The new European Succession Regulation and its implications for Switzerland

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1. Purpose
The free movement of persons between EU member states and growing mobility are increasing the number of instances of cross-border succession within Europe. Different connecting criteria in member states' conflict rules have frequently caused disputes over jurisdiction, which can result in an unintended but unavoidable fragmentation of the succession. The EU Succession Regulation (SR) is designed to harmonise conflict rules within the EU in order to avoid disputes over jurisdiction and the resultant division of an estate in cases of cross-border succession within the EU member states.

2. Scope
The SR covers all civil law aspects of legal succession on death. It applies to cases of succession on or after 17 August 2015. Among the areas excluded from the scope of the SR are substantive law of succession, matrimonial property regimes, inheritance tax legislation and trusts (establishment, operation and dissolution). The Regulation does not affect application of international conventions to which one or more member states are party at the time of adoption of the SR and which concern matters covered by it.

The SR applies in all cases where the deceased – regardless of whether he/she is a national of a member state of the EU or a non-member state (e.g. Swiss) –
- had his/her last habitual residence in an EU member state,
- left assets in an EU member state, or
- chose the law of an EU member state.

However, the SR will not be applied in the United Kingdom, Ireland and Denmark since these states have not adopted it.

3. Jurisdiction
3.1 Ordinary jurisdiction
The deceased's last habitual residence will have jurisdiction. The term "last habitual residence" is not precisely defined. According to the preamble of the SR, when determining the habitual residence, an overall assessment should be made of the circumstances of the life of the deceased during the years preceding and at the time of his/her death, taking account of all relevant factual elements, in particular the duration and regularity of the deceased's presence in the state concerned and the conditions and reasons for that presence. It will rest ultimately with the courts to decide what qualifies as the last habitual residence.

3.2 Subsidiary jurisdiction
If the deceased was not habitually resident in a member state at the time of his/her death (e.g. he/she resided in Switzerland), the courts of a member state may exercise subsidiary jurisdiction if the assets of the estate (movable and immovable) are located in a member state. If the deceased possessed the nationality of a member state in which assets of the estate are located, or if he/she habitually resided in that member state during the last five years before referral to court, jurisdiction will be over the entire estate. In the absence of one of these requirements, the courts of a member state will only have jurisdiction over the assets of the estate which are located in that state.

This ruling will lead to considerable conflicts of jurisdiction with regard to non-EU states such as Switzerland.
4. Applicable law

Habitual residence is (likewise) a connecting factor for determining the applicable law. This represents a compromise between states which to date have taken nationally as the connecting factor (e.g. Germany, Italy, Spain) and those which have used place of residence as the basis (e.g. France). The law determined as applicable under the SR is also enforced if it is the law of a non-EU state such as Switzerland.

The SR allows for a choice of law. A person may choose the law of the state whose nationality he/she possesses at the time of making the choice or at the time of death. A person possessing multiple nationalities may choose the law of any of the states whose nationality he/she possesses at the time of making the choice or at the time of death.

Agreements as to succession were also incorporated in the SR. Accordingly, the admissibility, substantive validity and binding effects of a succession agreement are governed by the law which, under the SR, would have been applicable if that person had died on the day on which the agreement was concluded. This provision opens up new options for estate planning since succession agreements have to date been inadmissible in some member states (e.g. France, Spain, Italy).

5. Recognition of decisions

Decisions given in matters of succession in one EU member state will be automatically recognised in all other member states without any special procedure being required. However, automatic recognition does not apply in the case of Switzerland, where the current requirement of a formal act of recognition will remain in place in future.

6. European Certificate of Succession

The SR marks the introduction of the European Certificate of Succession, the effects of which extend to all member states without any special procedure being required. A European Certificate of Succession (or a certified copy) is valid for a limited period of six months.

It should be noted that use of the European Certificate of Succession is voluntary and is not a replacement for domestic certificates of inheritance.

According to current opinion, the European Certificate of Succession does not constitute a recognisable foreign statement of inheritance in the eyes of the Swiss authorities.

7. Conclusion

The SR simplifies matters and brings a degree of legal certainty to estate planning in respect of cross-border succession within the EU member states. The tying-in of agreements as to succession also opens up new options for estate planning. In cross-border succession cases connected to several EU member states, the SR makes estate planning easier with regard to non-EU countries such as Switzerland, since the risk of having to apply different conflict rules is reduced and, with it, the risk of division of an estate. That being said, the SR cannot prevent all conflicts of jurisdiction with Switzerland as a non-EU country.