



**Polsko-Niemiecki
Instytut Badawczy
Deutsch-Polnisches
Forschungsinstitut**



Succession regulation - scope and jurisdiction

**Dr. Martin Margonski
Omšenie, 2-3 March 2017**



**This project is co-financed by
the European Union**

Scope and jurisdiction

→ scope of application

→ jurisdiction and choice of court

→ first case law

Scope of application

→ regulation applies in **all international cases**, also in relation to third states (as well as UK, Ireland and Denmark, treated as third states)

Scope of application

The **jurisdiction** and **applicable law** are, however, **regulated differently** in relation to member and non member states

Recognition of judgments (acceptance of authentic documents) is **limited to relations between member states** applying the regulation. Recognition of judgments from non-member states is regulated still by national law.

Scope of application

→ succession of a person who died on or after 17 August 2015 (art. 83 par. 1 regulation)

→ no bilateral agreement with a third state, which derogates the regulation (art 75 par. 2 regulation)

Bilateral agreements with third states

→ Poland:

Ukraine, Russia, Belarus, Vietnam, non EU successor states of former Yugoslavia, Cuba, Mongolia, North Korea

→ Hungary:

former Soviet Union (Russia, Belarus, Ukraine, Armenia, Moldova), Turkey, Iraq, North Korea, Mongolia

Bilateral agreements with third states

→ Czech Republic

Ukraine, non EU successor states of former Yugoslavia, Vietnam, Cuba, Mongolia, North Korea

agreement with the Soviet Union 1982

→ Slovakia:

non EU successor states of former Yugoslavia, Vietnam, Cuba, Mongolia

agreement with the Soviet Union 1982

Scope of application

Art. 1 par. 1

This Regulation shall apply to succession to the estates of deceased persons. It shall not apply to revenue, customs or administrative matters.

Scope of application

→ **civil law aspects** of the succession case with a foreign element, which are not excluded in art. 1 par. 2

the scope of applicable succession law, regulated in art. 23, may potentially be helpful

→ **no coordination of taxation** of international succession cases, tax law may restrict the release of / the access to succession property (rec. 10)

Scope: matrimonial property

→ exclusions: matrimonial property matters
(art. 1 par. 2 d)

*Regulation 2016/1103 of 24.6.2016
implementing enhanced cooperation in the
area of jurisdiction, applicable law and the
recognition and enforcement of decisions in
matters of matrimonial property regimes*

applicable after 29 January 2019

Scope: matrimonial property

Participating member states:

Austria, Belgium, Bulgaria, Croatia,
Cyprus, Czech Republic, Finland,
France, Germany, Greece, Italy,
Luxemburg, Malta, Netherlands,
Portugal, Spain, Slovenia

*Poland, Hungary, Slovakia do not
participate*

Scope: matrimonial property

Problems in distinguishing between law applicable to succession and matrimonial property regime:

§ 1371 German BGB

the spouse receives an additional share in the estate as a form of a simplified share of gains (Zugewinnausgleich) resulting from statutory matrimonial property regime (Zugewinngemeinschaft)

Scope: matrimonial property

Preliminary question of Kammergericht
in Berlin C-558/16 *Mahnkopf*

*Is the share of the estate resulting from
§ 1371 BGB to be revealed in the
European certificate of succession?*

Scope: matrimonial property

Jurisdictional problem of lack of coherence:

the matrimonial property regulation links the jurisdiction to the jurisdiction in succession case, if the common property is to be divided as a result of death of a spouse (art. 4)

Scope: matrimonial property

Member states not participating in the matrimonial property regulation may still impose their exclusive jurisdiction to immovable property in matrimonial property cases and refuse to recognise decisions from other member states, being at the same time bound by the succession regulation.

Scope: property rights

→ exclusions: property law (art. 1 par. 2 k)

the nature of rights in rem

application of the succession regulation cannot change the numerus clausus of rights in rem

an adaptation of the solutions of the applicable succession law may be needed (art. 31), if they undermine the property law system

Scope: property register law

→ exclusions: property register law (art. 1 par. 2 1 regulation)

any recording in a register of rights in immovable or movable property, including the legal requirements for such recording, and the effects of recording or failing to record such rights in a register.

Scope: property register law

Rec. 18:

*It should therefore be the law of the Member State in which the register is kept (for immovable property, the *lex rei sitae*) which determines under what legal conditions and how the recording must be carried out and which authorities, such as land registers or notaries, are in charge of checking that all requirements are met and that the documentation presented or established is sufficient or contains the necessary information.*

Scope: property (register) law

Preliminary question of Sąd Okręgowy in Gorzów
Wielkopolski C-218/16 *Kubicka*

*Must Article 1(2)(k), Article 1(2)(1) and Article 31
succession regulation be interpreted as permitting
refusal to recognise the material effects of a legacy
by vindication (legatum per vindicationem), as
provided for by [Polish] succession law, if that
legacy concerns the right of ownership of
immovable property located in a Member State the
law of which does not provide for legacies having
direct material effect?*

Jurisdiction

Jurisdiction is to be examined ex officio (art. 15):

Where a court of a Member State is seised of a succession matter over which it has no jurisdiction under this Regulation, it shall declare of its own motion that it has no jurisdiction.

Jurisdiction

→ where did the deceased had his/her last **habitual residence**?

→ are there any **dispositions of property upon death** (which could be a **source of choice of law**)?

Jurisdiction under art 4 f.

habitual residence of the deceased in a member state applying the regulation

→ jurisdiction regulated in art. 4 f.

→ concentration of jurisdiction in that member state „to rule on the succession as a whole” (including immovable property in other member states)

Jurisdiction under art 4 f.

Preliminary question of Kammergericht in Berlin C-20/17 *Oberle*:

*Must Article 4 succession regulation be interpreted as **regulating the exclusive jurisdiction**, which includes the issuing of national certificates such as the German Erbschein, despite of the fact that such certificates are not replaced by the European certificate of succession?*

Acceptance or waiver

Exception 1:

declarations made under art. 13

They are regulated by the applicable law, but it is **enough to meet formal requirements** of the law of the State in which the **person making the declaration has his habitual residence** (art 26)

Acceptance or waiver

Rec. 32:

Persons choosing to avail themselves of the possibility to make declarations in the Member State of their habitual residence should themselves inform the court or authority which is or will be dealing with the succession of the existence of such declarations within any time limit set by the law applicable to the succession.

Acceptance or waiver

Example:

Polish and German citizen residing in Berlin dies in January 2017, leaving considerable debts in both countries. No dispositions of property upon death are known. An adult daughter living in Gdańsk (Poland) would like to waive the succession.

Acceptance or waiver

Solution:

The daughter may waive the succession with German authorities (German court in Berlin, German consulate in Gdańsk) according to art. 4 or at the Polish court (a Polish notary) according to art. 13, but she has to send a translated Polish protocol (notarial deed) to the competent court in Berlin herself.

Provisional and protective measures

Exception 2: protective measures (art 19):

Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that State, even if, under this Regulation, the courts of another Member State have jurisdiction as to the substance of the matter.

Jurisdiction in case of choice of law

Courts of the **member state whose law had been chosen** under art 22 may have jurisdiction under art 7, if:

- choice-of court agreement has been made (art 5)
- court in the member state of the habitual residence declined jurisdiction (art 6)
- parties expressly accepted the jurisdiction of the state whose law had been chosen

Choice of law - sources

Dispositions upon death **made under the regulation** (after 17 September 2015) – art. 22 par. 2

→ choice made expressly in the disposition

→ demonstrated by the terms of such a disposition (*conclusive choice of law*)

old dispositions (made prior to 17 September 2015)

→ made under national private international law (expressly or conclusively) – art. 83 par. 2

→ presumed choice of law under art 83 par. 4, if a disposition has been “made in accordance with” the law of the nationality

Jurisdiction under art 10

Last **habitual residence in a third state** – a member state where assets of the estate are located has jurisdiction, if

→ the deceased had the nationality of that state at the time of death,

→ the deceased had his previous habitual residence in that state if, at the time the court is seised, a period of not more than five years has elapsed since that habitual residence changed

Jurisdiction under art 10

Art. 10 par. 2:

Where no court in a Member State has jurisdiction pursuant to paragraph 1, the courts of the Member State in which assets of the estate are located shall nevertheless have jurisdiction to rule on those assets.

Habitual residence - case law

Not defined in the regulation. Some explanatory remarks in rec. 23:

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.

Habitual residence - case law

Rec. 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.

Habitual residence - case law

Facts of the case:

The deceased German citizen died in February 2016. In February 2010, at the age of 72, he moved out of his Berlin apartment. He remained registered in a Berlin apartment of his daughter, which he nevertheless never visited. He moved to a rented apartment next to a storehouse in the border region in Poland. He retired in Germany but remained active as a constructing advisor in the area Berlin and Brandenburg, where he commuted on daily basis from his apartment in Poland.

Habitual residence - case law

Facts of the case:

The deceased spoke no Polish at all. He did not integrate in his Polish place of living in any way. He used medical care in Germany. All of his income was achieved in Germany. He lived at the Polish side of the border only because of the lower cost of living (rent for the apartment).

Two courts in Berlin started a competence disagreement when the daughter of the deceased tried to waive the succession. The competent court was to be determined by the appellate court (Kammergericht), which had to determine the place of habitual residence of the deceased.

Habitual residence - case law

decision (Beschluss) of the Kammergericht in Berlin of 24 April 2016, 1 AR 8/16

Germany remained the habitual residence of the deceased. The overall assessment of the facts of the case, especially no familiarly or social integration of the deceased in Poland, lead the court to such a conclusion. Taking into account the recitals 23 and 24 of the regulation, the ties to Germany prevailed, although the deceased had no place of residence (Wohnort) in Germany.

Habitual residence - case law

Case note of Peter Mankowski (Zeitschrift für das gesamte Familienrecht 2016, p. 1204-1206)

Social integration at the place of residence is a helping factor when confirming the habitual residence but it is not obligatory. Also a recluse has a habitual residence. The motivation to settle down in a particular country (lower cost of living in Poland) has no importance. Nor are sources of income (in casu coming from Germany) of importance.

Habitual residence - case law

Case note of Daniel Lehemann (Zeitschrift für Erbrecht und Vermögensnachfolge 2016, nr 9, p. 516-517)

After over 5 years of residence in Poland a habitual residence there should be confirmed also, if the deceased spoke no Polish. There is no proof that the deceased was better integrated in his previous German place of residence. Prevailing ties with Germany have not been precisely stated. The decision should not give grounds to any general conclusions.

Thank you for your attention