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THE NEW EU SUCCESSION REGULATION: DOES IT MATTER FOR EU CITIZENS RESIDENT IN TICINO/SWITZERLAND ?

From August 2015, the new European Union Regulation on Successions, designed to simplify cross-border inheritance and harmonize the conflict-of-law rules, was brought into effect for its 25 Member States – from 28 European Union Member States, excluding the UK, Denmark and Ireland that chose to opt-out. The objective was to ensure that, among the Member States, the deceased's estate could 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.

The scope of the Regulation includes 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 related to matrimonial property law and to property rights created or transferred otherwise than by succession. Furthermore, most questions related to trusts, as well as the tax aspects of a succession, are excluded from the scope of the Regulation, as well as matters of inheritance law.

Although Switzerland is not an EU Member State, the EU Succession Regulation affects EU citizens residing in Ticino as well as the Swiss nationals living in an EU Member State in the following cases: if the deceased person was a Swiss national and had his last habitual residence in an EU Member State; if the deceased person was an EU national who had his last habitual residence in Ticino/ Switzerland, and who made a choice of law in favor of his EU national law; or if the deceased person was residing in Ticino/Switzerland and leaves assets located in an EU Member State.

The general connecting factor under the Regulation for determining the competent authorities is the deceased's last "habitual residence" at the time of death. However, if a person dies with last habitual residence for example in France, the French Courts will basically have jurisdiction to rule on his worldwide estate. Difficulties in determining the habitual residence may particularly be encountered where people seasonally stay in holiday homes or temporarily study in foreign countries, as well as in case of frontier workers, among others. 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.

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. 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.

There are, however, some exceptions. 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. 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.

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 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. 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. Seemingly, 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.

The Regulation 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 definitely facilitates the settlement of international successions by bringing greater certainty, simplicity and uniformity. It also provides welcome opportunities for succession planning. Nevertheless, when involving third countries such as Switzerland, the Regulation also creates some uncertainties and potential conflicts of jurisdiction or of law, which should be anticipated.

Finally, the EU Succession Regulation does matter not only for EU citizens resident in Ticino/Switzerland, but also for the ones having assets located in the Canton or in another part of Switzerland, as well as for the Swiss nationals living or having assets in an EU Member State.

For further information on the above, please do not hesitate to contact us

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