European Studies

Legal Regulation of Succession in European Union Law, Case Study: Regulation no. 650/12 of the European Union

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Abstract: This paper aims to inform readers in general with the EU Regulation on Succession, on its content, by analysing briefly the most important issues of this Regulation, and by providing answers to various dilemmas that EU citizens and others may have on important issues such as what this Regulation generally regulates; if an EU resident who lives or resides in a country other than that of origin dies, which law shall apply to his succession and which authority shall govern that succession; if the decisions and documents issued by the authorities governing the succession in a state are recognized in the other state or not; some brief issues about European Certificate of Succession, and other important issues pertaining to the governing of succession of EU citizens. While analysing and elaborating the content of the regulation, we will give certain examples in order to understand it easier. This paper will serve all those who want to know more about the Regulation, either for personal or academic reasons.

Keywords: applicable law; jurisdiction; habitual residence; authentic instruments

1. Introduction

Over 500 million people live in the European Union. EU citizens enjoy their right to property, which includes the right to bequeath and inherit land. And a nearly unrestricted freedom of movement allows to move from one state to another and to own property in any of the 28 member states. Each member state has its own succession laws, and the rights of EU citizens raise questions about applicable law:

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Citizen X is a national or habitual resident of State Y, but he dies while living and working in State Z. Which law should govern his succession?

To resolve such dilemmas and to facilitate as far as possible the issue of inheritance, the European Union has drafted and adopted a regulation called "Regulation (EU) No 650/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession" (hereinafter "the Regulation").

The Regulation is an act of the European Parliament and the Council of the European Union and is often referred to as Brussels IV. This Regulation was approved in July 2012, but began to be implemented after three years, in August 2015, with the exception of Articles 77 and 78 which began to be implemented by January 2014, and Articles 79, 80, 81 which began to be implemented immediately in July 2012. The United Kingdom, Ireland and Denmark have not accepted the European Union Regulation on Succession.

2. The Scope of the Regulation

Regulations are the only source of the EU secondary legislation that is of general application and obliges all Member States[1]. This could even easily be called "first legislation", since it is the only legal source of the EU, after the basic treaties, that has the highest mandatory legal power (Reka & Sela, 2011).

The scope of the Regulation is limited and rather narrow, for it leaves some issues to the Member States to regulate with their own national laws. The Regulation therefore tries to facilitate the issue of succession in EU Member States, by removing difficulties, uncertainties and contradictions of national laws, but without interfering in more detailed issues of national law. According to the Regulation, its scope includes all legal-civilian aspects of the property inheritance of a deceased person, respectively all forms of transfer of property, rights and obligations due to death, either through a voluntary transfer to the availability of property after death or passing through legal inheritance (The EU Regulation on succession, no. 650/12, 2012, recital no. 9).

[1] The term "Member State" includes all EU member states, except the United Kingdom, Ireland and Denmark.

The Regulation also expressly mentions what falls outside of its scope. The Regulation does not apply to issues on who can inherit, the ranks of inheritance, ability to act and some other similar issues.

3. The Term "Court"

Regarding the term "court", the Regulation does not refer to the narrow meaning of this word, but includes all bodies that exercise inheritance governing functions, such as notaries or legal professionals, depending on how it is regulated by laws of member countries. The regulation deals with the term in question, and it defines it on several cases. Thus, the regulation in the term "court" includes both the courts in the full sense of the word and authorities such as notaries or other legal offices that exist in some Member States, but provided that those other authorities exercise judicial functions in matters of the inheritance, or these judicial functions should be delegated by a court (The EU Regulation on succession, no. 650/12, 2012, recital no. 20).

Another article that defines the meaning of the term "court" states that this term includes other authorities that perform judicial functions on matters of succession, but which have to fulfil certain conditions, such as:

a) Ensure the implementation of two fundamental principles, the principle of impartiality and the principle of hearing of all parties;

b) Their decisions may be the subject of an appeal or review by a judicial body;

c) To have the same effect as the decisions of judicial authorities on the same matter (The EU Regulation on succession, no. 650/12, 2012, section 3.2).

3.1. The Role of Notary

The Regulation does not specify that the court or notary will be competent to govern the inheritance, leaving the issue to the Member States' laws to designate the authority responsible to govern the inheritance. In this respect, the Regulation also accepts the role of a notary to govern the inheritance if that is permitted by national law (The EU Regulation on succession, no. 650/12, 2012, recital no. 21).

4. Jurisdiction (the Competent Authority)

A very important issue is the jurisdiction of the court, i.e. the answer to the question of what is the competent court for governing the inheritance of the deceased person. EU legislators sought to resolve this issue to prevent positive or negative conflict of jurisdiction of the courts in cases where a person has an estate outside of the country of nationality.

The jurisdiction of the court is divided into general jurisdiction and subsidiary jurisdiction, depending on where the deceased had their habitual. Of general jurisdiction to decide on the inheritance as a whole, according to the Regulation, is the court of the Member State in which the deceased habitually resided at the time of death (The EU Regulation on succession, no. 650/12, 2012, article 4).

Example: If a French citizen has his habitual residence in Germany, although he is not a German citizen, the court in the state of Germany has the jurisdiction to decide to govern the succession of that person.

Habitual residence as a criterion for determining the competent court to govern the succession may be a problem in certain cases when, for example, a citizen of a member's state goes to work for a relatively long time in another Member State, but both property and his successors are in the country whose national is the decedent.

4.1. Choice-of-Court Agreement

The Regulation also foresees the agreement as a possibility for choosing the court, in cases when a person has determined that after his death in accordance with Article 22 of the Regulation as a law to govern his inheritance shall not be the law of the state in which he has his habitual residence, but the law of the state whose citizen he is. In this case the interested parties can make arrangements for the jurisdiction to be the state court whose law the deceased has chosen to consider his property (The EU Regulation on succession, no. 650/12, 2012, article 5). This means that the choice of law preceded and enables the choice-of-court agreement.

Example: A person is a citizen of Spain, but has his habitual residence in the Netherlands, and he decides that the law of Spain, and not the law of the Netherlands, is to be applied for governing his succession. In this case, interested parties to govern that succession may opt for the court of Spain, rather than the Netherlands court.

4.2. Declining of Jurisdiction in the Event of a Choice of Law

Although under Article 22 of the Regulation the deceased may choose which law to apply for the examination of his property, this does not automatically mean that he has also chosen the court of that state if he has not stated that he also chooses the designated court.

Example: A citizen of Italy who has his residence in Croatia, for the examination of his property selects Italian law, but as far as the court is concerned, he does not make a selection, then the court of Croatia will consider his property by law of Italy.

However, in this case, when according to article 4 of the Regulation the court is assigned by the habitual residence of the decedent, while he has chosen the law according to his citizenship, then at the request of one of the parties to the proceedings, the court determined by the place of residence may refuse its jurisdiction if it considers that the court of the of the chosen law is more appropriate to decide on the inheritance, taking into account the practical circumstances of the inheritance, such as the habitual residence of the parties and the location of the property, or it will also refuse jurisdiction if the parties have entered into an agreement for the chosen court pursuant to Article 5 of the Regulation (The EU Regulation on succession, no 650/12, 2012, article 6).

Example: A citizen of Italy who has his residence in Croatia for the examination of his property chooses the Italian law, but as for the court he does not make a selection, then in this case the court of Croatia will govern his inheritance by law of Italy. However, if one of the parties concerned requests from the Italian to court to govern the inheritance, then the court of Croatia, if it considers it more appropriate for the parties to process the proceedings in Italy, then declines its jurisdiction.

4.3. Subsidiary Jurisdiction

The court lacks general jurisdiction if the decedent did not reside in one of the Member States. Therefore, subsidiary jurisdiction comes into play and in this case the Regulation gives many advantages to Member States as opposed to non-member states, therefore it doesn’t take residence as a criterion for determining jurisdiction but the nationality if he/she had it in the Member States, and if not, then the penultimate habitual residence in one of the Member States in the last five years (The EU Regulation on succession, no 650/12, 2012, article 10)

Example: If a Greek citizen has his/her residence in Albania at the time of death, then habitual residence will not be taken as a criterion, and consequently the court of Albania will not have the right to govern the inheritance but this right will belong to the court of Greece.

5. Habitual Residence

The regulation, as we discussed so far, an important and decisive role in determining jurisdiction gives to, as it calls it, the habitual residence. This is because, as we know the European Union, one of the four movements that ensures it is the free movement of persons, and taking into consideration the fact that this movement is growing every day and many citizens even though they are residents of a Member State, for various reasons (for example, for work, education, etc.) are relocated to another Member State whose citizens they are not, then it is obvious that habitual residence is more appropriate than citizenship, but nevertheless citizenship is not excluded, and is taken into account in the cases that we discussed above.

However, as regards the criteria for determining the habitual residence the Regulation does not clearly and explicitly define its determining factors. In this regard, it obliges the authority dealing with the examination of the inheritance to focus in particular on two important facts or elements:

a) the duration and regularity of the presence of the deceased in the State concerned; and

b) the conditions and reasons for that presence. (The EU Regulation on succession, no 650/12, 2012, recital 23).

The habitual residence for determining jurisdiction or applicable law in the case of conflict of laws is also used by the Convention on International Civil Aspects of International Child Abduction, but not defining the notion in question. (Hague Conference on Private International Law, 1980).

The term habitual residence is also used by the regulation of the European Parliament and the Council of the European Union on the social security system, no. Regulation 883/2004 of April 2004, as last amended by Regulation 465/12 of May 2012. In this regard, the European Commission in 2014 published a roadmap

for the implementation of the "Habitual Residence Test" where several criteria for determination of habitual residence were noted, such as:

- Family status and family ties;
- Duration and continuity of presence in the Member State concerned;
- Employment situation (in particular the place where such activity is habitually pursued, the stability of the activity, and duration of the work contract);
- Exercise of a non-remunerated activity, etc.
- (European Commission (2014). Web page. Retrieved from http://ec.europa.eu/social/main.jsp?langId=en&catId=849&newsId=2021&furtherNews=yes)

5.1. Difficulties in Determining the Habitual Residence

EU citizens move from one state to another very often, and do so for many reasons. This makes determining their habitual residence particularly difficult. One citizen may live in another member state for education or employment for a long time, while maintaining close ties with their country of citizenship. In such cases, the country of origin may be considered as the decedent's habitual residence. (The EU Regulation on succession, no 650/12, 2012, recital 24).

Example: An Austrian professor concludes a contract with a university in Germany for one year, and he goes to Germany to work, but returns for almost every week to Austria where his family and friends are and has consequently maintained a relationship close and stable with the state of Austria. If a person dies during this period of time, depending on the circumstances of the case, his habitual residence may be considered in Austria, not in Germany.

In addition to the above case, there are other cases when determining the habitual residence can be a complicated matter. Therefore, when the deceased was a national of a country, but before he died he had lived or travelled to several countries, but never settled in either of them permanently. In these cases, the determinant factor for habitual residence may be the nationality of the deceased, or the location of all his property. **(**The EU Regulation on succession, no 650/12, 2012, recital 24).

Example: A citizen of Croatia, where he has the majority of his property, has acquired a scholarship in Spain, has signed a job contract in Portugal and France. Due to his commitments, he spends almost the same time in all these states. In case of death of the person concerned, it is difficult to determine in which state he was habitually resident, and as such the habitual residence may be considered to be in the state of Croatia, where he was national and had the majority of his assets.

6. The Applicable Law

Regarding the issue of applicable law, the Regulation does not exclude the laws of states which are not members of the European Union (The EU Regulation on succession, no 650/12, 2012, article 20). According to the Regulation, the law applicable for the succession as a whole is the law of the country of which the decedent was habitually resident at the time of death (The EU Regulation on succession, no 650/12, 2012, article 21.1). However, as we mentioned when we discussed the issue of defining the term habitual residence, when it is clear from the circumstances of the case that, at the time of death, the deceased was significantly associated with a state other than the State whose law would apply under paragraph 1, the applicable law on succession is the law of that other State (The EU Regulation on succession, no 650/12, 2012, article 21.2).

Habitual residence as determinant of applicable law on governing the succession is also used by Convention on the Law Applicable to Succession to the Estates of Deceased Persons (Hague Conference on Private International Law, Hague, 1989, (not yet in force) article 3.1).

6.1 Choice of Law

The Regulation guarantees or enables all persons who, according to their will, may choose the law which is most appropriate for them, provided that they have the nationality of that country for whose law they are designated. In cases where there are persons with more than one nationality, then those persons may choose the law of any state they wish. But the selection of the law should be expressly made with a declaration expressly outlining the law that the testator chooses to govern his succession (The EU Regulation on succession, no 650/12, 2012, article 22).

6.2. The Scope of the Applicable Law

Article 23 of the Regulation sets out the scope of the law on which the succession is governed. So, this article determines:

- Issues related to the opening of inheritance (causes, place and time);
- Issues related to heirs (determining the heirs, their ability to inherit and disqualification because of the behaviour);
- Issues related to the inherited property, namely the obligations of the deceased (liability regarding the debts of the decedent, the disposable part of the property, the reserved part);
- As well as some other issues related to inheritance (The EU Regulation on succession, no 650/12, 2012, article 23.2).

From the above-mentioned article it is confirmed the fact that it was earlier mentioned that most of the inheritance issues the regulation leaves to Member States to regulate them by their national laws.

7. Recognition of Decisions

That the Regulation has facilitated the issue of governing the succession it is also confirmed by the fact that it guarantees the recognition of decisions of the competent authority of a Member State in other Member States without requiring any special procedure. However, not always court decisions of a Member State can be recognized in the other Member State and cases when such decisions are not recognized are e.g.:

"(a) If such recognition is manifestly contrary to public policy (ordre public) in the Member State in which recognition is sought;

(b) Where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the decision when it was possible for him to do so. "In this case, there is a breach of the principle of hearing of the parties by which principle the equality of parties

before the court is ensured, as well as the gathering of important facts for a correct decision, also for determining what is contentious and uncontentious between the parties" (Brestovci, & Morina & Qehaja, 2017);

(c) If it is irreconcilable with a decision given in proceedings between the same parties in the Member State in which recognition is sought;

(d) If it is irreconcilable with an earlier decision given in another Member State or in a third State in proceedings involving the same cause of action and between the same parties, provided that the earlier decision fulfils the conditions necessary for its recognition in the Member State in which recognition is sought." (The EU Regulation on succession, no 650/12, 2012, article 40).

8. Authentic Instruments

Authentic instrument means a document in a matter of succession which has been formally drawn up or registered as an authentic instrument in a Member State and the authenticity of which:

(i) Relates to the signature and the content of the authentic instrument; and

(ii) Has been established by a public authority or other authority empowered for that purpose by the Member State of origin (The EU Regulation on succession, no 650/12, 2012, article 3.1.(j)).

8.1. Acceptance of Authentic Instruments

According to the Regulation an authentic instrument established in a Member State shall have the same evidentiary effects in another Member State as it has in the Member State of origin, or the most comparable effects, provided that this is not manifestly contrary to public policy (ordre public) in the Member State concerned.

A person wishing to use an authentic instrument in another Member State may ask the authority establishing the authentic instrument in the Member State of origin to fill in the form established in accordance with the advisory procedure referred to in Article 81(2) describing the evidentiary effects which the authentic instrument produces in the Member State of origin (The EU Regulation on succession, no 650/12, 2012, article 59.1).

9. European Certificate of Succession

The European Certificate of Succession (hereafter The Certificate) is a document which serves the interested persons who consider that they are in one way or another entitled to participate actively in the succession that is to be governed. This document plays a major role as it serves as a unified document for all Member States.

9.1. Creation of a European Certificate of Succession

The Regulation establishes a European Certificate of Succession, which, when issued by the competent authority of a Member State, has effects and is recognized in all other Member States without the need for specific procedures. The use of this certificate is not mandatory, i.e. the nationals of the Member States, upon initiation of the succession governing procedure, are not required to apply for this document (The EU Regulation on succession, no 650/12, 2012, article 62.2). Also, the Certificate does not take the place of similar internal Member States, so it does not override the internal documents used for the same purpose.

9.2. The Purpose of the Certificate

Regarding the question of what the Certificate will be used for, or who needs the certificate, respectively who is going to use the Certificate, the Regulation states that the Certificate is for use by:

- Heirs;
- Legatees having direct rights in the succession; and,
- Executors of wills or administrators of the estate (The EU Regulation on succession, no 650/12, 2012, article 63.1).

9.3. Content of the Certificate

To achieve its purpose, the Certificate must contain information regarding:

- The issuing authority of the Certificate;
- The testator;
- Heirs and other persons related to the inherited property;
- The inherited property;

- The applicable law;
- Other issues necessary to properly implement the governing of succession (The EU Regulation on succession, no 650/12, 2012, article 68).

Regarding the forms of documents set out in the Regulation, the EU Commission has adopted a regulation on the forms of the documents in question, which forms will be used by the parties participating in the governing of succession, or by the authority issuing them. (Commission Implementing Regulation (EU) No 1329/2014, 9 December 2014).

10. Conclusion

Since so far we have outlined the content of the Regulation, we can clearly come to the conclusion that the need for this Regulation has been great, for many reasons, some of which are: the Regulation has facilitated the inheritance governing procedures; the recognition of Member State documents in other Member States; avoiding of eventual conflicts of state laws on inheritance issues, and other reasons.

Its importance is also based on the fact that within a year nearly 450,000 European families face international heritage issues, and therefore a comprehensive regulation for all those residents is very much needed. (European Commission Press Release (2014), web page, retrieved from http://europa.eu/rapid/press-release_IP-12-851_en.htm).

This regulation will be a great challenge for residents who will in one way or another have to deal with it, also for the authorities that will implement it, because it is relatively new and has begun to be implemented quite recently, but nevertheless the application of the Regulation in the long run will be worthwhile.

11. Bibliography

Reka, B., & Sela, Y. (2011). *Hyrje në të drejtën e Unionit Evropian.* Tetovë.

Brestovci, F., & Morina, I., & Qehaja, Rr., (2017). *E drejta e procedurës civile – procedura kontestimore*. Prishtinë.

Convention on International Civil Aspects of International Child Abduction, Hague Conference

on Private International Law. (1980).

EU Regulation on succession, no.650/12. (2012).

EU Regulation 883/2004 (2004).

EU Regulation 465/12 (2012).

European Commission (2014). Web page. Retrieved from http://ec.europa.eu/social/main.jsp?langId=en&catId=849&newsId=2021&furtherNews=yes.

European Commission Press Release (26 July 2014), web page, retrieved from http://europa.eu/rapid/press-release_IP-12-851_en.htm.

Commission Implementing Regulation (EU) No 1329/2014, (2014).

Convention on the Law Applicable to Succession to the Estates of Deceased Persons,

Hague Conference on Private International Law, Hague, 1989, (not yet in force).