

How New EU Rules for Cross-Border Succession Apply to Canadians

By Margaret O'Sullivan

Given the increased mobility of clients and globalization of assets, property at death is more often than before located in several different jurisdictions. When a client dies leaving assets in more than one country, conflict of laws rules step in to help determine which country's law should govern estate succession. To achieve more clarity and certainty, in 2012 the European Union passed Regulation No. 650—the “Succession Regulation”. As of August 17, 2015, it is now fully operational in all EU member states except Denmark, the U.K. and Ireland, which opted out.

The Succession Regulation, among other matters, provides harmonizing rules to determine which country's law will apply to a deceased person's estate (both personal property and real estate).

Under it, a deceased person's “last habitual residence” will in most cases determine which country's laws apply.

A person can choose to apply the law of his or her nationality if it is different from his or her place of habitual residence. This feature is of particular importance to Canadians who have a EU connection. Also, if a person has dual or multiple nationalities, he or she can choose any of them to apply to his or her estate, even a non-EU member state.

Situations in which the Succession Regulation may be particularly relevant include:

- Canadian citizen resident in a participating EU member state;
- Canadian citizen resident in Canada with assets in a participating EU member state; and
- Canadian citizen resident in a non-participating EU



member state (e.g., the U.K.) with assets in a participating EU member state.

As an example of how this new law can be helpful, consider an Ontario resident with a vacation property located in Italy, a civil law jurisdiction. He or she can choose in his or her Ontario will that Ontario law applies to the estate in Italy, including Italian real estate.

If correctly done, Ontario law should apply to the Italian real estate on his or her death. Without this new Regulation, Italian law would otherwise apply to Italian land. Italy's internal laws incorporate “forced heirship” rules, which an Ontario resident will usually wish to avoid with respect to his or her Italian property. Forced heirship

laws—present in a number of EU states—often provide a mandatory distribution scheme among a person's spouse and children.

In the Canadian estate planning context, the ability to apply a Canadian jurisdiction's laws to succession of property will help ensure forced heirship rules do not apply.

Another example is a Canadian citizen living in Germany and habitually resident there, but with an Ontario domicile for property purposes. Under the new Regulation, in the normal course, German law will apply to his or her worldwide assets, including assets outside of Germany. If there is real estate located in Ontario, the property falls under Ontario rules and is subject to Ontario law, but it can be brought into account in the German estate administration.

Habitual residence in Germany brings into play Germany's forced heirship rules—which is potentially unintended or unwanted. However, the new law permits the Canadian to choose Ontario law under his or her will. Ontario's internal law would apply given that property matters fall under provincial law, and German law will not apply.

Canadians habitually resident in an EU state should obtain advice on their estate planning to avoid the unintended application of the law where they habitually reside, and consider choosing their law of domicile of a Canadian province.

The new European rules are a welcome development in estate planning and administration, including for Canadian clients who increasingly have ties to EU jurisdictions given the ability to make a choice of law. In the Canadian context, consideration of these rules is critical when drafting a will for a client with connections to participating EU member states.

Sponsored by

O'SULLIVAN
ESTATE LAWYERS