

# EU SUCCESSION REGULATION – HOW IT AFFECTS YOU OUTSIDE OF THE EU

by Advocate David Dorgan

## INTRODUCTION

The EU Succession Regulation<sup>1</sup> is not just an EU thing as it ambitiously attempts to resolve the conflict of laws in succession matters. It will apply to deaths after 17 August 2015.

## BACKGROUND

Due to the mobility of today's people, who can accumulate assets in multiple countries, upon death the usual questions faced when dealing with cross-border succession issues are:

- (i) does a governing law clause only mean that place's domestic laws or does it include its private international laws which will, in all likelihood, pass the question to another country; and
- (ii) can the laws of different jurisdictions apply to different assets?

Therefore, the aim of the Succession Regulation is to resolve the conflict of succession laws between the participating member states (which in this case do not include the UK, Ireland and Denmark) so that the courts of a single jurisdiction will apply a single set of laws to a person's estate regardless of the location of assets.

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<sup>1</sup> (Regulation (EU) No.650/2012)

## WHAT JURISDICTION AND APPLICABLE LAW WILL APPLY?

In general terms, the courts and governing law will be the place of the deceased's "habitual residence" unless:

- (i) there is a jurisdiction to which the deceased was more closely connected; or
- (ii) the deceased elected for the law of their nationality to apply.

Therefore, if the law governing the succession falls within one of the above (even if that is not an EU member state), assets of the deceased located in a participating member state should pass entirely in accordance with the law of that other jurisdiction and regardless of the laws of the state within which the assets are located.

To accommodate this, interested parties in the estate will be able to apply to the courts of the relevant jurisdiction for a "European Certificate of Succession". This certificate will contain details about the deceased, such as the relevant succession law and the heirs, and will act as an equivalent to a grant of probate or representation for each participating member state; therefore doing away with post-death certificates in each jurisdiction.

## THAT SOUNDS GREAT, BUT...?

**Habitual Residence:** In typical EU fashion, the Succession Regulation does not define "habitual residence" so looking to other EU sources it is likely to be regarded as: 'the place where the person had established, on a fixed basis, his permanent or habitual centre of interests, with all the relevant facts being taken into account for the purpose of determining such residence'. Consequently, more often than not, the meaning will be a complex question of fact.

**Non-Participating Member States:** It is difficult to see how the non-participating member states, such as the UK, can be forced to follow the requirements of the Succession Regulation. Therefore, without all member states signing up to the Succession Regulation, you have to suspect its application will have limited success if an estate involves assets in a non-participating state. For example, a French resident and national can chose French law to apply to both his bank accounts in Luxembourg and house in London. Whilst the bank accounts could fall under French law for succession purposes, the UK is not bound by the Succession Regulation and so it is difficult to see why the English courts would recognise (i) the European Certificate of Succession; and (ii) that French law applies to English realty. If the situation was reversed, with an English resident national owning a Parisian house, the English courts would look to apply the law of its situs and apply French law.

**Forced Heirship:** It is entirely possible that, in some cases, the Succession Regulation could result in "forum shopping" by some testators having dual nationality and wishing to avoid forced heirship provisions in certain participating member states and which exist to avoid disinheritance of family members.

## APPLICABILITY TO ASSETS IN THE CHANNEL ISLANDS

Not being parties to the Succession Regulation, we anticipate the position being the same as a non-participating member state. Therefore, for those persons with assets in either Jersey or Guernsey and who may chose the law of their habitual residence or nationality to apply to those assets pursuant to the Succession Regulation, be aware that neither Jersey or Guernsey are likely to recognise its applicability or even perhaps the European Certificate of Succession.

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