52nd AIJA Annual Congress

Prague, 26-30 August 2014

Questionnaire for National Reporters

Private Client and Immigration Working Session

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

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Background

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 look for long term security and are increasingly looking overseas for a solution.

How do our immigration, legal and tax systems cope with the realties and complexities of 21st century aging family life and the demand for economic security/stability? What are the particular challenges for practitioners in assisting these families? How does increasing governmental exchange of information and compliance requirements affect strategies for investment, tax planning and personal security. How does the global citizen manage a world of overlapping, often conflicting regulation?

1. PRELIMINARY MATTERS

We would ask that you return completed the Questionnaire and your answers to the case studies below by **Friday, 28 February 2014** (earlier if possible please).

Prior to dealing with the legal problems thrown up by the case studies, could you please deal with the following questions with reference, where relevant, to any recent case law or general practice. If you need to clarify the answer to a question, please do so. If a question is not an issue in your country, please provide an explanation as to why it is not.

If you are a delegate responding as part of the Immigration Commission, please respond **only** to sections 1.1 and 2.1.

1.1 **Immigration and Nationality [for Immigration Commission only]**

1.1.1 Briefly outline any immigration, residency or citizenship programmes your jurisdiction has to attract high net-worth individuals (HNWIs).

1.1.2 Are there any proposed changes to the programmes outlined in 1.1.1?

1.1.3 Is there a dichotomy between your Government's wish to attract HNWIs as against public perception of immigration?

1.2 **Cross-border succession**

1.2.1 Is testamentary freedom a right recognised by national law or public policy?

(A) Yes (B) No

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?

(A) Yes (B) No **(C) Not relevant to your country**

If so, please briefly set out the options.

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**

The UK has exercised its right not to opt in to Brussels IV (because of clawback and other matters), although it can choose to opt in in future.

The system of election for EU individuals may nonetheless impact on UK estates/individuals. For example, an EU national who becomes habitually resident in England might elect for the law of his nationality to apply to his estate rather than the law of England. Similarly, an English national who is habitually resident in a member state may elect for the law of England to apply to his estate rather than the law of the member state in which he is habitually resident.

Succession to movables (e.g. bank accounts, shares) is governed by the law of the state in which the deceased had his/her domicile at the time of death, whereas succession to immovables (i.e. land) is governed by the law of the country in which they are situated.

"Domicile" is not defined in statute but is decided under general law, which means it must be interpreted according to previous rulings of the courts. Broadly speaking, a person's country of domicile is his permanent home which, if he has left it, he intends to return to.

A person has a domicile of origin based on the domicile of the parents: the child of married parents will take his father's domicile, whereas for unmarried parents the child will take his mother's domicile. The domicile of origin can be displaced by a domicile of dependency or a domicile of choice. A domicile of dependency would be found for unmarried children under the age of 16, mentally disordered persons, and married women before 1 January 1974. A domicile of choice requires actual residence in a new country combined with an intention to reside in the new country permanently and indefinitely. Intention can be inferred from all the circumstances of the person's life, including what they say or do.

An individual has a domicile in a jurisdiction, such as England and Wales or a state within the US, rather than a country. An individual can only have one domicile at any time and must have a domicile.

If yes, is this election limited to the law of the deceased's:

(A) Nationality (B) Habitual Residence (C) Other

1.3 Personal taxation and compliance

1.3.1 Please provide a brief summary on the current rules as to liability to tax (e.g. residence, nationality, domicile (if applicable)).

The extent to which an individual is liable to UK tax depends on whether he is resident or domiciled in the UK, according to the type of tax. "Residence" and "domicile" have particular meanings in English law. "Residence" is now defined using the statutory residence test (see 1.3.2). "Domicile" is not defined in statute (see 1.2.3).

Income tax: the rates for 2014-15 are as follows:

- Personal allowance: £10,000 (except for those earning over £100,000)
- Basic rate @ 20%: £0 - £31,865
- Additional rate @ 40%: £31,866 - £150,000
- Higher rate @ 45%: over £150,000

There are specific rules relating to the type of income but broadly UK resident and domiciled individuals are taxed on UK and foreign income on an arising basis.

Non-resident individuals are taxed on UK source income (which includes UK investment income and income from a UK business) only.

A resident non-domiciled individual is taxed on UK income on an arising basis. He can elect to be taxed on his foreign income on the remittance basis, meaning that he is only taxed on foreign income if he (or someone with whom he is closely connected) receives, uses or benefits from the income in the UK. When he has been resident for 7 of the previous 9 tax years he must pay a charge of £30k each year in order to continue to be taxed on the remittance basis, and when he has been resident for 12 of the previous 14 tax years he must pay a charge of £50k each year.

Capital gains tax: the rates for 2014-15 are as follows:

- Annual exempt amount: £11,000
- Standard rate: 18%
- Higher rate (for higher rate income tax payers): 28%
- Rate for Entrepreneurs: 10%

UK resident and domiciled individuals are taxed on UK and foreign gains on an arising basis.

Resident non-domiciled individuals are taxed on UK gains on an arising basis, but can elect to be taxed on their foreign gains on the remittance basis (subject to the charge outlined above).

Non-residents are not generally subject to capital gains tax (but see 1.3.4 below).

Inheritance tax: the rate of inheritance tax is 40% and (subject to any exemptions or reliefs) it is charged on the estate above the nil rate band of £325,000. It also applies to lifetime gifts made within 7 years of death.

Inheritance tax is payable on all UK assets (in lifetime and on death). It is also payable on non-UK situated assets if the holder is domiciled or deemed domiciled in the UK. An individual is deemed domiciled if he has been resident in the UK for 17 out of the previous 20 tax years. Individuals also remain within IHT as "deemed domiciled" for 36 months after ceasing to have UK domicile status.

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?

(A) Yes (B) No

If yes, please briefly summarise the changes.

A new statutory residence test has been introduced with effect from 6 April 2013. The previous test remains relevant for tax years 2012-13 and earlier in determining liability to income or capital gains tax.

Under the new test a person is automatically resident in the UK if any of the following tests is met:

- if he spends 183 days or more in the UK in a tax year;
- if he has a home in the UK, is in that UK home on 30 separate days or more in the tax year, and for a period of at least 91 consecutive days has no home overseas or has one or more overseas homes but is present in each on fewer than 30 separate days in the tax year; or
- if he carries out full-time work (whether employed or self-employed) in the UK.

Note that a "home" does not require property ownership.

A person is automatically not resident if any of the following tests is met:

- if he spends fewer than 46 days in the UK in the tax year and was not UK resident in any of the previous three tax years;
- if he spends fewer than 16 days in the UK in the tax year and was UK resident in one or more of the previous three tax years; or
- carries out full-time work (whether employed or self-employed) abroad.

If neither automatic test is met, then the "sufficient ties" test applies, which involves a mixture of day counting and assessing ties to the UK. The more UK ties a person has, the fewer days he can spend in the UK without becoming resident. There are slightly different rules for "arrivers" (individuals not resident in any of the previous three tax years) and "leavers" (individuals resident in one or more of the previous three tax years). The UK ties are:

- **Family** (spouse, partner, or child under 18 unless that child is in full-time education and spends fewer than 21 days in the tax year in the UK outside term-time)
- **Accommodation** (no legal interest required; available for at least 91 days and he spends one night there, or 16 nights if it belongs to a close relative)
- **Work** (40 days, more than 3 hours per day)
- **90 days** (spent in UK in either of previous two tax years)
- **Country** (for leavers only - more days spent in the UK than any other country)

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 (B) No

If yes, please briefly set out the key provisions.

General Anti-Abuse Rule: The General Anti-Abuse Rule came into force on 17 July 2013. It defines what are, for the UK tax authorities (HMRC), tax arrangements which are "abusive". It acts alongside all the existing UK anti-avoidance and anti-evasion measures, and operates as a "catch-all" for anything which is not covered by existing legislation.

GAAR operates using a "double reasonableness" test: a tax arrangement is abusive if "it cannot reasonably be regarded as a reasonable course of action, having regard to all the circumstances." If HMRC believes that an arrangement is abusive it must refer the issue to the GAAR Advisory Panel, a committee of independent tax experts. The Advisory Panel then provides an opinion as to whether the planning is "reasonable" before HMRC brings the case before the court.

When completing a self-assessment tax return, a taxpayer is required by law to consider and, if necessary disclose, that GAAR could apply.

Information exchanges/disclosure facilities: the UK government has introduced offshore disclosure facilities for UK taxpayers with assets in Jersey, Guernsey or the Isle of Man. After the offshore disclosure facilities end on 30 September 2016, financial institutions in Jersey, Guernsey, or the Isle of Man will automatically provide the UK tax authorities with information relating to the financial affairs of UK resident clients.

Automatic information sharing agreements have also been entered into by the UK Government with all the British Overseas territories with significant financial centres. Anguilla, Bermuda, BVI, the Cayman Islands, Montserrat, and Turks and Caicos have all agreed treaties and will now automatically exchange information with the UK.

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?

(A) Yes (B) No

If yes, please briefly set out the key provisions.

CGT extension: As outlined at 1.3.1, non-residents are not subject to capital gains tax. The UK tax authorities are currently consulting on the extension of capital gains tax to all non-residents on the disposal of UK residential property. This is expected to come into force on 6 April 2015.

ATED: The new Annual Tax on Enveloped Dwellings (ATED) was introduced with effect from 5 April 2013 in an attempt to address the perceived abuse of SDLT on valuable properties in the UK. It currently applies to residential properties valued at over £2 million held by non-natural persons (i.e. companies, collective investment vehicles, or partnerships which include one or more companies or collective investment vehicles). It does not apply to trustees or nominee companies. There are certain reliefs for property businesses.

The UK Government has recently announced that the ATED charge will be extended to bring properties valued at £1 million to £2 million into the charge from April 2015 and properties valued at £500,000 to £1 million into the charge from April 2016.

ATED is applied according to the value of the property, and the initial minimum charge was £15,000 for properties valued at over £2 million to £5 million, with a maximum charge of £140,000 for properties valued at over £20 million. The charges are increased each year in line with inflation. There will be two new bands introduced in future: £3,500 for properties valued at £500,000 to £1 million, and £7,000 for properties valued at £1 million to £2 million.

Capital Gains Tax now applies to entities caught by ATED, and applies to any gains made on the property for increases in value since 5 April 2013 (or from when the property entered the company if later).There is also a new 15% Stamp Duty Land Tax rate for those entities.

Also see 1.3.6.

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 (B) No

If yes, please briefly set out the key measures.

Companies' Register: in June 2013, the G8 leaders agreed to the introduction of a register of a company's beneficial owners in order to tackle tax avoidance. The EU Fourth Money Laundering Directive also proposes that such a register be introduced. The UK Prime Minister David Cameron announced in October 2013 that registers of UK companies will be made public. Assuming this goes ahead, companies registered in the UK will have to hold adequate, accurate and current information on the ultimate owners who benefit from the company. This information will be placed on a publicly accessible central register maintained by Companies House (the existing registrar of companies in the UK).

Trust Register: UK trusts may be affected by the Fourth Money Laundering Directive's transparency requirements, depending on the final form of the Directive. The European Parliament's economics committee and justice committee have voted to bring trusts fully into the Fourth Money Laundering Directive's transparency requirements, meaning that Member States would be required to keep a public register of ultimate beneficial owners of trusts. At the time of writing (March 2014) it has been suggested that the trust deed and letter of wishes should also be made publicly available, on a risk based basis.

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 (B) No

If yes, please briefly set out the key measures.

The main new tax is ATED – see 1.3.4.

1.4 Mental capacity of adults

1.4.1 What system is in place in your country to deal with an individual who has lost capacity?

There has been a well-established system for dealing with those who cannot make decisions for themselves for many years. This system was changed in 2005.

The Mental Capacity Act 2005 (the MCA) introduced a statutory framework for assessing capacity and assisting those who do not have capacity to make a decision for themselves. The MCA includes provisions based on what was considered to be the best practice that had developed over time. The following five core principles are set out in the MCA and are the foundation principles of it:

1) A person must be assumed to have capacity unless it is established that he lacks capacity.

2) A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.

3) A person is not to be treated as unable to make a decision merely because he makes an unwise decision.

4) An act done, or decision made, under the MCA for or on behalf of a person who lacks capacity must be done, or made, in his best interests.

5) Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.

The Act also provides for a Code of Practice which includes detailed guidance and information for those making decisions under the MCA. Furthermore, there is a duty on decision makers to consider the code when acting on behalf of those who lack capacity.

The Act established the framework for the Court of Protection (the Court), being the specialist court for all issues relating to people who lack capacity.

There is also a new statutory office holder of the Office of the Public Guardian (OPG), whose role is to:

1) Establish and maintain registers of Lasting Powers of Attorney (LPA) and deputies (deputies being those appointed by the Court to look after the affairs of someone who lacks capacity);

2) Supervise deputies and attorneys;

3) Receive security, reports and accounts; and,

4) Handle complaints.

The Official Solicitor acts on behalf of those who lack capacity sufficient to represent themselves in court proceedings.

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?

(A) Personal welfare only (B) Property and affairs only **(C) Both personal welfare and property and affairs**

England and Wales provide for Lasting Powers of Attorney (LPA) in respect of both personal welfare and property and affairs. LPAs were introduced by the MCA and they are the primary way of appointing a decision maker (attorney) to act on a donor's behalf in the event of a loss of mental capacity.

There are two types of LPAs. A LPA property and financial affairs grants authority in relation to the donor's physical property and matters of a financial nature. This type of LPA allows, for example, the attorney to pay the donor's bills, invest their funds or sell their property. A LPA health and welfare grants authority in relation to the donor's health and welfare. This type of LPA can only be used once the donor has lost capacity, and allows the attorney, for example, to make decisions about the care needed by the donor. This type of LPA can also allow the attorney to make decisions about life-sustaining treatment provided the donor specifically permits the attorney to make such decisions in the LPA.

Part of the process of granting a LPA involves a certificate as to the mental capacity of the donor being given. The certificate provider can either be a relevant professional or someone who has known the donor for two years. LPAs must be registered with the OPG before they can be used.

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?

This is an area of some debate and disagreement in the UK.

There are provisions detailed in the MCA for a 'protective measure' taken in relation to an adult under the law of another country to be recognised in England and Wales. There are also provisions that an interested person may apply to our Courts for a declaration whether such protective measure, valid and enforceable in the other country, is enforceable here.

A 'protective measure' for these purposes, however, is defined as 'a measure directed to the protection of the person or property of an adult'. Examples of protective measures are given, such as placing the adult under the protection of an appropriate authority, and placing the adult in a place where protection can be provided.

A leading commentary on this subject (Heywood and Massey, Court of Protection Practice) notes that a power of representation made under a private mandate is not a protective measure. And a private mandate is not capable of being recognised or enforced as those terms are more appropriate to judicial or quasi-judicial decisions. So, on this basis, a foreign Power of Representation of Attorney (classified as a mandate in case of incapacity conferred by the donor) would not be capable of being recognised or enforceable under this provision.

There is also provision in the MCA, however, to determine the law applicable to the existence, extent, modification or extinction of a LPA, Enduring Power of Attorney or other power of like effect (a foreign LPA). If the donor is habitually resident in another country, but is connected to England and Wales (either through nationality, having been habitually resident here or having property here), then the applicable law for those purposes is deemed to be the law of habitual residence when the power is granted (unless another law is specified in writing). This therefore allows for powers of representation of attorney that are foreign LPAs to be recognised as valid in these circumstances.

In practical terms, for such a power to be accepted here by an institution it is likely that the institution will need to see recognition of the instrument by the Court. English law will apply to the exercise of such power here.

The safest course of action is for an individual to complete LPAs for their UK assets and for when they are here, and have separate powers for other jurisdictions.

1.4.4 Are there proposals for legislative change in the field of mental capacity?

(A) Yes **(B) No**

If yes, what are the proposals?

1.4.5 Is your country a party to the Hague Convention XXXV for the International Protection of Adults of 13 January 2000?

(A) Yes **(B) No**

England and Wales have not ratified the Hague Convention XXXV for the International Protection of Adults. However Convention XXXV is, in effect, in force internally in the courts in England and Wales by virtue of Schedule 3 to the MCA. Schedule 3 is virtually identical to Convention XXXV.

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?

(A) Yes (B) No

The Convention was ratified on 8 June 2009 and the Optional Protocol was ratified on 7 August 2009.

QUESTIONS FOR CASE STUDIES

2. CASE STUDY A: ROBERTA AND PAUL

Roberta and Paul married in the Netherlands in 2008. Roberta is Brazilian and Paul is Dutch. Roberta, an IT specialist, was offered a job with Pear Inc in Silicon Valley and she and Paul moved to California (USA) in 2011. The family grows with twin boys and life is good.

Roberta's mother, Gloria, who is in her 70s, wants to live with Roberta (her only child) and Paul so that she can spend more time with her grandchildren. Interested in moving to your country, Roberta and Paul come to see you for advice.

2.1 Immigration law [for Immigration Commission only]

2.1.1 Roberta and Paul are exceptionally wealthy. What immigration categories (e.g. investor type programmes) might apply to HNWIs such as Roberta and Paul to:

(a) move firstly to the US (please omit this if you do not advise on US immigration law);

(b) and then secondly to your country?

If your advice would change if Paul was not a Dutch national, please explain.

2.1.2 What immigration options does Gloria have to move to your country on a long term basis?

2.1.3 What, if any, are the residency requirements for a long term move to your country for Roberta, Paul and Gloria?

2.1.4 Are there are any long term requirements that the family should be aware of in order to maintain their immigration status in your country?

2.1.5 Will any of the members of the family be able to acquire citizenship of your country?

Now settled into the hustle and bustle of life in your capital city, Roberta and Paul (who are very happy together and, incidentally, exceptionally wealthy), having purchased rental properties in Brazil and invested wisely in stocks and bonds, they are looking to buy a US$ 20 million Penthouse Duplex in the hipster district of your capital city. They believe it is time to consider tax and estate planning opportunities and come to see you.

During the meeting you are also told that:

- Roberta is likely to inherit family assets - principally artwork - 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 (**the Inheritance**).
- 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.

2.2 Real estate planning

What structuring and/or tax planning opportunities should Paul and Roberta consider with respect to the purchase of the Penthouse Duplex (i.e. to mitigate taxation in your country)?

This area has been subject to much change recently.

As outlined in 1.3.1, UK inheritance tax (IHT) is set at 40% and is generally charged on all of an estate in excess of £325,000. IHT is therefore a major concern when considering tax planning for valuable property in this country.

<u>Paul and Roberta's domicile</u>

As outlined at 1.3.1, an individual who is domiciled within the UK is subject to inheritance tax (IHT) on their worldwide estate. In comparison, an individual who is not domiciled or deemed domiciled within the UK is subject to IHT only on their UK estate. Consequently to determine their IHT position, Paul and Roberta's domicile needs to be understood.

Under the domicile test outlined at 1.2.3, Paul and Roberta's domicile of origin will depend on their parents' domicile and their marital status at the date of birth. We will assume that in neither case was this a domicile within the UK.

If neither Paul nor Roberta had a UK domicile of origin, we would need to consider whether their domicile of original had been superseded by a domicile of choice. In the circumstances it would seem difficult to conclude that Paul and Roberta have acquired a domicile of choice in England. They have lived an international life, and have only lived in England for a short time. Although they reside in England, they are therefore unlikely to have decided to live in England permanently or indefinitely. As a result they will only be subject to IHT on their UK estate.

<u>Offshore Company/ATED/SDLT</u>

A traditional plan to mitigate IHT on the purchase of UK property would be to establish an offshore structure and have the property owned by an offshore company. In this way the situs of the property would shift to the offshore jurisdiction, with the result that the property would not be subject to IHT. This would introduce many other issues that would need to be addressed, but could be found to be effective with careful planning.

If the property is already owned by an offshore company, Paul and Roberta could purchase the shares of the company. The value of the property would remain outside the IHT net, but they would be subject to ATED (see 1.3.4) on an on-going basis. An ATED charge of £71,850 would apply to the Duplex Penthouse for the tax year 2014/15.

If the property is not in a company then they could purchase it via an offshore company and structure, but then the SDLT rate would be increased to 15% (of the purchase price) and ATED would remain payable.

If the property is purchased in their own names then the SDLT rate will be 7% and ATED will not be payable, but the property will be subject to IHT.

<u>Further IHT planning</u>

If Paul and Roberta require a mortgage to purchase the property then there will only be IHT due on the net value. But it should be noted that there have been restrictions recently placed on IHT planning involving a mortgage being taken and the proceeds being placed where they are not subject to IHT (e.g. offshore in this case).

Furthermore, there is complete relief from IHT on transfers between spouses. Therefore if they organised matters such that on the death of one of them all the property passed to the survivor, then there would be no IHT charge on the death of the first. If the property remained in the estate of the survivor then there would then be an IHT charge on the death of the survivor. It is common for life insurance to be taken to cover the cost of any IHT that may arise on this basis, and provided Paul and Roberta are in good health this may be the most economic option. It also benefits from simplicity as the property is directly owned by them without the need for an offshore structure.

<u>Capital Gains Tax (CGT)</u>

As mentioned at 1.3.1, CGT is charged on disposals of assets belonging to those resident in the UK.

If Paul and Roberta decide not to hold the property through a company, and they live in the property as their primary residence throughout their ownership, they will be entitled to principal private residence relief from CGT (PPR) on disposal of the property.

PPR will not be available if they purchase the property through an offshore company. As outlined at 1.3.4, the company will be subject to CGT on any gains made on the property for increases in value since 5 April 2013 (or from when the property entered the company if later).

2.3 **Succession law and mental capacity**

2.3.1 What would you advise with respect to the Inheritance?

Inheritance passing directly to grandchildren

We would need to analyse what Gloria's domicile is. According to the facts already given to us there is a good chance that this will be Brazil but this would need to be confirmed. Gloria would need to be made aware of the fact that if she comes to London so as to be with her family then she may satisfy the test for making England her domicile of choice. Taking on a new English domicile of choice would have succession planning implications and tax implications (tax advice outside the scope of this answer). Gloria would need to consider whether she is happy with the implications.

As mentioned at 1.2.1, there is no forced heirship regime in England and Wales and testators have almost full testamentary freedom. As mentioned at 1.2.3, succession to movables is governed by the law of the state in which the deceased had his/her domicile at the time of death, whereas succession to immovables is governed by the law of the country in which it is situated.

If Gloria remains non-domiciled here she would need to take local advice and consider the succession law of her domicile on the question of whether she can pass her art collection without challenge directly to her grandchildren.

If the art collection is not brought here then she would also need advice in the country where it is located regarding any relevant succession and tax points.

A will for each relevant jurisdiction should be drafted accordingly. It may also be the case that holding the artworks in a trust will be the most practical way of organising matters, and it may be a tax efficient solution as well if the artworks are of sufficient value.

If the property passes to Roberta then the succession law and forced heirship considerations for the law of her domicile will also need to be considered to see if there would be any potential challenges to her passing the artwork to her children.

Community of property

With regards to any assets that go to Roberta, the concept of Community of Property needs to be considered.

As Paul and Roberta got married in the Netherlands they will need local Dutch advice as to the effect of community of property on their assets and whether this will restrict the ability of Roberta to pass all the artwork to her children.

The grandchildren

In the UK the age of majority is 18. Minors are unable to hold land in their own name but can hold other property, though this may not be wanted by the donor. Their inheritance under a will is governed by the terms of that will and it is usual for testators to specify an age at which minor beneficiaries can inherit. Minors cannot give personal representatives a valid receipt and it is usual for the will to contain a provision allowing the minor's parents to give a valid receipt instead.

If there is a gift now rather than by will, then given the age of the children it may be preferable to have the artwork (if of sufficient value) held in a trust. This would allow the trustees to control to what extent and at what age ownership and/or benefit passes to the children. The tax implications of assets being held in trust can be complicated and would need careful consideration.

2.3.2 What steps can Paul take to ensure that Roberta has full authority to take decisions on his behalf and deal with their assets in the event that Paul loses his mental capacity?

As stated in 1.4.2 Paul could complete types of LPA in consideration of him potentially losing his mental capacity in the future. The LPA could appoint Roberta (and potentially others to act together with Roberta or in substitution) as attorney to act on Paul's behalf.

It is possible to specify restrictions and conditions on an attorney in each LPA. For example, for a LPA property and financial affairs, Paul might want to:

- Specify that Roberta cannot act until he lacks capacity and how his capacity should then be assessed. Unless Paul specifies this, once the LPA is registered, Roberta can act even when Paul has capacity to make the decision himself.

- Add a condition that Roberta must act or not act in a particular way.
- Add a condition that Roberta must keep accounts and submit them to someone Paul chooses.
- Limit the powers of Roberta; for example, include a restriction that Roberta cannot make decisions on investing Paul's savings without professional advice.

With regard to Paul and Roberta's overseas property, for example the rental properties in Brazil, he should take legal advice in that country with a view to signing an equivalent document, if so required by Brazilian law.

On a practical level Paul could also make Roberta a joint signatory on his accounts and place his assets into joint ownership

2.3.3 More generally, with a shared wish to keep matters “simple”, what estate and succession planning opportunities should Roberta and Paul consider?

In summary of the above, Roberta and Paul, and parents where relevant, should:

1) Take advice and prepare separate wills for each jurisdiction in which they hold assets;
2) Take advice and prepare separate LPAs or equivalents in each jurisdiction in which they hold assets;
3) Structure their assets such that valuable assets are left outside the UK IHT net;
4) Take life insurance to cover any UK IHT liability and organise for the proceeds to be paid in a tax efficient manner; and
5) For income tax and CGT purposes they should also structure their investments such that they can take advantage effectively of the remittance basis of taxation available to non UK-domiciled taxpayers. As outlined at 1.3.1, this basis allows a taxpayer to only be subject to income tax and CGT on income and gains realised in the UK or remitted to the UK. Offshore income and gains can therefore be shielded from UK taxation.

3. QUESTIONS FOR CASE STUDY B

3.1 Case Study B: Bruce and Megan

Bruce, who has been given your contact details from an AIJA member, comes to see you for advice. Bruce gives you his background:

- 30 years old;
- Australian resident, national (and, if relevant to your country) "domiciled in a state of Australia";
- Single;
- Commodities trader;
- Family wealth from mining opals;
- Bruce has an Aus$15 M portfolio in Switzerland;
- Bruce also has shares in family mining company in Australia.

Bruce is looking to move to your country for 3-5 years.

3.2 Pre-arrival planning

3.2.1 What pre-arrival tax planning opportunities would you advise?

Clean Capital: Bruce could place a sum of cash in a new account before he becomes resident: a "clean capital" account. This money can then be brought to the UK without generating income tax or capital gains tax – as only income and gains generated <u>after</u> he becomes resident are taxable if they are remitted to the UK. Income or gains made before an individual becomes UK resident are treated as "clean capital".

Assuming that Bruce wishes to be taxed on the remittance basis, the primary objective will be to minimise remittances of income or proceeds of capital gains to the UK so that, so far as possible, only "clean capital" is remitted.

The concept of remittance is very widely interpreted and includes, for instance, paying for goods in the UK with credit cards funded by overseas accounts or (in most cases) bringing to the UK items acquired overseas.

Before coming to the UK, Bruce therefore needs to estimate the value of funds he will require to maintain himself while in the UK and put these funds aside in a sterling account outside of the UK ("the Capital

Account"). Income generated from the Capital Account should be mandated directly into a separate account ("the Income Account") so that the Capital Account remains untainted. Remittances from the Capital Account to the UK will not be taxable.

The Capital Account should not be used to generate capital gains. This is because, while the income can be kept segregated from the clean capital, the capital gains element of the proceeds of sale cannot. (This is why the account should be held in sterling; it avoids currency gains.) There would be nothing to stop Bruce from using other funds to generate capital gains, so long as the proceeds are not remitted to the UK.

Excluded property trust: The inheritance tax rules provide that property situated outside the UK is excluded property (i.e. not subject to inheritance tax) if the person beneficially entitled to it (broadly speaking, the owner) is an individual domiciled outside the UK. The rules also provide that property situated outside the UK that is settled on trust is excluded property if the settlor was domiciled outside the UK for inheritance tax purposes when he made the settlement.

Trust of UK situated property or trusts settled by persons domiciled in the UK are subject to an immediate inheritance tax charge of 20% over the nil rate band of £325,000, periodic charges (inheritance tax charges at a maximum rate of 6% every 10 years) and exit charges when capital leaves the trust.

For as long as Bruce remains non-domiciled or non-deemed domiciled, he can settle non-UK assets on trust, and that trust will be an excluded property trust for inheritance tax purposes (and therefore will avoid the tax charges outlined above). It will remain outside the inheritance tax net even if he subsequently becomes UK domiciled.

3.2.2 What are Bruce's tax, residence or other reporting obligations upon becoming resident in your country?

Bruce will have tax reporting obligations when he becomes resident in the UK. See 1.3.1 for an analysis of Bruce's liability to income tax and capital gains tax once he becomes resident, and (as he is a resident non-domiciliary) details of the remittance basis of tax, which he will need to claim.

In general, residence will not affect his inheritance tax position until he has been resident for 17 out of the previous 20 tax years at which point he will become "deemed domiciled."

When you next meet Bruce 3 years later, life is looking good. He has met fellow Australian Kylie and they are expecting their first child (Jason). Bruce is looking to start his own commodities business and wants to know whether he can invest part of his foreign income or gains in the target company.

Bruce also tells you that his grandfather died in 2011 and that he (together with his 3 cousins) is a beneficiary of a trust structure with a bank account in a sun kissed jurisdiction. The bank account has not been reported in his tax return and he now wonders whether it should have been.

3.3 **Lifetime matters**

3.3.1 With respect to the commodities business, how would you advise Bruce in relation to:

(a) the most tax efficient way to make the inward investment?

To avoid a UK gain on disposal, Bruce should not hold the shares in the company directly. If he does hold the shares directly, he should consider breaking his residence and disposing of the business once non-resident to avoid a gain.

Business Investment Relief: if Bruce is a remittance basis taxpayer, he can bring overseas income or gains to the UK and invest it in a particular type of private limited company <u>free of UK tax</u> (it would usually be taxed as a remittance). The company must be one of 3 eligible types:

- an "eligible trading company" (substantially all of whose activities are carrying on or preparing to carry on a commercial trade, including renting property, or carrying on research and development);

- an "eligible holding company" (which holds more than 51% of the shares in at least one eligible trading company); or

- an "eligible stakeholder company" (which exists for the purpose of investing in eligible trading companies).

The target company must use the investment in a qualifying trade within two years. Funds need to be invested within 45 days of the remittance to qualify for relief. If the investment ceases to qualify or is disposed of, the income and gains which were originally remitted to the UK must be taken offshore or re-invested in an eligible company within 45 days otherwise they will become chargeable to UK tax.

There are other tax reliefs in place for investors who provide equity finance by purchasing new shares in companies, such as the Enterprise Investment Scheme (designed to help smaller higher-risk trading companies) and the Seed Enterprise Investment Scheme (aimed at small, early-stage companies), but a commodities business does not qualify for relief under these schemes.

(b) any planning and structuring opportunities (including the use of double tax treaties) that Bruce should consider in order to minimise any tax leakage?

There is a UK/Australia Double Taxation Treaty (entered into force 17 December 2003) e.g. consider income tax and location of "permanent establishment" of business.

Bruce should also consider settling the business on an excluded property trust before he becomes deemed domiciled, so that it is excluded from inheritance tax. As outlined at 3.2.1, this trust must meet 2 conditions:

- the trust does not own UK assets; and
- when the settlor creates the trust or adds funds to it he is neither domiciled nor deemed domiciled in the UK for inheritance tax purposes.

(c) eventually exiting the business. In particular, are there any structuring or other opportunities that Bruce should consider either at the inception of the business or in the run-up to an exit?

<u>Exit point</u> (assuming Bruce owns some or all of the shares in the business directly)

Entrepreneurs' Relief: this relief will only apply if it is a personal trading company. Bruce must own at least 5% of the shares in the business for a year, and be a director, partner or employee of the business. The relief reduces capital gains tax to 10%, subject to a lifetime limit of £10 million.

Business Property Relief: this relief will not operate immediately if Bruce makes a lifetime sale, as it reduces inheritance tax liability, but it is important to note that it cannot be claimed unless the business property was owned as such by Bruce throughout the two years immediately before the transfer, which may affect the timing of the sale. The relief reduces the liability to inheritance tax, and is either 50% or 100%.

3.3.2 As to the unreported bank account:

(a) what would you advise Bruce?

As a UK resident beneficiary, Bruce must make full disclosure of income and capital gains he receives. Under the anti-avoidance legislation affecting trusts, Bruce may be taxed on any income earned in the trust structure if it can be "matched" to a benefit that he receives from the trust (such as rent-free occupation of a property). He may also be taxed on gains made on UK or non-UK assets within the trust if he receives a benefit from the trust in the UK. Again, this includes living in UK trust property rent-free. Benefits are matched first of all to the trust's income (the income tax rate being higher than the capital gains tax rate).

(b) what are the Trustee's reporting obligations in your country?

The trustees of a UK trust are responsible for making sure any income or gains are declared and tax is paid (if any) in the UK, unless it is a bare trust.

The trust will be non-resident if either all the trustees are non-UK resident, or the trustees are a mixture of UK and non-UK resident and the settlor of the trust was non-UK resident and non-UK domiciled at the time of the settlement. If the trust is non-resident then the trustees will not have reporting obligations.

Tragically, some years later still resident - and wealthy - in your country, Bruce dies without making a Will.

3.4 **Succession law**

3.4.1 Do Kylie and Jason have a financial claim against Bruce's estate?

As Kylie and Bruce were not married, under the current UK intestacy rules, his sole child Jason would inherit all of Bruce's immovable property. This would not include property which is jointly owned (which would pass by survivorship) or trust property etc.

Succession to Bruce's movables would be governed by the law of the Australian territory in which Bruce had his domicile, and therefore would be governed by the Australian rules of inheritance on an intestacy and/or any family provision claim which could potentially be brought under the Australian regime.

Assuming Bruce was domiciled in Australia, Kylie will not be able to bring a claim to his estate under the Inheritance (Provision for Family and Dependents) Act 1975 (the "I(PFD)A 1975"). The Inheritance and Trustees' Powers Bill 2013-14 which is currently before the UK Parliament originally contained provisions allowing applicants who are "habitually resident" in the UK to bring claims. However, this additional ground of jurisdiction was removed on 16 December 2013 by the Special Public Bill Committee, on the basis that there had been too much disagreement about this amendment to the I(PFD)A 1975.

If Bruce had been domiciled in England and Wales, assuming Kylie had been living with Bruce for the 2 years prior to his death as his wife or was being maintained by him, she could make a claim under the I(PFD)A 1975, on the basis that the disposition of Bruce's estate did not make reasonable financial provision for her maintenance. Any award made to her would be made from Bruce's net estate.

What inheritance or estate tax (if any) is to be paid and by whom? What steps could Bruce and Kylie have taken in order to mitigate/reduce this tax charge?

As Bruce is domiciled outside the UK, UK inheritance tax is only payable on his UK assets. Inheritance tax must be paid within six months of Bruce's death by his administrators. The money is usually paid from the estate. Assuming no reliefs apply, tax will be due on any amount above the nil rate tax band of £325,000. The current rate of inheritance tax is 40%.

If the shares Bruce held in the family mining company in Australia were subject to inheritance tax (i.e. if he was UK domiciled), Business Property Relief might apply. This relief can provide 100% exemption from inheritance tax. The shares must be unquoted (i.e. not listed on a recognised stock exchange) and generally must have been owned by Bruce throughout the two years prior to his death.

In order to mitigate/reduce the inheritance tax charge, Bruce and Kylie could have got married. Bruce could then have left Kylie his UK property and it would have been covered by 100% spouse exemption. This exemption is available where both spouses are non-UK domiciled, or both spouses are UK domiciled. If there is a "domicile mis-match" between spouses, and the assets are passing from the UK domiciled spouse to the non-UK domiciled spouse, then the spouse exemption is currently limited to £325,000 (although it is now possible for the non-domiciled spouse to elect to be treated as domiciled for UK inheritance tax purposes).

Alternatively, they could have invested in additional assets which qualify for Business, Woodland, Heritage and Farm Relief, which can provide 100% exemption. Bruce and Kylie could also have made lifetime gifts, as gifts made at least 7 years before death are exempt from inheritance tax. They could also have used the less significant but useful lifetime reliefs e.g. the annual exemption means that an individual can make gifts of up to £3,000 per tax year free from inheritance tax.

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