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The new necessity to make a declaration of succession for the nationals of the North African states with a habitual residence in Europe

The following explanations shall inform you, the nationals of Morocco, Algeria, Tunisia, Libya and Egypt, who reside in a country of the European Union, about a change in the European law concerning all cases of hereditary succession - a change which requires immediate attention and action.

Under the old German law, the succession of a North African deceased person was regulated in Art. 25 of the Introductory Law of the Civil Code. Usually, the succession was governed by the law of the state, in which at the time of death the deceased person was a national. Thus, the succession of a deceased person of Moroccan, Algerian, Tunisian, Libyan or Egyptian nationality was in principle governed by the law of the home state, viz. Moroccan, Algerian, Tunisian, Libyan, or, respectively, Egyptian law; in these countries, the law of succession is usually a religious or religiously inspired body of law, so that for Muslims Islamic law is applicable. It was without consequence where the person met his death, where it was buried, or where it was resident.

This has now changed under a regulation of European law. These regulations have immediate effect, they do not need a transposition into the national law of the member states. Now, the law is the Regulation (EU) No. 650/2012 of the European Parliament and the Council of July 4, 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (underlining added) (EU-OJ 2012 L 201/107 of July 27, 2012).

The new Regulation governs all deaths in the European Union (with the exceptions of UK, Ireland and Denmark) from August 17, 2015 onwards. It also governs those cases where a will has already been prepared (see Art. 83).

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According to Art. 21 (1) of the Regulation, all questions of succession shall be governed by the law of the state, where at the time of death the deceased person has had its habitual residence. In consequence, the succession after a deceased North African national will be governed by the law of his habitual residence. So neither the place of death nor the nationality nor the religious affiliation is relevant. If a Moroccan, Algerian, Tunisian, Libyan, or Egyptian dies, the member states of the European Union will apply the law of the habitual residence. If the habitual residence is in e.g. Germany, Italy, or France, German, Italian, or, respectively, French law will be applied and will govern all aspects of the succession. The law of the home state will no longer be applied, and this is especially true for Islamic law.

The notion of habitual residence is quite undetermined. The considerations for the Regulation in its preamble say the following:

“(23) In view of the increasing mobility of citizens ... this Regulation should provide that the general connecting factor for the purposes of determining both jurisdiction and the applicable law should be the habitual residence of the deceased at the time of death. In order to determine the habitual residence, the authority dealing with the succession should make an overall assessment of the circumstances of the life of the deceased during the years preceding his death and at the time of his death, taking into account all relevant factual elements, in particular the duration and regularity of the deceased’s presence in the State concerned and the conditions and reasons for that presence. The habitual residence thus determined should reveal a close and stable connection with the State concerned taking into account the specific aims of this Regulation.

(24) In certain cases, the deceased’s habitual residence may prove complex. Such a case may arise, in particular, where the deceased for professional or economic reasons had gone to live abroad to work there, sometimes for a long time, but had maintained a close and stable connection with his State of origin. In such a case, the deceased could, depending on the circumstances of the case, be considered still to have his habitual residence in his State of origin in which the centre of interests of his family and his social life was located. ...”

So one may accept that students and migrant or guest workers with North African nationality maintain their habitual residence in the state of origin, even if they learn or work in a EU member state. But the result will be different if in the member state, in which the deceased was living at the time of death, the deceased has acquired real estate or an unlimited residence permit, or has got married and stays on, or is living there with his spouse and maybe children. It should also be considered that usually it will be difficult for the heirs to prove circumstances hindering the assumption of a habitual residence.

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There are just two exceptions to this general rule that the habitual residence is governing the succession and its settlement.

A narrow exception is provided in Art. 21 (2): "Where, by the way of exception, it is clear from all the circumstances of the case that at the time of death, the deceased was manifestly more closely connected with a State other than the State whose law would be applicable under paragraph 1, the law applicable to the succession shall be the law of that other State." This is not a general exception for Muslims. Rather, very special circumstances must be proven, like e.g. the detachment by an authority or a company.

Art. 22 (1) para 1, (2) allows for a choice of law: "A person may choose as the law to govern his succession as a whole the law of the State whose nationality he possesses at the time of making the choice or at the time of death. ... The choice shall be made expressly in a declaration in the form of a disposition of property upon death or shall be demonstrated by the terms of such a disposition." This opens the route for a choice of the law of succession in a will, which has to observe all requirements of the state of origin, and thus for a choice of the Islamic law of succession. It is mandatory to make a clear and unequivocal determination of the chosen law of succession so that the authorities and the courts will be bound accordingly.

However, it will be necessary to observe special restrictions and recommendations under the law of the state of origin as well as Islamic law, the procedural rules, and the reservation of *ordre public*, in order to have a valid choice of law and to give effect to the dispositions of the deceased.

This effort is recommended for all North African expatriates, unless they want their succession governed by the law of the State of habitual residence. There is some urgency to it in view of the application of the new Regulation to all deaths occurring on August 17, 2015 or later.

A note behind: Please also be reminded that it is recommendable for all North African expatriates to install a living will as a matter of precaution for the case of accident or illness in order to ensure at least that the next of kin will be duly informed and may take action.