

# Seminar Slovakia

## Cross-border successions: The new Succession Regulation in legal practice

Omsenie

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Applicable law

# Universal application Art. 20

- The applicable law shall be applied even if that is the law of a Third State (a State outside the EU or UK, Ireland, Denmark)
- However Art. 35 about ordre public might be more of interest, if the applicable law is the law of a State outside the EU (for instance sharia law)

## Main rule Art. 21

- The applicable law shall be the law of the State in which the deceased had his habitual residence at the time of death
- That will usually result in that the court shall apply its own succession law

# The notion "habitual residence"

- No definition in the Succession Regulation (or in other EU Regulations)
- A person can only have one habitual residence
- No specific time limit (for instance two years) in order to obtain a new habitual residence when moving to another State

# The notion "habitual residence"

- There are several rulings in the ECJ (EU Court of Justice) on the notion, when used in other EU Regulations
- They can serve as guidance

# The notion "habitual residence"

- Recital No. 23
- Overall assessment "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"
- "Reveal a close and stable connection"

# The notion "habitual residence"

## Criteria

- Durable residence (most important)
- Family
- Work
- Assets



# The notion "habitual residence"

- Recital No. 24 (problem case)
- Working in another State, but maintains a close and stable connection with the Home-State
- Keeps center of interests (family and social life) in Home-State

# The notion "habitual residence"

## Further problem cases:

- Erasmus-students
- Expats. Temporary work. (More unsure if long time work with an open end)
- Retired persons living part of the year in a "Sun-State" and part of the year in "Home-State"

# The notion "habitual residence"

## Involuntarily living abroad

- Long term medical treatment (intention go home)
- Long term prisoner (intention go home)
- Refugee (intention stay)

# Limited Choice of law

## Art. 22

- A person can only choose the law of the State of his/her nationality
- Double nationality - he/she can choose the law of any of his/her States of nationality
- Form for choosing of law - the same form as for setting up a Last will

# Apply foreign succession law. Problem

- Both jurisdiction and applicable law have habitual residence as main rule. Thus normally the court will apply its own law
- However if the deceased has chosen the law of his nationality, the court of habitual residence (which has jurisdiction) must apply foreign (unknown) law
- Can also happen if the deceased had habitual residence in a Third State but a Member State has subsidiary jurisdiction (Art. 10)

# Solution: Transfer of jurisdiction

- Possible solution: Transfer of jurisdiction to the State of applicable law (State of nationality)
- Can only transfer to a Member State, not to a Third State
- Art. 5. All parties agree. (Court decision not needed)

# Solution: Transfer of jurisdiction

- Only one party requests for a transfer of jurisdiction. (Art. 6)
- The court of habitual residence may decide on a transfer, if it consider the court of the deceased`s nationality (law of choise) “better placed” to rule on the succession
- Requires “practical circumstances”
- But often heirs and/or assets are situated in the State of nationality

# Jurisdiction of court of nationality

- The court of nationality shall have jurisdiction if all parties have agreed to transfer the succession or court of habitual residence has decided to transfer the case. (Art. 7)
- The court of nationality may not transfer the succession back to the court of habitual residence



## Scope of the applicable law Art. 23

The applicable law shall govern the succession as a whole including:

- Real estate in a foreign State
- Procedure/administration of the succession. Recital 42. (Including the powers of an official Administrator)
- An heir`s responsibility for the deceased`s debts
- Claw-back.(Restoring of gifts if they interfere with the reserved portion of heirs/children)

# Procedure/Administration. Problems inside EU

- When jurisdiction in the Member State of habitual residence (Art. 4), but choice of law to the Member State of nationality (Art. 22)
- Court/Administrator shall apply procedure rules of an for them unknown law

# Procedure/Administration. Solution inside EU

- Transfer the succession to court of nationality, which then can apply its own procedure rules.
- All parties agree on transfer. No court decision needed. (Art. 5)
- One party requests transfer. Decision by the court of habitual residence, if it considers court of nationality “better placed” to rule. (Art. 6)

# Procedure/Administration. Problems Third State

- When jurisdiction in the Member State of habitual residence, but the deceased has chosen the law of a Third State (his/her State of nationality)
- When the deceased had habitual residence in a Third State, but a court in a Member State has subsidiary jurisdiction because there are assets in that Member State. (Art. 10)
- Court/Administrator shall apply procedure rules of the Third State

# Procedure/Administration. Solution Third State

- Court of habitual residence can not transfer the succession to a court in a Third State (including UK, Ireland, Denmark)
- The Court of the Member State that has jurisdiction can under certain circumstances appoint an Administrator. (Art. 29)
- The same court can, when the applicable law is the law of a Third State, also decide to give to such an Administrator all the powers of administration provided for by the law of the Member State in which he/she is appointed. (Art. 29.3)

# Procedure/Administration. Solution Third State

- The Administrator then only has to respect the law of the Third State for determination of the heirs and their succession rights
- Thus the Administrator can apply the procedure rules of his/her own State

# Limitation of proceedings

## Art. 12

- If a Court/Administrator in a Member State has jurisdiction, but there are assets in a Third State
- The Court/Administrator may decide not to rule on the assets in the Third State, if it may be expected that its/his/her decision in respect of those assets will not be recognized in the Third State
- Can result in a non-coherent division (for example on reserved portions for the children), but the alternative is a coherent decision that partly (the assets in the Third State) can not be executed

# No legal heir, no Last will

## Art. 33

- No person is heir due to the applicable law
- No Last will concerning any assets
- Member State A (applicable law) has the rule that State A is the last legal heir. (Wants to take all assets also in other states)
- But Member State B has the rule that State B has sovereign rights over assets located in state B
- State B takes the assets located in State B



# No legal heir, no Last will

- Creditors have the right to be payed also from assets in State B. (Recital 56)
- In what proportions will the creditors take payment in State A respectively in State B? No answer in the Regulation

## Ordre public Art. 35

- A succession rule in the applicable law is manifestly incompatible with lex fori
- Restrictive use. Exceptional circumstances. Recital 58
- Hardly be used against the law in another Member State

## Ordre public Art. 35

- Example: Men and women are differently treated (discrimination of women). Sharia law
- Other examples: Discrimination due to religion or nationality
- Reserved share rules are not against ordre public

# Ordre public

- What rule shall be applied instead?
- No answer in the Regulation
- Equivalent rule in lex fori
- Near at hand rule in applicable law

# Ordre public

Example:

- Iranian citizen living in Hungary
- Chosen Iranian law
- Heir: a son and a daughter
- Due to Iranian (sharia) law the son inherits  $\frac{2}{3}$  and the daughter  $\frac{1}{3}$  of the assets
- Hungarian court can decide to give the son and the daughter  $\frac{1}{2}$  each

# Different succession rules in different parts of a State Art. 36

- Examples: USA, UK, Spain
- The deceased has chosen the exact applicable law, for instance Texas. (Not in the Regulation)
- The deceased has not made a choice or has only chosen the State (for instance USA)
- Primarily: Internal conflict rules in the State of applicable law (for instance place of birth)
- In absence of internal conflict rules : Habitual residence

# Different succession rules in different parts of a State

- No habitual residence at the time of death in the chosen State of nationality.
- Solution: The part of the chosen State where the deceased had his/her habitual residence before moving.  
(Not in the Regulation)

# Recognition and enforcement

## Key issues



# Recognition

## Art. 39.1

- Automatic recognition of a decision in a Member State in all the other Member States
- For instance Land register, car register, bank accounts, funds, share depots
- Also a decision by an officially appointed Administrator; delegation by court. (Art. 3.1.g and 3.2)

# Recognition. Principal issue

## Art. 39.2

- Possible to obtain a court decision on recognition as a principal issue (= main issue)
- “Any interested party” can apply
- Procedure the same as for enforcement. (Art. 45-58)

# Recognition. Incidental question

## Art. 39.3

- A court case has another question as principal issue; for instance a dispute about the rent of a flat
- Incidental question: Who is the owner of the house and thus the land lord side in the rental dispute?
- The owner is the person who has inherited the house from the earlier owner
- The court, which hears the principal issue, may also decide incidentally on recognition of a court decision in another Member State on who the proper owner is

# Non-recognition

## Art. 40

- Only refusal of recognition on four specific grounds
- No refusal is allowed on other (national) grounds

## Non-recognition. Ground a. Ordre public

- Manifestly contrary to fundamental legal principles in the State of recognition
- Practically unthinkable as the decision is made by a court in another Member State. Respect for other Member States. (Court decisions in Third States can not be recognized by the Succession Regulation.)
- Compare to ordre public in Art. 35. A law of a Third State might be applied. (Art. 20.)

## **Non-recognition. Ground b. The defendant was not correctly served**

- Default of appearance
- Defendant not served in sufficient time or proper way
- Rare as the court of origin is in a Member State

## Non-recognition. Ground c

Irreconcilable with a decision in the State of recognition

- Courts in two Member States
- Very rare because of the rules of jurisdiction in Chapter II including Art. 17 on lis pendens. Only one Member State court shall have jurisdiction

## Non-recognition. Ground d

Irreconcilable with an earlier decision in another Member State or in a Third State

- Earlier decision
- Very rare when a decision from another Member State
- More practical when it is a decision from a Third State
- The decision from the Third State must be recognizable



# Non-recognition

Earlier decision from a Third State. Example

1. Court decision in November 2016 in USA (Third State)
2. Court decision in December 2016 in Germany. Same succession. Same parties. Later decision
3. The deceased had a real estate in Slovakia. The US decision has given that estate to heir A. The German decision has given the same estate to heir B

# Non-recognition

Earlier decision from a Third State. Example

4. Will Slovakia recognize the US decision due to Slovakian national recognition rules?
5. If yes - Non-recognition of the German decision
6. If no - Recognition of the German decision

# No review as to the substance

## Art. 41

- The very core of recognition is no review as to the substance of the foreign court decision
- Recognition is not a form of appeal to a higher court
- No review of facts or evidence
- No review of law (not even if the applied law is the law of the State of recognition and there is a mistake)
- No review of how private international law is applied. (The court of origin incorrectly applied Chapter III)

# Enforceability

- Distinguish between: enforceability - enforcement
- Enforceability: a declaration of a court that a foreign court decision may be enforced
- Enforcement: actual measures by an enforcement authority, for instance taking a car from someone who is not the owner (but who refuses to give it up voluntarily) and give it to the proper legal owner (heir)

# Enforceability

## Art. 43

- Court decision enforceable in the Member State of origin
- Enforceable also in other Member States, however only after a special procedure and a declaration of enforceability (not automatically as recognition)

# Jurisdiction for declaration of enforceability Art. 45

- Each State decides which court/courts in its State that shall have jurisdiction for declaration of enforceability
- If there is more than one court that have jurisdiction in a State, the local jurisdiction is determined by
  - where the defendant lives
  - where the defendant has the assets that shall be enforced

# Enclosures to application Art. 46

- Enclosures to application :
  - copy of court decision of origin
  - special attestation (EU-form) issued by the court of origin

# Declaration of enforceability

## Art. 48

- Stage 1
- Declaration immediately issued after relevant documents are presented (Art. 46)
- No review on grounds for non-recognition (Art. 40) at this stage
- No information to the defendant at this stage



# Notice/Serving the declaration

## Art. 49

- The declaration shall be noticed to the applicant
- The declaration shall be served on the defendant

# Appeal against the declaration

## Art. 50.1

- Stage 2
- The applicant can appeal if the application is refused (but he can also apply again; not res judicata)
- The defendant can appeal if the declaration is granted

# Appeal procedure

## Art. 50.3

- The appeal procedure shall be contradictory (= both parties are heard)

# Time limits for appeal

## Art.50.5

- Time for appeal when the defendant lives in the State of enforcement: 30 days after service
- Time for appeal if the defendant lives in another Member State: 60 days after service
- Time for appeal if the defendant lives in a Third State: Main rule - 30 days after service. But possibility for extension

# No enforcement during the appeal

## Art. 54.3

- No actual measures of enforcement may be taken during the time for appeal or during the procedure of appeal
- Only protective measures
- Important rule of legal rights for the defendant as he/she does not know of the application in Stage 1. (Thus no premature irreversible measures)

The background is a blue gradient with several overlapping, semi-transparent circular shapes of varying shades of blue, creating a layered effect.

**Workshop**

**Cross-border successions**

# Question 1

## Presumptions:

The deceased lived with his family since long time in Bratislava. He also worked there. But he was a citizen in the Czech Republic. He had a flat in Bratislava and a summer house near Brno. He had made no choice of succession law.

# Question 1

## Questions:

(Give reasons for your answers and quote the relevant Article in the Succession Regulation)

- a. In which State has a court jurisdiction?
- b. Which State`s succession law shall be applied?
- c. Shall a court decision in one of the two States be recognized in the other State?



## Question 2

### Presumptions:

The deceased was born in Hungary, but moved to London in 1956. After retiring 1992 he moved with his wife back to Budapest. He had dual citizenship, Hungarian and British. He had a flat in Budapest and bank accounts both in Budapest and in London. His grown up children, whom he visited once every year for a week, lives in London. He had made no choice of law.

# Question 2

## Questions:

- a. Jurisdiction?
- b. Applicable law?
- c. Can a court in Budapest decide on the bank account in London? Must it do so? If not, what are the conditions ?

## Question 3

### Presumptions:

The deceased was Polish citizen but lived together with his family since many years in South-Africa. He had a villa in Cape Town and a summer-house near Gdansk on the Baltic coast. He also had bank accounts in both Gdansk and Cape Town. He had made no choice of law.

# Question 3

## Questions:

- a. Jurisdiction?
- b. Applicable law?
- c. Can a Polish court decide on the assets in South-Africa?  
Must it?
- d. Can a Polish court decide to transfer the case to a court in South-Africa?

# Question 4

## Presumptions:

The deceased was Slovakian citizen. He had a house in Bratislava, where his wife and two children live. He worked in Vienna since five years. He had a small flat in Vienna where he stayed Monday to Friday. He stayed with his family in Bratislava every week-end.

# Question 4

## Question:

-Where was his habitual residence, Bratislava or Vienna?

(Don't forget to state the reasons for your opinion and mention applicable article/preamble)

# Question 5

## Presumptions:

The deceased was a citizen of the Czech Republic. She worked as an engineer in Dubai on a twelve month contract. When she was in Dubai she lived in a small flat owned by her employer. Her husband and their two children (10-12 years old) live in the house she and her husband own in Prague. She went home to her family one week every month. She spoke (except of course Czech) English but only a few words Arabic. She died in a car accident in Dubai.

# Question 5

## Question:

- Where was her habitual residence, Prague or Dubai?

(State reasons)



# Question 6

## Presumptions:

The deceased was a German citizen, retired since five years ago. Since his retirement he lived with his wife in a bungalow in Fuengirola in southern Spain. However in July and August every year he and his wife stayed in their summer house on the Baltic coast near Kiel. Their children are grown-up and live and work in Germany. He had a bank depot in Switzerland and bank accounts both in Germany and in Spain. He spoke very little Spanish and mostly socialized with other Germans living in southern Spain.

# Question 6

## Question:

- Where was his habitual residence, Spain or Germany?

(State reasons)

# Question 7

## Presumptions:

The deceased was a Hungarian citizen living and working in Germany since many years. She had in her Last will chosen Hungarian succession law. Her two grown-up children live and work in Hungary. She had a flat in Germany and a summer-house in Hungary. She had bank accounts both in Germany and Hungary.

# Question 7

## Questions:

- a. Jurisdiction (Main rule)?
- b. Applicable law in general?
- c. Applicable law on procedure?
- d. Possibility to transfer the case? If yes, what are the conditions?

(State reasons and applicable articles)

# Question 8

## Presumptions:

The deceased was an Iranian citizen. He was living and working in Stockholm since many years. Unmarried. No children. A brother and a sister both living in Theran. He had in his Last will chosen Iranian succession law. He had assets both in Sweden and in Iran.

# Question 8

## Questions:

- a. Jurisdiction (Main rule)?
- b. Applicable law in general?
- c. Applicable law on procedure?
- d. Possibility to transfer the case?
- e. Possibilities in accordance to Article 29.1 and 29.3?

# Question 9

## Presumptions:

The deceased had habitual residence in Germany, but had in her Last will chosen Polish succession law. (She was Polish citizen.) A court in Germany has in accordance with the choice of law applied Polish law. However the German court has on one point interpreted the Polish law wrongly. The German court decision was not appealed, so it is final. The deceased had a summer-house in Poland.

# Question 9

## Presumptions:

The heir (A), who has wrongly got the summer-house in the German court decision, wants his ownership registered in the Polish Land Register. Another heir (B), who should have got the summer-house in Poland if the Polish law had been correctly interpreted, writes a letter to the Land Register and asks it not to register A as owner, but to register himself (B) as owner.



# Question 9

## Questions:

- What shall the Polish Land Register do?
  - a. Send the decision back to the German court with information how the Polish law should had been correctly interpreted.
  - b. Register B as owner.
  - c. Register A as owner.