Effective August 17th 2015, the new European Regulation on Succession Law (EU Succession Regulation, Brussels IV) will apply in the Member States and deals with all civil-law aspects of succession to the estate of a deceased person. The Regulation does not, however, harmonise the law of successions in Member States; rather, for successions with cross-border implications, it determines which Member State law shall apply to the succession and which Member State has jurisdiction to rule over the succession.

I. Background
Until now, the application of private international law and international procedural law to successions was a matter reserved for the individual Member States. Legal counsel and clients were confronted with a multitude of complex and largely intransparent laws, which rendered simple Europe-wide estate planning unnecessarily complicated. The stated aim of the EU lawmakers is to remove these obstacles, which hinder both the free movement of persons in the Union as well as the proper functioning of the internal market, by introducing the new Succession Regulation and thus enabling the citizens of the European area of justice to easily plan their succession in advance and providing more legal certainty for legal practitioners.

The fiscal implications of succession will thus remain a matter of national Member State law.

II. Applicable Law
For future estate planning in the European area, the most important provisions of the Regulation are without doubt those that determine which law shall apply to a succession when the deceased died in another EU country.

1. From now on: The law of the place of habitual residence as the generally applicable law
If the deceased did not specify a choice of law, Art. 21 (1) Succession Regulation sets forth that the law applicable to the succession as a whole shall be the law of the State in which the deceased had his habitual residence at the time of death.

At the same time, this constitutes the most significant change with regard to currently applicable German law. Until now, it provided that the applicable law was that of the State whose nationality the deceased possessed at the time of death. The Succession Regulation parts with the so-called nationality principle traditionally found in many European legal orders, introducing in its stead the so-called residence principle. The determination of habitual residence depends in particular on its duration and regularity. However, other circumstances such as a person’s family and social ties at the place of residence can be relevant. In consequence, from now on, a permanent move to another country by the future deceased will entail not only a change of scene, but also a “change of law” with
regard to succession. The latter change will certainly be less obvious to the persons concerned than was a change of nationality. Thus, if a German national were to move, for example, to Majorca to spend his remaining years there, from now on Spanish succession law would apply. Up until now, German succession law would have applied.

There is one exception to this rule: if, at the time of death, the deceased was *manifestly more closely* connected with a State other than that of his habitual residence, then the law of this State may be applied to his succession. However, in effect the term ‘manifestly closer connection’ is no easier to define than that of ‘habitual residence’.

For persons wishing to plan their succession with certainty now and who cannot exclude the possibility, for example, of someday permanently moving abroad to a holiday residence, it is recommended to make use of the choice of law option provided by the Regulation, by stating which law shall apply in their testamentary dispositions, in order to avoid the complications and uncertainty discussed above.

### 2. Choice of law in favour of national law

Every citizen of a State in which the new Succession Regulation applies, has the option of choosing the law of the State of his nationality at the time of death, his so-called *national law*, as the law that shall apply to his succession. The choice of law can thus be used to deliberately depart from the *residence principle* mentioned above. Persons having *multiple nationalities* at the time of death are permitted to choose from any of the Member State laws of which they were nationals.

The choice must be made expressly in a disposition of property upon death or can be implied in the terms of such a disposition. Even if the future deceased does not make a disposition of property upon death and leaves only an intestate succession, he may, by means of a separate declaration, set down a choice of law favouring his national law.

It must be noted that a choice of law pursuant to Art. 22 Succession Regulation, as well as the determination of the applicable law based on a person’s habitual residence, always governs the whole succession (applying the so-called *single scheme* principle). Thus, as a general rule, a fragmentation of the succession cannot take place. A choice of law, too, under the existing German provision in Art. 25 (2) EGBGB (Introductory Act to the German Civil Code), which is limited to real estate located within Germany, will henceforth be invalid. Where necessary, currently existing wills and choice of law declarations should be modified effective 17 August 2015. If an existing choice of law already meets the conditions of the Succession Regulation, no changes are required (Art. 83 (4) Succession Regulation).

### II. Jurisdiction as well as the Recognition and Enforcement of Decisions

The *residence principle* has also asserted itself at the European level with regard to determining which court shall have jurisdiction over the succession. Pursuant to Art. 4 Succession Regulation, the courts of the Member State in which the deceased had his habitual residence at the time of death shall have jurisdiction. In case the deceased did not make a choice of law, there is an alignment between jurisdiction and applicable law. This has the effect, definitely intended by the lawmakers, that in the majority of cases the courts having jurisdiction will be applying the national law which is most familiar to them. This usually offers the parties the advantage of more cost-efficient and less burdensome proceedings. For choice-of-law cases, Art. 5 (1) Succession Regulation provides the parties involved the option of making a corresponding choice-of-court agreement. In accordance with this, the heirs of a deceased who has made a choice of law may agree that the court which shall have jurisdiction over the succession shall be the court of the Member State whose law was chosen by the deceased. In his testamentary disposition, the deceased cannot (unilaterally) determine which jurisdiction shall apply.

The jurisdiction of the probate courts at the deceased’s last habitual residence can also impact the binding effect of agreements as to succession and joint wills. This binding effect can potentially be undone by the partner (to an agreement) moving abroad. This is particularly true where a foreign legal order does not recognise that a previous agreement as to succession or a previous joint will can be binding, and thus does not have any procedural provisions with regard to the enforcement of such a binding effect. An agreement as to succession or a joint will concluded under German law may thus remain unenforced, if one of the partners (to the agreement) makes a will at his habitual residence in another State at a later date, unless other measures to protect the binding effect are undertaken.
A decision in matters of succession handed down by a court of another EU Member State must be, as is now common practice in the legal areas touched upon by European Regulations, recognised without any special procedure and enforced by every other Member State (Art. 39 Succession Regulation).

III. The European Certificate of Succession (ECS)
A further instrument provided by the Succession Regulation in order to facilitate the cross-border settling of successions is the European Certificate of Succession (ECS). The ECS shall be issued upon application to persons who need to invoke their status, or exercise their rights, as heirs, legatees having direct rights in the succession, executors of wills or administrators of the estate. It stands aside the German ‘Erb­schein’ (certificate of inheritance) which will remain in effect, as uniform proof of inheritance recognised throughout the EU. The ECS can considerably simplify the enforcement of claims and rights in a succession matter in other Member States. Protracted recognition proceedings and costly official translations of national certificates of inheritance can thus be avoided. The certificate shall be issued primarily by the authorities of the State in which the deceased had his habitual residence at the time of death.

IV. Practical Implications
The number of changes of applicable law in case of death which go unnoticed will increase substantially due to the extensive introduction of the residence principle by the Succession Regulation. The innovations discussed above will be of considerable importance in particular for two classes of persons: On the one hand, one might consider persons who, due to their work, also live in another Member State and thus have, strictly speaking, more than one habitual residence. On the other hand, individuals who wish to reside entirely or at least for many months of the year in another Member State will be affected in particular. In the first case, the applicable law will change; in the second case, a clear determination of the habitual residence for the purpose of defining the law applicable to the succession within the framework of the Succession Regulation will often be impossible, thus resulting in legal uncertainty. In order to achieve certainty in estate planning and to forestall any potential obstacles, it is recommended that in cases such as these in particular, one make timely use of the choice-of-law option provided by the Succession Regulation in one’s will or agreement as to succession. Also for persons not wanting to renounce the possibly more favourable provisions of their national succession law, such as, for example, a more liberal compulsory portion, a choice of law is recommendable. For under the new provisions of the Succession Regulation, the decision to permanently spend one’s retirement in another Member State will frequently result in an unexpected change of applicable law, which will most likely only come to light at the opening of a succession, which is to say, once it is “too late”. We recommend that you examine your will to this effect, and verify whether it contains a choice of law. If it does not, and you regularly reside abroad, you should consider the possibility of adding a choice of law. Should you want German succession law to apply and remain applicable in any case, it is recommended that a choice of law be stipulated accordingly.
This client information only provides an indicative summary of the topic addressed. It does not replace the obtaining of legal advice. For questions regarding this client information and for advice, please contact:

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