spouses or married couples with stepchildren are now given the possibility to insert into their marriage contract an accord about their respective inheritance rights. The Belgian legislature only grants certain individuals, that is to say future spouses or married couples with stepchildren, the option to regulate (though only within certain limits) the succession through a contractual device and to disclaim certain rights in favour of the children from the previous relationship. The rationale behind the Belgian reform was to protect children of the first relationship and to further second marriages.

2.22 Not only is the ambit of application of the Italian and Belgian pacts limited to certain testators and heirs, they also present some limits that could keep parties from concluding such pacts. In **Italy** the duty of the assignee of the business to compensate the legitimate heirs puts him or her in the difficult position of having to find the necessary financial resources. Further, it presupposes that all the legitimate heirs reach an agreement, when often that is simply impossible. It does not, therefore, come as a surprise that ever since the introduction of the patto di famiglia in February 2006, only few such pacts seem to have been stipulated and that the response by the legal profession has been rather lukewarm.

Conversion to movable assets

2.23 In some cases it may be worth exploring whether an immovable asset may be "converted" to a movable asset, usually by transferring it to a holding company. It is then possible to give away the shares in the holding company. The underlying assets remain the same, but the nature of the property owned has changed from being an immovable (which it is hard or impossible to leave other than in accordance with forced heirship) into a movable where the forced heirship rules may be more flexible (or may not apply).

Succession vehicles (e.g. trusts or foundations)

2.24 Many of the jurisdictional reports submitted are from civil law jurisdictions where trusts are not recognised. Additionally, in some countries such as **Gibraltar** and the **UAE** (which has no inheritance tax) or **Brazil**, where succession tax is reasonably low (4% in São Paulo and Rio de Janeiro), the extent to which planning vehicles are employed as a means of reducing an inheritance tax burden is limited to non-existent. In **Brazil**, where such planning tools are employed in states with a slightly higher tax rate (such as Bahia State at 8%) some may incorporate real estate holding companies. On the opposite end of the spectrum, in other jurisdictions with higher inheritance tax rates, trusts and foundations are widely used as succession vehicles; for example in **England and Wales**, where inheritance tax can be as high as 40%, trusts are a widely used succession planning tool whereas in **Belgium** (with a 30% inheritance tax rate) foundations are more commonly employed.

2.25 Trusts, foundations and holding companies (while inherently different) effectively enable testators and their heirs to derogate from rules of forced heirship and perhaps also MPRs. This enhances their private autonomy, and also indirectly enhances the freedom of testation of the testator. It goes without saying that taxation can play a substantial factor.

2.26 Additionally, with respect to other motives aside from tax planning, the use of succession vehicles may be preferred in order to avoid having to obtain local probate in that jurisdiction. For example in the **UAE**, the report highlights that it is advisable for foreigners purchasing property to set up a dual corporate structure and use a Jebel Ali Free Zone Authority (FAFZA) Offshore company, directly owned by another foreign offshore company, to hold the real estate. Otherwise, real estate directly owned by a deceased individual (or a JAFZA offshore company directly owned by that individual) will be automatically subject to UAE succession law and local probate procedures.

2.27 International clients (particularly those who have generated substantial wealth during their lifetimes, but also those who have inherited much of their fortune) frequently wish to leave their assets in a way which does not fully comply with the constraints imposed by forced heirship provisions, marital property regimes or (even where there is full testamentary freedom) a perception of fairness amongst their heirs. Overall, the message from the national reports is that forced heirship and succession laws, including matrimonial regimes, must be taken into account when considering succession planning for the 21st internationally mobile family. Even the best laid succession plans may fail if ignored.

3. PERSONAL TAXATION AND COMPLIANCE

	BELGIUM	BRAZIL	CANADA (ONTARIO)	ENGLAND & WALES	GIBRALTAR	ITALY	JAPAN	LIECHTENSTEIN	LUXEMBOURG	NETHERLANDS	SRI LANKA	UAE
1.3.1 Please provide a brief summary on the current rules as to liability to tax (e.g. residence, nationality, domicile (if applicable)).	Habitual Residence	Residency	Residence	Residence & Domicile	Ordinary Residence	Habitual residence or Domicile ('centre of business and interests')	Residence (and domestic source income for non-residents)	Residence	Residence	Residence	Residence	N/A
1.3.2 Have there been any changes introduced in the last 24 months to the definition of who is a "taxpayer" e.g. "resident", "habitually resident" or "domiciled" in your country?	(B) No	(B) No	(A) Yes	(A) Yes	(B) No	(B) No	(B) No	(B) No	(B) No	(A) Yes	(A) Yes	(B) No
1.3.3 Has your country introduced in the last 24 months (or proposed the introduction of) any new taxes or reporting requirements for residents?	(A) Yes	(A) Yes	(A) Yes	(A) Yes	(B) No	(A) Yes	(A) Yes	(B) No	(B) No	(B) No	(B) No	(B) No

	BELGIUM	BRAZIL	CANADA (ONTARIO)	ENGLAND & WALES	GIBRALTAR	ITALY	JAPAN	LIECHTENSTEIN	LUXEMBOURG	NETHERLANDS	SRI LANKA	UAE
1.3.4 Has your country introduced in the last 24 months (or proposed the introduction of) any new taxes or reporting requirements for non-residents with assets located in your country?	(B) No	(B) No	(A) Yes	(A) Yes	(B) No	(B) No	(B) No	(B) No	(B) No	(A) Yes	(A) Yes	(A) Yes
1.3.5 Has your country undertaken (or proposed the introduction of) any legislative steps in the last 24 months to promote transparency in tax reporting obligations and to combat international tax evasion in the context of private wealth?	(A) Yes	(A) Yes	(A) Yes	(A) Yes	(A) Yes	(A) Yes	(A) Yes	(A) Yes	(A) Yes	(A) Yes	(B) No	(B) No
1.3.6 Has your country introduced in the last 24 months (or proposed the introduction of) any new taxes or reporting requirements for holding structures with assets or "beneficiaries" located in your country?	(A) Yes	(A) Yes	(A) Yes	(A) Yes	(B) No	(A) Yes	(B) No	(A) Yes	(A) Yes	(B) No	(B) No	(B) No

Personal taxation and compliance

3.1 The national reports highlight the many different approaches to domestic personal taxation and tax compliance. As summarised in the above table at 1.3, and in our two case studies, when it comes to who is liable to tax in a given jurisdiction, this may be determined by concepts such as residence, nationality, domicile or the location ('situs') of assets. On opposite ends of the spectrum the United States taxes its citizens irrespective of their residence on their worldwide income and gains whereas the **UAE** does not levy any income tax and capital gains tax at all. Meanwhile the **UK** is somewhere in-between where residence, domicile and the location of assets may all factor into personal taxation: income tax is determined by residence (unless one is a non-resident in which case the location of the asset is then also a factor as all individuals are liable to UK source income tax on UK situs assets); capital gains tax is determined exclusively by residence (saved for some limited exceptions, particularly with respect to UK property) and inheritance tax is determined by an individual's domicile (as well as the situs of assets for non UK domiciliaires). Nevertheless, despite these differences, when viewing the reports as a whole, the majority of countries tax principally on residence.

3.2 Following the financial crisis, increased attention has turned in recent years to the vast amounts of funds that have historically been kept offshore and gone untaxed to the extent that taxpayers have failed to comply with their tax obligations in their home jurisdictions. Around the world, governments are increasingly working together and taking action to address the issues of international tax avoidance and evasion. In all jurisdictions we are witnessing steps taken to combat this perceived problem and to bolster compliance, with new taxes and reporting requirements coming into effect as well as legislative attempts to promote transparency in the context of private wealth. Governments have been occupied with signing up to new dual tax and multilateral treaties, including the Foreign Account Tax Compliance Act (FATCA), the UK intergovernmental agreements (IGAs), the Swiss Rubik Agreements as well as implementing new domestic anti money laundering legislation.

3.3 As summarised in the table at 1.3.5, the vast majority of reports (over 80%) submitted indicate that legislative steps have been taken in recent months to promote tax transparency and reporting obligations. Virtually all of the jurisdictional reports highlighted their country's participation in FATCA (save for **Sri Lanka**) and many indicate further measures taken domestically to combat tax evasion and avoidance, whether it be with respect to individuals or non-natural persons, such as the Domestic Trust Audit Programme in **Canada** under which the Canada Revenue Agency may perform assessments of trusts and beneficiaries for income tax, interest and penalties. Many jurisdictions are also introducing new reporting requirements for assets held offshore, including **Japan**, which introduced a new reporting requirement for overseas assets of more than 50 million JPY.

3.4 With respect to paying personal taxes, while the rules may vary amongst the national reports, an undeniable common theme towards greater transparency, reporting obligations and compliance emerges across the board (see table at 1.3.3-1.3.4). It is interesting to note the variety of new legislation and taxes (introduced within the last 24 months), for example: in the **UK**, the Annual Tax on Enveloped Dwellings (ATED) was introduced relating to companies holding UK residential property in an attempt to address perceived avoidance of stamp duty land tax on valuable UK residential properties. Even in traditionally low tax jurisdictions, new taxes have been introduced. 2010 saw the introduction of a new Income Tax Act in **Gibraltar** with increased investigative powers given to the Revenue and greater penalties for non-compliance as well as the introduction of self-assessment returns with penalties for missed deadlines.

3.5 Many reports additionally highlight new legislation with respect to disclosure. In June of last year, **Canada** introduced new legislation requiring disclosure of reportable transactions, relating to specific tax avoidance transactions. Various voluntary disclosure programmes are currently in operation, both domestically and internationally with agreements in operation, such as the Liechtenstein Disclosure Faculty (the LDF) between the

UK and **Liechtenstein**. The LDF remains open until 5 April 2016, and is a programme under which taxpayers with past undisclosed tax liabilities may come forward on very favourable terms to regularise their tax position.

3.6 The reports make it abundantly clear that we are facing a new world order in relation to tax transparency and exchange of information. The list of accelerating pressure points driving this dynamic of change is long and includes: the G8, the G20, the OECD (or more precisely the Global Forum), the European Union, the US Government (and its Justice Department). Additionally the recurrent incidents of data theft in banks, the global financial crisis, and ever-increasing multilateral demands for automatic exchange of information (AEI) have all provided momentum behind this push. The United States is not alone in promoting international reporting obligations. On the heels of FATCA, the UK has entered into its own IGA's with all its Crown Dependencies and eight British overseas territories with financial centres for AEI.

3.7 In the **EU**, particular attention is being paid to anti money laundering laws and the beneficial owners of companies and trusts. Presently the draft EU Money Laundering Directive has made its way through both the Economic Affairs and the Justice and Home Affairs committees and a first plenary vote in Parliament. Negotiations are set to continue after the May 2014 parliamentary elections. If this Directive becomes law this may bring trusts, foundations and other holding structures fully into the transparency/beneficial owner requirements, including the establishment of online public registries. The creation of public registries with respect to the beneficial owners of trusts will mark a radical change for common law countries such as the UK where the use of trusts is widespread. It will be the first time that information about such trusts will be made publicly available and will have wide implications for many families, as well as trustees and the European financial centres.

3.8 While it is evident that we have entered into a new era of information exchange, the question remains, where are we heading? Surely the move towards greater transparency is here to say. Nevertheless, universal AEI is still a long way off. For example, in Switzerland, the OECD's new AEI standard will not replace the 'upon request' standard but will complement it, while trying to address its many limitations. It will also run in parallel with other bilateral or regional practices of automatic exchange, such as the Rubik Agreements, FATCA and the EUSD. Nevertheless, in a country that for so long coveted its banking secrecy laws, Switzerland (amongst others) will continue to see a ramp-up of international efforts towards transparency, which are likely to translate into concessions.

3.9 Governments are also moving towards exchanging information without notification. For example, the **Belgian** national report highlights a recent change in its jurisdiction where the Constitutional Court has annulled the rule that there is an obligation for the Belgian tax authorities to inform the taxpayer of a request by a foreign tax administration to collect information regarding the financial position of the relevant taxpayer from a Belgian financial intermediary. Similarly, in Switzerland the Swiss Tax Administrative Assistance Act is likely to be amended to allow bank account information to be disclosed to foreign governments without warning the account holder. In the Swiss context, this is quite a change (this procedure will, however, be restricted to 'urgent cases', such as when prior notification would compromise the investigation).

3.10 We have also seen the door opened to governments making 'group requests' as a further step towards transparency. The OECD has updated the OECD Model Tax Convention (Article 26), which sets out the international standard on exchange of information. The standard provides for information exchange on request, where the information is "foreseeably relevant" for the administration of the taxes of the requesting party, regardless of bank secrecy and a domestic tax interest. This update explicitly allows for group requests. This means that tax authorities are able to ask for information on a group of taxpayers, without naming them individually, as long as the request is not a 'fishing expedition'.

3.11 Various offshore leaks and governments making use of stolen bank data to track down tax evaders additionally continues. While some jurisdictions such as the United States, **Canada**, the **UK**, France and Germany are comfortable with this line of strategy, for others, such as Switzerland, this does not sit as comfortably. However, not least because of pressure from India, the Swiss Government has announced its willingness to cooperate with foreign tax authorities seeking administrative assistance on account holders identified using data obtained passively through other governments, while maintaining the policy of non-cooperation in circumstances where the stolen bank data had been purchased by the government issuing the request (a proposal which still needs to be approved by Parliament). Nevertheless Germany, France and other EU countries are making extensive use of stolen data (chiefly from LGT and HSBC). In **Canada**, the 2013 Budget announced the launch of Stop International Tax Evasion Programme (SITEP), under which the Canada Revenue Agency will pay whistle-blowers rewards to provide information that identifies major international tax non-compliance, with a focus on high income taxpayers. As the appetite from the media and NGOs continues, it is clear that we have not seen the last of stolen data and information purchases and offshore leaks.

3.12 In the midst of all these developments, for individuals in the private wealth sphere with undeclared offshore assets, this is a clear reminder that now is the time to evaluate investment portfolios and consider regularising one's tax affairs where necessary via available voluntary offshore disclosure facilities. Governments such as the **UK**, Switzerland, the US and France have all been witnessing a wave of voluntary disclosures which has brought in billions of unpaid tax back into government coffers.

3.13 To conclude, it would seem that many global families will need advice to adopt sophisticated wealth planning approaches to respond not only to families' longer term succession and planning objectives but also to respond to legitimate privacy concerns and the fast changing international tax platform.

4. MENTAL CAPACITY OF ADULTS

	BELGIUM	BRAZIL	CANADA (ONTARIO)	ENGLAND & WALES	GIBRALTAR	ITALY	JAPAN	LIECHTENSTEIN	LUXEMBOURG	NETHERLANDS	SRI LANKA	UAE
1.4.1 What system is in place in your country to deal with an individual who has lost capacity?	"Bewind" (Administrator)	Civil Interdiction (Court declaration)	Power of Attorney, Statutory Guardian, Court Appointed Guardian	Statutory framework under Mental Capacity Act 2005	Power of Attorney	Civil Court powers	Adult Ward, Curatorship and/or assistance (with court ruling)	Court Appointed Curator	Judicial Protection Curatorship Guardianship	Power of Attorney	Discrimination prohibited but no administration mechanisms provided	Personal Status Court Declaration
1.4.2 Does your country provide for Powers of Representation/Lasting Powers of Attorney/Mandats de protection future in relation to an incapacitated adult's personal welfare and/or property and affairs?	(C) Both	(C) Both	(C) Both	(C) Both	No	No – see report	(C) Both		(C) Both	(C) Both	(C) Both	(C) Both

	BELGIUM	BRAZIL	CANADA (ONTARIO)	ENGLAND & WALES	GIBRALTAR	ITALY	JAPAN	LIECHTENSTEIN	LUXEMBOURG	NETHERLANDS	SRI LANKA	UAE
1.4.3 Will your country recognise and enforce a form of Power of Representation or Attorney intended to have effect after the onset of mental incapacity valid in the state in which it is prepared?	(A) Yes	(B) No	(A) Yes	See report	Likely yes - see report	Yes – see report	See Report	(A) Yes	(A) Yes	(A) Yes	(B) No	(A) Yes
1.4.4 Are there proposals for legislative change in the field of mental capacity?	(A) Yes	(B) No	(A) Yes	(B) No but see report	(B) No	(A) Yes	(B) No	(B) No	(B) No	(A) Yes	(A) Yes	(B) No
1.4.5 Is your country a party to the Hague Convention XXXV for the International Protection of Adults of 13 January 2000? [ie is it force in your jurisdiction?]	(B) No	(B) No	(B) No	(B) No	(B) No	(B) No	(B) No	(B) No	(A) Yes	(A) Yes	(B) No	(B) No

	BELGIUM	BRAZIL	CANADA (ONTARIO)	ENGLAND & WALES	GIBRALTAR	ITALY	JAPAN	LIECHTENSTEIN	LUXEMBOURG	NETHERLANDS	SRI LANKA	UAE
1.4.6 Is your country a party to the United Nations Convention on the Rights of Persons with Disabilities and its Optional Protocol 2006?	(B) No	(A) Yes	(A + B) Yes to the Convention , No to the Optional Protocol	(A) Yes	(B) No	(A) Yes	(A) Yes	(B) No	(A) Yes	(A) Yes	(A) Yes	(A) Yes

Mental capacity of adults

4.1 As the number of older people continues to rise, the number of such older people resident in a state other than the state of their nationality also increases. As the **Netherlands** report highlights, mental capacity regimes are increasingly relevant; statistics from this jurisdiction show that the risk of dementia in men is nowadays up to 20% and up to 30% for women. The increasing number of elderly people, combined with the fact that many more people own property abroad, means that advisors are increasingly seeing more and more problems associated with dealing across national borders with the assets of persons who have lost capacity and the problems of moving such persons from one state to another, so that they may be cared for nearer to their relatives in another state.

4.2 Capacity is not a separate legal classification or qualification, but a particular requirement for one of many separate legal acts. Under many internal laws, the precise test of capacity differs between each act. Across the research jurisdictions, the governing rules also differ. For example, Most states have historically regarded questions of capacity as a matter for the 'personal law' of the individual usually governed by the law of the nationality in civil-law states, while by contrast common-law jurisdictions have looked to the individual's domicile.

4.3 The direct private international law issues linked to the incapacity of adults are: (a) Which court has jurisdiction to make orders in relation to an incapacitated adult's personal welfare and/or property and affairs?; (b) Which state's law will that court apply?; and (c) Will state B recognise and enforce an order of the courts of state A and if so will it apply local conditions of implementation?

4.4 The first step will generally be to ascertain whether an individual can make the local equivalent of a lasting or enduring power of attorney (LPA) in the jurisdiction. If they can, then taking local advice on the possibility of using this local power is likely to be the simplest way forward. If a LPA is

acceptable in a foreign jurisdiction, local requirements may still have to be met before it can be used. If the individual who has lost mental capacity does not have a LPA (in the form prescribed) can an application be made to Court? In **England and Wales**, it may be possible to apply to the Court of Protection for a deputyship order, which may be recognised in the foreign jurisdiction. It is important to appreciate that this is a complex, specialist topic.

4.5 From the national reports, as summarised in table 1.4.2, the majority of jurisdictions have some form of power of attorney available to assist individuals with mental incapacity issues. Whether one jurisdiction will recognise the validity of a power of attorney made in another jurisdiction is another matter (see table 1.4.3). Of the 11 reports submitted, only **Brazil** and **Sri Lanka** will not recognise and enforce a foreign power of attorney to any degree. Others are more generous, for example, in **Canada**, the foreign grant is valid if at the time of execution it complied with the internal law of the place where it was executed, where the donor was domiciled or where the grantor had his or her habitual residence.

4.6 Particular reference should be given to the Hague Convention XXXV of 13 January 2000 on the International Protection of Adults (Convention XXXV) and its strengths. The convention seeks to provide solutions in cross-border mental capacity cases in that it attempts to produce some solutions both to the issues of jurisdiction, applicable law, and recognition and enforcement of court powers, and also to the form and acceptance of lasting powers of attorney across borders. There are now eight Contracting States (Austria, the Czech Republic, Estonia, Finland, France, Germany, Switzerland and the **United Kingdom** (in respect of Scotland)), with a further seven states having signed it (Cyprus, Greece, Ireland, **Italy**, **Luxembourg**, **Netherlands** and Poland). It is interesting to note that all of the states are European. All states should be encouraged to ratify. The UK has, unusually, only ratified Convention XXXV in relation to Scotland. Notwithstanding this, the law in England and Wales as set out in the Mental Capacity Act 2005 and in particular its Schedule 3, is now virtually identical to Convention XXXV.

4.7 The fact that Convention XXXV only applies to Powers of Representation once the donor cannot protect his interests as a result of an impairment or insufficiency of his personal faculties, is an inherent weakness. Third parties may find it impossible to establish easily whether under the applicable law, circumstances have arisen so that Convention XXXV actually applies to the Power of Representation. Even if it is clear that such circumstances have arisen, it can be difficult for third parties to understand and accept a Power of Representation created in a foreign language under the law of another state.

4.8 Reference should also be given to the United Nations Convention on the Rights of Persons with Disabilities and Optional Protocol, were adopted in 2006 and entered into force on 3 May 2008. The Convention attempts to change attitudes and approaches to persons with disabilities so that they are seen not as "objects" of charity, medical treatment and social protection but as "subjects" with rights, who are capable of claiming those rights and making decisions for their lives based on their free and informed consent as well as being active members of society. The Convention has been ratified by over 100 states.

4.9 If any cross-border issues may be relevant in relation to capacity, careful analysis and thought needs to be applied. It may not be possible to provide clients with a simple and straightforward overall solution. From the national reports, it can be concluded that there is need for legal systems to provide adequate protection for incapacitated adults and that this will undoubtedly become more pressing in the coming years, domestically as well as internationally.

Concluding thoughts

The scope of this general report has only allowed a brief discussion of the various approaches taken by the different jurisdictions to the issues that arise in the case studies provided; of course in the private client advisor's day to day business, even more complex issues arise for individuals and families with cross-border connections - whether they by multiple nationalities, business interests or assets held in a number of jurisdictions. The private client advisor can no longer confine his or her advice to discrete areas of taxation or law as has historically been the case. Instead, one must remain aware of the wider issues such as succession laws, personal tax exposures and reporting obligations.

The same is very true for the immigration advisor also. HNWIs must seek specific advice as the solution for them will depend on how much money they have available, whether they are seeking a long term residency right, settlement or citizenship, whether they have any dependants and how close the dependant relative is. In addition, the HNWI will be advised to seek tax advice as acquiring a visa could be financially detrimental and is often a determining factor in choice of residency/passport.

From an immigration perspective, overall, the majority of jurisdictions clearly wish to attract HNWIs. Some of the schemes do conflict with the views or wishes of the resident nationals. Whilst various schemes are limited in scope, others freely lead to naturalisation. There are various different strategies being adopted but it is clear from the national reports and answers provided that those in the position to purchase settlement or citizenship, are doing so but each jurisdiction has a way of trying to balance the need for money to come in and the need to protect the resident nationals.

While there is an undeniable common theme towards greater transparency and reporting obligations identified in the national reports, the private client advisor, it must be understood that clients will, in most cases, also be concerned to maintain privacy and confidentiality with respect to their affairs. It is arguable that there is an important balance to be struck between transparency for fighting 'crime' with the right to privacy and data protection. Being an intrusion into the private and family life of citizens (rights that are protected by the EU Charter of Fundamental Rights and the European Convention on Human Rights), some of the current international proposals and trends that we are seeing are likely to be of concern to many clients.

At the most practical level, the private client advisor in cross border matters must be aware of the wider issues and personal tax exposures of their clients, including making efficient use of double taxation agreements. While there may not be one right solution, advisors must be pragmatic, issue spot and provide workable (and hopefully long lasting) solutions. The approach is therefore to understand the broader needs of the internationally mobile client and to deliver integrated, commercial and innovative advice. Cultural awareness and cross border cooperation are constant themes and we must therefore continue adapt our approach, working where possible, in the language, and consideration of the jurisdictions of choice, of our clients.