

# Federal Act on Private International Law – Swiss Parliament adopts new provisions on Succession Law

On 22 December 2023, the Swiss Parliament adopted a revision of Chapter 6 (Succession Law) of the Federal Act on Private International Law (PILA). The revision has two main objectives, namely to harmonise Swiss law provisions with foreign rules of private international law, in particular with the EU legislation, and to increase the autonomy of the parties in relation with the law applicable to their succession as well as the designation of the competent authority.

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## General context

In 2020, the Federal Council submitted to the Swiss Parliament a draft amendment of the provisions of the PILA relating to succession law.

The need to adapt these provisions arose in particular from the entry into force of the *EU Regulation No 650/2012* (EU Regulation), which applies since 2015 in all EU Member States (with the exception of Denmark and Ireland) and defines notably the competent authorities to deal with an individual's estate as well as the applicable law.

In addition, the revision of the PILA was also intended to reflect various clarifications of the legal provisions, which have emerged from the case law and doctrine over the last 30 years.

The date of entry into force of the new provisions has not been decided yet. It is however likely that the new provisions will enter into force in 2025.

## Main amendments relating to jurisdiction

### **Possibility to exclude Swiss jurisdiction for Swiss national residing abroad (Art. 87 C2 nPILA)**

Until now, when the testator wished to chose Swiss law as being applicable to his/her estate it was presumed that he/she also wished for the Swiss authorities to deal with the estate after his/her demise. The election of Swiss law by a Swiss national living abroad thus automatically created a compulsory Swiss jurisdiction. This could result in positive conflict of jurisdictions and could also in some situations have an impact from an inheritance tax perspective.

Under the new provisions of PILA, the testator living abroad may now exclude the competence of the Swiss authorities in case he/she elects Swiss law as applicable to his/her estate.

### **Election of foreign jurisdiction for Swiss resident (Art. 88b nPILA)**

Once in force, Art. 88b nPILA will enable foreign nationals and Swiss nationals with one or more other nationalities to submit their succession to the jurisdiction of the authorities of their national State when they are electing their foreign national law as applicable to their estate.

Under the current PILA, the Swiss authorities automatically considered themselves as competent when somebody died having his/her last residence in Switzerland, irrespective from any *professio juris*.

This new possibility shall however be carefully considered as the same possibility does not exists with respect to the liquidation of the matrimonial property (Art. 51 lit. a nPILA), thus potentially creating a situation where one authority deals with the liquidation of the matrimonial regime upon passing and another with the liquidation of the estate *stricto sensu*.

### **Subsidiary jurisdiction of the Swiss authorities in case of inaction of a foreign authority (Art. 87 C1 and 88 C1 nPILA)**

Current Arts. 87 C1 and 88 C1 PILA create a general subsidiary jurisdiction of the Swiss authorities in cases where foreign authorities do not deal with the estate of a Swiss national living abroad (Art. 87 C1 PILA) or with the Swiss situs assets of a foreign national living abroad (Art. 88 C1 PILA).

Both provisions will be harmonized and clarified under nPILA. The new Arts. 87 C1 and 88 C1 nPILA will clarify that the Swiss subsidiary jurisdiction applies primarily in situations where the authorities of the State of residence do not deal with the estate.

In addition, in case where (i) the authorities of the State of the deceased's foreign nationality or (ii) the authorities of the State where assets are located deal with the succession, the Swiss authorities will have the possibility to decline jurisdiction in order to avoid positive conflicts of jurisdiction.

## Main amendments relating to applicable law

### ***Professio juris* (art. 91 nPILA)**

At present, Swiss dual nationals residing in Switzerland may not submit their succession to their foreign national law. Only foreign nationals who do not hold the Swiss citizenship may submit their succession to the law of their foreign national State.

Under Art. 91 C1 nPILA, Swiss nationals as well as foreign nationals will have the right to choose the law of one of their national States as being applicable to their estate. This will have the following main consequences:

1. The choice of foreign law will also be possible for Swiss dual nationals.
2. The choice of foreign law will continue to be valid also if the deceased was no longer a foreign national upon his/her passing (provided he/she was a foreign national at the moment the *professio juris* was made).

It is however important to note that Swiss dual nationals cannot derogate from Swiss forced heirship rules protecting the spouse and the deceased's descendants. Swiss forced heirship entitlement thus continue to apply to Swiss dual nationals' estate, even though he/she submits his/her estate to foreign law.

#### **Renvoi (art. 90 C2 nPILA)**

The succession of a person whose last residence was abroad will continue to be governed by the law designated by the private international law rules of the State of his/her last residence.

However, by virtue of art. 90 C2 nPILA, where the law of that State refers to Swiss private international law, the substantive succession law of the State of the deceased's last residence will be applicable. This new provision avoids "ping-pong situations" where foreign law was referring to Swiss international private rules, etc. and thus provides for more legal certainty.

#### **Applicable law in relation with the executor's or administrator (art. 92 C2 nPILA)**

Art. 92 C2 nPILA clarifies that *lex fori* applies in relation with the executor or administrator's rights over the estate's assets (notably power of disposal), irrespective of any *professio juris* made in favor of foreign substantive law.

This question was disputed under the current PILA, notably with respect to the right of disposition attributed to executors and administrators designated under English law wills.

## **Practical implications and recommendation**

The Federal Council has yet to determine when these new provisions will come into force. It is however likely that they will already come into force in 2025.

These provisions are of great practical importance for international estate planning and should already be taken into consideration when advising clients.

Firstly, they allow Swiss dual nationals to provide for the application of their foreign national law to their estate. When electing their foreign national law, Swiss nationals shall however continue to respect forced heirship provisions such as provided by Swiss inheritance law. It nevertheless gives to Swiss dual nationals the possibility to use inheritance instruments unknown to Swiss law, such as *mortis causa* trusts.

The new provisions will also allow to avoid positive conflict of jurisdiction, in particular in situations where a Swiss national residing abroad elects Swiss law as being applicable to his/her estate.

In addition, Swiss law will now allow foreign nationals residing in Switzerland to, not only, have their estate governed by their national law, but also, to submit their estate to the jurisdiction of their national authorities, thus avoiding situation where the Swiss authorities have to apply foreign law. The tax impact of such choice of jurisdiction should, however be carefully assessed.

The exclusion of Swiss jurisdiction as well as the choice of a national jurisdiction and applicable law must be expressly foreseen in the testator's will. In order to be effective, it is therefore key that the possibilities given by the new PILA provisions be reflected in the testator's will.

We recommend to review existing succession plans with a view to implement the opportunities arising from the new provisions.

Please do not hesitate to contact us if you have any further questions on this subject.

**Legal Note:** The information contained in this Smart Insight newsletter is of general nature and does not constitute legal advice.

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