Professio juris : an estate planning tool for foreign nationals living in Switzerland

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One of the first questions to be resolved in estate planning is to determine which law will apply to the deceased's estate. When drawing up a will or an inheritance agreement, such a choice of law enables the testator to determine the portion that must be allocated to certain family members (known as the reserve or reserved portion) and the portion that he or she may freely dispose of (known as the available portion). The professio juris is an institution that was introduced in Switzerland to settle inter-cantonal and then international disputes, and has been adopted in a large number of states, including the European Union. It allows the deceased to choose, within certain limits and subject to certain conditions, the law to which he or she wishes to submit his or her estate.

Two important points should be made at the outset regarding the scope of a professio juris. Firstly, it applies only to civil law and not to tax law. This means that a taxpayer cannot freely choose the tax law to which he wishes to subject his estate, and that opting for a foreign civil law has no influence on the tax law that applies to the estate. Depending on the circumstances, this can be good or bad news. On the other hand, without going into overly technical details that would go beyond the scope of this contribution, a professio juris only concerns what is termed the status of succession, for example, as mentioned above, the size of the reserved and available portions, but not the competent authorities or courts for probate and/or any legal proceedings, or the applicable law for determining the formal validity of a will or an inheritance agreement.

We will begin by presenting the rules currently in force in Switzerland, as set out in the Federal Act of 18 September 1987 on Private International Law ("PILA"). We will then take a brief look at the rules set out in European Union Regulation No 650/212 of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of authentic instruments in matters of succession and the creation of a European Certificate of Succession (EU Regulation), which came into force on 17 August 2015 and applies in all Member States except Denmark and Ireland. Finally, we will review the current state of affairs with regard to

the ongoing reform of the principles laid out in the PILA concerning the professio juris, which are due in particular to the entry into force of the EU Regulation.

Current Swiss law

Article 90 para. 1 PILA states the principle that if a deceased person was last domiciled in Switzerland, his or her succession is governed by Swiss law. However, the legislator has provided that a foreign national may, under certain conditions, subject his or her succession to the law of one of his or her national States (art. 90 al. 2 PILA). The legal conditions and limits, as clarified by doctrine and case law, can be summarised as follows:

a) The professio juris must be made in the form required for a will or a contract of inheritance. By virtue of article 93 para. 1 PILA, the validity of wills is governed as to form by the Hague Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions. The legislator has specified that this Convention applies by analogy to the form of other dispositions mortis causa (art. 93 para. 2 PILA), i.e. to inheritance agreements. As it is beyond the scope of this article to study the Hague Convention, we will refer the reader to its text. According to the Swiss Federal Court, professio juris may be express or tacit (ATF 125 III 35).

b) A foreign national domiciled in Switzerland is not free to subject his succession to any law. He may only subject it to the law of the State of which he is a national. If he has several nationalities, he is free to subject his succession to the law of the State of one of them. This principle was established by the Federal Court in Hirsch v. Cohen (ATF 102 II 136), to which we will return below. It does not matter whether or not the deceased had relations with that State.

c) Professio juris is only possible for foreign nationals (art. 90 al. 2 PILA), to the exclusion of Swiss dual nationals. In other words, a Swiss national who is also an English national cannot subject his or her estate to English law.

d) An important question is when the deceased must have had the nationality to which he has submitted his estate. In theory, there are four possibilities: at the time of drawing up the will containing the professio juris; at the time of death; both at the time of drawing up the instrument and at the time of death; or at one or the other of these times. Under article 90 para. 2 PILA, the deceased must hold the citizenship of the State of which he elected the law at the time of his death. However, although the text of this provision is relatively clear on the fact that the testator must also be the holder of this nationality at the time of drafting the professio juris, some legal scholars consider that this is not necessary. For the sake of legal certainty, we can only recommend that the reader not make a professio juris in favour of the law of a State of which he is not yet a national.

e) The scope of a professio juris is a vast subject. Given the extent of the subject, we will confine ourselves to the following remarks. On the one hand, it is clear from the wording of articles 90 para. 2 and 95 para. 2 PILA that it is not possible to make a partial professio juris regardless of whether it is contained in a will or a contract of inheritance. This means that, by virtue of the principle of unity of succession, a foreign national cannot decide to subject only certain assets of his estate to the law of the State of which he is a national. On the other hand, the professio juris has the consequence of subjecting the de cujus' succession to the substantive law of succession of his national State. This choice of law has no effect either on the form of the will or the contract of inheritance, or on the authorities and courts competent to open the succession and rule on any legal proceedings, or on the enforcement procedures (art. 92 al. 2 PILA). Finally, one of the fundamental questions is to determine whether Swiss law allows the testator to override the Swiss rules on reserves by means of a professio juris. By way of reminder, the new inheritance rules that came into force on 1 January 2023 provide that for a married couple with children, the reserved portion amounts to 2/8 for the surviving spouse and 2/8 for the descendants. In the above-mentioned Hirsch v. Cohen judgment, the Swiss Federal Supreme Court ruled that subjecting one's estate to a law that does not provide for reserves, in this case English law, was not in principle abusive or contrary to Swiss public order. On the other hand, according to case law and academic writers, Swiss public order would preclude rules of foreign law providing for discrimination based, for example, on the heir's sex or religion.

To conclude this presentation of current Swiss law, we draw the reader's attention to the fact that Switzerland has concluded a number of bilateral agreements, with the United States, the Persian Empire, Greece and Italy, and that foreign nationals wishing to make a professio juris in favour of one of these States must therefore ensure that it complies with these agreements.

European law

As mentioned above, the European Union introduced the professio juris when only certain Member States were familiar with this institution in Articles 22, 24 para. 2 and 25 para. 3 of the EU Regulation. We will briefly present the rules and put them into perspective with current Swiss law, as this European legislation is at the origin of the reform of Swiss law that we will present below.

While Article 21(1) of the EU Regulation lays down the principle that the law applicable to a succession as a whole is that of the State in which the deceased had his habitual residence at the time of his death, Article 22 governs the professio juris, the main principles of which can be summarised as follows.

a) As in Swiss law, a professio juris may be stipulated expressly or tacitly in a declaration in the form of a disposition mortis causa (Article 22(2) of the EU Regulation).

b) Similarly, the European legislator has provided that a person may choose as the law governing his succession the law of any State of which he is a national (Article 22(1) EU Regulation).

c) However, European law differs fundamentally from Swiss law on the question of dual citizens. A person with dual citizenship who is domiciled in a State of which he or she is a national may subject his or her succession to his or her other nationality. For example, a person of Belgian and Portuguese nationalities domiciled in Belgium can elect Portuguese law.

d) The EU Regulation also differs from Swiss law on the question of when the person making a professio juris must have the nationality of the State to which he is submitting his succession. He or she must have the nationality of that State either at the time he or she makes the professio juris or at the time of his or her death (Art. 22, par. 1 of the EU Regulation).

e) With regard to the scope of the professio juris, the main principles are as follows. Firstly, the choice of law must relate to the whole of the succession (Article 22(1) of the EU Regulation), which rules out any partial professio juris. Secondly, Article 23 of the EU Regulation explicitly sets out the issues governed by the applicable law. Finally, the EU Regulation does not contain any provisions designed to protect heirs with right of retention in the event of professio juris. However, given that Article 35 of the EU Regulation provides that the application of a provision of the law of a State designated by the EU Regulation may be refused if such application is manifestly incompatible with the public policy of the forum, States remain free in this respect.

Revision of Swiss law

On 13 March 2020, the Federal Council published its Message on the amendment of the Federal Act on Private International Law, which deals in particular with the provisions governing professio juris. The aim of this reform is to bring the Swiss rules into line with those set out in the EU Regulation. Below we present the main changes contained in the Federal Council's draft (D-PILA), stressing that this draft has already been submitted, in accordance with the legislative procedure, to the National Council and the Council of States and that it is possible that the final version that will be adopted will not correspond exactly to that of the D-PILA. We will confine ourselves to making a comparison between the rules contained in the D-PILA and current Swiss law by referring to the letters mentioned above.

The rules in letters a, b and e will remain unchanged. However, the proposed changes are as follows:

c) Pursuant to Article 91 para. 1 D-PILA, a Swiss with dual nationality would have the option of making his or her succession subject to foreign law. Consequently, a Belgian-Swiss dual national domiciled in Switzerland could subject his or her succession to Belgian law. It should be pointed out that, at the time of writing, the National Council has adopted and is defending this amendment, whereas the Council of States would like binational Swiss citizens to be able to submit their succession solely to Swiss law, which in practice would not change the current rules.

d) Article 91(1) of the D-PILA is in line with the EU Regulation on the question of when the testator must have the nationality of the State to which he is submitting his succession. In fact, this provision stipulates that he "must have had the nationality in question at the time of disposing of his estate or at the time of his death". However, we draw the reader's attention to the fact that the National Council has accepted this amendment, whereas the Council of States is opposed to it. The Council of States wants the testator to still have the nationality in question at the time of his or her death.

Conclusion

The professio juris is an interesting estate planning tool. Depending on the nationality or nationalities of the testator, it may allow him to elect a more favourable law, particularly in terms of reserved portions. We would like to stress that once a choice of law has been made, it is important for the settlor to follow the development of the that country's law. It is indeed possible that it may change between the time when it was elected for and the time of the testator's death and the law as at the date of death will apply. Added to this is a second uncertainty due to Swiss law, insofar as we do not yet know what the definitive rules resulting from the reform will be. To be continued… ■