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The newsletter of aquiver

"The right to be lazy"

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If, in the old days, one were to arrive at Geneva airport, they would no doubt come across a huge poster in the terminal, advertising that Napoléon Bonaparte was one of the valued customers of Patek Philippe, the world's leading watchmaker; what is equally true is that Mr. Bonaparte had a diverse collection of Breguet watches. Clearly, he was an aficionado of haute horlogerie.

His eventual successor, Emanuel Macron seems to also have an affinity for timepieces, as the social media have discovered (if not exploited) during Mr. Macron's television appearance over his fiercely opposed reforms in the pension system. Mr. Macron was vehemently criticised not just for wearing an expensive watch during the interview but for supposedly removing it while his hands were under the table. This was considered as adding insult to injury and perceived to be fuelling the belief that Mr. Macron is "out of touch with the ordinary French public" and being a "president of the rich". The fact that his Bell & Ross watch was 30 (that is, "thirty") times less expensive than originally outcried, did little to settle the public's ill sentiment.

what's on today's edition?

The clarification did even less in helping to appease the rioters in France, whose zeal in demonstrating for their right to retire at the age of 62 has come as another stark reminder that the heart of social Europe lies in the country whose revolution more than two centuries ago sparked the birth of the middle class. It came to also remind us that it was a Frenchman indeed, Paul Lafargue, who argued that one "…must accustom itself to working but three hours a day, reserving the rest of the day and night for leisure and feasting."[1] A good number of friends of mine could not agree more.

However. And this is a "however" that should have been spelled in capitals. It is not clear whether back in 1883, when Mr Lafargue was proclaiming his dogma, the world was in such dire demographic straits. In the European Union, the ratio of the number of elderly people (aged 65 years and over) compared to the number of people of working age (15-64 years) is now 33% (2017: 27%); it does not take a rocket scientist to do the math. In the United States of America, the social security system is predicted to be unable to make payouts at the present level after 2034. Not a terribly rosy outlook for a system that, when inaugurated in 1935, it boasted approximately 45 workers to every single beneficiary. Adding to the mixture the disinclination of workers to come back to work after covid, the increasing healthcare costs and of course the mighty inflation (still at 8.5% in the Eurozone in January), makes the situation more precarious than ever before. Raising the retirement age therefore is not only an option, it is an one-way street from which no country will double back. Even if it means cutting back on luxuries like the right to laziness. And it does not even preclude the possibility of rising social insurance taxes which, no doubt, will follow.

Have a pleasant reading

Pericles

[1] The Right to Be Lazy (French: Le Droit à la paresse). Paul Lafargue (1883)

The EU adds BVI, Costa Rica, Marshall Islands and Russia to its list of non-cooperative jurisdictions

On 14 February 2023, the European Council announced that the British Virgin Islands ("BVI"), Costa Rica, the Marshall Islands, and Russia will be added to the list of the European Union ("EU") of non-cooperative jurisdictions for tax purposes ("EU List"). What a gift for Valentine's Day…

The EU List, now incorporating 16 jurisdictions, includes countries that 'either have not engaged in a constructive dialogue with the EU on tax governance or have failed to deliver on their commitments to implement the necessary reforms'. The criteria for 'tax good governance' include a fair taxation system, transparency on tax matters and implementation of internationally-accepted standards aimed in preventing the erosion of the tax base and the shifting of profits. The criteria also impose the onus on a jurisdiction to have attained a 'largely compliant' rating by the Global Forum with respect to both the Common Reporting Standard for automatic exchange of information and the Standard on the Exchange Of Information On Request.

With regards to the BVI, the Global Forum has recognised that the existence of exceptional circumstances (including the legislative updates that the jurisdiction introduced in 2023) justify a supplementary investigation. These legislative updates, including the BVI Business Companies (Amendment) Act 2022 and BVI Business Companies (Amendment) Regulations 2022, are focused on continuous compliance with best international practices and on meeting the requirements set out by the Global Forum as part of its Peer Review Process. By way of an example, these reforms introduced by the BVI abolish the use of bearer shares. If, subsequent to this supplementary review, the BVI is upgraded by the Global Forum to its previous status, then the jurisdiction should be removed from the EU List.

As previously mentioned, Costa Rica, the Marshall Islands and Russia have also been added to the EU List. Including Russia, according to the EU, was because the new legislation that the country adopted in 2022 contravened its commitment to address the harmful aspects of a special regime for international holding companies.

There are no sanctions resulting from the inclusion in the EU List although member states may seek to apply administrative measures against the listed jurisdictions. These measures include enhanced scrutiny and monitoring of transactions, disallowance of expenses in the tax computation, application of controlled foreign corporation status, withholding tax measures and limitation of the participation exemption on shareholder dividends.

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European Court of Justice rules on Beneficial Owner Registers

In a judgment dated 22 November 2022, the European Court of Justice ("ECJ") has decided that unconditional access of the public to the beneficial owner registers ("BO registers") of European Union ("EU") member states should no longer be allowed. The ECJ found that this would be in contravention to the Charter of Fundamental Rights of the EU. Well, it was about time…

Under the amendment to the Fourth Anti-Money Laundering Directive ("AMLD") introduced by the Fifth AMLD in 2018, the member states of the EU were required to make the BO registers fully accessible to the general public. In a clearly reasoned judgment, the ECJ took the view that unhindered access to the public constitutes a serious interference with the fundamental rights to respect for private life and to the protection of personal data enshrined in the aforementioned Charter. The ECJ recognised that the objective of the AMLDs was to combat money laundering, terrorist financing and so on; however, it did note that the interference entailed by the amendment of the Fifth AMLD is neither proportionate to the objective pursued nor is it limited to what is absolutely necessary to achieve this objective.

It would appear that the effect of the judgment is that the provisions of the Fourth AMLD now apply which necessitate that a "legitimate interest" needs to be proven in order for access to the BO registers to be given. Interestingly, the ECJ commented that the fact that the legitimate interest concept may be difficult to define was not a reason to dispel it. There is a suggestion, therefore, in the judgment that care needs to be taken to delineate that concept carefully when applying it.

However, it is also clear that the ECJ considers the prevention of money laundering and terrorist financing as an objective of general interest and one that would justify a certain level of interference with fundamental rights of privacy and protection of personal data.

Needless to point out that the EU member states have immediately restricted access to their BO registers for companies until further clarity is provided and, in particular, whether the forthcoming AMLDs may be suitably worded to extend the access of the public in instances beyond those which entail a legitimate interest; whatever this "legitimate interest" will eventually be interpreted to be.

Plastics, the Wang family and the trustees rights to add beneficiaries

Wang Yung-ching was an Asian entrepreneur and business pioneer who, along his brother (Wang Yung-tsai) founded a business empire in Taiwan. In spite of having no formal higher education, he came to establish one of Taiwan's foremost conglomerates, the Formosa Plastics Group ("FPG"), in heart of which lies the petrochemical business which primarily produces PVC resins and other intermediate plastic products.

Succession planning

As part of their succession planning, the two brothers established a number of trusts, amongst which were the Global Resource Trust ("GRT") and the Wang Family Trust ("WFT"). The GRT was a discretionary trust for the benefit of the children and remoter descendants of the two Wang brothers. The WFT was a purpose trust for purposes which included philanthropic causes as well as the perpetuation of FPG; being a purpose trust, it did not (and could not) confer any benefit to individual members of the family.

Change of beneficiaries

In 2005, the trustees of the GRT added the WFT as a beneficiary and distributed all of the trust assets to it. Stating the obvious, these assets could no longer benefit individual family members, a conscious decision based on the belief that the individual members of the family were well-catered for in the settlors' wills. Dr Winston Wong, one of the beneficiaries of the GRT, challenged the monumental actions of the trustees in the Supreme Court of Bermuda, which ruled in his favour. This favourable ruling was then overturned by the Court of Appeal of Bermuda. Dr Wong then appealed to the Judicial Committee of the Privy Council, the final court of appeal for Bermuda.

Appeal to the Privy Council

The appellants argued to the Privy Council that the Court of Appeal of Bermuda did not correctly assess the power of the trustees of the GRT to add or remove beneficiaries. They contended that the court should establish the intended purpose of the original endowment, which in this case was plainly to benefit members of the Wang family and not WFT (the purpose trust). The trustees, on the other hand, argued that the trust deed itself had given them a wide-ranging power to add or remove beneficiaries. Such trustee power clauses are commonly used in, and inherently linked with the philosophy of, drafting such deeds for discretionary trusts in order to afford maximum flexibility.

Judgment of the Privy Council

The Privy Court's verdict sided with Dr Wong and the rest of the appellants in that the transfer of the assets to the WFT went against the notion that the trust power should be utilised for the purpose for which is has been granted. Although there is no overriding principle that all powers in any trust with individual beneficiaries must be exercised in the interests of the beneficiaries, it is necessary that the trustees act within the scope of the intention ("proper purpose"), for which their powers are given; the trustees could not validly use their powers of addition or exclusion to destroy the interests of beneficiaries.

Lessons for the trustees

- The trustees should identify the proper purpose of their power which emanates from the wording of the trust deed and, by extension, of the spirit and circumstances under which it came into being.
- When making a pivotal decision (of the scope of this one), it may be a sensible course of action for the trustees to seek from a court to sanction such a decision.
- Amending a will is easy, amending a trust is not; unless the latter is expressly provided for in the deed. It is not always wise to rely on the vagueness of a trust deed.