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Towards the entry into force of the succession regulation: building future uniformity upon past divergencies

Fondazione Italiana del Notariato

LMU LUDWIG-MAXIMILIANS-UNIVERSITÄT MÜNCHEN

SEMINAR AND EXCHANGE OF BEST PRACTICES | MUNICH, 23 JUNE 2015

The EU Regulation no. 650/2012: the European way in cross-border successions

The Habitual Residence of the Deceased and the Manifestly Closer Connection as Connecting Factors within the Succession Regulation

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THE PROJECT IS IMPLEMENTED BY COORDINATOR

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Article 21. General Rule.

1. 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.

2. Where, by way of exception, it is clear from all the circumstances of the case that, at the time of death, the deceased was manifestly more closely connected with a State other than the State whose law would be applicable under paragraph 1, the law applicable to the succession shall be the law of that other State.

I. Habitual Residence – Art. 21(1) SR

1. The Rationale of choosing Habitual Residence as a General Connecting Factor

The EU lawmakers have chosen the habitual residence of the deceased at the time of death as the general connecting factor for the purposes of determining both jurisdiction and the applicable law for three very specific reasons, i.e.

- in view of the increasing mobility of citizens,
- in order to ensure the proper administration of justice within the Union and
- to ensure that a genuine connecting factor exists between the succession and the Member State in which jurisdiction is exercised.

2. The Definition of Habitual Residence

a) No Inter-instrumental Interpretation of 'Habitual Residence'

The interpretation of this concept "*must take into account the context of the provision and the purpose of the relevant regulations*". There is no binding uniform concept of habitual residence based on some inter-instrumental interpretation of the various provisions in the relevant texts of the EU. The definition of the habitual residence can be different, depending on the matter being considered.

2. The Definition of Habitual Residence

b) Social security and civil service matters

The court of Justice has defined habitual residence as "*the place in which the official concerned has established, with the intention that it should be of a lasting character, the permanent or habitual centre of his interests*."

2. The Definition of Habitual Residence

c) The Habitual Residence of Children

In addition to the physical presence of the person in a Member State other factors must be chosen which are capable of showing that that the presence is not in any way temporary or intermittent and that the residence of the person reflects some degree of integration in a social and family environment. In particular, the duration, regularity, conditions and reasons for the stay on the territory of a Member State, the person's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the person in that State must be taken into consideration.

2. The Definition of Habitual Residence

d) The Habitual Residence of the Debtor in International Insolvency Cases

The centre of main interests of a natural person within the meaning of art. 3 of the Regulation (EC) 1346/2000 – now Regulation (EU) 2015/848 – is at his habitual residence.

2. The Definition of Habitual Residence

e) The Relevant Recitals of the Succession Regulation

"(23) *In order to determine the habitual residence, the authority dealing with the succession should make an overall assessment of the circumstances of life of the deceased during the years preceding his death and at the time of his death, taking account of all relevant factual elements, in particular the duration and regularity of the deceased´s presence in the State concerned and the conditions and reasons for that presence. The habitual residence thus determined should reveal a close and stable connection with the State concerned taking into account the specific aims of this Regulation.*

(24) *In certain cases, determining the deceased´s habitual residence may prove complex. Such a case may arise, in particular, where the deceased for professional or economic reasons had gone to live abroad to work there, sometimes for a long time, but had maintained a close and stable connection with his State of origin. In such a case, the deceased could, depending on the circumstances of the case, be considered still to have his habitual residence in his State of origin in which the centre of interests of his family and his social life was located. Other complex cases may arise where the deceased lived in several States alternately or travelled from one State to another without settling permanently in any of them. If the deceased was a national of one of those States or had all his main assets in one of those States, his nationality or the location of those assets could be a special factor in the overall assessment of all the factual circumstances*."

Example 1 (border commuters):

Mrs. Melitta Josefa Boedeker lives with her family in Mülheim/Germany. Every work day she crosses the border to the Netherlands where she works. The Netherlands are the country in which she pays taxes on the income from her activity and the country in which she is covered by a social security scheme and pension, sickness insurance and invalidity schemes.

Example 2 (medical treatment abroad):

Monsieur Dubois, a French national worked as a dentist in Abidjan (Ivory Coast) for several decades. Having developed cancer, he moved to Paris to have the cancer treated there and he died in Paris three years later. He had kept his flat in Abidjan, paid his social contributions there and stated himself to be resident in Abidjan in his wealth tax declaration.

Example 3 (sunset years abroad):

Herr Müller, of German nationality, had lived his active life in Germany. At the age of 65, he settled in Mallorca (Spain) with the intention of staying there until he died. The greater part of his assets were situated in Germany.

Example 4 (working abroad):

Signor Bianchi, an Italian national is employed in Germany; he lives there as if permanently, but his wife has remained in Italy, where he owns a flat, to which he goes in order to be with her every other weekend.

Example 5 (commuting migrants):

Señora Catherine Garcia, a woman of dual French and Spanish nationality has arranged her life by spending six months of the year in Paris and the other six months in Madrid. She has assets in both countries and elsewhere. It is impossible on this limited factual basis to decide whether the habitual residence is in France or in Madrid.

II. The Escape Clause: Under which circumstances was the deceased manifestly more closely connected with a State other than the State of his last habitual residence? – Art. 21(2) SR

1. The Rationale of the Escape Clause

Pursuant to art. 21(2) of the Regulation: "*Where, by way of exception, it is clear from all the circumstances of the case that, at the time of death, the deceased was manifestly more closely connected with a State other than the State whose law would be applicable under paragraph 1, the law applicable to the succession shall be the law of that other State.*"

The rationale of this escape clause is unclear and its scope of application is limited: Since already the determination of the habitual residence requires an overall assessment of the circumstances of life of the deceased (Recital no. 23 sentence 2), it is hard to understand how even more justice could be done in the individual case by applying the escape clause.

II. The Escape Clause:

2. The Definition of 'Manifestly Closer Links'

"(25) *With regard to the determination of the law applicable to the succession the authority dealing with the succession may in exceptional cases – where, for instance, the deceased had moved to the State of his habitual residence fairly recently before his death and all the circumstances of the case indicate that he was manifestly more closely connected with another State – arrive at the conclusion that the law applicable to the succession should not be the law of the State of the habitual residence of the deceased but rather the law of the State with which the deceased was manifestly more closely connected. That manifestly closest connection should, however, not be resorted to as a subsidiary connecting factor whenever the determination of the habitual residence of the deceased at the time of death proves complex*."

II. The Escape Clause:

Example 6 (a posted worker's closest links):

Herr Müller, a German national, has been an official at the Council of Europe until his death. He lived in Strasbourg and he has just died there. His habitual residence has been determined as being in Strasbourg and it is therefore French law that the objective connection clearly indicates

III. The „Single-Scheme“ Concept (*Nachlasseinheit*):

The so-called system of scission (*Nachlassspaltung*) creates several bodies of assets, each one subject to a different law which determines differently heirs and their respective shares, and the division and liquidation of the succession. The single-scheme concept adopted by the Regulation allows the succession to be subjected to a single law, thereby avoiding these disadvantages.

IV. Conclusive Remarks:

The replacement of nationality by habitual residence as a connecting factor for both jurisdiction and the applicable law in cross-border succession cases is **the right thing to do**. Such a connecting factor favors the integration of the testator into the social and legal reality of the state he chose to live in and it leads to quicker and less expensive court decisions in that field. Furthermore, there is high probability that judges find the correct solution to the cases they have to decide, because the uncertainties involved in the application of foreign law will be diminished significantly. However, there are **two weak points** in the new rules: the missing legal definition of the habitual residence as the key connecting factor in art. 21(1) of the Regulation and the unclear role of the escape clause in art. 21(2) of the Regulation.

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