



# FINAL CONFERENCE

EU Cross-Border Succession Law



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## EU Regulation n. 650/12

# “Succession” and “Habitual Residence”: two key concepts of the Succession Regulation

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## **Summary (1)**

- **Definition of Succession: the function of the term succession within the Regulation**
- **Definition of Succession: Single aspects (legacy in personam; transfer of assets as a 'reserved share'; universal succession and singular succession)**
- **Habitual residence: the role of Article 21 within the Regulation**
- **The rationale of choosing habitual residence as a general connecting factor: mobility; 'genuine' connecting factor; proper administration of justice**

## Summary (2)

- **inter-instrumental interpretation of ‘habitual residence’?**
- **Relevant circumstances for a ‘habitual residence’ (“close and stable connection with the State concerned”): overall assessment of the circumstances of the life of the deceased; duration and regularity of the deceased’s presence in the State concerned and the conditions and reasons for that presence; professional or economic reasons (to live abroad to work there); centre of interests of his family and his social life; main assets in one State; nationality of the deceased.**

**Article 3. Definitions.** 1. For the purposes of this Regulation:

(a) ‘succession’ means succession to the estate of a deceased person and covers all forms of transfer of assets, rights and obligations by reason of death, whether by way of a voluntary transfer under a disposition of property upon death or a transfer through intestate succession.

**Recital no. 9:** The scope of this Regulation should include *all civil-law aspects of succession* to the estate of a deceased person, namely all forms of transfer of assets, rights and obligations by reason of death, whether by way of a voluntary transfer under a disposition of property upon death or a transfer through intestate succession.

## **The legacy in personam: “succession”?**

**Example: The testator names his wife as the sole heir, and bequeaths the shares in his private limited company to his nephew. In the event of death, the widow becomes the sole heir. This means that she will become the owner of all the shares in the private limited company on the basis of universal succession. However, she is obliged, on the basis of the disposition of property upon death, to transfer the capital shares in the private limited company, to the legatee by assignment.**

**Succession within the meaning of the Regulation does not necessarily mean universal succession.**

**Succession can also be referred to a single asset, like in the case of a legacy in rem (see above, II. 2) or in the cases covered by Article 30 of the Regulation.**

**Furthermore, in case of the presence of several heirs, company law (e.g. in Germany) with regard to certain partnerships may allow only for singular succession as opposed to a universal succession according to the general principles of the law of succession.**

## **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.

## **Habitual Residence – Art. 21(1) SR** (*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.



*The Definition of Habitual Residence: 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.

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

## **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: sunset years abroad**

Herr Müller, of German nationality, had lived his active life in Germany. At the age of 65, he settles in Toscana (Italy) with the intention of staying there until the end of his days. He buys a country house (“rustico”) to live there with his wife. The greater part of his assets were situated in Germany (appartement, bank account).

**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.”

## → Summary:

1) As to the notion of 'succession', also the merely intermediate transfer of the asset to the heir and the subsequent acquisition of property on the basis of a legacy in personam is 'succession' within the meaning of the regulation.

2) The replacement of nationality by **habitual residence** as a connecting factor:

- contributes to the integration of the testator into the social and legal reality of the state he chose to live in,
- it leads to quicker and less expensive court decisions in that field.
- **Two weak points:** the missing legal definition of the habitual residence as the key connecting factor and the unclear role of the escape clause in art. 21(2) of the Regulation.