

Newsletter No.

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## Revision of Swiss International Inheritance Law

The Federal Council's draft of Chapter 6 of the Federal Act on International Private Law (PILA) regarding cross-border successions has been revised and approved by the National Council and the Council of States on December 22, 2023. The 100-day referendum period begins with the publication in the Federal Gazette. If the **referendum is not held**, then it can be expected that the revised PILA will enter into force on **January 1, 2025**.

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# Revision of Swiss International Inheritance Law



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The revision of Chapter 6 of the Federal Act on Private International Law aims to modernize Switzerland's international inheritance law and adapt it to legal developments abroad (in particular, to the European Succession Regulation) through improved coordination of states' competencies to adjudicate cross-border estate matters. One of the new rules is the introduction of the option for Swiss dual citizens to choose the law of their second state of citizenship to govern the estate. However, Swiss citizens may not derogate from the provisions of Swiss law on statutory entitlement (forced heirship). The revised law also changes the structure and the provisions of the applicable law. Furthermore, testators may submit their estate to the jurisdiction of their state of citizenship and real property to the jurisdiction of the state where the property is located. The revision clarifies various provisions, such as the renvoi, the subsidiary jurisdiction in Switzerland, the law governing executors and administrators and the law applicable to the substantive validity of testamentary dispositions. Finally, the revised law clarifies that a foreign proceeding on estate administration (namely the issuance of an inheritance certificate) qualifies as *lis pendens* and must be respected by Swiss authorities.



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## 1. General Information on the Revision Project

The final vote of the Federal Assembly has taken place on December 22, 2023. The draft of the Federal Council of March 13, 2020, which was amended by the National Council and the Council of States, was approved. With the publication in the Federal Gazette, the 100-day referendum period begins. If no referendum is held, it can be expected that the revised provisions of PILA will enter into force on January 1, 2025. The most relevant changes, following the order of the revised provisions, may be summarized as follows:

## 2. Jurisdiction

### Subsidiary Jurisdiction at the Place of Origin of Swiss Citizens (art. 87(1) rev-PILA) and at the Location of Assets (art. 88(1) rev-PILA)

A subsidiary jurisdiction of Swiss courts and authorities at the place of origin of a Swiss citizen domiciled abroad is grant-

ed to the extent that the "foreign authorities" do not deal with the estate (art. 87(1) PILA). Under current law, it is unclear which "foreign authorities" are meant. The revised law clarifies that inactivity of the foreign authorities of the state of the **last domicile** is required. To avoid a positive conflict of competence, **Swiss authorities may however decline jurisdiction** if the foreign authorities of **one of the states of citizenship**, the **state of the last habitual residence**, or to the extent that certain assets are concerned, the authorities of the **state where these assets are located** are dealing with the estate (art. 87(1) rev-PILA).

A subsidiary jurisdiction of Swiss courts and authorities can furthermore be established **at the location of assets** situated in Switzerland, again only to the extent the "foreign authorities" do not deal with the estate (art. 88(1) PILA). According to art. 88(1) rev-PILA the revised law clarifies that the inactivity of the authorities of the **state of the last domicile** is required. Swiss authorities

may also in this situation decline jurisdiction if the foreign authorities of **one of the states of citizenship** or the **state of the last habitual residence** are dealing with the estate.

#### **Opt-Out of Jurisdiction by Swiss Citizens (art. 87(2) rev-PILA)**

Current law establishes jurisdiction of Swiss authorities at the place of origin where a Swiss citizen (domiciled abroad) makes a choice of law in favor of Swiss law (art. 87 (2) PILA). In practice, this automatism can lead to positive conflicts of competence. Therefore, the revised law foresees the option to **opt-out**, i.e. to **avoid the automatic parallelism of applicable law and jurisdiction by reserving the jurisdiction of the foreign forum** (art. 87(2) rev-PILA). This shall allow the testator to actively address the risk of the positive competence conflicts.

#### **Clarification Regarding Competency to Commence Estate Administration Proceedings (art. 88a rev-PILA)**

Swiss courts are only competent if no court proceeding having the same subject matter is already pending between the same parties abroad (art. 9 PILA). Art. 88a rev-PILA determines that **art. 9 PILA (principle of *lis pendens*) shall also apply to proceedings regarding estate administration**, such as opening of a will and the issuance of inheritance certificates. Hence, if an inheritance certificate has already been requested in another state, which also covers Swiss assets, then Swiss courts and authorities have no competency to issue an inheritance certificate. The new provision is also intended to eliminate another existing legal uncertainty. It implicitly clarifies that in Switzerland the probate proceedings do not begin with the opening of the succession within the meaning of Article 537 of the Swiss Civil Code (i.e. with the death of the testator), as is advocated by a considerable part of the doctrine, but only upon the submission of a corresponding application.

#### **Choice of Jurisdiction for Foreign Citizens and for Real Properties (art. 88b rev-PILA)**

To harmonize cross-border successions, in particular where **foreign citizens** own assets in their home-state within the EU (art. 10(1)(a) EUSuccReg), the revised law allows foreign citizens to submit their estate to the **jurisdiction of their state of citizenship** if such state deals with the estate in question and the testator was at the time when the testamentary disposition was made or at the death a citizen of such state. This provision also aims to avoid the risk of positive conflict of competence.

Art. 86(2) PILA excludes real property located abroad from Swiss jurisdiction if the foreign state claims exclusive jurisdiction. To also allow a state to (solely) deal with the property, even though no exclusive jurisdiction is claimed, art. 88b(2) rev-PILA foresees the right of a testator to **submit the real property located abroad to the respective foreign jurisdiction**.

### **3. Applicable Law**

#### **New Structure of Provisions Regarding Applicable Law (art. 90 and art. 91 rev-PILA)**

For the sake of clarity, the revised law restructures the relevant articles regarding the applicable law: **Art. 90 rev-PILA** establishes the **principles regarding the statutory rules**, while **art. 91 rev-PILA** sets out the **rules on the choice of law**. In contrast, under current law, art. 90 PILA and art. 91 PILA differentiate between the domicile of the deceased in Switzerland or abroad. In the future testators who wish to make a choice of law have to refer to art. 91(1) rev-PILA and not to art. 90(2) PILA anymore.

#### **Testator with Last Domicile Abroad (Renvoi, art. 90(2) rev-PILA)**

The estate of a person domiciled abroad

is subject to the law to which the conflict of law rules of the state of the last domicile refer (art. 91(1) PILA). The revised law clarifies that where the foreign conflict of law rules refer back to the Swiss conflict of law rules ("*renvoi*"), the **substantive inheritance law of the foreign state of domicile** is applicable to avoid a "ping-pong" (art. 90(2) rev-PILA). This situation typically occurs in cross-border cases with the United Kingdom where the deceased left assets in Switzerland ("*foreign court theory*"). This solution is to be welcomed as it corresponds to the basic principle according to which the last domicile of the deceased shall be the relevant link to determine the applicable law for the worldwide estate.

#### **Limited Choice of Law for Swiss Dual Citizens (art. 91(1) rev-PILA)**

Foreign citizens last domiciled in Switzerland may subject their estate to the law of one of their states of citizenship (art. 90(2) PILA). A Swiss double citizen domiciled in Switzerland has currently no such right and in any event Swiss law governs the estate of a Swiss national residing in Switzerland. However, Swiss citizens domiciled abroad may subject their estate to the foreign law of their last domicile (art. 91(2) PILA). The revised law provides for a new testamentary freedom for Swiss dual citizens: According to art. 91(1) rev-PILA, Swiss dual citizens may choose the **foreign law of their second citizenship**, however, they **may not derogate from the Swiss provisions on statutory entitlement (forced heirship)**. This means that the Swiss provisions on the statutory entitlement continue to apply regardless of the choice of law. The foreign provisions on the disposable portion of the estate in the chosen law shall not apply, even if they are stricter than Swiss law. Opening the choice of law option for Swiss dual citizens is welcomed and aims to abolish the existing discrimination against Swiss dual citizens. However, the chosen compromise leads to a split of the law gov-

erning the estate if the (explicitly or implied) chosen foreign law deviates from the Swiss rules on statutory entitlement, which may cause legal uncertainty.

#### Opt-Out of Applicable Law by Swiss Citizens (art. 91(2) rev-PILA)

The choice of Swiss jurisdiction by Swiss citizens (art. 87(2) rev-PILA) encompasses a choice of Swiss law unless, as set out by the new rule, the testator **opts-out** by making a reservation that the choice of jurisdiction **does not affect the applicable law** (art. 91(2) rev-PILA).

#### 4. Lex Fori Governs the Executor's or Administrator's Entitlement to the Estate (art. 92(2) rev-PILA)

The revised law answers a highly disputed question in practice, namely the question of the executor's or administrator's entitlement to the estate and his power of disposal over it, when these office holders have been appointed by Swiss courts or authorities. The revised law determines that these questions shall be **governed by Swiss law resp. the law where the courts and authorities have jurisdiction ("lex fori")** irrespective which law (Swiss or foreign) governs the estate.

#### 5. New Structure and Specific Provisions for Last Wills and Inheritance Contracts (art. 94 und 95 et seq. rev-PILA)

Art. 94 and art. 95 rev-PILA set out that the substantive validity (which is defined in art. 95b rev-PILA), revocability and interpretation of a testamentary disposition resp. of an inheritance contract and the effects of the instructions resp. provisions contained therein are subject to the law of the **testator's domicile at the time of its establishment resp. at the time the contract was concluded**. If a choice of law has been made by the tes-

tator, then such law (of the testator's citizenship) applies. "*Mutual wills*" of the common law system qualify as inheritance contracts (art. 95(3) rev-PILA).

#### 6. Recognition of Foreign Decrees, Measures and Deeds (art. 96(1) rev-PILA)

To harmonize Swiss law with the EU Succession Regulation art. 96(1) PILA has been amended, so that decisions and deeds from the **state of citizenship** of a testator shall also be recognized if the testator submitted the estate to the jurisdiction or laws of the state of citizenship (art. 96(1) lit. c rev-PILA). The same applies, if such decisions were made, issued or established in the **state of the deceased's last habitual residence or a state of citizenship or, if they relate only to individual movable assets of the estate, in the state in which they are located**, provided that the deceased's last domicile was abroad and the state in question does not deal with the estate (art. 96(1) lit. d rev-PILA).

#### 7. Clarification for the Liquidation of Matrimonial Property (art. 51 and 58 rev-PILA)

In case a spouse dies, the Swiss courts which have jurisdiction for the estate are competent to liquidate the matrimonial property regime of the spouses (art. 51(a) PILA). The revised law clarifies that the new **art. 88b rev-PILA is disregarded** in this context. Hence, a spouse who made a choice of jurisdiction for the estate is not allowed to also *unilaterally* derogate Swiss jurisdiction regarding the liquidation of the matrimonial property regime.

With the same rationale, the revised law provides that art. 96(1) lit. c rev-PILA is exempt from the reference to the provisions governing recognition insofar as it

would allow a spouse to unilaterally choose the forum for the liquidation of the matrimonial property regime (art. 58(2) rev-PILA).

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