EUROPEAN UNION REGULATION NO 650/2012:
THE EU SUCCESSION REGULATIONS

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I. Prior to EU Regulation No 650/2012

a. Many succession disputes occurred due to the frequent migration of individuals
   between EU Member States.

b. EU Member States vary greatly in their succession laws.
   i. In some EU Member States, decedents may leave their estate to whomever
      they wish, e.g., England, Wales, Ireland.
   ii. In other EU Member States, forced heirship rules apply, e.g., France and
       Scotland.
   iii. Choice of law questions were addressed in various ways based on the
        applicable jurisdiction and applied different connecting factors such as
        domicile, residence, nationality and/or habitual residence to determine
        which jurisdiction’s laws should govern a decedent’s estate.

II. EU Regulation No 650/2012: Summary

a. EU Regulation No 650/2012 (the “EU Succession Regulation”) governs
   succession among EU Member States that have opted in for persons dying on or
   after August 17, 2015.

b. Under the EU Succession Regulation, the country in which a decedent died
   habitually resident will, by default, govern succession of decedent’s estate.

c. Alternatively, under Article 22 of the EU Succession Regulation, an individual
   may elect, in writing (i.e., in a Will), to apply the law of his or her nationality to
   govern the succession and administration of his or her estate. If an individual has
   more than one nationality, he or she may choose between them.

d. The EU Succession Regulation apply to all property (i.e., fixed and tangible).

e. All EU Member States have signed on to this regime (each a “Participating EU
   Member State”), other than the United Kingdom, Ireland and Denmark (each an
   “Opt-Out State”).

f. In practice, the EU Succession Regulation creates both opportunities and
   challenges.
III. Challenges

a. The EU Succession Regulation does not specifically define “habitual residence.”
   i. Under the EU Succession Regulation, determining “habitual residence” requires facts and circumstances analysis of the length of time spent by the decedent in various countries and other relevant factors.
   ii. The absence of a specific definition causes uncertainty when compared to jurisdictions that do define and apply the term “habitual residence” under local law.

b. EU Succession Regulation vs. Switzerland.
   i. Swiss law defines “habitual residence” as the last place a decedent was living with the intent to remain permanently.
   ii. Thus, where a decedent has a connection to both Switzerland and a Participating EU Member State, both jurisdictions may try to claim authority over the estate. Examples:
      1. Swiss national with last habitual residence in a Participating EU Member State.
      2. Swiss resident owning assets in a Participating EU Member State.
      3. National of a Participating EU Member State with last habitual residence of Switzerland and who elected their law of nationality to determine succession.

c. The EU Succession Regulation Exception from the Habitual Residence Rule.
   i. An exception to the application of the default habitual residence rule is provided where a decedent was “manifestly closer connected” to a country other than their last country of habitual residence.
   ii. Example: If a French national were to move to Spain and die shortly thereafter, French law would likely still apply because the decedent arguably had a “manifestly closer connection” to France.
   iii. The goal of this exception is to prevent EU nationals from forum shopping immediately prior to death, but does create uncertainty under the EU Succession Regulation.

d. EU Succession Regulation v. Opt-Out States
   i. Though the EU Succession Regulation is non-binding on non-EU Member States and Opt-Out States, it will affect persons from such a state, such as the U.S. or the U.K.
   ii. U.K. National: Examples
      1. U.K. national who has moved to Scotland, but owns property in both Scotland and England. If no jurisdictional election is made, such individual could die and be considered habitually resident in Scotland. Under the default rule of the EU Succession Regulation, Scotland would then attempt to apply their forced heirship succession laws to both the property in both England and Scotland. English courts would likely reject this and apply English intestacy
law as to succession of the English real property because it is fixed in England. This uncertainty may be avoided by having such an individual sign a Will explicitly providing that English law apply to his or her estate.

2. U.K. national, resident and domiciliary who owns a vacation home in France. To avoid France’s forced heirship rules, such individual should consider signing a French Will specifically stating that English law apply to his or her estate, including the French vacation property.

e. EU Succession Regulation and the United States
   i. Article 36 of the EU Succession Regulation applies internal conflicts-of-law rules to determine jurisdiction for a national of a country, such as the U.S., with a number of states, each with its own set of laws. If such a country does not have internal conflicts-of-law rules, then references to the nationality of the decedent shall refer to the law of the territorial unit with which the decedent had the closest connection.
   ii. Both a U.S. citizen who is resident in France as well as a French citizen who is habitually residing in the U.S. may be able to avoid forced heirship.
   iii. States should consider enacting legislation that would ensure that a choice of U.S. law under the EU Succession Regulation, particularly for U.S. persons domiciled in the EU, will be recognized by U.S. courts.
      1. For example, New York EPTL Section 3-5.1 provides clear choice-of-law provisions.
         a. Consider contacts with each jurisdiction.
         b. Note policy differences between laws of each jurisdiction.
         c. Apply law of jurisdiction with greatest governmental interest in outcome.

IV. Opportunities: Provides Planning Options

a. Electing out of forced heirship rules.
   i. Theoretically, a decedent who has a connection to France and another Participating EU Member State may choose to apply the succession laws of the latter to circumvent France’s forced heirship rules.
   ii. Note, however, Article 35 of the EU Succession Regulation provides that the application of the provisions of the EU Succession Regulation may be refused if, and only if, the application is “manifestly incompatible” with public policy.
      1. This rule generates a concern as to whether the EU Succession Regulation would be able to trump forced heirship rules, particularly with respect to real property, in states such as France or Scotland, or if a state may successfully argue that such application is “manifestly incompatible” with public policy.
V. Summary of Specific Relevant Provisions of the EU Succession Regulation

   i. Provides that a disposition made in writing is valid as to form if it complies with the law of the State:
      1. **where the disposition was made** (or an agreement as to succession concluded);
      2. **of the nationality** the decedent (or at least one of the persons whose succession is concerned by an agreement as to succession), either at the time when the disposition was made or the agreement concluded, or at the time of death;
      3. where the decedent (or at least one of the persons whose succession is concerned by an agreement as to succession) was **domiciled**, either at the time when the disposition was made or the agreement concluded, or at the time of death.
      4. where the testator (or at least one of the persons whose succession is concerned by an agreement as to succession) had his or her **habitual residence**, either at the time when the disposition was made or the agreement concluded, or at the time of death; or
      5. **where the property is located**, in the case of immovable property.

b. Article 83: Applicability to Dispositions Prior to Enactment
   i. A disposition of property upon death made prior to August 17, 2015 is formally valid if:
      1. it meets the conditions of Art 27 or
      2. it is admissible and valid in substantive terms and as regards form when made:
         a. in the country of decedent’s habitual residence;
         b. in any of decedent’s countries of nationality; or
         c. in the EU Member State with authority for dealing with the succession under the EU Succession Regulation.

c. Article 75: EU Succession Regulation vs. Hague Convention
   i. If an EU Member State is a contracting party to the Hague Convention, then the Hague Convention rules trump Article 27 as to form.

VI. Conclusion

a. The EU Succession Regulation provides planning opportunities, but it is not without pitfalls and issues of uncertainty. For individuals with assets and ties to multiple jurisdictions, it is important to review their estate plan and, in most cases, sign a new Will which clearly elects a jurisdiction to govern such individual’s estate administration and succession matters.