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Cross-Border Successions – Entry into force of the EU Succession Regulation on 16 August 2012. Successions with cross-border elements are in general highly complex due to the various jurisdictions involved. Within the EU, a major step to facilitate cross-border successions has been taken by enacting the EU Succession Regulation, which harmonizes the conflict-of-law rules on cross-border successions of 24 EU states with the effect that in principle only one single criterion remains for determining the jurisdiction and the law applicable to cross-border successions, namely the *last habitual residence of the deceased*.

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EU Succession Regulation

The EU Succession Regulation harmonizes the conflict-of-law rules on cross-border successions of 24 members of the European Union («24 EU Member States») and is by operation of law directly applicable to all deaths on or after 17 August 2015. The United Kingdom, Denmark and Ireland along with Switzerland and other third countries are not directly bound by it but are also affected.

Harmonization of Conflict-of-Law Rules on Successions

Due to the expanding mobility of persons, more and more people take up residence abroad and own assets, which are located in various jurisdictions. Along with the diversity of both the substantive inheritance law rules and the conflict-of-law rules the legal obstacles in cross-border successions have increased. Legislative action by the EU to simplify the processing of cross-border successions within the EU has now led to the EU Succession Regulation (Regulation 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 an European Certificate of Succession of 4 July 2012, No 650/2012).

The EU Succession Regulation mainly answers two important conflict-of-law questions: Firstly, which court is competent to deal with a cross-border succession and secondly, which law governs a cross-border succession? However, neither the substantive inheritance laws of the 24 EU Member States nor the fiscal aspects of international successions are affected.

The EU Succession Regulation has already entered into force on 16 August 2012 but in principle will only have direct effect on deaths on or after 17 August 2015. With regard to deaths before 17 August 2015 the 24 EU Member States will continue to apply their existing national conflict-of-law rules.

Key Elements

Last Habitual Residence

Under the EU Succession Regulation only one single criterion remains for determining the jurisdiction and the law applicable to cross-border successions: the *last habitual residence at the time of death* of the deceased (art. 4 and art. 21 sec. 1). Thus, for deaths as of 17 August 2015, criteria such as nationality (Germany) or the location of the deceased's real property (France) will no longer be the primary connecting factors for successions. The determined applicable law will govern the succession as a whole, embracing the worldwide assets of the estate, irrespective of their nature and whether they are located in another EU state or in a third state.

The EU Succession Regulation fails to give a definition of the term «*last habitual residence*». According to the legislative materials an overall assessment of the circumstances of the life of the deceased during the years preceding his or her death and at the time of his or her death should be made by taking all relevant factual elements into account such as the duration and regularity of the deceased's presence in the state concerned and the conditions and reasons for that presence. The habitual residence should reveal a close and stable connection with the state concerned.

Difficulties in determining the last habitual residence will evidently arise for example in case of frontier workers, persons having an itinerant life (for business or private reasons) including persons with seasonal stays in holiday

homes abroad («Mallorca retiree»), temporary study stays in foreign countries, stays in a nursery home, etc. It will be for the European Court of Justice to refine the concept of habitual residence and develop case law.

Manifestly Closer Connection to another State

Instead of defining the term «*last habitual residence*» an exception clause has been created for cases where the deceased was *manifestly more closely connected to another state* than to the state of the last habitual residence (art. 21 sec. 2). The inheritance law of that other state should then govern the estate of the deceased.

Choice of Law

Testators are entitled to make a choice of law and determine the law applicable to their succession. This choice of law is, however, restricted to the *law of nationality* of the deceased (a) at the time of making the choice or (b) at the time of death and should be made expressly (or demonstrated by the terms) in the form of a disposition of property upon death (art. 22 sec. 1 and 2).

Choice of Law Fiction

If a disposition of property upon death (e.g. will) was made prior to 17 August 2015 in accordance with the law which the deceased could have chosen (*law of nationality*), that law shall be deemed to have been chosen by the deceased (art. 83 sec. 4).

Need for Action

In order to predict the applicable succession law for persons with cross-border affairs in the 24 EU Member States as of 17 August 2015, it might be recommendable to exercise the option to make a choice of law in favor of the law of nationality or to document the factual elements which substantiate the last habitual residence. The choice of law may already be made today due to the advance effect of the EU Succession Regulation (art. 83 sec. 2).

Inconsistency with Swiss Conflict-of-Law Rules

Pursuant to Swiss conflict-of-law rules, the connecting factor for determining jurisdiction and the law applicable in inheritance issues is the «*last residence*» of the deceased. In cases where the term «*last habitual residence*» is not defined congruently with the term «*last residence*» conflicts of law and competence will occur. For instance, a person with last residence in Switzerland dies in Austria. Based on the circumstances the Austrian courts, however, determine that his or her last habitual residence was in Austria. Both countries, Switzerland and Austria, will claim competence and apply their own national inheritance law, unless a valid choice of law was made.

Another case amongst many others for a competence conflict arises if the last (habitual) residence of a deceased was in Switzerland and the deceased owned assets in one of the 24 EU Member States, e.g. bankable assets in Italy. In that case Italy has jurisdiction to rule on the bankable assets in Italy (art. 10 sec. 2). If the deceased was (a) an Italian citizen, or (b) had his or her habitual residence in Italy less than 5 years before moving to Switzerland, Italy is even competent to rule on the succession as a whole (art. 10 sec. 1), including on the worldwide estate of the deceased, just as Switzerland is from a Swiss perspective. Hence, in the case of a competence conflict, forum shopping needs to be considered.

Dispositions of Property upon Death

The EU Succession Regulation foresees that the law governing the substantive validity of a disposition of property upon death (e.g. wills) is the law which, under the EU Succession Regulation, would have been applicable to the succession if the deceased had died on the day on which the disposition was made («*law of establishment*», art. 24 sec. 1).

The same rule applies to the admissibility, the substantive validity and the binding effects between the parties of inheritance contracts as long as to a one person's estate is concerned (art. 25 sec. 1).

Recognition, Enforcement & European Certificate of Succession

Decisions in matters of succession given in one of the 24 EU Member States as well as authentic instruments issued by a notary in any of the 24 EU Member States will be recognized and enforceable throughout the EU.

The EU Succession Regulation further creates a new uniform European Certificate of Succession to enable a person to prove his or her status and rights as heir/legatee or his or her powers as administrator of the estate or executor of the will without further formalities and with effect in all 24 EU Member States, i.e. the beneficiaries will be able to dispose of the estate based on one single certificate.

Conclusion

By unifying the connecting factor for jurisdiction and applicable law, the EU Succession Regulation significantly improves the legal position of beneficiaries in cross-border succession cases within the 24 EU Member States. However, in some cases and in particular with regard to third countries, such as Switzerland, the EU Succession Regulation may lead to unsatisfactory results. Therefore, it is advisable that persons with cross-border affairs in any of the 24 EU Member States review their estate planning in order to avoid unintended and undesired legal consequences.

The Walder Wyss Newsletter provides comments on new developments and significant issues of Swiss law. These comments are not intended to provide legal advice. Before taking action or relying on the comments and the information given, addressees of this Newsletter should seek specific advice on the matters which concern them.

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