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More Freedom to Dispose of Property by Will from 1st of January 2023

By Eric Alves de Souza

The long-awaited revision of Swiss inheritance law is about to come into force. It includes a key measure: the reduction and simplification of the compulsory portions of legal heirs. Other adjustments are included in this first legislative package.

The Parliament's focus is now on facilitating the transfer of family businesses.

The main features of the forthcoming changes are as follows.

1) Reduction and elimination of the compulsory portion of certain legal heirs

Swiss inheritance law is a compromise between the freedom of disposal typical of Roman law and the protection of the clan characteristic of old Germanic law. Thus, the system of compulsory portions guarantees the legal heirs - family members - a certain share of the estate, thus limiting the freedom of everyone to dispose of his or her property by will. The amendments that will come into force weaken these restrictions and simplify the system :

- **The compulsory portion of the father and mother disappears.**
- **The compulsory portion for children is reduced from 75% to 50% of their legal share.**

At the same time, the **devisable portion** - what can be freely disposed of - increases: if one dies leaving a surviving spouse (or registered partner ¹) and descendants, it is **50%** of one's property; if one leaves a spouse **or** descendants, the available share is also **50%**; if one dies without children but still having a father or mother sharing the estate with one's spouse, the available share is 5/8 of the estate; finally, the freedom to dispose of one's property is complete if the only heirs are one's father or mother.

☞ The system of compulsory portions should not be confused with the legal rights of inheritance of the heirs in the absence of a will. In other words, to allocate the devisable portion by derogating from the legal rules of distribution, one must expressly provide for in testamentary dispositions.

2) The surviving spouse or registered partner

The surviving spouse or registered partner is not a heir like the others. Through the rules coming into force, his or her situation is modified in several ways:

¹ In the following explanations, the rights of the registered partner are identical to those of the spouse.

- **In the case of a usufruct in favour of the surviving spouse or registered partner, the devisable portion increases** from 25% to 50% of the estate; thus, if the surviving spouse's situation is not to be affected at the time of death, he or she can be granted the usufruct of half of the estate and the other half can be reserved for him or her.
 - ☞ However, the usufruct in favour of the spouse or registered partner may only encumber the share of the estate devolving to their **common children**.
- **The consequences of a divorce are advanced at the time of the commencement of the proceedings** (provided that the proceedings have been initiated by mutual agreement or after two years of separation). Therefore, **if the death occurs at that time, the surviving spouse or registered partner loses his or her privileges**: his or her reserve (50% of his or her entitlement), and any benefits resulting from testamentary dispositions in his or her favour or from gifts provided for in a marriage contract.
 - ☞ The spouse or registered partner, however, **remains a legal heir** until the end of the divorce proceedings. If one does not wish one's spouse or registered partner to inherit in the event of divorce proceedings or dissolution of the partnership, one should make provision for this in one's will.

3) The testamentary pact will be more binding

A testamentary pact is a contract that a person concludes with his or her heirs in order to settle the estate : unlike a will, the pact cannot be cancelled freely.

The amendments to the Civil Code that are about to come into force further strengthen the position of the beneficiaries of a pact :

- Testamentary dispositions or gifts *inter vivos* (donations) **which exceed the customary gifts** may be challenged by the beneficiaries unless **they have been reserved** in the pact.
 - ☞ It will be prudent, when concluding an inheritance agreement, to define the types of *inter vivos* gifts or testamentary dispositions that will remain admissible despite the agreement (in particular the circle of recipients of such largesse); similarly, the notion of gifts of use may be specified (for example with a value threshold).

4) The claim for reduction of the heirs entitled to a compulsory portion

This action allows heirs entitled to a compulsory portion (i.e. descendants and the surviving spouse or registered partner) who receive less than their compulsory portion to demand the abatement of testamentary dispositions and *inter vivos* gifts, in a certain order and by bringing them back into the estate. **The revision broadens the scope of this action** and clarifies a number of issues that were controversial.

- ☞ In particular, it should be noted that **assets of tied individual private pension schemes (tax-saving pillar 3a)** are subject to the claim for reduction, at their surrender value at the time of death. However, in order not to expose the insurance companies concerned to the risk of litigation, it is provided that they must nevertheless pay the benefits to the beneficiaries in all cases.

5) What happens on 1st of January 2023 ?

- The former testamentary dispositions remain **valid**.

- It is **the date of death that triggers** the application of the new rules.
- Therefore, it is advisable to **review the testamentary arrangements that have been made**. In particular:
 - ☞ If, in a will which has been drawn up before 1st of January 2023, the children's share is reduced "to the compulsory portion" (a common wording in a will), it is best to rewrite the will to make it clear that they will now receive only 50%, not 75%, of their legal share.
 - ☞ The testamentary pact, which is an instrument often used to settle one's estate before one's death, now considerably reduces the possibility of making gifts afterwards: it is better to review it in order to create more possibilities.

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The transfer of family businesses: a project still far from being completed

The death of the owner of a business can threaten its existence. **Inheritance rules often require the business to be divided** among the heirs (**or sold** to a third party), unless the deceased has other assets that can compensate for the value of the business.

The increase in the devisable portion that comes into effect on 1st of January 2023 will already allow an entrepreneur to allocate a larger share to the surviving spouse or descendant(s) to whom he or she intends to bequeath the family business.

In the wake of the first reform of the inheritance law, the government has drafted specific succession rules for this situation, similar to the long-standing legal framework for farms where a similar problem exists. This long-awaited second revision of inheritance law was submitted to the Federal Parliament on **10th of June 2022**². In summary, it provides for :

- The right of the heirs to the **full allocation of a business** (or to a controlling interest) if the deceased did not make provision for this.
- The possibility for the transferee(s) to obtain a **deferral of the payment of cash adjustments** to the other heirs.
- In the event of a transfer of the family business during the entrepreneur's lifetime, the **entrepreneurial risk** assumed by the transferee will be taken into account in the calculation of the value of the gift on succession.

In a curious twist, this project, if adopted, will impose a new set of rules when the inheritance of a family business is at stake. The road to hell is paved with good intentions !

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² The project has not yet been processed at the time of writing.