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The International Comparative Legal Guide to:

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A practical cross-border insight into private client work

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Country Question and Answer Chapters:

EDITORIAL

Welcome to the fifth edition of *The International Comparative Legal Guide to: Private Client.*

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of private client work.

It is divided into two main sections:

Eight general chapters. These are designed to provide readers with a comprehensive overview of key issues affecting private client work, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in private client laws and regulations in 29 jurisdictions.

All chapters are written by leading private client lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editors Jonathan Conder and Robin Vos of Macfarlanes LLP for their invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.co.uk.

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European Union Succession Regulation Now in Effect: How it Impacts Planning for All Persons With EU Connections

O'Sullivan Estate Lawyers

Margaret R. O'Sullivan

Introduction

When a client dies leaving assets in more than one country, conflict of laws rules (also known as private international law or PIL rules) step in to help determine which country's law should govern succession of the estate. These rules are often complex and challenging to navigate.

To achieve more clarity and certainty, the European Union ("EU") passed a law known as the Succession Regulation in July 2012. It became fully operational in all EU member states as of August 17, 2015 (except in Denmark, the UK and Ireland, which decided to opt out).

The Succession Regulation can significantly impact all persons with assets in, or other ties to, a participating EU member state. It is important for all advisors to understand how the Succession Regulation operates and can be effectively used by their clients in their estate planning.

While issues involving succession and conflicts of laws can often be both challenging and troublesome, the likelihood of these issues arising in future continues to increase as globalisation of people and capital speeds ahead. When our clients become increasingly mobile with respect to assets, investments and personal relationships, the resulting overlay to the estate planning and administration process is an ever-expanding set of complex and multijurisdictional issues and considerations. According to the EU, in 2009 it was estimated that there were approximately 4.5 million successions a year in the EU, and about 10% of those had an international dimension. As a result, there were almost 450,000 successions in the EU with a cross-border element. The EU has estimated these international successions to be valued at approximately 123 billion Euros per year.[1]

Historical Background

Currently, conflict of laws rules address succession issues when a person dies with assets in more than one country. Each jurisdiction has its own unique, distinct and separate PIL rules. The first attempt to create a uniform resolution to some of the uncertainty and confusion in succession issues caused by the application of PIL was the 1989 Hague Convention, *Convention on the Law Applicable to Succession to the Estates of Deceased Persons*. The objective of that Convention was to create a single uniform conflict of laws rule that would apply to a variety of succession issues, but unfortunately it received minimal support and only the Netherlands and Luxembourg ratified it.

In a further attempt to deal with the often confusing and complex analysis and application of PIL rules in succession matters within the EU, the European Commission published a draft succession regulation in October 2009, which followed initial discussions on the topic based on a Green Paper the Commission published in March 2005. Regulation (EU) No. 650/2012, also referred to as "Brussels IV", was passed on July 4, 2012 and subsequently came into force in a transitional manner on August 17, 2012, but was not fully operational until August 17, 2015. The full name of the regulation is *Regulation (EU) No 650/2012 of the European Parliament and of the Council 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* (herein referred to as the "Succession Regulation").

By way of background, EU regulations are general measures that are "directly applicable" – meaning they create law which takes immediate effect in all of the member states in the same way as a state's internal legislation, without any further action being required on the part of the respective individual states' legislatures.[2]

The Succession Regulation will be applied by institutions in all participating EU states (as stated above, all EU states except Denmark, the United Kingdom and Ireland, each of which has exercised its right to not "opt in" – at least not for the time being in the case of the UK and Ireland). Thus, the Succession Regulation's member states total 24 at present count.

As noted above, the Succession Regulation will apply to the succession of estates of individuals that die on or after August 17, 2015. It applies to both testate and intestate estates, and effectively changes EU PIL as of this date.

Goals of the Succession Regulation

The main goals of the Succession Regulation are to:

1. help settle international successions that involve people living in the EU, and/or with connections to more than one jurisdiction;
2. unify and simplify the rules governing successions, while also increasing their predictability; and
3. provide more effective guarantees for the rights of heirs (children and spouses) and/or legatees and other persons linked to the deceased, as well as creditors of the succession.[3]

Matters Excluded from the Succession Regulation

As suggested by its name, the Succession Regulation primarily deals with succession matters. There are a number of areas

explicitly excluded from the scope and operation of the Succession Regulation, including: taxation issues (e.g., taxation on inheritances); matrimonial property regime issues; and trust matters (except where assets have devolved and beneficiaries are determined pursuant to testamentary will trusts and statutory trusts created upon intestacy).

Unified Choice of Law Rules

The Succession Regulation does not attempt to replace or harmonise existing internal succession laws of EU states. Instead, the Succession Regulation provides unified choice of law rules to determine which jurisdiction's laws will apply to the succession of a deceased's worldwide estate. The Succession Regulation permits a single member state's laws to govern the succession. Thus, (in theory) only one law applies to the entire worldwide estate, and equally to both movables (generally personal property) and immovables (generally real property) (potential issues relating to PIL of non-Succession Regulation states and *renvoi* are discussed below).

Primary Connecting Factor: Last Habitual Residence

Under the Succession Regulation, the primary connecting factor throughout the EU for determining applicable law will be the deceased's last habitual residence. Habitual residence, however, is not a defined term in the Succession Regulation.

There is an exception to the last habitual residence rule which arises if the deceased was "manifestly more closely connected" to another jurisdiction (article 21.2). In other words, if the centre of the deceased's vital interests such as personal presence, family, and to a lesser degree, business and economic interests, was manifestly elsewhere, then the last habitual residence rule will be overridden in favour of the jurisdiction to which he or she was more closely connected. For example, if a Canadian national and Ontario long-time resident with assets located in Ontario moves to Germany and dies shortly thereafter, arguably Ontario law will most likely apply to the succession of the deceased's estate, and not German law.

Choice of Law Can Be Made in a Will Based on Nationality

Individuals are also given the option to choose in their wills (either explicitly or implicitly) to apply the law of their nationality if it differs from their place of habitual residence (article 21.1), subject to conditions, which nationality may be held at the time of the choice or at the time of death. If a person has dual or multiple nationalities, he or she can choose to apply any one of them. A person may choose a state that is not a Succession Regulation member state (article 20). This choice of nationality must be made in a testamentary disposition (article 22.2) and such a declaration supersedes the habitual residence default rule.

The choice of a specific law based on nationality may also subsequently be revoked or modified, however, such revocation or modification must meet the requirements regarding the form of the modification or revocation of a testamentary disposition in accordance with the law chosen (article 22.4).

Jurisdiction in Succession Matters

The Succession Regulation provides rules to determine which jurisdiction has exclusive jurisdiction over the winding-up of the estate, in order to avoid so-called "forum shopping". Generally, the default provision is the court of the member state in which the deceased was habitually resident when he or she died has jurisdiction in succession matters (article 4). If, however, the deceased made a choice of law of a member state pursuant to article 22, the parties to a matter can agree the court of that particular member state has exclusive jurisdiction.

Article 10 goes on to provide for subsidiary jurisdiction in the event that the deceased was not habitually resident in any member state at the time of his or her death, but held assets located in a member state. In this instance, the courts of any such state, in which assets of the estate are located, will have jurisdiction to rule on the succession as a whole if the deceased had nationality of that state at his or her death or, failing that, if he or she was habitually resident in that state within five years of death. If neither of these conditions apply, the court of a member state in which assets are located will have jurisdiction to rule in respect of the assets. There is also a provision for exceptional jurisdiction (*forum necessitatis*), which is found at article 11. If no court of a member state is given jurisdiction pursuant to any other provisions of the Succession Regulation, and proceedings cannot reasonably be brought or conducted or would be impossible in a third state, the courts of a member state may, on an exceptional basis, rule on the succession. The case, however, must have a sufficient connection with the member state.

Recognition and Enforcement

The Succession Regulation stipulates that member states are to recognise and enforce decisions, authentic instruments and court settlements made in another member state, except in certain limited instances such as those whereby the application of rules or recognition of decisions/instruments would be "manifestly contrary" to a member state's internal public policy.

European Certificate of Succession

There are provisions in the Succession Regulation for the issuance of a European Certificate of Succession. According to the EU, such a certificate will constitute "uniform proof of a person's capacity as heir or powers as an administrator of the succession. The certificate will be recognizable throughout the EU and will thereby simplify and speed up the procedure".[4]

Renvoi: Largely Abolished Between Member States

The principle of *renvoi* (where the PIL of one state determines that a matter should be referred back to the law of a different state) is largely abolished under article 34 of the Succession Regulation, save for certain limited (and in some cases vague) circumstances. It no longer applies to Succession Regulation member states *vis à vis* themselves. It can apply, however, if the applicable law is determined to be that of a non-Succession Regulation state.

Pursuant to article 26, *renvoi* will never apply to a specific choice of national law made by an individual prior to death in accordance with article 17. Such a choice is always to be respected and the internal law of the chosen jurisdiction applied, with no reference to PIL whatsoever. *Renvoi* may still occur, however, where the law that applies to a deceased's estate under the new rules is that of a non-member state, and that state's law makes a *renvoi* to the member state or to another non-member state.

The Succession Regulation is silent, however, when the applicable law has been determined pursuant to the deceased's last habitual residence (article 21.1), suggesting that *renvoi* may still apply between member states in this instance.

Clawback and Forced Heirship Rules

As a starting point, clawback refers to the requirement of certain states that lifetime gifts are to be restored or accounted for when establishing entitlement to an estate. Further, certain jurisdictions require specific individuals (mainly spouses and children) to share in certain portions of an estate through the application of forced heirship rules. The possible application of these provisions under French law and other civil law jurisdictions to UK nationals and the resultant effect on testamentary freedom has reportedly been a stumbling block for the UK and a significant factor in it choosing not to opt in to the Succession Regulation to date.

Pursuant to article 23(i), gifts, advancements or legacies can become subject to different clawback rules by virtue of a change of residence. The applicable law determined pursuant to the Succession Regulation will control whether certain *inter vivos* gifts made by a deceased during his or her lifetime are to be restored or taken into account when distributing an estate to its beneficiaries.

In an attempt to prevent the application of clawback provisions and forced heirship rules, the Succession Regulation gives a testator who is a national of a member state in which *inter vivos* gifts are irrevocable the opportunity to confirm and preserve their validity by choosing to have his or her national law apply to the succession of his or her estate by making the appropriate declaration in his or her will.

Practical Effect of the Succession Regulation

The Succession Regulation may affect persons including those not habitually resident in an EU member state but with assets in a member state, as well as those who are "habitually resident" in a member state at the time of death (or in certain circumstances, within five years of their death) regardless of the location of their assets. It will also apply to nationals or residents of non-member states who hold dual or multiple nationalities in member states. Specifically, some likely scenarios include:

- non-EU nationals habitually resident in a Succession Regulation member state;
- non-EU nationals habitually resident in a non-Succession Regulation member state with assets in a Succession Regulation member state;
- Succession Regulation member state nationals resident in a non-Succession Regulation member state with assets in a Succession Regulation member state; and
- former Succession Regulation member state residents resident in a non-Succession Regulation member state with assets in a Succession Regulation member state.

Assets in a Succession Regulation Member State

If a U.S. citizen owns real property in a Succession Regulation member state, he or she has the opportunity to access provisions of the Succession Regulation. For example, an American citizen (and Florida) resident and domiciliary with a vacation property located in Spain can from this point forward state in his or her will that Florida law is to apply to the estate in Spain, including Spanish land. Spain is a member state under the Succession Regulation and provided the declaration is done correctly, under the Succession Regulation Florida rules will be applied to the Spanish land on a person's death for deaths that occur after August 16, 2015. This is a significant change as before, Spanish law was required to be applied to Spanish land regardless of whether the deceased died resident in the United States or domiciled in Florida. Spain's internal succession laws incorporate forced heirship laws, which a U.S. citizen may wish to avoid with respect to his or her Spanish property. However, there is some concern with regard to how member states will deal with this result and whether certain member states may assert that matters such as forced heirship are public policy matters for which the Succession Regulation allows a state to refuse to apply the law of a state where it is manifestly incompatible with the public policy of the jurisdiction.

Non-EU National Habitually Resident in a Succession Regulation Member State

Another example is a Canadian national habitually resident in a Succession Regulation member state, e.g., France. If he or she has not chosen his or her national law to apply to his or her estate, local law (e.g. French law) will apply to his or her worldwide assets, including assets outside of France. If there is real property located in a Canadian jurisdiction, like Ontario, the property falls under Ontario PIL rules and is therefore subject to Ontario law, but it can be brought into account in the French administration. With respect to the property, the applicable law determined by habitual residence brings into play forced heirship rules, which may be an unintended or unanticipated occurrence.

However, pursuant to the new rules in the Succession Regulation, the Canadian national (and say Ontario domiciliary) can choose his or her law of nationality prior to death, which would be Ontario's internal law, as Canada is a federal state and matters of succession fall under provincial and territorial law.

Multiple Nationalities Including in a Non-Succession Regulation Member State

If a New York State resident with dual U.S. citizenship with an EU Succession Regulation member state has assets in France consisting mainly of real property, on his or her death, the default rule of last habitual residence applies. In which case New York State law applies, but includes PIL back to France since New York law would say for real property, *situs* governs and the applicable law is France. The individual could have made a choice of law, however, of New York in his or her will, if he is a U.S. citizen with the result that New York's internal law would apply, and *renvoi* would not apply back to France.

Consider also the situation of a German domiciliary who is resident in Barbados, but has German assets. Upon his or her death, Barbados PIL applies such that if his or her domicile is Germany, then under Barbados law German law governs moveables and also German real property—the *situs*. German courts would have jurisdiction over the deceased's worldwide estate given the German *situs* assets. However, if the person has dual German/Barbadian nationality, under the terms of the Succession Regulation he or she can make a choice of Barbados law to govern succession and to exclude German law, including forced heirship with respect to the German assets, subject to the caveat discussed above.

Conclusion

These new European rules are a welcome and positive development in estate planning and administration, including for all persons who increasingly have ties to many EU jurisdictions. In the private client planning context, it is critical to consider these rules when drafting a will for a client with connections to participating EU member states. It will be important to consider where appropriate making an express choice of law in order to have better certainty with regard to which law will apply on death to succession of an estate and avoid an unintended and inadvertent result in accordance with the principles and objectives of the Succession Regulation.

Endnotes

1 European Union, "*Press Release: Simplification of regulation on international successions*", October 14, 2009, http://europa.eu/rapid/press-release_MEMO-09-447_en.htm.

2 R. Frimston, *Cross Border Estates*, Chpt. 6, Section 6.2, www.stepnetwork.net.

3 European Union, "*Press Release: Simplification of regulation on international successions*", October 14, 2009, http://europa.eu/rapid/press-release_MEMO-09-447_en.htm.

4 European Union, "*Press Release: Simplification of regulation on international successions*", October 14, 2009; http://europa.eu/rapid/press-release_MEMO-09-447_en.htm.

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