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EU LAW TRAINING IN ENGLISH LANGUAGE:
BLENDED AND INTEGRATED CONTENT AND LANGUAGE TRAINING
FOR EUROPEAN NOTARIES AND JUDGES



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Regulation (UE) 650/12 on cross-border successions

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Notary Chamber of Bulgaria



**International
Association of
Judges**

promoting an independent judiciary worldwide

Legal sources

Judicial cooperation in civil matters - Article. 81 TFUE Green book 1.3.2005

EP Resolution 16.10.2006 Proposal of regulation

14.10.2009 Adoption reg. 650/2012 4.7.2012

Entry in force 17.8.2015

Exceptions: articles 79, 80, 81 – Entry in force 5.7.2012



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Characteristics of the Regulation

- Unifies in Europe the PIL of successions
- Bounds the EU Member States, except Denmark, Ireland and United Kingdom
- It is applicable since 17 August 2015 to persons died on or after that date
- It is part of a wider project of unification in the field of PIL

Purpose of the Regulation

The regulation **disciplines** in a basically complete way:

- Competence of the authorities of Member States
- Conflicts of laws
- Circulation of decisions and authentic acts between Member States

The Regulation **introduces** the **European Certificate of Succession (ECS)**



Main implications of the Regulation

Being part of the EU law, the Regulation:

- requires a uniform interpretation and benefits of the prejudicial competence of the ECJ
- it is subject to the parameters of legitimacy of the EU legal order
- requires by the national authorities an attitude of loyal cooperation

Scope of the Regulation

The Regulation:

- regulates succession, as defined by it, including agreements as to succession
- does not regulate matters of another nature, even if related to the succession
- presupposes an element of internationality
- it is not limited to intra-European cases

Article 23

The scope of the applicable law

1. The law determined pursuant to Article 21 or Article 22 shall govern the succession as a whole.
2. That law shall govern in particular:
 - (i) any obligation to restore or account for gifts, advancements or legacies when determining the shares of the different beneficiaries;

Exclusions

Article 1.2, point (g) (h) (i) (j)

(g) property rights, interests and assets created or transferred otherwise than by succession, for instance by way of gifts, joint ownership with a right of survivorship, pension plans, insurance contracts and arrangements of a similar nature, without prejudice to point (i) of Article 23(2);

(h) questions governed by the law of companies and other bodies, corporate or unincorporated, such as clauses in the memoranda of association and articles of association of companies and other bodies, corporate or unincorporated, which determine what will happen to the shares upon the death of the members;

(i) the dissolution, extinction and merger of companies and other bodies, corporate or unincorporated;

(j) the creation, administration and dissolution of trusts;



The principle of unity of succession

In the Regulation, succession is treated as a **single matter**, without distinction on the basis of the nature of the assets of the axis or their location.

The principle of unity:

- is aimed at the search for stable convergence between forum and ius
- suffers some temperament

Jurisdiction in succession matters

1. Basic rule (Art. 4 and Art. 10 SR)

- General jurisdiction at the last habitual residence of the deceased (Art. 4 SR)
- Subsidiary jurisdiction at the place where assets of the estate are located (Art. 10 SR)
- “Omni-jurisdiction” for the worldwide estate (Art. 10[1] SR), or
- Limited jurisdiction for the parts of the estate which are situated in that Member State (Art. 10[2] SR)

2. Derogations in case of a choice of law by the deceased (Arts. 5– 9 SR)

- Formal choice-of-court agreement (Art. 5 with derogating effects → Art. 6[b] SR and prorogating effects → Art. 7[a] or [b])
- Informal, but explicit acceptance of jurisdiction (Art. 7[c])
- Discretionary decline of jurisdiction by the competent court (Art. 6[a] with prorogating effects → Art. 7[a])



Jurisdiction in succession matters

3. Forum necessitatis (Art. 11 SR)
4. Limitation of proceedings to assets situated in the European Union (Art. 12 SR)
5. Acceptance of certain succession-related declarations (Art. 13 SR)



The law applicable to successions upon death

1. The general conflict rule, Art. 21 et seq. SR

- Basic rule (Art. 21[1] SR) and escape clause (Art. 21[2] SR)
- Limited freedom of choice, Art. 22 SR
- Scope of the lex hereditatis, Art. 1 SR on the one hand and Art. 23 SR on the other hand



2. Special conflict rules

- Admissibility, substantive validity and binding effects of a testamentary disposition (Art. 24 et seq. SR)
- Formal validity of a testamentary disposition, Art. 27, 75[1]2 SR and 1961 Hague Convention
- Formal validity of other succession-related declarations, Art. 28 SR
- Mandatory administration of the estate, Art. 29 SR
- Special succession regimes for certain assets, Art. 30 SR
- Simultaneous deaths, Art. 32 SR
- Heirless estates and the participation of the State, Art. 33 SR

3. General rules

- Incidental questions, cf. Art. 1[2][a] SR
- Adaption of rights in rem, Art. 31 SR
- Renvoi, Art. 34 SR
- Public policy, Art. 35 SR
- States with more than one legal system, Art. 36 et seq. SR

Recognition and enforcement of decisions in succession matters (Art. 39 et seq. SR)



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Treaties of the Member States with third states (Art. 75 SR)

Priority of the existing treaties (Art. 75[1])



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The habitual residence criterion



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Determination of habitual residence

- No definition in the regulation!
- Autonomous notion – factual criterion – functional and uniform interpretation
- Useful indications in recitals 23 and 24



Habitual residence

Criterion used in:

- International conventions of PIL
- EC and EU regulations on PIL
- Other EC and EU acts



Determination of habitual residence – interpretive tools

Recital 23 - parallelism ius/forum

In order to determine the habitual residence, the authority dealing with the succession should make an **overall assessment of the circumstances of the 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**.

Determination of habitual residence – interpretive tools

Recital 23

Overall assessment of the circumstances of the life of the deceased during the years preceding his death and at the time of his death

Duration and regularity of the deceased's presence

Conditions and reasons for that presence

Purpose: ascertain a close and stable connection with the State concerned

The Relevant Recitals of the Succession 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.”



Determination of habitual residence

Complex cases, recital 24

1) The deceased lived in several States alternately or travelled from one State to another without settling permanently in any of them.

Role of nationality? Location of main part of the estate?

2) 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.

Habitual residence in that country?

3) The deceased moved in a new country just before the death

Role of the intention?



Disadvantages of habitual residence

A certain degree of uncertainty as to the applicable law

- Corrective in professio juris (also implicit)
 - How to plan your own succession?
- Possibility of legal fraud and abuse of rights? See recital 26.
 - Non intra-EU inheritances
- Role of the renvoi: possible scission of the law applicable to the succession

It is possible that an individual has more than one habitual residence or none at all?



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.

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.”



The disposition

Article 22 Choice of law

1. 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.
2. The choice shall be made expressly in a declaration in the form of a disposition of property upon death or shall be demonstrated by the terms of such a disposition.
3. The substantive validity of the act whereby the choice of law was made shall be governed by the chosen law.
4. Any modification or revocation of the choice of law shall meet the requirements as to form for the modification or revocation of a disposition of property upon death.



A choice of law was possible also

before

the entry in force of the Regulation (17.8.2015)

Relevance of the transitional provisions



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Transitional provisions

Article 83 (2)

If the deceased had chosen the law applicable to his succession before 17 August 2015, that choice shall be **valid** if it satisfies the **conditions** set out in **Chapter III** or if it is valid in application of the rules of private international law in force at the time of the choice in the State in which the deceased had his habitual residence or in any of the States of which he possessed the nationality.



Transitional provisions

Article 83 (2)

- It attributes effect to the choice of one of the laws referred to in Article 22 **even when the systems of conflict closest to the deceased in force at that time did not allow the choice**
- Retains effect to the choice of laws other than those referred to in Article 22 even when the admissibility of the choice was assessed on the basis of Regulation



Transitional provision

Article 83 (4)

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 shall be deemed to have been chosen as the law applicable to the succession.**



Transitional rules

Art. 83, c. 4

The purpose of the rule is to keep the successions which would have been subject to the law of nationality under the connecting factor in force in the country of the deceased at the time when the will was drawn up, even if there does not appear to be a formal choice of law.

It is assumed that the deceased also wished to submit his succession to additional national rules



Tacit choice of law

Article 22

2. The choice shall be made expressly in a declaration in the form of a disposition of property upon death or shall be **demonstrated** by the **terms of such a disposition**.



Tacit choice of law

Elements (see Recital 39)

- Reference to specific provisions of the law of the State of his nationality (e.g. a testamentary trust by a British national)
- Language
- Drafting by the notary of the State whose law is implicitly chosen
- External circumstances (confirmative)



Tacit choice of law

Interpretative problems

- Would the deceased really chose (implicitly) the law?
- Or he/she disposed in that way because believed that that was the law?

(Errors, lack of international connecting factors, coincidence)



Tacit choice of law

Need for awareness?

The rule says "results" from the provisions, so it is generic compared to formulas used in other EU acts (which use terms such as "clearly" or "unambiguously")

Sufficiency of the "intention" - *Favor validitatis* – Discretion of the court

Fiction: those who want to choose the law should do so expressly!



The renvoi in Regulation (EU) 650/12



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The disposition

Article 34 Renvoi

1. The application of the law of any third State specified by this Regulation shall mean the application of the rules of law in force in that State, including its rules of private international law in so far as those rules make a *renvoi*:

(a) to the law of a Member State; or

(b) to the law of another third State which would apply its own law.

2. No *renvoi* shall apply with respect to the laws referred to in Article 21(2), Article 22, Article 27, point (b) of Article 28 and Article 30.



Member' and 'third' States

UK, Ireland and Denmark have not opted-in the Regulation:
are they Member States or third States?

"Bound" " and "unbound" States



Objectives of the renvoi

- Predictability of the applicable law
- Avoid forum shopping and forum running
- Avoiding incompatibility between judgments



The renvoi solves:

- (a) Negative conflicts of **laws** (each State considers its own law inapplicable)
- (b) Positive conflicts of **jurisdiction** (both courts consider themselves competent)

Article 34

Renvoi

1. The application of the law of any third State specified by this Regulation shall mean the application of the rules of law in force in that State, including its rules of private international law in so far as those rules make a *renvoi*:

- (a) to the law of a Member State; or
- (b) to the law of another third State which would apply its own law.



Exceptions to renvoi

- 1 - Article 21 (2) – Escape clause
- 2 - Article 22 - Choice of law
- 3- Article 27 - Law regulating the form of dispositions of property upon death made in writing
- 4- Article 28 (b) - Formal validity of the declaration concerning acceptance or waiver
- 5- Article 30 - Special rules imposing restrictions concerning or affecting the succession in respect of certain assets



The model of renvoi

Double renvoi

The renvoi includes not only the substantive law but also the PIL



Countries where the principle of unity of succession applies

(a) National law of the deceased

Albania
Germany (with temperaments)
Netherlands
Spain
Greece Portugal
Austria (except real estate of Austrians abroad and of foreigners in Austria = scission)
Czech Republic
Poland
Hungary
Turkey (except real estate in Turkey)
Slovenia
China, Cuba, Egypt, Japan, Mexico Philippines, Puerto Rico, Sweden



Countries where the principle of unity of succession applies

(a) Law of domicile

Switzerland (with exceptions)

Brazil (with exceptions)

Argentina

Ecuador

Venezuela

Burkina Faso

Denmark

Norway

Chile

Colombia

Peru



**Countries in which the principle of scission applies
(immovables = lex rei sitae; movables= national law/domicile law)**

(a) National law of the deceased

Liechtenstein Iran

Bolivia San Marino



Countries in which the principle of scission applies **(immovables = lex rei sitae; movables= national law/domicile law)**

(b) Law of the domicile

France Belgium

United Kingdom and Wales

Scotland

Luxembourg

China

Belarus

Gabon

Ireland, Canada, USA (except Mississippi), Costa-Rica, El Salvador



Countries where the principle of full scission

Uruguay

Panama

Guatemala

Latvia

Mississippi (USA)



Thank you for your attention



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