



JULY 2015

INHERITANCE AND TAX LAW

THE EUROPEAN UNION SUCCESSION REGULATION

PRACTICAL APPLICATION

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I. INTRODUCTION: EUROPEAN UNION REGULATION NO. 650/2012

On 4 July 2012, the European Parliament and the Council approved Regulation (EU) no. 650/2012 which covers the jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession (inheritance). The Regulation also creates a European Certificate of Succession.

This regulation applies to the succession of persons who die on or after 17 August 2015. However, the regulation safeguards the validity of dispositions of property upon death or the choice of law made by the deceased, in a will, a joint will or an agreement as to succession, if made before the above date.

In terms of temporal application and transitional provisions, it is important to note that this Regulation also safeguards the validity of acts of succession (including wills) made prior to 17 August 2015, as long as they respect the conditions set out in the Regulation.

The European legislation in question applies to all Member States, with the exception of the United Kingdom, Denmark and Ireland, because of their special position in relation to the area of freedom, security and justice and to the Treaty on the Functioning of the European Union.

This Regulation is based on three fundamental principles:

- i) Jurisdiction and application to all of the assets of the deceased regardless of their situation and location;
- ii) It establishes the general rule (connecting factor) of the habitual residence of the deceased at the date of death, but it does not establish any minimum residence period to meet the requirement of the rule;

This means that habitual residence has to be assessed in light of the factual circumstances of the deceased, in particular, the duration and regularity of the deceased's residency in the State in question, as well as the conditions and reasons for this residence.

- iii) The law that applies to the deceased's succession under the new Regulation applies to the whole of the succession;

However, the regulation safeguards the validity of dispositions of property upon death or the choice of law made by the deceased, in a will, a joint will or an agreement as to succession, if made before the above date.

II. SCOPE OF APPLICATION OF THE REGULATION

The Regulation applies to all aspects of succession: from the date the process begins until the final distribution of the estate.

However, the Regulation excludes everything related to gifts, like insurance contracts, trusts, matrimonial property regimes, family maintenance obligations, the nature of property rights and taxation.

(i) General rule and universal application of the Regulation

The Regulation establishes the law of the last habitual residence of the deceased as the only connecting factor. The aim of this is to designate the court with jurisdiction to decide on the whole of the succession and to designate the law applicable to the succession.

This means that, in order to decide the habitual residence, the authority that is dealing with the succession – in Portugal that power was given to the notaries public offices by Law 23/2013 of 5 March – must carry out an overall evaluation of the circumstances of the life of the deceased during the years prior to death and at the time of death.

To do this, the authority must take the relevant facts into consideration, in particular, the duration and regularity of the residence of the deceased in the State in question, as well as the conditions and reasons for this residence.

In light of the above, when it comes to international jurisdiction, the following provisions of the Regulation have to be considered: article 4 *“The courts of the Member State in which the deceased had his habitual residence at the time of death shall have jurisdiction to rule on the succession as a whole”*, article 5 (Choice-of-court agreement), article 6 (Declining of jurisdiction in the event of a choice of law) and article 22 (Choice of law).

Article 21(1) addresses the applicable law and provides that: *“Unless otherwise provided for in this Regulation, the law applicable to the succession as a whole shall be the law of the State in which the deceased had his habitual residence at the time of death”*. Article 20 of the Regulation provides that: *“Any law specified by this Regulation shall be applied whether or not it is the law of a Member State”*.

In certain cases, determining the habitual residence of the deceased may be complicated. This is the case when the deceased, for professional or economic reasons, has been living abroad in order to work, sometimes for long periods, but has maintained a close and stable relationship with his or her State of origin.

As an example of this, a significant number of Portuguese people emigrated to other Member States or countries outside the European Union. In these cases, it is necessary to consider the terms on which they are working abroad, how often they return to Portugal, whether they have assets in Portugal or in the country where they work and, even if they work abroad, if they invest and acquire assets in Portugal, etc.

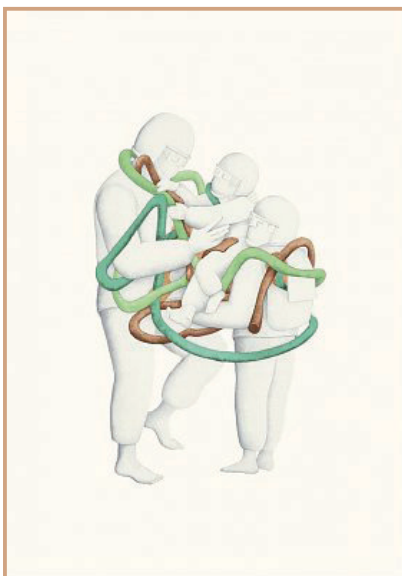
Another complex set of circumstances can arise when the deceased has lived alternatively in various States or has travelled between States without settling permanently in any of them.

(ii) Choice of law

As mentioned above, the general rule defined by the Regulation is that of the habitual residence of the deceased at the date of death, **except if the deceased has chosen the law of his or her nationality to govern the whole of the succession.**

Article 22(1) of the Regulation states that: *“A person may choose as the law to govern his succession as a whole the law of the State whose nationality he 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 possesses at the time of making the choice or at the time of death.”*

That testamentary provision may be in the following terms: *“I choose, under Regulation no. 650/2012 of the European Parliament and of the Council of 4 July 2012, the law of my nationality (Portuguese) as the law applicable to my succession. I also choose the jurisdiction of the Portuguese courts for the same purposes.”*



CATARINA LEITÃO (detail)
S/ título (da série Os Personagens), 2006
Aquarela s/ papel | 42 x 30 cm
From the Collection of the PLMJ
Foundation



CATARINA LEITÃO (detail)
One with Nature 001, 2005
Aquarela s/ papel | 180 x 106 cm
From the Collection of the PLMJ
Foundation



Any such choice must be made expressly in a declaration that takes the form of a disposition of property upon death (for example, a will) or results from the terms of this disposition.

Furthermore, article 83(4) provides that if a disposition of property upon death was made prior to 17 August 2015 in accordance with the law which the deceased could have chosen in accordance with this Regulation, that law is deemed to have been chosen as the law applicable to the succession.

(iii) Agreements as to succession

In the case of any agreement as to succession, article 25(1) of the Regulation provides that – when it relates to the succession of one person – the agreement will be governed, as regards its admissibility, its substantive validity and its binding effects between the parties, including the conditions for its dissolution, by the law which, under this Regulation, would have been applicable to the succession of that person if he had died on the day on which the agreement was concluded.

Article 25(2) adds that: “An agreement as to succession regarding the succession of several persons shall be admissible only if it is admissible under all the laws which, under this Regulation, would have governed the succession of all the persons involved if they had died on the day on which the agreement was concluded.”

In a way, the new Regulation on succession is a useful contribution and a warning about the situation we live in today: free movement of people and property in the European Union. Because of this, we hope that people take on board the situation that exists and approach the issue of succession in a very natural way.

Despite the two provisions of article 25, the law allows the parties to choose as the law that governs the agreement as to succession, the law than the person or one of the people whose estate is in question could have chosen under the terms of article 22 of this Regulation.

(iv) Public policy

Under article 35 of this Regulation, in exceptional circumstances and for public interest reasons, the authorities responsible for the matter may refuse to apply certain provisions of foreign law whenever their application, in a specific case, is manifestly incompatible with the public policy of the Member State in question.

(v) The European Certificate of Succession

The Regulation also allows the beneficiaries of the succession to deal with the whole process with a single authority, thus avoiding duplication of procedures and costs.

For this purpose, the Regulation creates a European Certificate of Succession which allows the heirs and/or administrators of the estate to prove their capacity to any authority in the Member States without the need for further formalities.

In this respect, article 4 of the Regulation determines that the courts of the Member State in which the deceased had his or her habitual residence at the time of death will have jurisdiction to rule on the succession as a whole.

III. TAX ISSUES

(i) Tax on gratuitous transfers upon death: what and who is subject to the tax

The Tax on Inheritance and Gifts was abolished in Portugal in 2003. Nevertheless, gratuitous transfers upon death are currently subject to tax in Portugal in the form of stamp duty.

Stamp duty is a territorial tax that is charged, among other legal situations, on gratuitous transfers upon death of real or personal property located in Portugal.

In this case, stamp duty is payable by the heirs on the date of the opening of the succession. There is an exemption from stamp duty for the spouse or legally-recognised partner, and relatives in the ascending or descending line. However, the remaining beneficiaries of an inheritance, regardless of the degree of affinity of family relationship, even if collateral, are subject to payment of this tax at the rate of 10% on the taxable value of any assets received that are located in Portugal.

(ii) Proposal to introduce a tax on high-value estates

One of the proposals for tax policy for the next decade contained in the report of the Socialist Party working group is to tax estates (gratuitous transfer upon death) with a value of €1 million or more.

What is proposed is a combination of eliminating the current exemption from stamp duty on gratuitous transfers upon death for the spouses, legally-recognised partners and relatives in the ascending or descending line in the case of estates with a value of €1 million or above and, at the same time, increasing the applicable stamp duty rate from the current 10% to 28%.

IV. CONCLUSION: SUCCESSION PLANNING

In light of the above, today we are seeing a clear call for succession (inheritance) planning that takes into consideration the mass of domestic and international legislation and the free movement of people.

As we see it, it is time for us to put aside any fear of considering death and organise our succession in good time, in an informed way and, principally, to avoid legally complex situations and legacies that create conflict between our heirs.

In a way, the new Regulation on succession is a useful contribution and a warning about the situation we live in today: free movement of people and property in the European Union. Because of this, we hope that people take on board the situation that exists and approach the issue of succession in a very natural way.

V. CASES THAT ILLUSTRATE THE APPLICATION OF THE REGULATION

To make it easier to understand the practical application of the rules described above, we now present some hypothetical cases:

1. On 17 August, Mr Anders, a Swedish national, died in Rome (Italy), where he had lived since 2000. He has real and personal property in Sweden and Italy. He has one daughter.

■ Which law applies to succession?

Regulation no. 650/2012 - the law of the habitual residence of the deceased, therefore, the Italian authorities have jurisdiction and Italian law applies to the whole of succession.

■ What taxes will be charged on the estate in Portugal?

Given that none of the assets that make up the estate are located in Portugal, the gratuitous transfer of assets taking place upon the death of Mr Anders will not be subject to stamp duty in Portugal.

2. In 2016, Mr Michel, a French national, dies in Argentina where he had lived since 1990. He leaves a son and real and personal property in Argentina and France.

■ Which law applies to the succession?

To answer this, it is necessary to look at the conflict of laws rules of each of the States involved in this case (Argentina and France):

Under Argentina's private international law, the applicable law is that of the last residence of the deceased: Argentinian law applies to the whole of the succession and the Argentinian authorities have jurisdiction;

Regulation no. 650/2012 - the law of the last habitual residence of the deceased: Argentinian law applies to the whole of the succession and the Argentinian authorities have jurisdiction;

■ What taxes will be charged on the estate in Portugal?

Given that none of the assets that make up the estate are located in Portugal, the gratuitous transfer of assets occurring upon the death of Mr Michel will not be subject to stamp duty in Portugal.

3. Mr Edivaldo, a Brazilian national, resides in Portugal, and dies in Portugal in 2016. He has assets in Portugal and Brazil.

■ Which law applies to the succession?

Regulation no. 650/2012 - the law of the last habitual residence of the deceased: Portuguese law applies and the Portuguese authorities have jurisdiction.

■ What taxes will be charged on the estate in Portugal?

The gratuitous transfer of assets located in Portugal occurring upon the death of Mr Edivaldo is subject to stamp duty in Portugal. Depending on who the beneficiaries of this estate are (relatives in the ascending or descending lines as opposed to other collateral family members or non-family members), that transfer may or may not be exempt from payment of stamp duty in Portugal at the rate of 10% over the respective value.

4. Mrs Johnson, a British national, has lived in Faro, Portugal, since 1998, and dies in 2019. Mrs Johnson has assets in Portugal and in the United Kingdom.

■ Which law applies to the succession?

Regulation no. 650/2012 - that question arises in the Portuguese legal system so the Regulation applies. Therefore, Portuguese law applies as the law of the last habitual residence of the deceased and Portuguese authorities have jurisdiction over the succession.

■ What taxes will be charged on the estate in Portugal?

The gratuitous transfer of assets located in Portugal occurring upon the death of Mrs Johnson is subject to stamp duty in Portugal. Depending on who the beneficiaries of this estate are (relatives in the ascending or descending lines as opposed to other collateral family members or non-family members), that transfer may or may not be exempt from payment of stamp duty in Portugal at the rate of 10% over the respective value.



MARTINHO COSTA (detail)
A Colecionadora, 2007
Óleo s/ MDF | 40 x 45 cm
From the Collection of the PLMJ Foundation

5. Mr António, a Portuguese national, has lived in Brighton, England, since 2005, and dies in 2020. Mr António has assets in Portugal and in the United Kingdom.

■ Which law applies to the succession?

Under the terms of article 1 and two of Protocol no. 21 on the position of the United Kingdom and Ireland in relation to the area of freedom, security and justice annexed to the Treaty of European Union and the Treaty on the Functioning of the European Union, these Member States have not adopted the Regulation and are not subject to its application. As such, in the case set out above, the question is posed to the UK authorities and will be resolved according to its internal rules, because the Regulation does not apply.

■ What taxes will be charged on the estate in Portugal?

The gratuitous transfer of assets located in Portugal occurring upon the death of Mr António is subject to stamp duty in Portugal. Depending on who the beneficiaries of this estate are (relatives in the ascending or descending lines as opposed to other collateral family members or non-family members), that transfer may or may not be exempt from payment of stamp duty in Portugal at the rate of 10% over the respective value.

6. Mr Klaus, a German national, went into a retirement home in Portugal (the Algarve). He dies in Portugal in 2018, five years later. Except for the bank account he has in Portugal, all his real and personal property is in Germany. His only son, who visits him regularly, lives in Germany.

■ Which law applies to the succession?

The authority may, in exceptional cases, reach the conclusion that the law applicable to the succession should not be that of the State of habitual residence, but rather the law of the State with which the deceased had a manifestly much closer relationship. This is regardless of the fact that, as a rule, the law of the habitual residence applies. In this case, therefore, German law would apply and the Portuguese authorities would have jurisdiction.

■ What taxes will be charged on the estate in Portugal?

The gratuitous transfer occurring upon the death of Mr Klaus of the cash deposited in the Portuguese bank in favour of his son will be subject to, but exempt from, payment of stamp duty in Portugal.

7. Mr Klaus, a German national, went into a retirement home in Portugal (the Algarve). He dies in Portugal in 2018, five years later. He sold all his assets in Germany and only left a bank account in the country. His only son, who visits him regularly, lives in Germany.

■ Which law applies to the succession?

Regulation no. 650/2012 - the law of the last habitual residence of the deceased: Portuguese law would apply to the whole of the succession and the Portuguese authorities would have jurisdiction over it.

■ What taxes will be charged on the estate in Portugal?

Given that none of the assets that make up the estate are located in Portugal, the gratuitous transfer of assets occurring upon the death of Mr Klaus will not be subject to stamp duty in Portugal.

8. Mr Santos was born in Évora lived there his whole life. He has dual Portuguese and Brazilian nationality. He dies in Évora in 2016, leaving real and personal property in Portugal and Brazil. When he prepared his will 2013, he chose Brazilian law as the law applicable to succession.

■ Which law applies to the succession?

Regulation no. 650/2012 - the choice of Brazilian law is possible and valid; Brazilian law would apply to the whole of the succession while the Portuguese authorities would have jurisdiction over it.

■ What taxes will be charged on the estate in Portugal?

The gratuitous transfer of assets located in Portugal occurring upon the death of Mr Santos is subject to stamp duty in Portugal. Depending on who the beneficiaries of

this estate are (relatives in the ascending or descending lines as opposed to other collateral family members or non-family members), that transfer may or may not be exempt from payment of stamp duty in Portugal at the rate of 10% over the respective value.

9. Mr Olivier, a French national, resides in Portugal and has assets in Portugal. He dies in 2016 and his children lived with him in Portugal. Mr Oliver chooses the law of his nationality (French) to govern his succession by will.

■ Which law applies to the succession?

Regulation no. 650/2012 - the choice of French law is possible and valid; however, the children may seek a declaration that the French authorities (chosen by the father) do not have jurisdiction over the succession, taking into consideration the location of the assets and the residence of the two heirs in Portugal. In this case, French law would apply to the whole of the succession and the Portuguese authorities would have jurisdiction over it.

■ What taxes will be charged on the estate in Portugal?

The gratuitous transfer of assets located in Portugal occurring upon the death of Mr Olivier to his children would be subject to, but exempt from, stamp duty in Portugal.

10. A couple, in which the wife is a German national and the husband is an Austrian national and who reside in France, has a choice. They may designate either German or Austrian law as the law applicable to the succession and, until this designation is made, French succession law will apply to the succession (and French succession law does not recognise agreements as to succession).

■ What taxes will be charged on the estate in Portugal?

On the assumption that none of the assets that make up the estate are located in Portugal, the gratuitous transfer of assets that occurs upon the death of either of the couple will not be subject to stamp duty in Portugal.

11. A citizen with Algerian nationality, who resides in Algeria, dies in this country in 2016 leaving bank accounts in Spain and real property in Algeria. He leaves two children, a girl and a boy, who live in Spain.

■ **Which law applies to the succession?**

Regulation no. 650/2012 - the law of the last habitual residence of the deceased: Algerian law governs the whole of the succession;

Algerian succession law gives rise to inequalities between the girl and the boy;

Spanish public policy - the Spanish notary does not have to accept the gender-based discrimination and, for this reason, should substitute Algerian law, which would normally be applicable by Spanish law.

■ **What taxes will be charged on the estate in Portugal?**

Given that none of the assets that make up the estate are located in Portugal, the gratuitous transfer of assets occurring upon the death of this Algerian citizen will not be subject to stamp duty in Portugal.

12. Mr Pierre, a Belgian national, dies in Portugal in 2016, where he has lived for 10 years, leaving real and personal property in Belgium, Luxembourg and Portugal. He leaves one son.

■ **Which authority has jurisdiction to issue the European Certificate of Succession?**

The only authority with jurisdiction will be the Portuguese notary chosen by the heir.

■ **What taxes will be charged on the estate in Portugal?**

The gratuitous transfer of assets located in Portugal occurring upon the death of Mr Pierre in favour of the son will be subject to, but exempt from, the payment of stamp duty in Portugal.

13. On 17 August, Mr Anders, a Swedish national, dies in Rome (Italy), where he has lived since 2000. He has real and personal property in Sweden, Italy and Portugal. He has one daughter.

■ **Which law applies to the succession?**

Regulation no. 650/2012 - the law of the last habitual residence of the deceased: Italian law applies to the whole of the succession.

■ **What taxes will be charged on the estate in Portugal?**

As she is a descendant in the direct line, Mr Anders' daughter will be exempt from the payment of stamp duty in Portugal at the rate of 10% on the real and personal property located in Portugal that forms part of the estate.

14. Mr Pierre, an Italian national, dies in Portugal in 2016, where he has lived for 10 years. He leaves real and personal property in Italy, Luxembourg and Portugal. He leaves one brother.

■ **Which law applies to the succession?**

Regulation no. 650/2012 - the law of the last habitual residence of the deceased: Portuguese law applies to the whole of the succession.

■ **What taxes will be charged on the estate in Portugal?**

As he is not a descendant in the direct line, Mr Pierre's brother will be subject to payment of stamp duty in Portugal at the rate of 10% on the real and personal property located in Portugal that is part of the estate.

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