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PRIVATE CLIENTS

The New EU Succession Regulation - a Swiss Perspective

In view of the growing mobility of people, in particular within Europe, the number of cross-border successions has significantly increased in recent years. Upon the death of a person, complex questions arise, such as who has jurisdiction over the estate and which law governs succession to the estate. The European Union ("EU") has now taken a major step to facilitate cross-border successions within its Member States by adopting the new EU Succession Regulation.

1 GENERAL PURPOSE OF THE REGULATION

The new EU Succession Regulation[1] (the "Regulation") harmonizes the conflict-of-law rules of its Member States (the "Member States") in cross-border successions and more particularly introduces uniform rules of jurisdiction and applicable law. The objective is to ensure that, among the Member States, the deceased's estate be dealt with as a whole by a single authority and be governed by a single law - irrespective of the nature or *situs* of the assets. Parallel proceedings in different Member States and conflicting judicial decisions should thus be avoided.

[1] Regulation No 650/2012 of 4 July 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.

2 SCOPE OF APPLICATION

The scope of the Regulation includes all civil-law aspects of succession to the estate of a deceased person, including both testamentary succession and *intestate* succession. However, it does not apply, amongst others, to questions relating to matrimonial property law and to property rights created or transferred otherwise than by succession, for example by way of lifetime gifts. Furthermore, most questions relating to trusts, as well as the tax aspects of a succession, are excluded from the scope of the Regulation. It should also be noted that the substantive national rules on successions, i.e. the inheritance law of the Member States, will remain unchanged.

The Regulation entered into force on 16 August 2012. It has direct binding legal force and will apply in all EU Member States, except in the United Kingdom, Denmark and Ireland, as these countries have opted out and are thus not bound by this Regulation. Further, the Regulation will not affect the application of existing international conventions relating to succession matters to which a Member State and a third country were party at the date of the Regulation's adoption (Art. 75)[2].

"The EU Succession Regulation will also affect persons residing in Switzerland and Swiss nationals living in the EU."

The new rules will apply to estates of persons who die on or after **17 August 2015** and particularly come into play where the deceased either:

> had his last habitual residence in a Member State;

> left assets in a Member State; or

> made a choice of law in favor of the laws of a Member State.

The Regulation will thus also have significant implications for Swiss nationals who have their last habitual residence in a Member State, as well as for persons residing in Switzerland with assets in one of the Member States. For example, if a Swiss national dies with last habitual residence in Zurich, leaving a holiday apartment in Spain, the Spanish authorities will, as of 17 August 2015, apply the Regulation to determine the competent authorities and the law that governs the estate.

3 WHICH AUTHORITIES WILL BE COMPETENT TO DEAL WITH CROSS-BORDER SUCCESSIONS?

The Regulation aims at having a single authority to deal with the estate as a whole, irrespective of where the assets are located. The **general connecting factor** under the Regulation for determining the competent authorities is the deceased's **last "habitual residence"** at the time of death. Thus, if a person dies with last habitual residence in France, the French Courts will basically have jurisdiction to rule on his worldwide estate.

The Regulation lacks, however, a definition of the term "habitual residence". From the preamble to the Regulation, it arises that an "overall assessment of the circumstances of the life of the deceased during the years preceding his death and at the time of death" is necessary, taking into account all relevant factual elements, in particular the duration and regularity of the deceased's presence in the country concerned and the conditions and reasons for that presence. Difficulties in determining the habitual residence may particularly be encountered where persons seasonally stay in holiday homes or temporarily study in foreign countries, as well as in case of frontier workers, etc. It will thus be for the European Court of Justice to refine the concept of habitual residence.

Furthermore, the term "habitual residence" under the Regulation does not necessarily have the same meaning as that of "last residence" under Swiss conflict of law rules. Whereas the term "last habitual residence" under the Regulation seems to focus on the circumstances at the time of death and preceding years, the term "last residence" under Swiss private international law rules focuses on where a person resides at the time of death with the intention of remaining there permanently and thus contains a future element. These differing approaches may result in a conflict of jurisdiction. For example, if a German national moves from Germany to Switzerland with the intention to stay there permanently and dies shortly thereafter during a visit to Germany, the deceased will most likely be considered, from a Swiss (law) perspective, to have had his last residence in Switzerland, whereas the German authorities might conclude, under the Regulation, that his last habitual residence was still in Germany. As a result, both Germany and Switzerland could claim jurisdiction over the estate.

"The deceased's last habitual residence and the location of assets in a Member State are the main connecting factors."

If the deceased did not have his last habitual residence in one of the Member States but in a third country such as Switzerland, then the rule on subsidiary jurisdiction comes into play (Art. 10). According to this provision, a Member State still has jurisdiction to rule on the estate - as a whole or on part of the estate - if the deceased left **assets in that Member State**.

For example, a person dies with last habitual residence in Geneva and leaves bankable assets in France. If he was a French national (i) or if he had his previous habitual residence in France at any time during the 5-year period set out in Art. 10 (ii), then the French Courts will have jurisdiction to rule on the succession as a whole (Art. 10 (1)). This competence extends to the deceased's worldwide estate, including, for example, assets in Switzerland. If neither (i) nor (ii) applies, then France will only be competent to deal with assets which are located in France (Art. 10 (2)). From a Swiss law perspective, these rules will, in some cases, again result in a conflict of jurisdiction.

The Regulation furthermore provides for the possibility for the parties concerned to enter into a **choice-of-court agreement** and agree that the courts of the Member State of the chosen law will have jurisdiction over the estate (Art. 5(1)). This provision, however, only applies if the testator has made a choice of law in favor of the laws of one of the Member States, but not if he has chosen the law of a third country, such as Switzerland.

4 WHICH LAW WILL GOVERN CROSS-BORDER SUCCESSIONS?

As a rule, the law applicable to a succession will be **the law of the country in which the deceased had his last habitual residence** (Art. 21 (1)). Thus, the Regulation refers to the same connecting factor as used for determining the competent authority.

[2] For example the Establishment and Consular Convention of 22 July 1868 between Switzerland and Italy.

The applicable law governs the entire estate, irrespective of the nature of the assets and regardless of where they are located. This means a radical change for jurisdictions, which have in the past followed the so-called scission system (such as France) and who have applied the law of the place where property is situated (*lex situs*) in relation to immovable property. For example, if a French national dies with last habitual residence in Switzerland leaving a property in France, French authorities will under the Regulation no longer apply French inheritance law to the succession of this property but will rather have to apply Swiss inheritance law.

> "As a rule, the entire estate will be governed by a single law – that at the testator's last habitual residence or his national law."

In most cases, this rule will result in the competent authority applying its own internal succession law. There are, however, some exceptions. For example, if the deceased was **manifestly more closely connected with another State**, the law of that other State shall apply to the succession (Art. 21 (2)).

Furthermore, the Regulation adopts the rule - which also exists for foreigners under Swiss law - which allows the testator to make a **choice of law** and elect that the law of his citizenship will govern succession to his estate (Art. 22). The recognition of such *professio juris* is an important innovation under the Regulation, as a number of Member States do not currently allow any choice of law regarding the succession. Individuals with dual or multiple nationalities may choose the law of any of the countries of which they are nationals at the time of making the choice or at the time of death, irrespective of whether this is a Member State or a third country. It should also be noted that a choice of law in favor of a national law which does not provide for forced heirship rules is in principle valid, subject to the public policy exception and the doctrine of abuse of law. For example, under the Regulation, a UK national habitually resident in Germany may, by way of a choice of English law, exclude the applicability of German forced heirship provisions to his estate. However, it remains unclear as to whether, notwithstanding the Regulation, German Courts will regard such choice as contrary to the *ordre public* of Germany.

The choice of law must be made expressly or implicitly by testamentary disposition, for example by reference to the specific provisions of the deceased's national law. A choice of law made now by a person who dies on or after 17 August 2015, will remain valid provided it meets the requirements laid down by the Regulation or the conflict of law rules in force at the time the choice is made.

5 OTHER PROVISIONS

The Regulation provides another estate planning opportunity by recognizing, under certain conditions, the validity of a **testamentary agreement**, which some Member States such as France, Belgium, Spain and Italy, currently (partially or totally) prohibit. Such agreement will generally be recognized under the Regulation, provided it is valid under the applicable law as stipulated in the Regulation (Art. 25). This means that a testamentary agreement entered into by a Swiss national whose last habitual residence was in France will be recognized if he has opted for Swiss law to apply, even though French inheritance law does not recognize testamentary agreements.

The Regulation also introduces a **European certificate of succession**, intended to facilitate the recognition of the status, rights and/or powers of the heirs, legatees, executors or administrators of the estate. Such certificate will be recognized throughout the Member States, without further formalities, but not in third countries, such as Switzerland. Conversely, certificates of succession issued in Switzerland will still have to be validated by a recognition procedure in order to produce their effects in a Member State.

The same principle of **automatic recognition** among the Member States applies to decisions in matters of succession. As a rule, decisions of a Member State will automatically be recognized in all other Member States without any special procedure.

6 PRACTICAL IMPLICATIONS

As shown above, the scope of the Regulation is very wide. Anyone having EU cross-border ties or interests, including **nationality, habitual residence** or **simply assets in a Member State**, should therefore be aware of the impact of the new Regulation: he should analyze the implications it may have on his estate and plan accordingly or review the existing arrangement.

One key element of succession planning is the **possibility to make a choice of law** as per the Regulation. It allows the testator to determine in advance which law should govern the whole of his succession and may open the door for a choice-of-court agreement by the parties concerned. A choice of law will avoid the uncertainties entailed by the concept of "last habitual residence" and prevent the change of applicable law following a transfer of habitual residence. As seen above, making a choice of law may also be advisable in order to give effect to a testamentary agreement, if such agreement could be rejected by the internal law of the deceased's habitual residence.

7 CONCLUSION

The Regulation will have far-reaching implications for all cross-border successions that have some form of connection with a Member State. Within the EU, the new rules will definitely facilitate the settlement of international successions by bringing greater certainty, simplicity and uniformity. It will also provide welcome opportunities for succession planning. This is also true for successions that involve the EU and third countries, such as Switzerland, but in these cases, the Regulation also creates some new uncertainties and potential conflicts of jurisdiction or of law, which should be anticipated.

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The content of this Newsletter does not constitute legal or tax advice and may not be relied upon as such. Should you seek advice with regard to your specific circumstances, please contact your Schellenberg Wittmer liaison or any of the following persons:

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