

Max Planck Institute for Comparative
and International Private Law*

Comments on the European Commission's Proposal for
a Regulation of the European Parliament and of the
Council on jurisdiction, applicable law, recognition and
enforcement of decisions and authentic instruments in
matters of succession and the creation of a European
Certificate of Succession

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Introduction

The growing body of the Union’s private international law

1. In October 2009, the European Commission published a Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic in-

struments in matters of succession and the creation of a European Certificate of Succession, hereinafter entitled Succession Proposal (SP). It had been preceded by a Green Paper on succession and wills published in the year 2005, hereinafter referred to as Green Paper, and an informal Discussion Paper on successions upon death in 2008, hereinafter denoted as Discussion Paper.

2. In preparing the Succession Proposal the Commission has essentially drawn from the following instruments: The provisions on jurisdiction in chapter I of the Proposal have been tailored to a large extent according to the Brussels I Regulation, partly also according to the Brussels IIbis Regulation; the same is true with regard to chapter IV on recognition and enforcement. The 1989 Hague Convention on the law applicable to succession to the estates of deceased persons has been the main source of inspiration for Chapter III on choice of law; this Hague Succession Convention has only been ratified by a single State, i.e. the Netherlands¹. Some of the Institute's proposals for amendments of chapter III are also based on the 1961 Hague Convention on the conflicts of laws relating to the form of testamentary dispositions, the Hague Form Convention, which has been ratified by a large number of countries including 16 Member States², and the 1985 Hague Convention on the law applicable to trusts and on their recognition, the Hague Trust Convention, which is in force for five Member States³. To a certain extent the 1973 Hague Convention concerning the international administration of the estates of deceased persons, the Hague Administration Convention, has been a model for the European Certificate of Succession; that convention has taken effect for three Member States (Czech Republic, Portugal and Slovakia)⁴.

3. It is noteworthy that where Hague conventions have been followed, the French text of the Succession Proposal usually copies the respective conventional provisions verbatim whereas the English text often deviates from the English version of the Hague convention without compelling grounds. In other parts, too, the English version appears to deserve more linguistic care than what has been applied so far.

4. The Commission proposal is a further important step in the codification of the conflict of laws at the European level. Having acquired the powers to legislate with regard to the judicial cooperation in civil matters by the Treaty of Amsterdam as late as 1997⁵, the Community has enacted more than 10 Regulations concerning issues of international civil procedure and the applicable law since the year 2000. With regard to succession, the most important of these instruments dealing with neighbouring areas of the law

¹ See the status table at <www.hcch.net/index_en.php?act=conventions.status&cid=62>.

² See the status table at <www.hcch.net/index_en.php?act=conventions.status&cid=40>.

³ See the status table at <www.hcch.net/index_en.php?act=conventions.status&cid=59>.

⁴ See the status table at <www.hcch.net/index_en.php?act=conventions.status&cid=83>.

⁵ Treaty of Amsterdam of 2. 10. 1997, O.J. 1997 C 340/1.

are: the European Insolvency Regulation, the Brussels I Regulation on jurisdiction and recognition and enforcement of judgments in civil and commercial matters, the Brussels IIbis Regulation on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, the Rome II Regulation on the law applicable to non-contractual obligations, the Rome I Regulation on the law applicable to contractual obligations and the Maintenance Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations. The Brussels I and Brussels IIbis Regulation as well as the Rome I and Rome II Regulation explicitly exclude matters of succession from their respective scope of application, while the Insolvency Regulation does not contain such an exclusion and thereby is applicable to insolvency proceedings concerning the estate of a deceased person⁶. The Maintenance Regulation does not address succession issues.

Interpretation and preliminary questions

5. The context of the various instruments indicates the gradual growth of a system of European private international law. It suggests that concepts used in multiple regulations should be interpreted in the same way such as to exclude frictions, in particular avoiding overlaps and gaps between different instruments. While this objective must primarily be attained in the interpretation and application of the future Succession Regulation, it has to be kept in mind in the process of legislative drafting as well.

6. A further issue arising in this context relates to preliminary or incidental questions. In matters of succession, the outcome of proceedings very often depends on issues arising from different areas of the law; thus, doubts may arise whether an alleged heir has actually been adopted by the deceased or whether a certain contractual claim or other asset forms part of the estate. The laws governing adoption, the validity of contracts and rights *in rem* are not matters of succession, and they should not be determined by the future Succession Regulation merely because the respective issues arise as preliminary questions in a matter of succession.

7. If the applicable succession law is the law of a Member State, an independent or dependent solution of the preliminary question will in many cases not lead to different results. Thus, the validity of a contract made *inter vivos* will always be subject to the Rome I Regulation even if arising as an incidental question in the context of inheritance. The forum and the Mem-

⁶ See Münchener Kommentar zum BGB⁴ (-Birk) X (2006) Art. 25 EGBGB para. 371 seq. (cited: Münch. Komm. BGB [-Birk]). As to the relation between a future Succession Regulation and the Insolvency Regulation see *infra* the comments on Art. 45a in para. 355 seq.

ber State of the *lex hereditatis* will always apply the same conflict rule. However, where there are no uniform conflict rules divergences may arise. It is true that a dependent solution of the preliminary question, i.e. the application of the conflict rules of the *lex hereditatis*, will lead to a greater harmony of decision in the fields covered by the Regulation. On the other hand, divergences in the assessment of other issues should be avoided. The validity of an adoption should rather be subject to the same law irrespective of whether the issue is litigated in the context of maintenance proceedings or succession proceedings. Particularly if in exceptional cases the law of a Non-Member State is the law governing succession, the application of the conflict rules of this State may cause problems. This observation points to the need for a general part of European private international law that would also deal with the problem of preliminary questions⁷.

8. It may be argued, therefore, that in the absence of such general rules preliminary questions should basically be treated as if they were principal questions. This would guarantee that issues of succession would be governed by the future Succession Regulation irrespective of whether they arise in succession proceedings or whether allegedly inherited rights are subject to a claim of infringement by some other party. This basic rule follows from the exclusions listed in Art. 1(3) SP, but it should also apply to subjects not contained in that list. It is only in exceptional cases that the conflict rules applicable to succession may extend to preliminary questions.

Scope: Succession and matrimonial property regimes

9. Where the deceased was married, the rights of the surviving spouse will often be determined by legal principles arising not only from the law of succession, but also from the law relating to matrimonial property regimes. The Succession Proposal excludes issues of the latter kind from its scope of application, see Art. 1(3)(d) and *infra* para. 171. While this exclusion can be justified on several grounds, it threatens to dissolve the link between both areas of the law that is firmly established in many jurisdictions⁸. In some of them a community of property is the default regime which governs where no marital agreement provides otherwise; they protect the surviving spouse by awarding him or her a 50% share in the estate of the deceased partner,

⁷ *Kreuzer*, Was gehört in den allgemeinen Teil eines europäischen Kollisionsrecht? in: *Kollisionsrecht in der Europäischen Union, Neue Fragen des internationalen Privat- und Zivilverfahrensrechtes*, ed. by *Jud/Rechberger/Reichelt* (2008) 1 seq.; *Heinze*, Bausteine eines Allgemeinen Teils des europäischen internationalen Privatrechts, in: *Die richtige Ordnung*, FS Jan Kropholler (2008) 105 seq.; *Bernitt*, Die Anknüpfung von Vorfragen im europäischen Kollisionsrecht (2010).

⁸ For a broad comparative survey see *Pintens*, Ehegüterrecht, in: *Handwörterbuch des Europäischen Privatrechts*, ed. by *Basedow/Hopt/Zimmermann* I, II (2009) 350–354.

irrespective of any effective contributions made by the surviving spouse to that estate during the time of marriage. On the other hand, those jurisdictions only grant minor succession rights to the surviving spouse. In a second group of countries, the default matrimonial property regime only provides for a participation of the surviving spouse in the *gains* made by the deceased during the time of marriage. This may be put into effect by the establishment of a community of property limited to those gains or by compensatory payments; employing a kind of legal flat rate, German marital property law grants a quarter of the estate to the surviving spouse, Sec. 1371(1) of the German Civil Code, a share which will be complemented by another quarter under the law of succession if the deceased leaves descendants, Sec. 1931(1) of the German Civil Code. In a third group of countries and especially those of common law tradition, no particular matrimonial property regime exists. It follows that, depending on the jurisdiction in question, the actual position of the surviving spouse may substantially be determined by the law applicable to matrimonial property.

10. Issues relating to matrimonial property which are excluded from the scope of the Succession Proposal will therefore have to be decided under the law designated by national conflict rules which are not unified yet in the Union. With regard to the same couple the national conflict rules may refer to different national laws as being applicable. Given the divergences in substantive law outlined above, this may threaten or even frustrate the achievement of the objective of the Succession Proposal, which is to guarantee the rights of heirs and/or legatees and other persons involved, see Recital 6. Even if the same law is designated by a future Succession Regulation, this law may be distorted by the simultaneous application of different matrimonial property laws in the Member States involved. The unification of the conflict rules on succession would still represent progress as compared with the *status quo*, but the threat of distortion should make the Union's institutions aware of the urgent need to pursue the unification project relating to matrimonial property which was initiated by a Green Paper in 2006⁹. The divergence of conflict rules on matrimonial property regimes also reduces the significance of the envisaged European Certificate of Succession for succession issues concerning married persons, as will be further discussed below, see *infra* para. 273 and para. 322 *seq.*

⁹ Green Paper on conflict of laws in matters concerning matrimonial property regimes, including the question of jurisdiction and mutual recognition, COM(2006) 400 final of 17. 7. 2006.

Legislative basis

11. The low number of ratifications of most Hague instruments (see *supra* para. 2) indicates the difficulties of unification in this area of the law. An initiative of the Union with its more efficient procedures of legislation and implementation appears all the more timely and appropriate. The Commission's proposal is based upon "Art. 61(c) and the second indent of Art. 67(5)" of the EC Treaty. Following the entry into force of the Treaty of Lisbon on 1 December 2009 these provisions have been replaced by Art. 81 of the Treaty on the Functioning of the European Union (TFEU)¹⁰. The Treaty of Lisbon has not only consolidated and renumbered the previous provisions, but also changed their wording and content on some relevant points. The Commission has taken the view that the institutions of the Union have to deal with proposals made under the EC Treaty in accordance with the new framework created by the Treaty of Lisbon¹¹.

Legislative basis – Significance for the internal market

12. Art. 81 TFEU differs from Art. 65 EC with regard to the significance of measures for the functioning of the Internal Market. While the latter provision allowed Community legislation only "in so far as necessary for the proper functioning of the Internal Market", Art. 81(2) instructs the European Parliament and the Council to adopt measures "for the purposes of paragraph 1", i.e. in view of the development of judicial cooperation in civil matters, referring to the need for such measures for the Internal Market only as an example ("particularly") of a situation where legislation of the Union is required.

13. In the context of succession this has two consequences: In a geographic sense, a limitation of legislative acts of the Union to intra-Union fact situations can no longer be alleged; while the "judicial cooperation in civil matters" for the purposes of Art. 81(1) TFEU may still refer to the cooperation between the judiciaries of the Member States exclusively, the fact situations requiring such cooperation may very well involve third States. Therefore, the universal application ordered by Art. 25 SP appears to be beyond doubt whereas similar provisions under the Rome I and Rome II Regulations adopted on the basis of Art. 65 EC have been questioned.

14. Since the significance of measures adopted under Art. 81 TFEU for the functioning of the Internal Market is no longer an indispensable require-

¹⁰ See the consolidated version of the Treaty on the Functioning of the European Union, O.J. 2008 C 115/47.

¹¹ Communication from the Commission to the European Parliament and the Council – Consequences of the entry into force of the Treaty of Lisbon for ongoing interinstitutional decision-making procedures, COM(2009) 665 final/2 of 11. 12. 2009.

ment, the succession proposal of the Union cannot be challenged for a lack of market significance either. But even if such significance for the market were still necessary, it could be ascertained without difficulty, as can be demonstrated by a closer look at succession to business undertakings. At present, individual owners of undertakings having subsidiaries in various Member States find estate planning increasingly difficult. They have to face a variety of divergent substantive laws of succession and, moreover, a variety of different conflict rules governing inheritance matters in the Member States. It is difficult if not impossible for them to ensure a continuous operation of their businesses throughout the Community beyond their own death. The difficulties flowing from the legal differences constitute restrictions of the fundamental freedoms, in particular of the free movement of capital and the freedom of establishment guaranteed by the Treaties as constitutive elements of the Internal Market, see Art. 3(3) EU and Art. 26 TFEU.

Art. 81 TFEU – A basis for provisions of substantive law?

15. Art. 81 TFEU differs from Art. 65 EC also with regard to the wording of the list of measures contained in para. 2. While that list only had an illustrative character under Art. 65 EC (“shall include”), it may be interpreted as being conclusive and exhaustive in Art. 81(2) TFEU. Since the list only contains traditional subjects of the conflict of laws, it might be argued that substantive regulations such as the rule on simultaneous death in Art. 23 SP or the European Certificate of Succession are not covered by Art. 81 TFEU.

16. That conclusion would, however, appear to go too far. For the list now enunciates only *goals* of measures of the Union (“aimed at ensuring”) whereas it previously described the *subject* of those measures which consisted of conflict rules; it would follow that while legislation under Art. 81 has to respect the objectives listed in para. 2, it is not limited as to the nature of the instrumental provisions being substantive or pertaining to private international law. It further follows that provisions of a substantive type like those on the European Certificate of Succession which serve to attain objectives such as mutual recognition or effective access to justice, see Art. 81(2) (a) and (d) TFEU, can be based on that Article of the Treaty. In a similar vein, Art. 23 SP dealing with simultaneous death is covered by Art. 81(2)(c) TFEU; the provision presupposes a conflict of laws and makes the conflict rules involved compatible by resort to a substantive solution. It should finally be noted that the relation between Art. 81(1) and Art. 81(2) TFEU is not quite clear and that Art. 81(1) might be considered as the true legislative basis having a much broader scope and that Art. 81(2) simply serves to clarify the content of the first paragraph. All in all, the Institute concludes that Art. 81 is a sufficient legislative basis for the proposal as a whole.

Legislative basis – Succession matters as family law?

17. A final observation concerns the Commission's reference to the second indent of Art. 67(5) EC. This reference is ambiguous because the cited section refers both to the legislative procedure laid down in Art. 251 EC that is meant to apply to the judicial cooperation in civil matters in general and also to the "exception of aspects relating to family law". Does the citation in the Succession Proposal to the second indent of Art. 67(5) refer to the former or to the latter? The recitals of the draft regulation are silent on this point, which arguably breaches the requirement laid down in Art. 253 EC (= Art. 296(2) TFEU) to state the reasons of legal acts. In the explanatory report the Commission takes the view that the law of succession and family law have sufficient autonomy to be treated separately from each other and that the exception for family law has to be interpreted and applied strictly¹². In terms of the new Art. 81 TFEU the Commission would probably characterise the Succession Proposal as a measure under para. 2 to be adopted in accordance with the ordinary legislative procedure and not as a "measure concerning family law" under para. 3 which would have to be taken by the Council acting unanimously and with the rights of the European Parliament restricted to a consultation.

18. By its very nature, the law of succession does not deal with family relations, but with the attribution of, and the responsibility for, the estate of a deceased. In this perspective, inheritance is a prolongation of the law of property interests which would not be covered by Art. 81(3), but rather by Art. 81(2) TFEU. This is particularly true where no relatives eligible as heirs survive the deceased. Moreover, Art. 81(3) TFEU is limited to measures "concerning" family law and not simply "relating to" family law; this might be interpreted as narrowing the scope of the provision as compared with the second indent of Art. 67(5) EC. On the other hand, the estate of a deceased in intestate succession is traditionally attributed by national law to members of his or her family, and the laws of numerous Member States even contain mandatory rules ensuring that in the case of a deviating will of the deceased at least part of the estate is inherited by family members¹³. In light of this legal background, reliance on either Art. 81(2) or Art. 81(3) TFEU would appear to be reasonable. The issue is a matter of political discretion which the Union institutions are entitled to exercise. The simple fact that a unanimous decision of the Council as required by Art. 81(3) TFEU may be

¹² Succession Proposal p. 3.

¹³ For the rights of relatives in a succession see, in a comparative perspective, *Kroppenberg*, *Erbfolge*, in: *Handwörterbuch des Europäischen Privatrechts* (supra n. 8) 409–413, and *id.*, *Pflichtteilsrecht*: *ibid.* 1156–1160.

difficult to achieve¹⁴ should be of minor importance in this context. Whatever the decision will be, it would have to be made manifest by the indication of the legal basis in the final text of the regulation.

Europe and the world: "Outdated" conventions with third States

19. Art. 45 SP, reflecting the *pacta sunt servanda* principle of public international law, clarifies that the Member States will continue to be bound by the bilateral or multilateral international conventions between them and third States which relate to the subjects covered by the future Regulation. There are various bilateral conventions between Member States and third States also covering matters of succession, such as the Agreement on Succession annexed to the Consular Treaty between the German Empire and the Republic of Turkey of 1929¹⁵, the Agreement on Settlement between the German Empire and the Persian Empire of 1929¹⁶, the Consular Treaty between the Kingdom of Italy and the Republic of Turkey of 1929¹⁷, and the Consular Treaty between the Federal Republic of Germany and the Union of Soviet Socialist Republics of 1958¹⁸ which continues to be binding not only for the Russian Federation but also for other members of the Commonwealth of Independent States¹⁹. Notably, the treaties between the Member States and Turkey are of utmost practical importance as the largest group of the approximately 18.5 million third-state nationals living in the European Union currently come from Turkey (2.3 million), followed by Morocco (1.7 million), Albania (0.8 million) and Algeria (0.6 million)²⁰.

20. These treaties which were signed during the first half of the 20th century reflect a 19th century concern that citizens living in the other Contract-

¹⁴ But see *Mansel/Thorn/R. Wagner*, *Europäisches Kollisionsrecht 2009: Hoffnungen durch den Vertrag von Lissabon*, IPRax 2010, 1–27 (10).

¹⁵ RGBl. 1930 II 748. The Consular Treaty was put into force again on 1. 3. 1952 after the Second World War (Proclamation of 29. 5. 1952, BGBl. 1952 II 608).

¹⁶ RGBl. 1930 II 1006. The Agreement was put into force again on 1. 11. 1954 after the Second World War (Proclamation of 15. 8. 1955, BGBl. 1955 II 829). Art. 8 of the Agreement stipulates that the national law of the citizen of the other Contracting State covers personal status, family law and inheritance law matters.

¹⁷ Resmî Gazete [Official Gazette of the Turkish Republic] of 7. 4. 1931, no. 1768. Chapter 2 of the Consular Treaty governs matters of succession and adopts the same principles regarding the conflict of laws as the Agreement on Succession between Germany and Turkey (*supra* n. 15).

¹⁸ BGBl. 1959 II 233. Art. 28(3) of the Treaty stipulates that the succession in the immovable estate will be governed by the *lex rei sitae*.

¹⁹ See e.g. Proclamation of 14. 8. 1992, BGBl. 1992 II 1015; Proclamation of 19. 10. 1992, BGBl. 1992 II 1120; Proclamation of 21. 10. 1992, BGBl. 1992 II 1128.

²⁰ Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions – Third Annual Report on Migration and Integration, COM(2007) 512 final of 11. 9. 2007, p. 3.

ing State may be subject to discrimination and that the application of their national law ensures that they will not be discriminated against abroad²¹. Therefore, those Conventions adopt conflict rules which, almost without exception, refer to the national law of the foreigner living in the other Contracting State. They are thus incompatible with the basic connecting factor of the Succession Proposal which is the habitual residence of the deceased (cf. Art. 16 SP). Moreover, the Agreement on Succession between Germany and Turkey adopts a dualist approach for movables, subject to the national law of the deceased, and immovables, governed by the *lex rei sitae* (Art. 14 of the German-Turkish Agreement). This is in clear contrast to the monist approach taken by the Succession Proposal (see Art. 16 and 19(1) SP and *infra* para. 128 seq.). Hence, if a Turkish citizen habitually residing in Germany has left both movable and immovable property in Germany, the law applicable to the succession in the movable property is Turkish law, while German succession law applies with regard to the immovable property. Under Art. 16 SP the succession to the whole of the estate would be governed by German law alone.

21. Pursuing a dualist approach on the level of jurisdiction as well, the German-Turkish Agreement on Succession vests the *situs* courts with exclusive jurisdiction regarding the succession in immovables, and the national courts of the deceased with exclusive jurisdiction with regard to the succession in movables (Art. 15 of the German-Turkish Agreement). The nationality principle and the scission of the estate for purposes of jurisdiction cause considerable inconvenience to the heirs and legatees. Although a deceased of Turkish nationality and his or her family may have been resident in Germany for 30 years or more, the heirs who may have spent the whole of their lives in Germany will have to apply to Turkish courts in all matters relating to the movable estate including the issue of a certificate of inheritance. Such an outcome is undoubtedly not in line with the regime and objectives of the Succession Proposal, which generally confers jurisdiction for the whole of the estate to the courts of the last habitual residence of the deceased and grants only a minor role to the courts of the *situs* State (Art. 5(2)(c), 6, 9 SP). On several occasions, attention has been drawn by academics to the need for a termination or amendment of these outdated international Conventions²². However, there has thus far been no change of the law.

22. Conventions concluded before the EEC Treaty are basically not affected by the law of the Union, see Art. 351 TFEU. However, it is critical whether the Member States will still be able to act autonomously in their

²¹ *Krüger*, Studien über Probleme des türkischen Internationalen Erbrechts, in: Prof. Dr. Tuğrul Ansay'a armağan [FS Tuğrul Ansay] (2006) 131–158 (141 seq.); *Bauer*, Anmerkung zur Entscheidung LG München v. 26. 9. 2006 – 6 O 15963/05: FamRZ 2007, 1252–1257 (1255).

²² See e.g. for the German-Turkish treaty *Krüger* 157 seq., *Bauer* 1257 (both previous note); *Ercan*, Deutsch-türkische erbrechtliche Probleme: IDTJ 1–96, 6–11 (10 seq.).

relations with third States in matters subject to the Regulation if the Succession Proposal is adopted. The “area of justice” which also covers Art. 81 TFEU, the legal basis of the future Regulation, has been classified as one of the *shared* competences of the European Union (Art. 4(2)(j) TFEU). However, the jurisprudence of the European Court of Justice (ECJ) with regard to the *implied external competence* plays an important role in determining the scope of the Member States’ ability to conclude bilateral and multilateral international agreements. In several judgments and opinions, the Court has stressed that the Union has an implied external competence if participation in international commitments is necessary to achieve a certain objective within common policies, provided that the Union already has internal legislative competence²³. Once the Union has exercised its internal legislative power to regulate a certain field, it has the exclusive competence to conclude international agreements within the same area. The implied external competence excludes any competence on the part of Member States, since obligations undertaken by Member States under bilateral or multilateral conventions might affect or alter the scope of the common rules adopted within the European Union (Art. 3(2) TFEU)²⁴.

23. The European Union has already exercised its powers with regard to judicial cooperation in civil matters several times and has adopted several regulations (*supra* para. 4). The ECJ, in its opinion on the Lugano Convention, drew attention to the “unified and coherent system” regarding the conflict of laws established by those regulations. The ECJ, subsequently, pointed out that any international agreement within the same area is capable of affecting that system since those regulations are also applicable to relations between Member States and third States. Consequently, the Union has exclusive external competence to conclude international agreements in matters covered by relevant regulations²⁵. It is doubtless that the Succession Proposal will establish a unified and coherent system in succession matters. Consistent application of the future Regulation is necessary for the proper functioning of the system. Therefore, the Union will have the exclusive external competence in matters covered by the future Regulation once the Succession Proposal has been adopted. Accordingly, the Member States will

²³ *Bischoff*, Die Europäische Gemeinschaft und die Konventionen des einheitlichen Privatrechts (2010) 139 seq.; *id.*, Außenkompetenzen der EG, in: Handwörterbuch des Europäischen Privatrechts (*supra* n. 8) 139–143 (140 seq.) (cited: Außenkompetenzen); see also ECJ 31. 3. 1971, Case 22/70 (*ERTA*), E. C. R. 1971, 263, para. 15–22; 26. 4. 1977, Opinion 1/76 (*Laying-up fund for inland waterway vessels*), E. C. R. 1977, 741, para. 3–4; 19. 3. 1993, Opinion 2/91 (*Convention No. 170 of the International Labour Organization*), E. C. R. 1993, I-1061, para. 7; 7. 2. 2006, Opinion 1/03 (*Lugano Convention*), E. C. R. 2006, I-1145 para. 114–115.

²⁴ ECJ 31. 3. 1971, para. 18, 31; 19. 3. 1993, para. 8–9; 7. 2. 2006, para. 116, 134 (all previous note).

²⁵ ECJ 7. 2. 2006, para. 134 seq.; *Bischoff* 180 seq.; *id.*, Außenkompetenzen 143 (all *supra* n. 23).

have no authority to conclude further treaties so as to supersede the outdated rules with modern principles of private international law in matters of succession.

24. The Institute reminds the European legislator and the Member States of the problems posed by the existing international agreements between Member States and third States that cover matters of succession. We suggest that either the European Union must take the initiative and solve the existing and future problems caused by these conventions within its external competence, or, following the example of Regulations No. 662/2009²⁶ and No. 664/2009²⁷, establish a procedure to authorise the Member States to amend the existing conventions with a view to the adoption of conflict rules on matters of succession which are more compatible with the principles laid down in the Succession Proposal.

About these Comments

25. The following observations are the result of a series of meetings of scholars affiliated with the Max Planck Institute for Comparative and International Private Law held from November 2009 to March 2010. They do not purport to be comprehensive or complete. Apart from some suggested linguistic improvements, our comments concentrate on issues that appeared particularly important to the members of our group. We have tried to focus our comments as much as possible on alternative proposals which, where applicable, are reproduced in italicised print next to the Commission's Proposal. Some of the Recitals have similarly been amended, and others have been added; however, further Recitals would be needed to the extent that our proposals for additional provisions are accepted. While the proposals have undergone several discussion rounds and reflect the majority opinion in the group, not all of them have been approved unanimously.

²⁶ Regulation (EC) No 662/2009 of the European Parliament and of the Council of 13. 7. 2009 establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries on particular matters concerning the law applicable to contractual and non-contractual obligations, O.J. 2009 L 200/25.

²⁷ Council Regulation (EC) No 664/2009 of 7. 7. 2009 establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries concerning jurisdiction, recognition and enforcement of judgments and decisions in matrimonial matters, matters of parental responsibility and matters relating to maintenance obligations, and the new law applicable to matters relating to maintenance obligations, O.J. 2009 L 200/46.

Recitals

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 61(c) and the second indent of Article 67(5) thereof,

Having regard to the proposal from the Commission [...],

Having regard to the opinion of the European Economic and Social Committee [...],

Acting in accordance with the procedure laid down in Article 251 of the Treaty,

Whereas:

(1) The Community has set itself the objective of maintaining and developing an area of freedom, security and justice. For the progressive establishment of such an area, it has to adopt measures relating to judicial cooperation in civil matters with a cross-border impact to the extent necessary for the proper functioning of the internal market.

(2) In accordance with Article 65(b) of the Treaty, these measures are to include those promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction.

(3) The European Council meeting in Tampere on 15 and 16 October 1999 endorsed the principle of mutual recognition of judgments and other decisions of judicial authorities as the cornerstone of judicial cooperation in civil matters and invited the Council and the Commission to adopt a programme of measures to implement that principle.

(4) On 30 November 2000 the Council adopted a draft programme

Recitals

of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters. The programme identifies measures relating to the harmonisation of conflict-of-law rules as those facilitating the mutual recognition of decisions. It provides for the drawing up of an instrument relating to successions and wills, which were not included in Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

(5) The European Council meeting in Brussels on 4 and 5 November 2004 adopted a new programme entitled “The Hague Programme: strengthening freedom, security and justice in the European Union”. The programme underlines the need to adopt by 2011 an instrument on the law of succession which deals among other things with the issue of conflict of laws, legal jurisdiction, mutual recognition and the enforcement of decisions in this area, a European Certificate of Succession and a mechanism enabling it to be known with certainty if a resident of the European Union has left a last will or testament.

(6) The smooth functioning of the internal market should be facilitated by removing the obstacles to the free movement of persons who currently face difficulties asserting their rights in the context of an international succession. In the European area of justice, citizens must be able to organise their succession in advance. The rights of heirs and/or legatees, other persons linked to the deceased and creditors of the succession must be effectively guaranteed.

(7) In order to achieve these objectives, this Regulation should group

together the provisions on legal jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in this area and on the European Certificate of Succession.

(8) The scope of this Regulation should include all questions arising in civil law in connection with succession to the estates of deceased persons, namely all forms of transfer of property as a result of death, be it by voluntary transfer, transfer in accordance with a will or an agreement as to succession, or a legal transfer of property as a result of death.

(9) The validity and effects of gifts are covered by Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I). They should therefore be excluded from the scope of this Regulation in the same way as other rights and assets created or transferred other than by succession. However, it is the law on succession determined pursuant to this Regulation which should specify if this gift or other form of provisions *inter vivos* giving rise to an immediate right *in rem* can lead to any obligation to restore or account for gifts when determining the shares of heirs or legatees in accordance with the law on succession.

(10) While this Regulation should cover the method of acquiring a right *in rem* in respect of tangible or intangible property as provided for in the law governing the succession, the exhaustive list (“*numerus clausus*”) of rights *in rem* which may exist under the national law of the Member States, which is, in principle, governed by

(8) The scope of this Regulation should include all questions arising in civil law in connection with succession to the estates of deceased persons, namely all forms of transfer of property as a result of death, be it by voluntary transfer, transfer in accordance with a will or an agreement as to succession, or a legal transfer of property as a result of death. *In general, the Regulation should not apply to preliminary or incidental questions.*

the *lex rei sitae*, should be included in the national rules governing conflict of laws. The publication of these rights, in particular the functioning of the land registry and the effects of entry or failure to make an entry into the register, which is also governed by local law, should also be excluded.

(11) In order to take into account the different methods of settling a succession in the Member States, this Regulation should define the jurisdiction of the courts in the broad sense, including the jurisdiction of non-judicial authorities where they exercise a jurisdictional role, in particular by delegation.

(12) In view of the increasing mobility of European citizens and in order to encourage good administration of justice within the European Union and to ensure that a genuine connecting factor exists between the succession and the Member State exercising jurisdiction, this Regulation should provide for the competence of the courts of the Member State of the last habitual residence of the deceased for the whole of the succession. For the same reasons, it should allow the competent court, by way of exception and under certain conditions, to transfer the case to the jurisdiction where the deceased had nationality if the latter is better placed to hear the case.

(13) In order to facilitate mutual recognition, no referral to the rules of jurisdiction under national law should be envisaged from now on. There are therefore grounds for determining in this Regulation the cases in which a

(11) In order to take into account the different methods of settling a succession in the Member States, this Regulation should define the jurisdiction of the courts in the broad sense, including the jurisdiction of non-judicial authorities, *such as notaries public*, where they exercise a jurisdictional role, in particular by delegation. *Where courts have jurisdiction to rule in matters of succession their competence should be given a wide scope, including the receipt of declarations.*

(12) In view of the increasing mobility of European citizens and in order to encourage good administration of justice within the European Union and to ensure that a genuine connecting factor exists between the succession and the Member State exercising jurisdiction, this Regulation should provide for the competence of the courts of the Member State of the last habitual residence of the deceased for the whole of the succession. For the same reasons, it should allow the competent court, by way of exception and under certain conditions, to transfer the case to the jurisdiction where the deceased had nationality if the latter courts of another Member State which is are better placed to hear the case rule on the succession.

court in a Member State can exercise subsidiary jurisdiction.

(14) In order to simplify the lives of heirs and legatees living in a Member State other than that in which the courts are competent to settle the succession, the settlement should authorise them to make declarations regarding the acceptance or waiver of succession in the manner provided for under the law of their last habitual residence, if necessary before the courts of that State.

(15) The close links between the succession rules and the substantive rules mean that the Regulation should provide for the exceptional competence of the courts of the Member State where the property is located if the law of this Member State requires the intervention of its courts in order to take measures covered by substantive law relating to the transmission of this property and its recording in the land registers.

(16) The harmonious functioning of justice requires that irreconcilable decisions should not be pronounced in two Member States. To this end, this Regulation should provide for general rules of procedure based on Regulation (EC) No 44/2001.

(17) In order to allow citizens to avail themselves, with all legal certainty, of the benefits offered by the internal market, this Regulation should enable them to know in advance which law will apply to their succession. Harmonised rules governing conflict of laws should be introduced in order to avoid contradictory decisions being delivered in the Member States. The main rule should ensure that the succession is governed by a predictable law to which it is closely linked. Concern for legal certainty requires that this law should cover all

of the property involved in the succession, irrespective of its nature or location, in order to avoid difficulties arising from the fragmentation of the succession.

(18) This Regulation should make it easier for citizens to organise their succession in advance by enabling them to choose the applicable law. This choice should be subject to strict rules in order to respect the legitimate expectations of the heirs and legatees.

(19) The validity of the form of dispositions of property upon death is not covered by the Regulation. For the Member States which have ratified it, its scope is governed by the provisions of the Hague Convention of 5 October 1961 on the conflicts of laws relating to the form of testamentary dispositions.

(20) In order to facilitate recognition of succession rights acquired in a Member State, the conflict-of-laws rule should favour the validity of the agreements as to succession by accepting alternative connecting factors. The legitimate expectations of third parties should be preserved.

(21) To the extent compatible with the general objective of this Regulation and in order to facilitate the transmission of a right in rem acquired under the law on succession, this Regulation should not present an obstacle to the application of certain mandatory rules of law of the place in which property is located that are exhaustively listed.

(22) On account of their economic, family or social purpose, some buildings, enterprises or other categories of property are subject to a particular succession regime in the Member State in which they are located. This Regulation should respect the particular regime. However, this exception

(22) On account of their economic, family or social purpose, some buildings, enterprises or other categories of property are subject to a particular succession regime in the Member State in which they are located. This Regulation should respect the *overriding mandatory provisions of the lex rei si-*

to the application of the law on succession requires strict interpretation in order to remain compatible with the general objective of this Regulation. The exception does not apply in particular to the conflict of laws rule subjecting immovable property to a different law from that applicable to movable property or to the reserved portion of an estate.

(23) The differences between, on the one hand, national solutions as to the right of the State to seize a vacant succession and, on the other hand, the handling of a situation in which the order of death of one or more persons is not known can lead to contradictory results or, conversely, the absence of a solution. This Regulation should provide for a result consistent with the substantive law of the Member States.

(24) Considerations of public interest should allow courts in the Member States the opportunity in exceptional circumstances to disregard the application of foreign law in a given case where this would be contrary to the public policy of the forum. However, the courts should not be able to apply the public-policy exception in order to disregard the law of another Member State or to refuse to recognise or enforce a decision, an authentic instrument, a legal transaction or a European Certificate of Succession drawn up in another Member State when this would be contrary to the Charter of Fundamental Rights of the European Union, and in particular Article 21, which prohibits all forms of discrimination.

tae establishing such a particular special succession regime. However, this exception to the application of the law on succession requires strict interpretation in order to remain compatible with the general objective of this Regulation. The exception does not apply in particular to the conflict of laws rule subjecting immovable property to a different law from that applicable to movable property or to the reserved portion of an estate.

(24) Considerations of public interest ~~should allow~~ *justify giving the courts* ~~in of the Member States the opportunity,~~ *in exceptional circumstances, to* ~~disregard the application of foreign law in a given case where this would be contrary to the public policy of the forum.~~ *the possibility of resorting to public policy and overriding mandatory provisions. However, the courts may not resort to such exceptions on the sole ground that the provisions of the law applicable according to this Regulation with regard to the reserved portion and other indefeasible rights to the estate differ from those of the forum or another State. In particular, the courts may not* ~~should not be able to~~ *apply the public-policy exception in order to disregard the law of another Member State or to refuse to recognise or enforce a decision, an authentic instrument, a legal transaction or a European Certificate of Succession drawn up in another Member State*

when this would be contrary to the Charter of Fundamental Rights of the European Union, and in particular Article 21, which prohibits all forms of discrimination.

(25) In the light of its general objective, which is the mutual recognition of decisions given in the Member States concerning succession to the estates of deceased persons, this Regulation should lay down rules relating to the recognition and enforcement of decisions on the basis of Regulation (EC) No 44/2001 and which should be adapted where necessary to meet the specific requirements of matters covered by this Regulation.

(26) In order to take into account the different methods of settling the issues regarding successions in the Member States, this Regulation should guarantee the recognition and enforcement of authentic instruments. Nevertheless, the authentic instruments cannot be treated as court decisions with regard to their recognition. The recognition of authentic instruments means that they enjoy the same evidentiary effect with regard to their contents and the same effects as in their country of origin, as well as a presumption of validity which can be eliminated if they are contested. This validity will therefore always be contestable before a court in the Member State of origin of the authentic instrument, in accordance with the procedural conditions defined by the Member State.

(27) An accelerated, manageable and efficient settlement of international successions within the European Union implies the possibility for the heir, legatee, executor of the will or administrator to prove easily on an out-of-court basis their capacity in the Member States in which the prop-

erty involved in the succession is located. In order to facilitate free movement of this proof within the European Union, this Regulation should introduce a uniform model for the European Certificate of Succession and appoint the authority competent to issue it. In order to respect the principle of subsidiarity, this certificate should not replace the internal procedures of the Member States. The Regulation should specify the linkage with these procedures.

(28) The international commitments entered into by the Member States mean that this Regulation should not affect the international conventions to which one or more Member States are party when they are adopted. Consistency with the general objectives of this Regulation requires, however, that the Regulation take precedence as between Member States over the conventions.

(29) In order to facilitate the application of this Regulation, provision should be made for an obligation for Member States to communicate certain information regarding their law on succession within the framework of the European legal network in civil and commercial matters created by Council Decision 2001/470/EC of 28 May 2001.

(30) The measures necessary for the implementation of this Regulation should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission.

(31) It would be particularly appropriate to enable the Commission to adopt any amendment to the forms provided for in this Regulation in accordance with the procedure laid

down in Article 3 of Decision 1999/468/EC.

(32) Where the concept of “nationality” serves to determine the law applicable, account should be taken of the fact that certain States whose legal system is based on common law use the concept of “domicile” and not “nationality” as an equivalent connecting factor in matters of succession.

(33) Since the objectives of this Regulation, namely the free movement of persons, the organisation in advance by European citizens of their succession in an international context, the rights of heirs and legatees, and persons linked to the deceased and the creditors of the succession, cannot be satisfactorily met by the Member States and can therefore, by reason of the scale and effects of this Regulation, be better achieved at Community level, the Community may take measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve those objectives.

(34) This Regulation respects fundamental rights and observes the principles recognised in the Charter of Fundamental Rights of the European Union, in particular Article 21 thereof which states that any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited. This Regulation must be applied by the courts of the Member States in observance of these rights and principles.

(34) This Regulation respects fundamental rights and observes the principles recognised in the Charter of Fundamental Rights of the European Union, in particular Article 21 thereof which states that any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited. *The courts of the Member States shall ensure the observance of these fundamental rights and principles when applying this*

Regulation, and in particular when resorting to exceptions based on public policy and overriding mandatory provisions. This Regulation must be applied by the courts of the Member States in observance of these rights and principles.

(35) In accordance with Articles 1 and 2 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and the Treaty establishing the European Community, [the United Kingdom and Ireland have notified their wish to participate in the adoption and application of this Regulation]/[without prejudice to Article 4 of the Protocol, the United Kingdom and Ireland will not participate in the adoption of this Regulation and will not be bound by it or be subject to its application].

(36) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and the Treaty establishing the European Community, Denmark is not taking part in the adoption of this Regulation and is therefore not bound by it or subject to its application,

HAVE ADOPTED THIS REGULATION:

Comments

26. The Recitals have not undergone a comprehensive review (see *supra* para. 25). For Recital 8 see *supra* para. 6 seq. (Introduction); for Recital 11 see *infra* para. 55 (Art. 2(b) SP), para. 63 (Art. 3 SP) and para. 113 seq. (Art. 8 SP); for Recital 12 see *infra* para. 73 seq. (Art. 5 SP); for Recitals 24 and 34 see *infra* para. 204 seq., 210 and 212 seq. (Art. 22 SP) and para. 248 (Art. 27 SP).

**Chapter I:
Scope and definitions**

Article 1 – Scope

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

2. In this Regulation, “Member State” means all the Member States with the exception of Denmark, [the United Kingdom and Ireland].

3. The following shall be excluded from the scope of this Regulation:

(a) the status of natural persons, as well as family relationships and relationships which are similar in effect;

(b) the legal capacity of natural persons, notwithstanding Article 19(2)(c) and (d);

(c) the disappearance, absence and presumed death of a natural person;

(d) questions regarding the matrimonial property regime and the property regime applicable to relationships which are deemed to have comparable effects to marriage;

(e) maintenance obligations;

(f) rights and assets created or transferred other than by succession to the estate of deceased persons, including gifts, such as in joint ownership with right of survival, pension plans, insurance contracts and or arrangements of a similar nature, notwithstanding Article 19(2)(j);

(g) questions covered by company law, such as clauses contained in company memoranda of association and articles of association, associations and

**Chapter I:
Scope and definitions**

Article 1 – Scope

(a) the status of natural persons, as well as family relationships and relationships *deemed by the law applicable to such relationships to have comparable effects which are similar in effect*;

(b) the legal capacity of natural persons, notwithstanding Articles 18(2), 18a(2) and 19(2)(be) and (cd);

(c) the disappearance, absence and presumed death of a natural person, *except for the question of simultaneous death in the context of Article 23*;

(d) questions regarding the matrimonial property regime and the property regime applicable to relationships which are deemed *by the law applicable to such relationships* to have comparable effects to marriage;

(e) maintenance obligations, *subject to Article 19(2)(h)*;

(f) rights and assets created or transferred other than by succession to the estate of deceased persons, including gifts, such as in joint ownership with right of survival, pension plans, insurance contracts and/or arrangements of a similar nature, notwithstanding Articles 19(2)(ij) and 19a;

(g) questions covered by company law, ~~such as clauses contained in company memoranda of association and articles of association, associations and~~

legal persons and determining what will happen to the shares upon the death of their partners;

(h) the dissolving, closure and merging of enterprises, associations and legal persons;

(i) the constitution, functioning and dissolving of trusts;

(j) the nature of rights in rem relating to property and publicising these rights.

~~legal persons and determining what will happen to the shares upon the death of their partners~~ *such as the succession upon death in the shares of a company or a partnership to the extent that the law applicable to the company or partnership contains special rules for succession;*

(i) the constitution, functioning and dissolving of trusts, *except trusts created by testamentary dispositions or by the rules on intestacy;*

(j) *questions of property law such as the nature of rights in rem and publicising these rights, subject to Articles 21(3) and 42;*

(k) *questions relating to intellectual property rights including copyrights, insofar as the law applicable to such rights contains special rules for succession.*

Summary

27. Apart from some minor changes of wording, the Institute proposes as to the scope of the future Regulation the following modifications of Art. 1(3) SP:

– Art. 1(3)(c) SP should clarify that the question of simultaneous death in the context of Art. 23 is to be included into the future Regulation (infra para. 29 seq.).

– Art. 1(3)(e) SP should clarify that indefeasible rights to the estate resulting from a duty of maintenance are to be covered by the future Regulation (infra para. 34 seq.).

– In Art. 1(3)(g) SP the delimitation of the applicable company and succession law should be clarified, notably in cases where the applicable company law contains special succession rules for certain shares in companies or partnerships (infra para. 38 seq.).

– Trusts created by testamentary dispositions or by the rules on intestacy should be included in the scope of the future Regulation by Art. 1(3)(i) SP (infra para. 44 seq.).

– In Art. 1(3)(j) SP the relation to the applicable property law should be clarified (infra para. 51).

– A new Art. 1(3)(k) SP should exclude intellectual property rights from the scope of the future Regulation to the extent that the law applicable to such rights contains special succession rules (*infra* para. 52 seq.).

Comments

Minor changes, Art. 1(3)(a), (b), (d), and (f) SP

28. First, the Institute proposes some linguistic changes. Notably, for the sake of consistency, the wording of Art. 1(3)(a) and Art. 1(3)(d) SP should be aligned to the wording of Art. 1(2)(b) and Art. 1(2)(c) of the Rome I Regulation. The references to other provisions inserted in Art. 1(3)(b) and (f) SP are a consequence of the changes proposed by the Institute to the provisions referred to.

Inclusion of rules on simultaneous death, Art. 1(3)(c) SP

29. Where the death of a natural person cannot be ascertained after he or she has disappeared for years without any proof of life or where that person was involved in a life-threatening event, the substantive laws of Member States envisage different solutions.

30. The first group (e.g., Germany and Austria) provides that the courts render a “death declaration” to the effect that the absentee is presumed to be dead from the moment fixed in the decree with regard to all legal relations²⁸. It is geared to the extinction of the absentee’s legal personality²⁹. The second group (e.g., France) traditionally focuses on the protection of the absentee’s interests. The courts are entitled, at a first stage, to make an order establishing a “presumption of absence” for the administration of the absentee’s assets³⁰ and, at a later stage, render a “declaration of absence” with the effect of presumption of death for the purposes of succession and dissolution of marriage³¹. The third group (e.g., England) lacks a general presumption of death. It decides on the matter incidentally based on the evidence available

²⁸ Sec. 9(1) of the Austrian Declaration of Death Act; Sec. 9(1) of the German Missing Persons Act.

²⁹ A curator can, however, be ordered for the administration of the absentee’s assets (Sec. 276 of the Austrian Civil Code; Sec. 1911 of the German Civil Code), independently of the declaration of death.

³⁰ Art. 112 seq. of the French Civil Code (“*présomption d’absence*”); Art. 112 seq. of the Belgian Civil Code; see also Art. 181 seq. of the Spanish Civil Code; Art. 48 seq. of the Italian Civil Code; Art. 1:409 seq. of the Dutch Civil Code.

³¹ Art. 122 seq. of the French Civil Code (“*déclaration d’absence*”) (since 1977); Art. 118 seq. of the Belgian Civil Code; see also Art. 193 seq. of the Spanish Civil Code; Art. 58 seq. of the Italian Civil Code; Art. 1:412 seq. of the Dutch Civil Code. In the case of disappearance in a life-threatening event (e.g., war or shipwreck), however, the courts can immediately render a

in matrimonial cases concerning the marital status of a person or the validity of a second marriage, as well as in succession cases upon request of potential beneficiaries or other parties concerned³².

31. From the viewpoint of choice of law, the disappearance, absence and presumed death of a natural person belong to the general matter of legal capacity. They do not only come up as a preliminary question of succession, but also affect, *inter alia*, the absentee's representation, administration of assets, dissolution of marriage and the maintenance claim of a surviving spouse. Hence, the majority of Member States characterise the disappearance, absence and presumed death of an individual as a matter of personal status and subject them to the absentee's national law³³, independently of succession. As an exception, the English common law favours application of the *lex fori*, considering such matters as procedural³⁴. These issues are rightly excluded from the scope of the Succession Proposal pursuant to Art. 1(3)(c) SP and are left to the national choice of law rules of Member States.

32. On the other hand, the question of simultaneous death (*commorientes*) concerns cases where two or more persons have died under circumstances which do not allow ascertainment of whether one person survived the other(s), i.e. which person died first. While most Member States provide for a rebuttable presumption of simultaneous death and exclude mutual succession³⁵, others establish a presumption of seniority or a combined principle³⁶.

"death declaration" ("*déclaration de décès*"). See, *inter alia*, Art. 88 seq. of the French Civil Code (since 1945; modified in 1958); Art. 126 seq. of the Belgian Civil Code.

³² Sec. 19 of the Matrimonial Causes Act 1973; see *Dicey/Morris/Collins*, *The Conflict of Laws*¹⁴ I, II (2006) para. 18–154; *Sherrin/Bonehill*, *The Law and Practice of Intestate Succession*² (1994) 201 seq.

³³ See, *inter alia*, Sec. 14 of the Austrian Private International Law Act; Art. 41(1) of the Belgian Private International Law Act (cf. exception in Art. 41(2)); Art. 9 of the German Introductory Act to the Civil Code; Art. 22(1) of the Italian Private International Law Act. See also *Jacquet*, *Absence*, *Juris Classeur – Droit international*, Fasc. 543–50, no. 21 (France).

³⁴ See *Staudinger (-Weick)*, *Kommentar zum BGB, EGBGB/IPR: Art 7, 9–12, 47* (2007) Art. 9 EGBGB para. 22.

³⁵ See, *inter alia*, Sec. 11 of the Austrian Declaration of Death Act; Sec. 11 of the German Missing Persons Act; Art. 725–1 of the French Civil Code (since 2001); Art. 4 of the Italian Civil Code; Art. 33 of the Spanish Civil Code; Art. 2 of the Annex to the Benelux Convention on *Commorientes* of 29. 12. 1972, adopted in Art. 721 of the Belgian Civil Code; Art. 4–878(1) and Art. 4:941(1) of the Dutch Civil Code; Art. 720 of the Luxemburgian Civil Code.

³⁶ In England, Sec. 184 of the Law of Property Act 1925 presumes that the younger survived the elder (seniority principle; cf., however, the exception in Sec. 46(3) of the Administration of Estates Act 1925); see also Sec. 31(1)(b) of the Succession (Scotland) Act 1964. The former French Civil Code (until 2001) provided for a combined principle. If all the deceased were under the age of 15, the oldest was presumed to have survived the others, if all the deceased were over 60, the youngest received the benefit of the presumption. If one of the deceased persons was under 15 and the other over 60, the former was presumed to have survived the latter (*ex-Art. 721*). If all the deceased were between 15 and 60 and of the same sex, the youngest was presumed to have survived the others; if they were of different sex, the male was

These rules aim at determining the order of death between two or more persons in light of their eligibility to succession and do not play an independent role in other legal relations. From the choice of law perspective, therefore, the question of simultaneous death should be characterised as a matter of succession to be governed by the law applicable to succession (*lex hereditatis*), together with other issues listed in Art. 19 SP. Art. 13 of the Hague Succession Convention³⁷ as well as most Member States³⁸ follow this characterisation, except for Germany³⁹.

33. In order to clarify this point, the Institute suggests that Art. 1(3)(c) SP should be revised to explicitly include the question of simultaneous death into the scope of the Succession Proposal; it is only the implementation of this proposal that would allow Art. 23 SP to achieve uniform decisions in different Member States.

Inclusion of indefeasible rights other than reserved portions, Art. 1(3)(e) SP

34. Following the modifications proposed for Art. 19(2)(i) SP⁴⁰, the Institute suggests as well an amendment to Art. 1(3)(e) SP. In most continental legal systems the classic concept for securing the rights to the estate of close

presumed to have survived the female if the age difference was less than one year (*ex-Art. 722*). Despite these detailed rules, they did not cover the case where one of the deceased was under 15 or over 60 and the other between 15 and 60. It was generally presumed that the latter was stronger and therefore died later. *Jayme/Haas*, Die Kommorientenvermutung im internationalen Erbrecht bei verschiedener Staatsangehörigkeit der Verstorbenen: ZvglRWiss. 84 (1985) 85; cf. *infra* the comments on Art. 23 SP in para. 218.

³⁷ *Waters*, Explanatory Report, in: Actes et documents de la seizième Session, ed. by Conférence de La Haye de droit international privé, 3 au 20 octobre 1988 II: Successions – loi applicable (1990) 526–617 (584).

³⁸ Art. 21 of the Italian Private International Law Act; Art. 80(1) No. 1 Belgian Private International Law Act (cf. *Het Wetboek Internationaal Privaatrecht* becommentarieerd, ed. by *Erauw et al.* [2006] 411); see for Spain *Fernández Rozas/Sánchez Lorenzo*, Derecho internacional privado⁴ (2007) 295. For further reference see *Dutta*, Succession and Wills in the Conflict of Laws on the Eve of Europeanisation: *RabelsZ* 73 (2009) 547–606 (598). The position of the UK is not clear. While common law countries generally follow the procedural characterisation of simultaneous death and apply the *lex fori*, German law was applied as the *lex causae* in *Re Cohn*, [1945] Ch. 5. Cf. *Jayme/Haas* (supra n. 36) 95; *Cheshire/North/Fawcett*, Private International Law¹⁴ (2008) 50.

³⁹ Some German authors simply refer the question of simultaneous death to the respective national law of the deceased pursuant to Art. 9 of the German Introductory Act to the Civil Code, see *Bamberger/Roth* (-S. Lorenz), Kommentar zum Bürgerlichen Gesetzbuch² III (2008) Art. 25 EGBGB para. 23; *Staudinger* (-Dörner), Kommentar zum BGB, EGBGB/IPR: Art. 25, 26 (2007) Art. 25 EGBGB para. 92 seq. (cited: *Staudinger* [-Dörner]). Other German authors, in the case of divergent nationalities of the deceased, point to the law governing their family relation, see *Jayme/Haas* (supra n. 36) 96; *Palandt* (-Thorn), Bürgerliches Gesetzbuch⁶⁹ (2010) Art. 25 EGBGB para. 10 (cited: *Palandt* [-Thorn]).

⁴⁰ Art. 19(2)(i) SP would be converted into Art. 19(2)(h) in the amendments suggested by the Institute, see *infra* para. 166 seq.

family members of the deceased is the legitimate portion. Some of these legal systems reserve a certain part of the estate for those family members. Thus, if the testator disposes of these reserved parts the affected family members have the right to a forced heirship and can invalidate the testamentary disposition in so far as it is in violation of their legitimate share⁴¹. In other legal systems the family members have a monetary claim based on the value of their legitimate part of the estate⁴². Close family members eligible for a legitimate portion of the estate are usually the descendants of the deceased⁴³, in some cases his or her parents⁴⁴ and frequently the surviving spouse⁴⁵. In some European countries a supplementary condition for the legitimate portion is that the beneficiary is permanently unable to work or is still a minor⁴⁶.

35. The common law systems generally⁴⁷ do not recognise any legitimate portions. In the last century there has, however, evolved a system of so-called family provision⁴⁸. Persons maintained by the deceased at the time of death who cannot meet their needs out of their own means or inherited assets can lodge a claim with the judge. The judge will then allocate parts of the estate to the dependants of the deceased as a substitute for the previous maintenance. Art. 19(3)(i) SP explicitly recognises these family provisions.

⁴¹ See Art. 913 seq. of the Belgian Civil Code; Art. 70 of the Croatian Succession Act; Art. 912–930 of the French Civil Code; Art. 540 seq. of the Italian Civil Code; Art. 5.20 of the Lithuanian Civil Code; Art. 913 seq. of the Luxembourgian Civil Code; Art. 2156 seq. of the Portuguese Civil Code; Chapter 7 of the Swedish Succession Act; Art. 471 seq. of the Swiss Civil Code; Art. 806 seq. of the Spanish Civil Code.

⁴² Art. 762 seq. of the Austrian Civil Code; Art. 4:63 seq. of the Dutch Civil Code; Sec. 2303 of the German Civil Code; Art. 7:1 of the Finnish Civil Code.

⁴³ Art. 762, 765 of the Austrian Civil Code; Art. 913 of the Belgian Civil Code; Art. 70 of the Croatian Succession Act; Art. 4:63(2) of the Dutch Civil Code; Sec. 2303(1) of the German Civil Code; Art. 7:1(1) of the Finnish Civil Code; Art. 913 of the French Civil Code; Art. 536 seq. of the Italian Civil Code; Art. 5.20 of the Lithuanian Civil Code; Art. 913 seq. of the Luxembourgian Civil Code; Art. 2157 of the Portuguese Civil Code; Chapter 7 of the Swedish Succession Act; Art. 471 of the Swiss Civil Code; Art. 807 of the Spanish Civil Code.

⁴⁴ Art. 762, 766 of the Austrian Civil Code; Art. 915 of the Belgian Civil Code; Sec. 2303(2) of the German Civil Code; Art. 938 of the Italian Civil Code; Art. 5.20 of the Lithuanian Civil Code; Art. 2157 of the Portuguese Civil Code; Art. 471 of the Swiss Civil Code; Art. 807 of the Spanish Civil Code.

⁴⁵ Art. 762, 765 of the Austrian Civil Code; Art. 915bis of the Belgian Civil Code; Art. 70 of the Croatian Succession Act; Sec. 2303(2) of the German Civil Code; Art. 914(1) of the French Civil Code; Art. 540 of the Italian Civil Code; Art. 5.20 of the Lithuanian Civil Code; Art. 2157 of the Portuguese Civil Code; Art. 471 of the Swiss Civil Code; Art. 807 of the Spanish Civil Code.

⁴⁶ Sec. 104 of the Estonian Succession Act; Art. 991 of the Polish Civil Code.

⁴⁷ An exception is, e.g., Ireland where the Succession Act recognises a legitimate portion for the surviving spouse (Sec. 111 of the Irish Succession Act), but only a maintenance claim for the children (Sec. 117 of the Irish Succession Act).

⁴⁸ See, e.g., the Australian (New South Wales) Family Provision Act 1982 and, for England, the Inheritance (Provision for Family and Dependents) Act 1975.

36. However, in other legal systems infeasible rights of dependants of the deceased based on the previous duty of maintenance are recognised in the framework of the law of succession as well. The recent law reform in the Netherlands has, for example, introduced a claim of usufruct to assets of the estate for the surviving spouse and a lump sum claim for dependant minors and children under the age of 21 for the time span of their education⁴⁹. These claims have been granted as a (more flexible) substitute for, or as a supplement to, a legitimate portion in order to secure the rights of the core dependant family of the deceased. Therefore they form an integral part of the law of succession.

37. Against this background, Art. 1(3)(e) SP should make it clear that those rights are not excluded from the scope of the Regulation even though they are based on a duty of the deceased to maintain the claimant.

Delimitation of the applicable company and succession law, Art. 1(3)(g) SP

38. The death of a shareholder or partner of a partnership raises, in most substantive laws, intricate questions at the intersection of succession and company law. In the conflict of laws, however, the law applicable to the company or partnership on the one side and the law governing the succession in the deceased shareholder's or partner's estate on the other side have to be delimited. Both laws often diverge: Whereas the law governing the succession will be, according to Art. 16 of the proposed Regulation, primarily the law at the last habitual residence of the deceased shareholder or partner, the law governing the company or partnership is still defined by national law. Currently, in most jurisdictions companies and partnerships are subjected either to the law of their seat (seat theory) or to the law according to which they have been incorporated (incorporation theory). The seat theory has come under pressure within the European Union. The freedom of establishment, now guaranteed by Art. 49 and Art. 54 TFEU, restricts – according to the ECJ in *Centros*⁵⁰, *Überseering*⁵¹ and *Inspire Art*⁵² – the application of the law at the seat if the company or partnership was validly established under the law of another Member State – a fact which has not only caused, for instance, the German courts to follow the incorporation theory for EU companies and partnerships⁵³, but might also have, as will be seen momentarily, implications for the delimitation of the applicable company law and succession law.

⁴⁹ Art. 4:29, 30 and 35 respectively of the Dutch Civil Code.

⁵⁰ ECJ 9. 3. 1999, Case C-212/97 (*Centros*), E. C. R. 1999, I-1459.

⁵¹ ECJ 5. 11. 2002, Case C-208/00 (*Überseering*), E. C. R. 2002, I-9919.

⁵² ECJ 30. 9. 2003, Case C-167/01 (*Inspire Art*), E. C. R. 2003, I-10155.

⁵³ See BGH 13. 3. 2003, BGHZ 154, 185 (189); BGH 14. 3. 2005, IPRspr. 2005 No. 212 (p. 567 seq.).

Obvious company law matters: The consequences of the shareholder's death on the company and the shares

39. Against this background it does not come as a surprise that Art. 1(3)(g) SP explicitly excludes company law from the scope of the future Regulation. Hence, for example, the consequences of the shareholder's or partner's death for the company, the partnership and shares, e.g. the possible exclusion of a partner or even the dissolution of the partnership by virtue of a partner's death, will not be covered by the future Regulation but rather by the conflict rules for companies and partnerships.

Problematic cases: Special succession rules for certain company shares

40. More problematic, however, is the characterisation of the succession to the shares of the deceased shareholder or partner. In most legal systems the succession to shares is, in general, dealt with by succession law. Many legal systems, though, provide for special succession rules for shares in certain private companies and partnerships. For example, in German law shares of a partnership are subject to special succession rules which deviate from the general rules of succession law. Thus, for example, the special rules split shares in a firm between several heirs *ex lege*⁵⁴ unlike the general succession rules which provide that the estate is divided between the heirs according to certain settlement provisions⁵⁵.

41. As to the characterisation of such special succession rules for certain shares, the proposed amendments to Art. 1(3)(g) SP attempt to delineate the border between the applicable company and succession law more precisely than the currently envisioned wording of the provision does: The proposed examples of questions covered by company law for the purpose of Art. 1(3)(g) SP establish the precedence of the applicable company law over succession law only as far as the applicable company law contains special rules for the succession to the shares of the deceased shareholder or partner. Hence, the new wording clarifies that clashes between the applicable company law and succession law are to be solved by giving precedence to the applicable company law. If the applicable company law does not contain any special rules on the succession to the shares of the deceased shareholder or partner – as is the case in most jurisdictions for incorporated companies – the succession to the shares is governed by the applicable succession law.

42. For EU companies and partnerships, the precedence of the applicable company law – where providing special succession rules – does not only follow from the jurisprudence of the ECJ on the freedom of establishment mentioned earlier; the succession in company or partnership shares concerns the

⁵⁴ See e.g. BGH 22. 11. 1956, BGHZ 22, 186; 10. 2. 1977, BGHZ 68, 225.

⁵⁵ See Sec. 2042 seq. of the German Civil Code.

relations between the partners and shareholders and can also be a factor when, in exercise of the freedom of establishment, one chooses among the European company laws⁵⁶. Rather the law of the Union itself – as with many national laws – recognises the precedence of company law over succession law with regard to the succession in company or partnership shares: Art. 28(2) of the Regulation on the European Economic Interest Grouping⁵⁷ provides that in case of the death of a member of the grouping “no person may become a member in his place except under the conditions laid down in the contract for the formation of the grouping or, failing that, with the unanimous agreement of the remaining members”. The Commission’s Proposal for a Council Regulation on the statute for a European private company⁵⁸ does not contain provisions which directly derogate from succession law. However, the Proposal requires in Annex I that the articles of association of the European private company must determine “rules applicable in the event of the death or dissolution of a shareholder” – a provision which assumes that the applicable company law might derogate from the applicable succession law.

43. The proposed changes in Art. 1(3)(g) SP are necessary to codify the potential precedence of the applicable company law due to two reasons: First, the present wording of Art. 1(3)(g) SP is too narrow and only partially regulates the precedence of the applicable company law. It excludes the application of the future Regulation only if the *articles of association* determine the succession to shares after the death of a shareholder or partner. However, there are special rules for the succession to certain shares which apply as a matter of law *without* any basis in the articles of association. Again taking German company law as an example, one finds, for instance, special default rules for the succession to partnership shares which modify the general rules on testamentary execution especially with regard to the powers of the executor⁵⁹. Secondly, the precedence of the applicable company law is also not secured by the general provision for special succession regimes in Art. 22 SP. Art. 22 SP only applies to special succession regimes “on account of their economic, family or social purpose”; however, special succession rules for certain company and partnership shares are not necessarily of such nature and internationally mandatory⁶⁰ but rather simple provisions of company law which are often not even internally mandatory and can be modified by the

⁵⁶ See *Dutta*, Die Abgrenzung von Gesellschaftsstatut und Erbstatut beim Tod des Gesellschafters: *RabelsZ* 73 (2009) 727–749 (736 seq.).

⁵⁷ Council Regulation (EEC) No. 2137/85 of 25. 7. 1985 on the European Economic Interest Grouping (EEIG), O.J. 1985 L 199/1.

⁵⁸ Proposal for a Council Regulation on the statute for a European private company, COM(2008) 396 final of 25. 6. 2008.

⁵⁹ See e.g. BGH 14. 5. 1986, BGHZ 98, 48; 3. 7. 1989, BGHZ 108, 187.

⁶⁰ See also *infra* para. 205 seq.

shareholders or partners. Furthermore, even if Art. 22 SP covers certain special succession rules for shares the consequences of Art. 22 SP do not adequately encompass those special rules. Art. 22 SP refers to the law where the relevant property is situated. Wherever one regards company shares to be located – at the place where the property of the company is located⁶¹ or at the place where the company has its real seat – the law of that place need not necessarily be the law governing the company or partnership. As a consequence, the precedence of special succession rules existing in the law applicable to the company or partnership should be clarified in Art. 1(3)(g) SP.

*Inclusion of testamentary trusts and statutory trusts upon intestacy,
Art. 1(3)(i) SP*

44. The Green Paper raised the question whether special conflict rules should be adopted for trusts created by a testator⁶². This question alludes especially to express testamentary trusts by which the testator – acting as a settlor – stipulates in a testamentary disposition (see the proposed Art. 2(c) SP) that after his or her death the estate or certain parts of the estate are to be held and administered by a trustee in favour of a beneficiary. In the conflict of laws, such testamentary trusts are subject to divergent characterisation in the various Member States. Some apply the conflict rules for succession and wills to testamentary trusts by characterising them as ordinary testamentary dispositions⁶³. The Hague Trust Convention, which is in force for some Member States⁶⁴, however, contains common conflict rules for all kinds of express trusts covering testamentary trusts as well⁶⁵. As a consequence, Art. 14(1) of the Hague Succession Convention stipulates that the conflict rules for successions do not preclude the application of another law to a trust created by the testator. According to Art. 1(3)(i) SP, trusts are not covered by the future Regulation at all. That restrictive approach, however, is not convincing, in particular not with regard to testamentary trusts (*infra* para. 45 seq.) and statutory trusts upon intestacy (*infra* para. 50).

⁶¹ In that direction e.g. BGH 5. 5. 1960, BGHZ 32, 256 (260 seq.).

⁶² Question 11 of the Green Paper.

⁶³ See for France Cass. Civ. 3. 11. 1983, Rev. crit. d. i. p. 73 (1984) 336; see for Germany LG Wiesbaden 18. 1. 1960, IPRspr. 1960/1961 No. 138; LG Nürnberg-Fürth 29. 12. 1962, IPRspr. 1962/1963 No. 148; OLG Frankfurt a.M. 2. 5. 1972, IPRspr. 1972 No. 125; BGH 2. 6. 1976, WM 1976, 811; LG München I 6. 5. 1999, IPRspr. 1999 No. 95.

⁶⁴ Namely, Italy, Luxembourg, Malta, the Netherlands and the United Kingdom, see *supra* n. 3.

⁶⁵ See Art. 2(1) of the Convention and *Re Barton (Deceased)*, [2002] EWHC 264 (Ch.) para. 29 seq.

Testamentary trusts

45. First of all, testamentary trusts should be within the scope of the future Regulation⁶⁶. Trusts might indeed be, as labelled in the preamble of the Hague Trust Convention, a “unique legal institution” of the common law. However, the interests of the settlor of a testamentary trust are recognised also by equivalent institutions in non-common law Member States: Some effects of testamentary trusts might, for instance, remind a German lawyer of *Testamentsvollstreckung* or *Vor- und Nacherbschaft*⁶⁷. It is, thus, difficult to understand why a legal concept which relates to successions and has become a common vehicle of estate planning should be excluded from the scope of the uniform conflict rules for that area. An inclusion of testamentary trusts into a European instrument would not necessarily disturb the existing Hague Trust Convention if, as envisioned by Art. 45(1) SP, the application of the Convention is reserved between the five Member States which are Contracting States. Rather an inclusion of trusts would ensure, on the choice of law level, that – unlike now – at least testamentary trusts are recognised European-wide; the legal certainty for a testator creating a trust by a testamentary disposition would be enhanced.

46. If testamentary trusts are to be included in the scope of the instrument, the further question arises whether they should be subject to the conflict rules for testamentary dispositions or whether *modifications* are necessary. In the view of the Institute, without any modification the existence, material validity, effects and interpretation of a disposition establishing a testamentary trust would primarily be governed by the law which would hypothetically govern the succession at the time the disposition is made (see the proposed amendments to Art. 18 SP and the proposed Art. 18a), which is either the law of the habitual residence of the testator at this time or the law which the testator has chosen. That law would also apply to the trust itself whose creation would – if trusts are included in the scope of the future Regulation – be one of the “effects” of the testamentary disposition. Hence, the testator would only have a limited choice of law (see Art. 17 SP). By

⁶⁶ Green Paper reply of the Swedish Government p.5; *Dutta* (supra n.38) 592 seq.; *D. Lehmann*, Die Reform des internationalen Erb- und Erbprozessrechts im Rahmen der geplanten Brüssel-IV Verordnung (2006) 180; *Mansel*, Vereinheitlichung des Internationalen Erbrechts in der Europäischen Gemeinschaft, Kompetenzfragen und Regelungsgrundsätze, in: Tuğrul Ansay'a armağan (supra n.21) 185–226 (220 seq.); *Termer*, Perspectives of a European Law of Succession: Maastricht Journal of European and Comparative Law 14 (2007) 147–178 (169). For an exclusion of trusts: Opinion of the European Economic and Social Committee of 26.10.2005 on the Green Paper, O.J. 2006 C 28/1, para. 2.13; Parliament Report p.8 (Recommendation 9); Green Paper replies of the German Federal Council p.6, the German government p.5, the Polish government p.4 seq., the UK government p.7 and Annex B to the reply of the UK government p.16; *Harris*, The Proposed EU Regulation on Succession and Wills: Trust Law International 2008, 181–235 (202 seq.).

⁶⁷ See *Kötz*, Trust und Treuhand (1963) 97 seq.

contrast, the Hague Trust Convention grants the settlor, in principle, an unlimited freedom of choice of law (Art. 6). If the settlor does not designate a governing law, the trust is governed by the law to which the trust is most closely connected (Art. 7).

47. The European instrument should *not* deviate for testamentary trusts from the proposed conflict rules for testamentary dispositions. There is no reason why the settlor of a testamentary trust should have a greater freedom of choice of law than a testator who establishes a civil law equivalent to a testamentary trust. Furthermore, the application of the conflict rules for testamentary dispositions warrants that, in the regular case, testamentary trusts and succession in general will be subject to the same law and that no coordination issues will arise, e.g. with regard to the protection of family members. Those restrictions to the freedom to testate vis-à-vis the establishment of a testamentary trust can in any event not be circumvented by separate conflict rules for trusts, as shown by the Hague Trust Convention which does not restrict the application of mandatory provisions of the governing succession law⁶⁸.

48. An inclusion of trusts into the future instrument could, however, be problematic if the applicable law is *unfamiliar* with the institution of trusts. But even if the testator establishes a trust by a testamentary disposition, despite the applicable law containing no provisions on testamentary trusts, this would not necessarily lead to a disregard of the testator's desire. Rather the establishment of a testamentary trust can often be interpreted as an implied choice of law in favour of a law which contains pertinent provisions and is eligible for a choice by the testator⁶⁹. And even when such a choice of law cannot be inferred, the testamentary trust can be transformed to its closest equivalent under the applicable succession law⁷⁰.

49. Even aside from the choice of law issues mentioned, an inclusion of testamentary trusts into the future Regulation would be sensible. This applies especially to the jurisdiction rules which would be fitting for trust purposes as well. The general jurisdiction at the last habitual residence of the settlor (Art. 4 SP) would in many cases concentrate related succession and trust matters before a single court. Hence, a single court would decide on the succession and a testamentary trust which was, in most cases, set up to influence the succession. Furthermore, the proposed Art. 6a(1) would allow – if trusts are included in the future Regulation – the settlor to fix the forum

⁶⁸ See Art. 15(1)(c) of the Convention. See also Art. 14(1) sentence 2 of the Hague Succession Convention.

⁶⁹ See the proposed amendments to Art. 17(2) SP allowing an implied choice of law; see for further details *infra* para. 150.

⁷⁰ See e.g. for Germany: OLG Frankfurt a.M. 22. 9. 1965, IPRspr. 1966/1967 No. 168a; BayObLG 18. 3. 2003, IPRspr. 2003 No. 99.

for all disputes arising out of the trust, a possibility which also currently exists for inter vivos trusts in Art. 23(4) of the Brussels I Regulation⁷¹.

Statutory trusts upon intestacy

50. However, testamentary trusts are not the only type of trusts which should, from a functional perspective, fall within the scope of the future Regulation. In some cases English succession law also creates statutory trusts upon intestacy. For example, in case of intestacy the estate is held in trust by a personal representative who administers the estate⁷². Furthermore, after the end of administration some parts of the estate are to be kept by the personal representative in trust for the benefit of certain family members of the deceased⁷³; the statutory trust is used as a legal tool for the distribution of the estate. Performing true succession purposes, such statutory trusts must be covered by the future Regulation⁷⁴. Yet as far as the trust is created for the administration of the estate, the special jurisdiction and conflict rules for administration might apply (see Art. 9 and Art. 21(1) and (2) SP).

Relation to the applicable property law, Art. 1(3)(j) SP

51. The Institute proposes to bring Art. 1(3)(j) SP in line with the other exceptions and to clearly state that pure questions of property law are excluded from the scope of the future Regulation. Furthermore, it should be made clear that the property law exception does not impact the property-related effects of the European Certificate of Succession pursuant to Art. 42 SP. The exclusion of questions of property law from the scope of the Regulation should, however, not obscure the reality that the actual delimitation of property law from the law of succession might be quite difficult: On a very abstract level, the law applicable to succession should deal with the question of entitlement to the estate; the question whether and how the form of entitlement envisaged by that law can be implemented has to be answered by the *lex rei sitae* as the law applicable to property⁷⁵. The precedence of the *lex rei sitae* with regard to property rights created by the law applicable to succession but unknown to the *lex rei sitae* is dealt with in a new Art. 21(3) SP.

⁷¹ Testamentary trusts are currently not within the scope of the Brussels I Regulation, cf. *Schlösser* Report, O.J. 1979 C 59/71, para. 52. See, however, also *Harris* (supra n. 66) 223 seq. The United Kingdom advocates an extension of the scope of the Brussels I Regulation to testamentary trusts which would lead to comparable results, cf. UK Comments on the Review of the Brussels I Regulation of 3. 9. 2009, para. 42.

⁷² Sec. 33(1) of the Administration of Estates Act.

⁷³ See Sec. 46(1), 47(1) of the Administration of Estates Act.

⁷⁴ *Dutta* (supra n. 38) 594.

⁷⁵ See e.g. for Germany BGH 28. 9. 1994, NJW 1995, 58 (59).

Delimitation of the law applicable to the succession and to intellectual property rights – the new Art. 1(3)(k) SP

52. From a comparative perspective, the transfer upon death of certain intellectual property (IP) rights and especially copyrights is subject to divergent substantive regulations. Yet neither the Commission's Succession Proposal nor the Green Paper addresses the issue of succession in such rights. One might contend that the matter could be adequately covered by Art. 22 SP as amended by the Institute's proposal⁷⁶. However, that provision would only deal with overriding mandatory provisions⁷⁷, and in light of ECJ jurisprudence regarding that matter there is reasonable doubt whether special succession rules for IP rights are overriding mandatory provisions, particularly whether they are crucial for safeguarding public interests such as those vested in the social or economic organisation of a State⁷⁸. As such provisions mainly serve private interests, the Institute takes the view that special succession rules on IP do not fall within the definition in Art. 22(1) SP as amended⁷⁹. Those special rules should rather be addressed by an exception.

53. In cross-border cases, the extent to which, for example, a copyright may be transferred is, in principle, governed by the law of the country in which the right is protected (*lex loci protectionis*)⁸⁰. Thus, the transferability of such rights by way of succession is closely interwoven with the respective national copyright law. Many substantive laws contain special succession rules for intellectual property and in particular copyrights. Such special provisions can be found, for example, in Italy and Turkey⁸¹. Some of them contain a conclusive list of the persons who are entitled to exercise the copyright after the author's death. Under the copyright acts of other States, the transfer of copyrights upon death is entirely excluded or at least subject to

⁷⁶ See also DNotI Study p. 323.

⁷⁷ See *infra* para. 204 seq. (comments on Art. 22 SP).

⁷⁸ See ECJ 19. 6. 2008, Case C-319/06 (*Commission ./. Luxembourg*), E. C. R. 2008, I-4323, para. 29; 23. 11. 1999, joined Cases C-369/96 and C-376/96 (*Arblade*), E. C. R. 1999, I-8453, para. 30.

⁷⁹ See also the corresponding definition of overriding mandatory provisions in Art. 9(1) of the Rome I Regulation.

⁸⁰ *Dicey/Morris/Collins* (supra n. 32) para. 22–051; *Fawcett/Torremans*, Intellectual Property and Private International Law (1998) 483 seq.; Münchener Kommentar zum BGB⁺ (-Drexl) XI (2006) Internationales Immaterialgüterrecht para. 127 seq.

⁸¹ See Art. 23 of the Italian Copyright Act; Art. 19 of the Turkish Copyright Act. See also Sec. 38(4) and 81 of the Danish Copyright Act. See as to Art. L. 121–1 seq. of the French Intellectual Property Code *Asmus*, Die Harmonisierung des Urheberpersönlichkeitsrechts in Europa (2004) 198 seq. See also ECJ 15. 4. 2010, Case C-518/08 (*Dali*) para. 33 seq. (not yet in E.C.R.) with regard to special succession rules in Art. L.123–7 of the French Intellectual Property Code and Directive 2001/84/EC of the European Parliament and of the Council of 27. 9. 2001 on the resale right of an author of an original work of art, O.J. 2001 L 272/32.

strict limitations⁸². Such legal rules form an integral part of the copyright as an artefact of a given national law; the application of a different law to the succession in such rights would interfere with the structure and content of such rights where special rules on succession are laid down in the *lex loci protectionis*. The Institute therefore proposes to exclude intellectual property rights from the scope of the Regulation to the extent that the law governing these rights contains special succession rules. This approach ensures that a decision rendered on the basis of the choice of law provisions of the Regulation is accepted in the State in which the intellectual property right is protected – a fact which increases the likelihood that such a decision will be recognised and enforced, especially in non-Member States that are not bound by Art. 29 seq. SP⁸³.

Article 2 – Definitions

For the purposes of this Regulation, the following definitions shall apply:

(a) “succession to the estates of deceased persons”: all forms of transfer of property as a result of death, be it by voluntary transfer, in accordance with a will or an agreement as to succession, or a legal transfer of property as a result of death;

(b) “court”: any judicial authority or any competent authority in the Member States which carries out a judicial function in matters of succession. Other authorities which carry out by delegation of public power the functions falling within the jurisdiction of the courts as provided for in this Regulation shall be deemed to be courts;

Article 2 – Definitions

(a) “succession to the estates of deceased persons”: all forms of transfer of property as a result of death, be it by voluntary transfer, in accordance with a *testamentary disposition* ~~a will or an agreement as to succession~~, or a legal transfer of property as a result of death;

(b) “court”: *regardless of its nature*, any judicial authority or any competent authority in the Member States which carries out a judicial function in matters of succession. Other authorities which carry out by delegation of public power the functions falling within the jurisdiction of the courts as provided for in this Regulation shall be deemed to be courts;

(c) “*testamentary disposition*”: *a will, a joint will or an agreement as to succession*;

⁸² See Sec. 9(2) and 14 of the Hungarian Copyright Act; Art. 41(1) and 78(2) to (4) of the Polish Copyright Act; Art. 29(2) of the Russian Copyright Act; Sec. 59, 60 and 116 of the Japanese Copyright Act. Cf. as to copyright *Skerzipek*, Urheberpersönlichkeitsrecht und Vorfrage (2005) 25 seq.

⁸³ See *infra* para. 251 seq.

(c) “agreement as to succession”: an agreement which confers, modifies or withdraws, with or without consideration, rights to the future succession of one or more persons who are party to the agreement;

(d) “joint wills”: wills drawn up by two or more persons in the same instrument for the benefit of a third party and/or on the basis of a reciprocal and mutual disposition;

(e) “home Member State”: the Member State in which, depending on the case, the decision has been given, the legal transaction approved or concluded and the authentic instrument drawn up;

(f) “Member State addressed”: the Member State in which recognition and/or enforcement of the decision, the legal transaction or the authentic instrument is requested;

(g) “decision”: any decision given in a matter of succession to the estate of a deceased person by a court of a Member State, whatever the decision may be called, including a decree, order, ordinance or writ of execution, as well as the determination of costs or expenses by an officer of the court;

(h) “authentic instrument”: an instrument which has been formally drawn up or registered as an authentic instrument and the authenticity of which:

- relates to the signing and content of the authentic instrument; and
- has been established by a public authority or other authority empowered for that purpose by the Member State in which it originates;

(i) “European Certificate of Succession”: the certificate issued by the competent court pursuant to Chapter VI of this Regulation.

(*dē*) “agreement as to succession”: an agreement which confers, modifies or withdraws, with or without consideration, rights to the future succession of one or more persons who are party to the agreement;

(*eđ*) “joint wills”: wills drawn up by two or more persons *with the intention of testating jointly, especially in the same instrument* for the benefit of a third party and/or on the basis of a reciprocal and mutual disposition;

(*fe*) “home Member State”: the Member State in which, depending on the case, the decision has been given, the legal transaction approved or concluded and the authentic instrument drawn up;

(*gf*) “Member State addressed”: the Member State in which recognition and/or enforcement of the decision, the legal transaction or the authentic instrument is requested;

(*hg*) “decision”: any decision given in a matter of succession to the estate of a deceased person by a court of a Member State, whatever the decision may be called, including a decree, order, ordinance or writ of execution, as well as the determination of costs or expenses by an officer of the court;

(*ih*) “authentic instrument”: an instrument which has been formally drawn up or registered as an authentic instrument and the authenticity of which:

- relates to the signing and content of the authentic instrument; and
- has been established by a public authority or other authority empowered for that purpose by the Member State in which it originates;

(*jđ*) “European Certificate of Succession”: the certificate issued by the competent court pursuant to Chapter VI of this Regulation.

Comments

54. The Institute proposes some rather technical changes of the definitions contained in Art. 2 SP:

Definition of court, Art. 2(b) SP

55. First, the Institute proposes that the definition of “court” in Art. 2(b) SP should be amended in accordance with Art. 1(1) of the Brussels I Regulation. Matters of succession, e.g. the appointment of an administrator or other measures concerning the administration of an estate, are often dealt with in non-contentious proceedings (*jurisdiction gracieuse, Außerstreitverfahren, Freiwillige Gerichtsbarkeit*). It may also be the case that some matters of succession call for the involvement of an administrative authority. The Institute therefore suggests that Art. 2(b) shall be amended to clearly state that courts in the sense of the Regulation are all judicial or otherwise competent authorities dealing with matters of succession within the scope of the Regulation no matter what their respective nature may be. An additional amendment to this effect concerns Recital 11.

Testamentary disposition – a new Art. 2(c) SP

56. Furthermore, the Institute proposes to add a new definition in the list of Art. 2 SP. In a new Art. 2(c) SP the term “testamentary disposition” should be defined as a will, joint will (as currently defined in Art. 2(c) SP) or agreement as to successions (as currently defined in Art. 2(d) SP). That definition of an overarching concept, which entails no substantive changes, allows other provisions of the Succession Proposal to simply refer to “testamentary dispositions” rather than to “wills, joint wills and agreements as to succession” as is done in the proposed versions of Art. 1(3)(i), 6a(1), 17(2), 18, 18a, 18b, 19(h), 20, 22(4), 24, 38(1)(c) and 50(3) SP. Consequently, Art. 1(3)(i), 2(a) SP should also refer to testamentary dispositions rather than only to “a will or an agreement as to succession”.

Joint wills, Art. 2(d) SP

57. A third small amendment concerns the definition of “joint wills” in Art. 2(d) SP: The present version defines a joint will as a will “drawn up by two or more persons in the same instrument for the benefit of a third party and/or on the basis of a reciprocal and mutual disposition”. That definition is too narrow in two respects: Firstly a joint will must not necessarily be drawn up in the *same instrument*. For example, under German law joint wills of spouses pursuant to Sec. 2265 seq. of the Civil Code do not have to be

contained in the same deed. It suffices that the spouses have the intention to testate – albeit in two documents – jointly⁸⁴. Therefore, the definition should make clear that a common intention of the testators suffices. Additionally, not every joint will must be *for the benefit of a third party and/or on the basis of a reciprocal and mutual disposition*. Again according to German law a joint will does not necessitate any special content apart from the requirement that the spouses intend to testate together. The Institute therefore proposes that the terms “for the benefit of a third party and/or on the basis of a reciprocal and mutual disposition” should be used as a mere example for the possible content of a joint will.

Chapter II Jurisdiction

Article 3 – Courts

The provisions of this Chapter shall apply to all courts in the Member States but shall apply to non-judicial authorities only where necessary.

Chapter II Jurisdiction

Article 3 – Courts

The provisions of this Chapter shall apply to all courts in the Member States but shall apply to non-judicial authorities *and notaries public* only where their involvement is required with respect to rulings in matters of succession where necessary.

Summary

58. The Institute generally endorses the Commission’s proposal for Art. 3. Nevertheless, for the sake of clarity, the Institute considers a modification necessary. The unclear wording of the provision causes confusion as to which extent non-judicial authorities are deemed to be courts within the Regulation.

Comments

59. The Institute agrees that the rules of the Succession Proposal on jurisdiction should not be restricted to the exercise of judicial authority. As the Succession Proposal itself indicates, its functioning will require the involvement of authorities not performing judicial functions. The issue of a European Certificate of Succession⁸⁵, for instance, would arguably not fall within

⁸⁴ Cf. BGH 12. 3. 1953, BGHZ 9, 113 (115 seq.).

⁸⁵ See Art. 37 SP.

the rules on jurisdiction if they were confined to judicial rulings: The ECJ has consistently held with regard to preliminary rulings (Art. 267 TFEU⁸⁶) that non-contentious proceedings are deemed to be non-judicial and administrative if an applicant seeks, from a public authority, the confirmation of private rights such as the registration of a company or the recognition of a surname⁸⁷. With respect to that case law, the confirmation of inheritance rights by the issue of a certificate might not be characterised as an exercise of judicial authority. The contention that these cases involve non-judicial activity could be furthermore based on the fact that the issue of a certificate will in some cases not result in a decision with separate procedural effects recognisable pursuant to Art. 29 SP⁸⁸ but, if at all, only fall within the scope of Art. 34 SP⁸⁹ on authentic instruments.

60. Extending the scope of Art. 3 SP to non-judicial authorities raises the question where the borderline between “courts” or authorities and other actors has to be drawn. The Institute suggests adding the concept of “ruling” as the basic test for this purpose. Rulings require authority which is related to public empowerment. It should not be construed too strictly however; for instance, at least in some Member States notaries public to a certain extent exercise non-judicial authority⁹⁰ when they issue certificates of inheritance⁹¹ or disclose the will of the deceased⁹². However, this observation raises the uneasy question of the relation between jurisdiction and provisions governing the validity of testamentary dispositions. If, for example, a will is drawn up with a notary public, the conflict rules on the formal validity of testa-

⁸⁶ = Art. 234 EC.

⁸⁷ See ECJ 19. 10. 1995, Case C-111/94 (*Job Centre No. 1*), E. C. R. 1995, I-3361, para. 7; 11. 12. 1997, Case C-55/96 (*Job Centre No. 2*), E. C. R. 1997, I-7119, para. 7; 10. 7. 2001, Case C-86/00 (*HSB-Wohnbau*), NJW 2001, 3179, para. 12 seq.; 27. 4. 2006, Case C-96/04 (*Standesamt Niebüll*), E. C. R. 2006, I-3561, para. 13 seq.; cf. as to the Brussels Convention on jurisdiction and enforcement of judgments in civil and commercial matters of 27. 9. 1968, O.J. 1998 C 27: OLG Koblenz 5. 11. 1985, IPRspr. 1985 No. 183.

⁸⁸ For a distinction between recognition of decisions and authentic instruments under German law see KG 25. 3. 1997, IPRspr. 1997 No. 11; *Staudinger (-Dörner)* (supra n. 39) Art. 25 EGBGB para. 914; *Siehr*, Das internationale Erbrecht nach dem Gesetz zur Neuregelung des IPR: IPRax 1987, 4–8 (7 seq.).

⁸⁹ It should, however, be noted that the Institute suggests the removal of that rule, see *infra* para. 256.

⁹⁰ See Green Paper para. 3.3.; for an overview cf. *Wenckstern*, Notariat, in: Handwörterbuch des Europäischen Privatrechts (supra n. 8) 1116 seq. This is true regardless of the pending ECJ infringement proceedings in Cases C-54/08, 450/08 and 157/09.

⁹¹ See, for instance, Art. 730–1 seq. of the French Code Civil (*acte de notoriété*); Art. 82 seq. of the Portuguese Código do Notariado (*habilitação notarial*); Art. 979 of the Spanish Ley de Enjuiciamiento Civil of 1881; Art. 209 of the Reglamento Notarial (*acta de notoriedad*), further examples *infra* in n. 400.

⁹² See for instance Art. 620 seq. of the Italian Codice Civile; Art. 115 of the Portuguese Código do Notariado; Art. 694 seq. of the Spanish Código Civil.

mentary dispositions⁹³ would apply exclusively. The authentication of the will by the notary public cannot be classified as a ruling. According to the modifications proposed by the Institute, both lifetime matters of succession and the formal validity would fall within the scope of the Regulation without however being covered by Art. 3 SP⁹⁴.

61. The need for an efficient administration of international estates requires extensive transnational cooperation between the Member States. Both judicial and non-judicial rulings should therefore be covered by the Regulation. Yet, the present wording of Art. 3 SP (“authorities only where necessary”) causes confusion as to which extent non-judicial authorities can be put on an equal footing with courts. “Only where necessary” must be read in conjunction with Art. 8 and 9 and should clarify that where, according to the applicable law, the involvement of a non-judicial authority is required, it should not lack competence. The law governing the issue whether the involvement of an authority is necessary or not depends on the delimitation between the *lex fori* primarily governing the proceedings⁹⁵ and the substantive law of succession applicable under Art. 19 SP – a delimitation which cannot be couched in precise and abstract terms. As generally accepted in private international law the lines should be drawn with regard to the *purpose* of the rules in question, particularly whether they underpin the goals of the substantive law (in that case governed by the law applicable to the succession) or whether they serve procedural efficiency (in that case governed by the *lex fori*)⁹⁶.

62. First, the Regulation itself may require the involvement of an authority, be it judicial or non-judicial. This is indicated by Art. 37 SP according to which a European Certificate of Succession has to be issued by a competent court. Second, non-judicial activity can be needed under the *lex hereditatis* (Art. 19 seq. SP). This can be illustrated by the rules on acceptance and waiver of the succession. If under the law applicable to the succession⁹⁷ these declarations must be made before a court, the court is competent for receiving these declarations. The same holds true if the law alternatively applicable to declarations at an heir’s place of habitual residence⁹⁸ requires the engage-

⁹³ See e.g. Sec. 2232 of the German Civil Code.

⁹⁴ See infra para. 72 (comments on the proposed Art. 4(2) SP) and infra para. 160 (comments on the proposed Art. 18b SP).

⁹⁵ Representing a generally accepted principle, see *Dicey/Morris/Collins* (supra n.32) para. 7 R-001 seq.; BGH 27. 6. 1984, IPRspr. 1984 No. 168; *Heldrich*, Internationale Zuständigkeit und anwendbares Recht (1969) 14.

⁹⁶ See *Basedow*, Qualifikation, Vorrang und Anpassung im Internationalen Zivilverfahrensrecht, in: *Materielles Recht und Prozessrecht und die Auswirkungen der Unterscheidung im Recht der internationalen Zwangsvollstreckung*, ed. by *Schlosser* (1992) 131–156 (138 seq.); *Geimer*, Internationales Zivilprozessrecht⁶ (2009) para. 322 seq.

⁹⁷ See Art. 19(2)(f) SP.

⁹⁸ See Art. 20 SP.

ment of an authority (Art. 8 SP). Another example can be found in the appointment of executors, which can be assumed to be a matter of the succession law⁹⁹: The competent authority will have to appoint an executor even if according to the *lex fori* the appointment is not necessary. It should be noted that in these cases a referral to the court of that Member State whose law governs the succession (Art. 5 SP) might be appropriate. Third, rulings in matters of succession may be necessary under the substantive *lex fori* to the extent that it is referred to under the Regulation. Art. 9 clarifies that if the substantive law of a Member State in which property is located requires the involvement of a court relating to, for instance, the recording or transfer of property in a public register, these courts shall be competent¹⁰⁰. Fourth, there will be cases where jurisdiction and applicable law diverge and, accordingly, either the *lex fori* or the applicable law on non-judicial activity is required. Whenever jurisdiction and the applicable law do not concur the question is raised whether the involvement of an authority is a matter of succession law or procedural law. Every Member State will, in principle, apply its national procedural rules by adjusting them to the law applicable to succession¹⁰¹. In many cases, applying the *lex fori* including the rules on the competence of non-judicial authorities will be inevitable. If the equivalent national proceedings in matters of succession require the involvement of certain non-judicial authorities, these rules may be seen as instruments of procedural rather than substantive law.

63. The Institute feels it appropriate to emphasise that the phrase “rulings in matters of succession” as it is used now in both Art. 3 and 4 SP should not be interpreted too narrowly. As indicated in Art. 8 SP, it should also be read as covering the reception of declarations. This broader sense is now expressed in Recital 11 as modified in the Institute’s proposal.

⁹⁹ See Art. 19(1), (2)(f), (g) SP.

¹⁰⁰ Cf. Haas, Der europäische Justizraum in “Erbsachen”, in: Perspektiven der justiziellen Zusammenarbeit in der Europäischen Union, ed. by Gottwald (2004) 43–110 (64 seq.).

¹⁰¹ See Berenbrok, Internationale Nachlaßabwicklung (1989) 115 seq.; Bünning, Nachlaßverwaltung und Nachlaßkonkurs im internationalen Privat- und Verfahrensrecht (1996) 117 seq.; cf. Max-Planck-Institut, Kodifikation des deutschen Internationalen Privatrechts – Stellungnahme zum Regierungsentwurf von 1983, RabelsZ 47 (1983) 595–690 (688).

Article 4 – General jurisdiction

Notwithstanding the provisions of this Regulation the courts of the Member State on whose territory the deceased had habitual residence at the time of their death shall be competent to rule in matters of successions.

Article 4 – General jurisdiction

~~1. Notwithstanding the provisions of this Regulation~~ The courts of the Member State on whose territory the deceased *habitually resided* had habitual residence at the time of their death shall be competent to rule in *proceedings which have as their object* matters of successions.

2. *In matters relating to the future succession of a person, the courts where the person is habitually resident shall be competent.*

Summary

64. The Institute generally welcomes the Commission's proposal for Art. 4. Two questions concerning the interpretation of Art. 4 SP, however, should be addressed more precisely.

– The rules of the Succession Proposal on jurisdiction do not provide any guidelines regarding the interaction of the proposal with the Brussels I Regulation. If matters of succession are raised only as preliminary or incidental questions, they should come within the scope of the Brussels I Regulation.

– Art. 4 SP does not explicitly determine which courts shall have jurisdiction in proceedings dealing with matters of future succession.

Comments

Interaction with Brussels I

65. Art. 4 SP must be read in conjunction with the Brussels I Regulation. Art. 4 establishes a rule on jurisdiction relating to “matters of succession”. Art. 1(2)(a) of the Brussels I Regulation excludes “wills and succession” from its scope. Consequently, the two Regulations should apply without any residual gaps and oust national laws on jurisdiction completely. Yet, it does not seem entirely clear which disputes will be captured by Art. 4 and, particularly, whether it will be sufficient that a dispute raises *some* questions relating to matters of succession.

66. Several difficult issues come to mind when the interaction between the Succession Proposal and the Brussels I Regulation is explored. They especially concern the role of third parties who are not directly involved in

the internal affairs of an estate, i.e. parties who do not allege rights flowing from succession but from *other* legal relations. An intricate case, for instance, is an action brought by an heir based on the vindication of property rights whereby he or she claims from the defendant the restitution of a good, and the only issue of contention is whether the claimant is entitled to the property as successor of the deceased. Looking at two recent ECJ judgments¹⁰² on the analogous demarcation existing between Brussels I and the European Insolvency Regulation, it is hard to predict how the judiciary will address that question. The Institute recommends that disputes that are not directly concerned with the internal affairs of the estate should lie outside the scope of Art. 4 SP. Essentially, the subject matter of such disputes deals with proprietary claims. Questions of inheritance arising in this context should be characterised as preliminary issues. Interests of other possible heirs or legatees are not directly affected by such an action: The decision is at its core not directed to determining the inheritance rights of the claimant. Furthermore, it does not seem justified to suspend the important principle of *actor sequitur forum rei*¹⁰³ and submit the defendant to the jurisdiction of courts that would not have been competent had the deceased, instead of the successors, sued him or her before his or her death.

67. Art. 4 SP should apply, however, when an heir seeks the vindication of property rights from a defendant who pretends to be an heir or alleges other rights flowing from the succession. Though such an action might be formally founded upon a property right, the dispute is directly related to the inheritance rights and calls for coordination with the administration of the estate¹⁰⁴. If the proceedings were not concentrated in the forum of the deceased's last habitual residence, an eminent risk of irreconcilable judgments would result and threaten procedural efficiency with respect to interests of third parties. Furthermore, jurisdiction should not depend on whether the claimant frames the action in terms of either inheritance or property rights.

68. The conclusion to be drawn from this is that only those disputes which directly affect the internal affairs of an estate should fall within Art. 4 SP, particularly the relations between heirs, legatees, beneficiaries of a reserved portion, executors, administrators and/or the estate¹⁰⁵. The justification of Art. 4 SP should be seen in creating an enhanced requirement for the coordination of the internal affairs of estates. Thus, obligations to restore or

¹⁰² ECJ 2. 7. 2009, Case C-111/08 (*SCT Industri AB*); 10. 9. 2009, Case C-292/08 (*German Graphics*) (both not yet in E.C.R.).

¹⁰³ See ECJ 1. 3. 2005, Case C-281/02 (*Owusu*), E. C. R. 2005, I-1383, para. 39 seq.; 13. 7. 2000, Case C-412/08 (*Group Josi*), E. C. R. 2000, I-5925, para. 35.

¹⁰⁴ Cf. ECJ 13. 7. 2006, Case C-4/03 (*GAT*), E. C. R. 2005, I-6509, para. 25.

¹⁰⁵ See *Basedow*, in: *Handbuch des Internationalen Zivilverfahrensrechts I* (1982) Kapitel II para. 106 seq.; cf. *Schlosser Report* (supra n. 71) para. 52; *Lüttringhaus*, *Der Direktanspruch im vergemeinschafteten IZVR und IPR nach der Entscheidung EuGH VersR 2009, 1512 (Vorarlberger Gebietskrankenkasse): VersR 2010, 183–190 (186 seq.)*.

account for gifts¹⁰⁶ come only within Art. 4 SP if that obligation is directed against the defendant in his or her position as an heir or legatee.

69. For the sake of clarity, the Institute recommends bringing Art. 4 in line with the terminology and approach of the Brussels I Regulation and restricting the provision to those proceedings which have as *their object* matters of succession¹⁰⁷. Consequently, jurisdiction will not come within Art. 4 if matters of succession are only raised as incidental or preliminary questions. This will usually hold true for proceedings brought by or against third parties. In such cases, jurisdiction will be determined according to Brussels I.

70. While the examples given so far concern various types of litigation, “proceedings which have as their object matters of succession” may also be non-contentious. In fact, the practical application of the law of succession gives rise to litigious proceedings much less frequently than non-contentious proceedings concerning, for example, the issue of a certificate of inheritance, the appointment of an executor or other decisions relating to the administration of the estate. The jurisdiction for such decisions will similarly be vested in the courts of the country of the last habitual residence of the deceased. It is up to the national law of procedure of that Member State to determine the competent court.

71. Finally, the Institute suggests deleting the introductory words of Art. 4 SP (“notwithstanding the provisions of this Regulation ...”) as they evidently express a proposition that is naturally inherent in the character of any rule on *general* jurisdiction: This rule may, of course, be derogated from by the rules on special jurisdiction. Therefore, the phrase in question is superfluous and can be deleted¹⁰⁸.

Proceedings relating to future succession

72. The wording of Art. 4 is restricted to proceedings that are instituted after a person’s death. Yet, “matters of succession” might be litigated during the lifetime of a future deceased with respect to another individual’s future succession. To give an example, a dispute between a person and his or her potential heirs on the validity of a lifetime renunciation of inheritance may come up. Proceedings seeking declaratory relief might be instituted¹⁰⁹. There was unanimous consent among the working group’s members that

¹⁰⁶ See *infra* para. 174 (comments on Art. 19(2)(j) SP and the proposed Art. 19a).

¹⁰⁷ See Art. 5(1)(a), 5(3), 15(1), 18(1), 22 of the Brussels I Regulation (“which have as their object”).

¹⁰⁸ The Institute is aware that Art. 4 SP is modelled after Art. 2(1) of the Brussels I Regulation. Yet, the same criticism might be levelled at that rule.

¹⁰⁹ See *MünchKommBGB* (-Leipold) IX (2004) § 1922 BGB para. 146; cf. BGH 1. 10. 1958, BGHZ 28, 177 (178) (concerning lifetime litigation on reserved portions).

these proceedings should be captured by Art. 4 SP. With regard to procedural efficiency and the avoidance of irreconcilable judgments, jurisdiction should be vested in the courts that will be competent after the person's death. Consequently, the Institute proposes to extend Art. 4 SP to lifetime proceedings on succession.

Article 5 – Referral to a court better placed to hear the case

1. Where the law of a Member State was chosen by the deceased to govern their succession in accordance with Article 17, the court seised in accordance with Article 4 may, at the request of one of the parties and if it considers that the courts of the Member State whose law has been chosen are better placed to rule on the succession, stay proceedings and invite the parties to seise the courts in that Member State with the application.

2. The competent court in accordance with Article 4 shall set a deadline by which the courts of the Member State whose law has been chosen must be seised in accordance with paragraph 1. If the courts are not seised by that deadline, the court seised shall continue to exercise its jurisdiction.

Article 5 – ~~Referral~~ Transfer to a court better placed to hear the case

1. ~~Where the law of a Member State was chosen by the deceased to govern their succession in accordance with Article 17,~~ *By way of exception,* the court seised in accordance with Article 4 may, at the request of one of the parties and if it considers that the courts of the *another* Member State ~~whose law has been chosen~~ *with which the dispute has a particular connection* are better placed to rule on the succession, *stay its proceedings, or a specific part thereof,* and invite the parties to seise the courts in that Member State with the application.

2. *The dispute shall be considered to have a particular connection to another Member State as mentioned in paragraph 1 only where*

(a) the law of that other Member State was chosen by the deceased to govern the succession in accordance with Article 17, 18(3) or 18a(3), or

(b) all parties to the proceedings are habitually resident in that other Member State, or

(c) immovable property of the deceased is located in that other Member State, as far as the dispute concerns that property.

23. The ~~competent~~ court seised in accordance with Article 4 shall set a ~~deadline~~ *time limit* by which the courts of the *other* Member State *considered to be better placed to rule on the succession* ~~whose law has been chosen must~~ shall be seised in accordance with paragraph 1. If the courts of the *other Mem-*

3. The courts of the Member State whose law has been chosen shall declare themselves competent within a maximum period of eight weeks from the date on which they were seised in accordance with paragraph 2. In this case, the court seised first shall decline jurisdiction. Otherwise, the court seised first shall continue to exercise its jurisdiction.

ber State are not seised by that ~~deadline~~ *time*, the court *first* seised shall continue to exercise its jurisdiction *in accordance with Article 4*.

34. The courts of the *other* Member State ~~whose law has been chosen~~ shall ~~declare themselves competent~~ *accept jurisdiction* within a maximum period of ~~eight~~ *four* weeks from the date on which they were seised in accordance with paragraph 2 3. In this case, the court *first* seised ~~first~~ shall decline jurisdiction. Otherwise, the court *first* seised ~~first~~ shall, *upon the request of one of the parties*, continue to exercise ~~its~~ jurisdiction *in accordance with Article 4*.

5. *The courts involved shall cooperate for the purposes of this article.*

Summary

73. The Institute welcomes the Commission's proposal to soften the rigid jurisdictional framework laid down in Art. 4 SP (which is basically limited to jurisdiction at the habitual residence of the deceased) by a transfer provision in Art. 5 SP. In view of the significant concentration of jurisdiction for which the Succession Proposal provides in intra-European disputes, the Institute proposes to enhance this limited flexibility by extending the possibility of transfer to two additional pre-defined scenarios, namely to allow the transfer to a court where all parties to the proceedings are habitually resident and, as far as immovable property is concerned, to the courts of the Member State where the immovable property is located. In addition, in order to avoid unnecessary delay of proceedings, the acceptance of jurisdiction should be binding for the receiving court and, correspondingly, the time period for the declaration of this acceptance should be shortened. Finally, the Institute proposes to bring the wording of Art. 5 SP in line with the language of Art. 15 of the Brussels IIbis Regulation.

Comments

74. The transfer of a case based on the discretion of the court is a concept particularly familiar to the Anglo-American legal tradition. The flexible instrument of *forum non conveniens* allows a fine-tuning of jurisdiction, thereby promoting procedural justice tailored to the circumstances of the indi-

vidual case. In continental European countries, the concept is viewed more sceptically, being accused of sacrificing legal certainty in favour of individual justice, undermining the right of the plaintiff to certain pre-defined grounds of jurisdiction¹¹⁰ and creating a potential for costly “litigation over litigation”. Still, the concept is not alien to continental procedural tradition, particularly in the field of non-contentious proceedings. A prominent example for a transfer provision can be found in Art. 15 of the Brussels Ibis Regulation. As Art. 15 of the Brussels Ibis Regulation has proven successful in practice, the Institute welcomes the Commission’s proposal to soften the rigid jurisdictional framework of the Succession Proposal by a transfer provision in Art. 5 SP. In view of the considerable concentration of jurisdiction under Art. 4 SP, the Institute proposes to introduce an even greater degree of flexibility by extending the transfer possibility to two additional scenarios, namely to allow the transfer to the courts of the Member State *where all parties to the proceedings are habitually resident* (infra para. 78) and – as far as immovable property of the deceased is concerned – to the courts of the Member State *where the immovable property is located* (infra para. 80).

75. A fourth case where transfer may be appropriate is the situation where *all parties to the proceedings agree and explicitly apply for transfer to a different court*. The Institute did not include this situation in the provision on transfer as it proposes to separately introduce a choice of court provision (Art. 6a of the Institute’s proposal). But in an instrument which – as the Succession Proposal so far – does not endorse prorogation, the parties’ agreement to litigate elsewhere might at least be considered as a ground which establishes the possibility of allowing the transfer of the case. Likewise, the Institute did not propose to extend the possibility of transfer to courts whose jurisdiction is based on grounds other than Art. 4 SP, as both the jurisdiction flowing from prorogation (Art. 6a of the Institute’s proposal) and the limited jurisdiction under Art. 8 and 9 SP are justified by concerns of proximity which are unlikely to ever be overcome by the finding that the courts of another country are better placed to rule on the succession¹¹¹.

76. In general, the possibility for the court to allow the transfer of a case implies an exception to the clearly defined jurisdictional rules and thus risks curtailing certainty and foreseeability of jurisdiction, principles fundamental for a system of civil justice in a supranational framework such as the European Union. These concerns may be addressed by introducing, as Art. 15 of the Brussels Ibis Regulation has done, a form of “guided judicial discretion” which clearly and conclusively (“only”) defines those scenarios in

¹¹⁰ ECJ 1.3.2005 (supra n. 103) para. 38 seq.

¹¹¹ The Institute is aware that Art. 15 of the Brussels Ibis Regulation may apply also to cases of prorogation. However, we felt that this is justified by the overriding public concern for “the best interests of the child” which is not present in succession matters. Against a transfer away from the prorogated jurisdiction *Lehmann* (supra n. 66) 220.

which a court may exceptionally consider a discretionary transfer to the courts of another Member State to which the dispute has a particular connection. The judges' discretion to allow the transfer of the case to the courts of another Member State which are better placed to rule on the succession shall thus arise only if a particular connection as defined by Art. 5(2) of the Institute's proposal can be established, which may be the case in one of three scenarios (*infra* para. 77–80). It is only when such a particular connection can be established that the court may – following a party's earlier request to transfer the case (*infra* para. 83) – undertake to determine whether the courts of the other Member State are better placed to rule on the succession (*infra* para. 84), thereby observing the technicalities for transfer as provided for in Art. 5(3)–(5) (*infra* para. 85).

Particular connection to the courts of another Member State

Transfer to the courts of the Member State whose law was chosen to govern the succession (Art. 5(2)(a) of the Institute's proposal)

77. The Institute endorses the possibility of transfer to the courts of the Member State whose law has been chosen (Art. 5(1) SP, reiterated in Art. 5(2)(a) of the Institute's proposal) as it may lead to an alignment of the forum and applicable law, saving time and expenses for the parties and avoiding incorrect decisions by courts having to apply foreign law¹¹². For this scenario, the Institute merely proposes to add a reference to the new choice of law provision for testamentary dispositions as found in Art. 18(3), 18a(3) of the Institute's proposal.

Transfer to the court of the parties' common habitual residence (Art. 5(2)(b) of the Institute's proposal)

78. In addition, the Institute proposes to allow a discretionary transfer of the case also *if all parties to the proceedings are habitually resident in another Member State*¹¹³. Such a transfer may become relevant particularly in the situation which the Commission rightly describes in the explanatory memorandum to Art. 5 as a situation suitable for transfer, namely the case where the de-

¹¹² Supportive of the model of Art. 5 SP *Rechberger*, Europäische Projekte zum Erb- und Testamentsrecht, in: 30 Jahre österreichisches IPR-Gesetz – Europäische Perspektiven, ed. by *Reichelt* (2009) 77–86 (78); *Kindler*, Vom Staatsangehörigkeits- zum Domizilprinzip: das künftige internationale Erbrecht der Europäischen Union: IPRax 2010, 44–50 (46); for an automatic transfer of jurisdiction if a law different from the law of the last habitual residence of the deceased has been chosen *Lehmann* (*supra* n. 66) 227.

¹¹³ For a similar proposal *Harris* (*supra* n. 66) 222: “allow for the transfer of proceedings to a state where the heirs and assets were located which is other than the deceased's state of habitual residence”.

ceased had lived for a short while in a foreign Member State and where his or her family has remained in their Member State of origin¹¹⁴. According to the present wording of Art. 5(1) SP, a transfer would be possible in such a situation only if the deceased also chose the law of nationality as the law applicable to his or her succession (which is by no means certain), whereas Art. 5(2)(b) of the Institute's proposal permits a transfer also in cases where the law of the last habitual residence of the deceased is to apply (as is generally contemplated by the proposal). It is true that this extension may lead to a divergence of forum and applicable law, but it allows all parties to the proceedings to litigate "at home", in a language (most likely) common to court, parties and lawyers. It does not seem unreasonable to presume that these advantages might offset the disadvantage of the receiving court having to apply foreign succession law, a practice which already today arises frequently under the widespread connecting factor of nationality. The possibility of transfer to the common habitual residence of all parties to the proceedings also mitigates the problem that the Succession Proposal does not – in contrast with other EU instruments, most notably the Brussels I Regulation, and in contrast with many national jurisdiction rules for contentious succession proceedings¹¹⁵ – provide for (general) jurisdiction at the defendant's domicile.

79. The Institute is aware that non-contentious proceedings in particular (e.g. the grant of a succession certificate) may also affect persons potentially entitled to the succession who are not parties to the proceedings and whose residence would thus not be considered under Art. 5(2)(b) of the Institute's proposal. Still, the group decided not to limit the provision to contentious proceedings for three reasons. First, Art. 5(2)(b) does not mandate the transfer, but only affords the judge discretion to consider a transfer, a decision in which the interests of potential outsiders to the proceedings will be considered. Further, in non-contentious proceedings the courts are likely to take the effort to inform non-parties potentially affected by the proceedings and invite them to join (cf. Art. 40(4) of the Institute's proposal, as far the procedure for the European Certificate of Succession is concerned). And finally, the rules on recognition and enforcement and the procedural right to be heard should protect persons who were not aware of the proceedings from potentially adverse effects of the outcome of such proceedings.

¹¹⁴ Succession Proposal p. 5.

¹¹⁵ For example (at least to a certain extent) in Austria, Belgium, Germany, Italy, the Netherlands, Portugal, Spain and Sweden, see DNotI Study p. 198.

Transfer to the court where immovable property of the deceased is located (Art. 5(2)(c) of the Institute's proposal)

80. A third scenario in which at least a partial transfer (Art. 5(1) of the Institute's proposal: "or a specific part thereof") may be appropriate is a dispute which concerns immovable property of the deceased located in a Member State other than that of the court competent under Art. 4 SP¹¹⁶. The Succession Proposal has wisely accepted that the *lex rei sitae* may require certain measures or procedures for transmission of this property. This will often be the case where immovable property is involved which may require recording or transfer in a public register. For this reason, Art. 9 SP contemplates jurisdiction for the court where the property is located, limited however to "measures under substantive law relating to the transmission of the property". Thus, for all other questions relating to the settlement of the estate, the heirs will have to conduct proceedings in a different country with the result that, first, a foreign judgment needs to be translated and recognised in the country where the immovable property is located and, second, only after such recognition may the authorities at the *situs* of the property – on the basis of the judgment on succession – take those measures which are necessary for transmission of the property. Especially in situations where the immovable property makes up a large portion of the estate, it may be easier and more cost-efficient to delegate the case from the outset to the place where the immovable property is located, leaving it to the courts of the *situs* to produce a decision which settles the succession, which may then immediately be implemented by the authorities of that same country in transmitting the property. Therefore, the possibility of concentration at the place of property should not be excluded from the outset; it is recommended and also regarded as sufficient to give the judge discretion to permit the transfer of the case¹¹⁷. Such a solution would also be a certain compromise for those national jurisdiction rules which today grant jurisdiction for succession in (immovable) property to the courts at the *situs* of the (immovable) property¹¹⁸.

¹¹⁶ For a limited forum non conveniens-doctrine as far as jurisdiction over immovable property in a third state is concerned *Dörner/Hertel/Lagarde/Riering*, *Auf dem Weg zu einem europäischen Internationalen Erb- und Erbverfahrensrecht*: IPRax 2005, 1–8 (3).

¹¹⁷ For the discussion of property as a relevant criterion for the transfer of a case in the context of Art. 15 of the Brussels IIbis Regulation see also the Opinion of the Economic and Social Committee on the Proposal for a Council Regulation concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in the matters of parental responsibility repealing Regulation (EC) No. 1347/2000 and amending Regulation (EC) No. 44/2001 in matters relating to maintenance, O.J. 2003 C 61/76, para. 5.2.7.1, p. 79.

¹¹⁸ A jurisdiction rule for which the *situs* of property is relevant at least in some respect can be found in Austria, Belgium, England and Wales, Germany, Finland, France, Luxembourg, Portugal, Spain and Sweden, see DNotf Study p. 196.

No transfer to non-Member States' courts

81. The Institute considered further the possibility of transfer to the courts of non-Member States of the European Union, but rejected this possibility. While such a rule may be desirable in cases where the succession is more closely connected to a third State (in particular where the Member State court is seised on the ground of Art. 6 SP)¹¹⁹, such a transfer could not attain the objective of an intra-European transfer: The model provision of Art. 15 of the Brussels IIbis Regulation was explicitly drafted “both to recognize and to further promote the mutual trust that has been developing between Member States in the area of judicial cooperation”¹²⁰, a principle which does not exist in a comparable form in relation to third States. This does not exclude the introduction of a rule on transfer to non-Member States' courts at a later stage, in particular in an international convention building on similar considerations of mutual trust, but the Institute felt that the issue ought to be addressed in the context of the broader debate on the relation to third States¹²¹.

82. If a transfer to third States were to be considered, the enabling rule would probably differ considerably from the proposed rule in Art. 5 SP. In particular, as the decisions of third States are not automatically recognised within the European Union, a positive forecast for the recognition must be a necessary condition of the transfer. Also, for respect of the sovereignty of the third State which is not bound by EU law, the text would have to avoid putting any positive obligation (as Art. 5 SP does for EU courts) on the receiving non-Member State court, such as accepting jurisdiction or making certain declarations within a particular time limit. Instead, it could be stipulated that the court in the EU will continue to exercise jurisdiction if the court in the third State has not started its proceedings within a certain time

¹¹⁹ In the absence of a rule for transfer, the court of a Member State seised on the basis of Art. 6 SP will – almost certainly (cf. ECJ 1. 3. 2005 [supra n. 103]) – not be allowed to decline jurisdiction in favour of the courts of a third State. In practice, this means that a court of a Member State in which an asset belonging to the estate is located and which is seised by an heir having his or her habitual residence in this Member State must decide over the whole succession even if all relevant factors such as the last habitual residence and the nationality of the deceased and all other heirs as well as the vast majority of assets belonging to the estate are located in a third State.

¹²⁰ Proposal for a Council Regulation concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility repealing Regulation (EC) No. 1347/2000 and amending Regulation (EC) No. 44/2001 in matters relating to maintenance, COM(2002) 222 final/2, p. 10.

¹²¹ For the debate of third State relations in the Brussels I Regulation see Green Paper on the review of Council Regulation (EC) No. 44/2001 of 22. 12. 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM(2009) 175 final of 21. 4. 2009, and, in particular, Question 2(2), which asks how exclusive jurisdiction of third State courts and proceedings brought before the courts of third States should be dealt with in the Brussels I Regulation.

limit. Furthermore, the criteria for transfer might have to be reconsidered as certain facts are more difficult to establish outside the European Judicial Network. Finally, a provision on transfer to third States would have to take into account that third States will not necessarily be bound by standards of procedural justice comparable to Art. 6 of the European Convention on Human Rights, which might raise concerns about the overall fairness of proceedings in the third State which the Member State's court would have to consider before ordering the transfer.

Request of one party to transfer the case

83. It is only when a particular connection to the courts of another Member State as defined by Art. 5(2) of the Institute's proposal exists that the court competent under Art. 4 SP has the discretion to transfer the case. This decision to transfer should, as the Commission has proposed in Art. 5(1) SP, be *subject to the request of at least one party* and cannot therefore be made on the court's own initiative¹²². While the Institute recognises that Art. 15(2) of the Brussels IIbis Regulation takes a different position, the principle of party control over proceedings should be observed more closely in succession disputes than in matters of parental responsibility, as the latter involve a much more imminent public interest to safeguard the best interests of a child.

Courts of another Member State better placed to rule on the succession

84. Finally, a transfer requires that a judge competent under Art. 4 SP considers, by way of exception, *the courts of another Member State to be better placed to rule on the succession*. The explicit reference to the *exceptional nature* of the transfer in Art. 5(1) of the Institute's proposal is meant to clarify that a transfer is not an automatic consequence of the criteria of Art. 5(2) being met, but rather an exception to the general jurisdictional framework for succession matters which builds on the principle of jurisdiction at the deceased's last habitual residence (Art. 4 SP)¹²³. In their decision about transfer, the judges should, as appropriate, take into account such factors as the interests of the deceased including the duration of the last habitual residence, earlier habitual residence(s), nationality and ties to other Member States; the interests of the parties to the proceedings, in particular their interest in litigating "at home" and obtaining a judgment in a reasonable time at reasonable costs; the interests of non-parties to the proceedings such as (other) heirs, legatees, creditors and other third persons who might be affected by the outcome of

¹²² Concurring *Rechberger* (supra n. 112) 78.

¹²³ With the same thrust, Art. 15 of the Brussels IIbis Regulation. See on the exceptional nature of the transfer Commission Proposal for the Brussels IIbis Regulation (supra n. 120) 10.

the case; and also the interests of sound administration of justice, in particular the proximity of relevant evidence, the correct application of the law which governs the succession and the effective implementation of the final decision¹²⁴. Especially in deciding about a transfer based on the common habitual residence of the parties to the proceedings (Art. 5(2)(b) of the Institute's proposal), the judge should consider carefully whether the final decision might concern the interests of third persons not party to the proceedings who may have an entitlement in the succession, e.g. unknown heirs who live in the State where the deceased had his or her last habitual residence who might be unduly burdened by a transfer of the case to the courts of another Member State where all other parties to the proceedings reside.

Technicalities of transfer

85. The technicalities of transfer have to make sure that *unnecessary delay in proceedings* is, as far as possible, avoided. While provisional measures (Art. 15 SP) may help in situations where the estate requires immediate attention, the time limits in Art. 5(2) and (3) SP (Art. 5(3) and (4) of the Institute's proposal) are paramount for ensuring the swiftness of proceedings. Therefore, the Institute encourages the European legislator to consider even stricter time limits than so far proposed (e.g. four weeks)¹²⁵. A further instrument for avoiding unnecessary delay is the *binding effect of the transfer decision for the jurisdiction of the receiving court* ("shall accept jurisdiction", Art. 5(4) of the Institute's proposal). Even if the acceptance of jurisdiction is not subject to any review by the receiving court, reasons of legal certainty suggest that the receiving court explicitly acknowledges the acceptance of the case, which should – in view of the binding nature of the transfer decision for the jurisdiction of the receiving court – be possible within a delay of four weeks. The Institute discussed the alternative of a direct transfer of proceedings from one court to another (without the procedure of staying the matter, setting a time limit to seise the foreign court, waiting for the second court to accept jurisdiction, and then finally closing the file in the first court), but has doubts whether the time is already ripe for such a far-reaching instrument as it would force the receiving court to continue a case which has been started in the context of a different procedural environment (with different procedural formalities and in a different language) and could lead to uncertainty about the status of a specific case¹²⁶. As regards the *scope of the transfer decision*, in particular the extension to all proceedings which may arise in the context

¹²⁴ For (some of) these criteria see Succession Proposal p. 5.

¹²⁵ As the transfer requires, under both the Commission's and the Institute's model, the application of a specific party, it should be possible to start the time limit by serving the decision under Art. 5(2) SP (= Art. 5(3) of the Institute's proposal) at least on this party.

¹²⁶ For similar scepticism see Commission Proposal for the Brussels IIbis Regulation (supra

of the succession, the Institute would prefer to leave this to the discretion of the judge initiating the transfer. While there may be situations in which a wide transfer of all succession matters may appear desirable, in other cases it could be more appropriate to transfer only the specific matter at issue as it may concern only a limited dispute between two parties¹²⁷. Finally, the Institute proposes to include a specific reference to cooperation between the transferring and the receiving court (Art. 5(5) of the Institute's proposal) in order to encourage such cooperation.

Article 6 – Residual jurisdiction

Where the habitual residence of the deceased at the time of death is not located in a Member State, the courts of a Member State shall nevertheless be competent on the basis of the fact that succession property is located in that Member State and that:

(a) the deceased had their previous habitual residence in that Member State, provided that such residence did not come to an end more than five years before the court was deemed to be seised; or, failing that,

(b) the deceased had the nationality of that Member State at the time of their death; or, failing that,

(c) an heir or legatee has their habitual residence in the Member State; or, failing that,

(d) the application relates solely to this property.

Article 6 – Residual jurisdiction

~~1. Where the habitual residence of the deceased at the time of death is not located in a Member State, no court of a Member State has jurisdiction according to this Regulation, the courts of a Member State shall nevertheless be competent on the basis of the fact that assets belonging to the estate are succession property is located in that Member State and that:~~

~~(a) the law of that Member State has been chosen in accordance with Article 17, 18(3) or Article 18a(3); or, failing that,~~

~~(ab) the deceased previously habitually resided had their previous habitual residence in that Member State, provided that such residence did not come to an end more than five years before the court was deemed to be seised; or, failing that,~~

~~(bc) the deceased had the nationality of that Member State at the time of their death; or, failing that,~~

~~(c) an heir or legatee has their habitual residence in the Member State; or, failing that,~~

~~(d) the application relates solely to those assets this property.~~

n. 120) 10: "At a later stage, a mechanism for direct court-to-court transfer may be envisaged, for the time being, however, the second court must be seized using normal procedures".

¹²⁷ *Lehmann* (supra n. 66) 220 seq. (arguing against a global transfer, but proposing an alternative jurisdiction of the receiving court for counterclaims and claims against other defendants closely related to the case which has been transferred).

2. Where no court of a Member State has jurisdiction pursuant to paragraph 1, jurisdiction shall be determined, in each Member State by the laws of that State.

Summary

86. The Institute welcomes the idea of adopting common rules for residual jurisdiction. However, the Institute proposes the following amendments of Art. 6 SP:

– The wording of the first sentence shall be adapted to that of other European instruments or, respectively, to that of the Hague Conventions (see *infra* para. 88).

– In the hierarchy of the different connecting factors for residual jurisdiction, the Member State whose law has been chosen by the deceased shall take priority, whilst the Member States of nationality and of previous habitual residence of the deceased shall rank equally in the second position (see *infra* para. 89–91).

– To guarantee access to justice in any circumstance, jurisdiction shall be determined by the autonomous rules of each Member State where no Member State is competent in accordance with para. 1 (see *infra* para. 94).

The Institute is aware of the fact that Art. 6 might be seen by third States as exorbitant and discriminating. The Institute, however, considers that such reservations are of a rather theoretical nature and that the rule can be justified by the special regime on recognition and enforcement between the Member States.

Comments

Background

87. The general jurisdiction rule in Art. 4 SP designates the courts of the Member State in whose territory the deceased habitually resided at the time of death. Where this last habitual residence is located in a third State, no court of a Member State is competent by virtue of either Art. 4 or Art. 5 SP. However, there may be situations in which the succession has significant links to a Member State and access to justice requires that heirs or creditors are able to bring an action before the courts of a Member State, particularly in cases where assets belonging to the estate are located there. This task is fulfilled by Art. 6 SP which represents a harmonised rule on residual juris-

diction. Former European instruments have referred this question to the autonomous national rules of each Member State¹²⁸.

Some minor changes in wording

88. The beginning of the first sentence of Art. 6 has been redrafted in order to more clearly highlight the scope of application. The new wording concurs with the wording used in other European instruments¹²⁹. Additionally, in the first sentence, the words “*succession property*” have been changed to “*assets belonging to the estate*”, which appears to be a more appropriate translation for “*biens de la succession*” in the French version of the Succession Proposal¹³⁰. The proposed amendments do not imply any changes as to the substance of the rule.

Proposed changes for the connecting factors and their hierarchy

89. The mutual relationship of the four alternatives has been understood by the Institute as a relationship of hierarchy between the different alternatives (cascades). The Institute understands that in the 2008 Discussion Paper¹³¹ a distinction was drawn between the wording “*or, failing that*”, which is meant to create a hierarchy, and the simple term “*or*”, which separates alternative connecting factors that rank equally. The Institute would like to adopt this technique in Art. 6 SP and thereby refine the hierarchy among the different connecting factors.

Residual jurisdiction of the Member State whose law has been chosen:
the new Art. 6(1)(a) SP

90. The highest priority in the allocation of residual jurisdiction should be given to the Member State whose law has been chosen by the deceased in accordance with Art. 17, 18(3) or 18a(3) SP as amended. Under the Succession Proposal, this ground of jurisdiction could only be applied via Art. 6(1)(b) SP where the deceased had chosen the law of his or her nationality and did not habitually reside in any other Member State in which assets of the estate are located. However, the Institute believes that if the deceased is given a possibility to choose the applicable law, then the Member State whose law has been chosen should have priority over the Member State of the previous

¹²⁸ Cf. Art. 4 of the Brussels I Regulation.

¹²⁹ Cf. Art. 14 of the Brussels IIbis Regulation and Art. 6 and 7 of the Maintenance Regulation.

¹³⁰ That amendment corresponds to the wording used in the Hague Succession Convention; cf. Art. 16 of the French and the English text.

¹³¹ Art. 2.3 of the Discussion Paper: “Subsidiary competence”, in n. 18.

habitual residence of the deceased as far as residual jurisdiction is concerned (the last habitual residence as the principal connecting factor being located in a third State in this case anyway). This amendment also has the important benefit of ensuring that the competent court and the applicable law coincide, which is a general objective of the Succession Proposal.

Residual jurisdiction of the Member State of previous habitual residence or nationality: Art. 6(b) and (c) of the Institute's proposal

91. The next two connecting factors of Art. 6(1) SP establishing residual jurisdiction, the previous habitual residence and the nationality of the deceased at the time of death, should rank equally and are therefore now separated by a simple "or" instead of "or, failing that". The practical significance can be illustrated by the following case: Suppose a retired German woman moves to her holiday home in Spain, living there for several years before joining her daughter married in the US. After the mother's death two years later, only Spanish courts would have jurisdiction under Art. 6 SP whereas there may be good reason for German courts, as well, to deal with the succession. Not only is there no good reason why the *previous* habitual residence in Spain should rank above the German nationality of the deceased for purposes of residual jurisdiction. Another main benefit of this amendment would be to relieve the national judge in Germany seised in accordance with Art. 6(1)(b) SP (Art. 6(1)(c) of the Institute's proposal) from conducting rather difficult inquiries about the previous habitual residence of the deceased and about the location of assets in Spain. One negative outcome of this amendment would, however, be the fact that potentially several courts might be competent – a fact which might generate a possible incentive for forum shopping. Art. 6(1)(c) SP, however, also allows for jurisdiction in several Member States so that such a situation is obviously not being regarded as wholly intolerable by the European Commission.

No residual jurisdiction of the Member State where an heir or legatee is habitually resident

92. The Institute proposes to delete Art. 6(c) SP which vests residual jurisdiction in the courts of a Member State where assets belonging to the estate are located and an heir or legatee is habitually resident. The scope of application of that alternative head of jurisdiction is, in the first place, quite small because of its inferior rank in the hierarchy. Furthermore, the court seised on the grounds of this provision would encounter very high hurdles for establishing its jurisdiction; it would have to establish that there are no competent courts in a Member State of citizenship or previous residence of the deceased. Moreover, the original version of Art. 6(c) SP would create a

strong incentive for forum shopping in cases where several heirs have their habitual residence in different Member States.

Limited residual jurisdiction of the Member State where assets are located: Art. 6(d) of the Institute's proposal

93. Alternative (d) of Art. 6(1) SP has been retained (with the exception that "property" has also been changed to "assets" here, cf. supra para. 88) although it will be equally difficult for a court to establish jurisdiction in this case because Art. 6(1)(d) SP will only be applicable if Art. 6(1)(a)-(c) do not apply. Since, according to the Succession Proposal¹³², the underlying rationale of this rule is to guarantee access to justice for heirs as far as assets of the estate are located within the European Union, this alternative should, however, be kept.

Residual jurisdiction based on domestic law: the new Art. 6(2)

94. In order to further enhance access to justice, the Institute proposes the introduction of a new para. 2 according to which, if no Court of a Member State is competent according to para. 1, jurisdiction is determined by the autonomous rules of each Member State. That approach can also be found in Art. 7 and 13 of the Brussels IIbis Regulation. Given that the Succession Proposal already sets a high standard of access to justice, there is no need to cut off national rules such as Sec. 343(2) of the German Act on Family and Non-Contentious Proceedings that provide for an even higher protection. In exceptional cases where, for example, a national of a Member State habitually resided in a third State at the time of his or her death and no assets belonging to the estate are located in any EU Member States, it can be highly desirable to give the courts of the Member State of nationality of the deceased jurisdiction if the third State has no functioning legal system or does not grant access to justice for any other reason. Therefore, the proposed Art. 6(2) leaves that question of a *forum necessitatis* to national law.

95. An alternative solution would be to adopt a rule on emergency jurisdiction. Such a rule on a European *forum necessitatis* can be found in Art. 7 of the Maintenance Regulation which provides that in cases where there is no jurisdiction according to the Maintenance Regulation, the "courts of a Member State may, on an exceptional basis, hear the case if proceedings cannot reasonably be brought or conducted or would be impossible in a third State with which the dispute is closely connected". However, such a provision would also have its drawbacks, as – due to its vague wording – it invites litigation on jurisdiction.

¹³² Succession Proposal p. 5.

Concerns about the impression the residual jurisdiction rule could give to third States

96. Generally, it must be kept in mind that Art. 6 might be regarded by third States as exorbitant and discriminating against their residents. The main element likely to be perceived as discriminating – namely, the jurisdiction of the Member States being accorded more respect than the jurisdiction of a third State – might however be justified by the fact that judgments given in a Member State are generally recognised in the other Member States without a special procedure; this is not the case where judgments given in a third State are concerned. Also, insofar as it has an exclusive competence over the case pursuant to its own rules on international civil procedure, the third State will not recognise and enforce a conflicting judgment given in a Member State of the European Union in any event.

Article 6a – Choice of court

1. *A person may by way of a testamentary disposition provide that a court or the courts of a Member State whose law they may choose to govern the succession pursuant to Articles 17, 18(3) or 18a(3) shall have jurisdiction to rule on their succession as a whole or in part. The jurisdiction thus conferred shall be exclusive.*

2. *The parties to a dispute may agree that a court or the courts of a Member State shall have jurisdiction to settle any contentious proceedings which have arisen or which may arise among them in connection with the succession. The jurisdiction conferred by the agreement shall be exclusive unless the parties have agreed otherwise. The agreement shall be in writing or evidenced in writing. Any communication by electronic means which provides a durable record of the agreement shall be equivalent to a “writing”.*

Article 6b – Jurisdiction based on the appearance of the defendant

Apart from jurisdiction derived from other provisions of this Regulation, a court of a Member State before which a defend-

ant to contentious proceedings enters an appearance shall have jurisdiction. This rule shall not apply where the appearance was entered to contest jurisdiction.

Summary

97. The Institute suggests allowing, within reasonable limits, freedom to choose the competent courts. The proposed new rules would bring the Regulation in line with other European instruments on jurisdiction which also recognise some degree of autonomy in selecting the forum (see Art. 23 of the Brussels I Regulation, Art. 12 of the Brussels IIbis Regulation and Art. 4 of the Maintenance Regulation).

98. In particular, the Institute suggests granting freedom of choice at two different levels:

– Firstly, the Regulation should permit *the person whose succession is concerned* to designate the competent courts on the basis of a testamentary disposition (see the new Art. 6a(1) SP).

– Secondly, with regard to contentious proceedings in succession matters, *the parties to the dispute* should be allowed to enter jurisdiction agreements (see the new Art. 6a(2) SP). In the absence of a prior jurisdiction agreement, the court before which the defendant makes an appearance shall be competent unless the defendant does so exclusively to challenge jurisdiction (see the new Art. 6b SP).

Comments

Art. 6a(1): Choice of jurisdiction by the testator

99. Under the new Art. 6a(1) SP, the testator may determine that a particular court or the courts of a particular Member State are to have jurisdiction on the succession. The provision thus permits a *unilateral* choice of court¹³³. A similar rule can be found in the Brussels I Regulation with regard to *inter vivos* trusts: according to its Art. 23(4), the settlor may designate the forum for trust-related disputes in the trust instrument. Speaking generally, Art. 6a(1) SP may be said to reflect the notion of freedom of testation at the level of procedural law.

¹³³ It must be noted, however, that the forum selection clause may be included in a succession agreement and, hence, be *bilateral*, see *infra* para. 104.

Freedom to choose the forum as a complement to the freedom to choose the applicable law

100. The possibility for the testator to select the forum is particularly important in view of the freedom to choose the law governing the succession as provided by Art. 17 SP. Where the testator opts for the law of a State other than the State where he is habitually resident, he may also wish the State of the chosen law to have jurisdiction on the succession¹³⁴. The courts in that State, being familiar with the content of the applicable law, are usually better placed to hear the case and to deliver a speedy and correct decision¹³⁵. The Institute is aware that Art. 5 SP provides the possibility of a *transfer* to cope with the difficulties arising from the application of foreign law: thus, where a succession matter is subject to a law other than the *lex fori*, the court seised with the case may order a transfer to the courts of the State of the applicable law. For a number of reasons, however, the transfer rule is insufficient to give full effect to the testator's choice of law. First, the transfer is at the discretion of the court in the State of last habitual residence of the deceased¹³⁶. Moreover, the transfer requires the request of one of the parties involved in the proceedings. And finally, the transfer is confined solely to the succession matter at issue before the court. As a consequence, it may happen that in one case the transfer is granted, whereas in a later case it is denied. Such a situation is hardly in the testator's interest. The proposed Art. 6a(1) SP, on the other hand, leaves no margin of discretion. The rule ensures that the courts in the Member State of the applicable law are automatically competent to rule on the succession if the testator so orders. As a result, predictability and consistency in determining the competent courts are promoted.

Limits on the autonomy to select a forum

101. An unlimited freedom to select the forum could lend itself to abuse and produce unfair results. The testator may, for instance, choose the courts in a foreign Member State having no link whatsoever to the succession in order to make it more difficult and costly for family members to enforce mandatory succession rights. Hence, the testator's freedom to choose the competent courts needs to be limited.

102. The choice of jurisdiction should be confined to the States whose law the testator *is allowed to choose* to govern the succession pursuant to Art. 17,

¹³⁴ See also *Harris* (supra n. 66) 220.

¹³⁵ See e.g. *Illmer*, Gerichtsstandsvereinbarung, internationale, in: Handwörterbuch des Europäischen Privatrechts (supra n. 8) 688–693 (689), pointing out that, quite often, the choice of the forum is made in combination with the choice of the applicable law.

¹³⁶ See also the Succession Proposal p. 5, stating that the transfer “should not be automatic”.

18(3) and 18a(3) SP as amended by the Institute. By referring to the eligible laws, it is ensured that the testator can designate the courts in the State of the applicable law. As noted earlier, this is one of the main reasons for granting party autonomy on jurisdiction. Moreover, the reference rests on the idea that Art. 17 SP deals with the analogous issue at the level of the applicable law: it seeks to prevent fraudulent behaviour on the part of the testator by limiting the number of eligible laws to those with a genuine link to the succession. The criteria used to establish the genuine link at the level of the applicable law are also a valid basis to establish a genuine link at the level of jurisdiction.

103. The Institute is however opposed to a limitation of the choice of jurisdiction to the courts of the State whose law the testator *actually chooses*. There may be circumstances where the testator has a legitimate interest in choosing the courts in a State other than that of the law governing the succession. For instance, a testator may be resident in State A and have all of his property in that State while his descendants have all emigrated to State B. Here, the testator may want the succession to be subject to the law of State A. For the convenience of the descendants, however, he may wish the courts in State B to have jurisdiction.

Formal and material validity of the choice of jurisdiction

104. In the Institute's view, the testator has to designate the competent courts on the basis of a "testamentary disposition" as defined by the new Art. 2(c) SP. This rule has important implications for the formal and material validity of the declaration. Thus, the designation of the competent courts is only valid if it meets the formal requirements for testamentary dispositions under the applicable law as determined by the new Art. 18b SP. Likewise, recourse must be had to the law applicable to testamentary dispositions with regard to questions of material validity governed by the new Art. 18, 18a. Thus, it is the national law designated by Art. 18, 18a SP which determines whether or not the testator had legal capacity to choose the forum. A particularly important issue of material validity arises where the testator selects a forum in a joint will or in an agreement as to succession¹³⁷. Here, the question is whether the declaration has binding effects or whether the testator is allowed to alter or revoke it unilaterally. Again, the applicable law designated by Art. 18, 18a SP provides the answer.

¹³⁷ The terms are defined in the new Art. 2(d) and (e) SP; see also the new Art. 2(c) SP.

Possibility of partial choice

105. Under the proposed Art. 6a(1) SP, the choice of jurisdiction may relate to the succession “as a whole or in part”. The Institute is aware of the fact that the Succession Proposal seeks to concentrate jurisdiction over the succession in one Member State. This is indeed a reasonable default rule. However, the Institute believes that, in certain cases, the testator may have a legitimate interest in departing from that rule. For instance, the testator may have a business in State A and private assets in State B. Under such circumstances, it may not be unreasonable to submit one part of the estate to the jurisdiction in State A and the other to the jurisdiction in State B. Moreover, the possibility of “splitting” jurisdiction would be in line with the proposed new Art. 17 SP which permits a limited choice of the applicable law as to particular parts of the estate.

No rule on choice of courts located in third States

106. Finally, it must be noted that the proposed rule only relates to the prorogation of jurisdiction of courts within the EU. The Institute did not address the question whether the testator is entitled to choose the competent courts in third States, thus derogating jurisdiction of the courts in the EU. The issue is not peculiar to succession law and is currently under debate in connection with the reform of the Brussels I Regulation¹³⁸. In the Institute’s view, the European legislator should take a uniform approach on this matter and adopt consistent rules in all instruments dealing with jurisdiction.

Art. 6a(2) and Art. 6b: Jurisdiction agreements by the parties to the dispute

107. Under the proposed Art. 6a(2) SP, the parties to a dispute involving a succession matter may choose the competent courts¹³⁹. Unlike Art. 6a(1) SP, the rule covers *bilateral* or *multilateral* choice of court agreements, usually by persons other than the testator. Thus, for example, the heirs may stipulate a particular forum for any dispute arising among them on the distribution of the estate. A number of Member States already accept such agreements¹⁴⁰.

¹³⁸ Green Paper on the review of the Brussels I Regulation (supra n. 121). See also *Hess/Pfeiffer/Schlösser*, Report on the Application of Regulation Brussels I in the Member States (Study JLS/C4/2005/03) para. 388.

¹³⁹ See for a similar proposal Art. 2.2 of the Discussion Paper.

¹⁴⁰ See e.g. Art. 50(d) of the Italian Private International Law Act; see also e.g. Sec. 104 of the Austrian Jurisdiction Act, Art. 8 of the Dutch Code of Civil Procedure, and Sec. 38 of the German Code of Civil Procedure, which do not exempt litigation in succession matters from the scope of the rules on jurisdiction agreements. The 2005 Hague Convention of 30. 6. 2005 on Choice of Court Agreements is not applicable to wills and succession according to its Art. 2(d).

The rule is rooted in the general principle that, subject to certain limits for the sake of public interest, the parties to a civil lawsuit shall be free to choose the courts before which they want to litigate their case¹⁴¹. In essence, Art. 6a(2) SP extends the rule on jurisdiction agreements provided by Art. 23(1) of the Brussels I Regulation to matters of succession. Consequently, the new provision is by and large modelled after Art. 23(1) of the Brussels I Regulation.

Jurisdiction agreements only with regard to contentious proceedings

108. Choice of court agreements must not interfere with the legitimate interests of third parties. In the field of wills and succession, one has to bear in mind that numerous proceedings have effects *erga omnes*, i.e. they affect the position of parties not directly involved in the proceedings. For instance, this is generally true for the issuing of certificates of succession or for the appointment of an administrator or executor. In such proceedings, the litigants (and also the courts) may be unaware of the existence of affected third parties (e.g. descendants of the deceased born out of wedlock). It may seriously harm the interests of such a third party if the litigants were allowed to derogate jurisdiction in the State of last habitual residence of the deceased and conduct the proceedings in a State where the third party is unlikely to take notice of it.

109. Thus, in the Institute's view, party autonomy to choose the forum should be confined to contentious proceedings which produce binding effects solely on the litigants. Such proceedings may include, for instance, disputes among the heirs on the distribution of the assets or claims brought by a legatee against the heirs to enforce succession rights.

Formal and material validity of jurisdiction agreements

110. The new Art. 6a(2) SP determines the *formal validity* of the jurisdiction agreement in an autonomous manner. In essence, the formal requirements are the same as in Art. 23(1)(a), (2) of the Brussels I Regulation and Art. 4(2) of the Maintenance Regulation. With regard to their *material validity*, Art. 6a(2) SP lacks a comprehensive autonomous regulation. Here, to the extent the provision is silent, recourse must be had to the law applicable to the legal relationship between the parties; generally, this will be the law governing the succession, but see also the new Art. 19(2)(j) SP (infra para.

¹⁴¹ See for that principle e.g. ECJ 9. 11. 2000, Case C-387/98 (*Coreck Maritime*), E.C.R. 2000, I-9339, para. 14 (in connection with Art. 17 of the Brussels Convention [supra n. 87]).

173). Ultimately, the approach towards assessing the validity of the agreement is essentially the same as in Art. 23(1) of the Brussels I Regulation¹⁴².

Jurisdiction based on the appearance of the defendant (submission)

111. The new Art. 6b SP complements Art. 6a(2) SP by allowing jurisdiction based on submission: a court lacking jurisdiction becomes competent to rule on the case if the defendant appears before that court without challenging jurisdiction. The rule is based on the broadly accepted understanding that where the defendant agrees to litigate before a court lacking jurisdiction, a tacit choice of court agreement results¹⁴³. It follows from this proposition that jurisdiction based on submission is only admissible where the parties could have otherwise entered a choice of forum agreement, i.e. in contentious proceedings.

Article 7 – Counterclaim

The court before which proceedings are pending under Article 4, 5 or 6 shall also be competent to examine the counterclaim where this falls within the scope of this Regulation.

Article 7 – Counterclaim

Article 8 – Jurisdiction to accept or waive succession

The courts in the Member State of the habitual residence of the heir or legatee shall also be competent to receive declarations concerning the acceptance or waiver of succession or legacy or designed to limit the liability of the heir or legatee where such declarations must be made before a court.

Article 8 – Jurisdiction to accept or waive for the acceptance or waiver of rights in a succession

1. The courts in the Member State ~~of the habitual residence of~~ *where the heir, beneficiary, devisee or legatee is habitually resident* shall also ~~be competent~~ *have jurisdiction* to receive declarations concerning

(a) the acceptance or waiver of *rights in a succession or legacy* or

(b) ~~designed to limit the limitation of liability of the heir, beneficiary, devisee or legatee where such declarations must be made before a court.~~

¹⁴² See for an overview e.g. *Magnus/Mankowski (-Magnus)*, Brussels I Regulation (2007) Art. 23 Brussels I Regulation para. 75 seq.

¹⁴³ See e.g. *Hess*, *Europäisches Zivilprozessrecht* (2010) § 6 para. 148.

2. The court shall transfer the declaration without delay to the courts generally competent for matters of succession under this Regulation.

3. Declarations made according to this Article shall be treated in other Member States as if they have been received by the courts generally competent for matters of succession under this Regulation.

Summary

112. The Institute welcomes the proposed rule and suggests – apart from some linguistic changes – the following amendments:

– Art. 8 SP should be extended to cover all declarations relating to acceptance, waiver and limitation of liability and not only those that must be made before a court by virtue of mandatory provisions (see *infra* para. 115).

– Furthermore, under a new Art. 8(2) SP the receiving court shall transfer the declaration to the generally competent court (see *infra* para. 116).

– Finally, a new Art. 8(3) SP should clarify that declarations made before the court competent under Art. 8 SP(1) shall be deemed to have been received by the generally competent court under Art. 4 seq. SP (see *infra* para. 117).

Comments

113. Art. 8 SP seeks to simplify procedures for heirs and other beneficiaries by allowing them to make declarations concerning their rights and obligations in the Member State in which they are habitually resident. This is relevant in cases in which the habitual residence of the deceased and the habitual residence of an heir or other beneficiary do not coincide. Suppose, for example, that the deceased was habitually resident in Germany at the time of death, while the sole heir was habitually resident in Spain. In this case, the succession would be governed by German law if the deceased died intestate. If the deceased leaves behind nothing but debts, the heir will be personally liable for those debts pursuant to Sec. 1967(1) of the German Civil Code unless he or she waives the rights in the succession.

114. Under the current system, the heir would have to declare the waiver of rights before a German court (Sec. 1945(1) of the German Civil Code) and thus would be forced to incur the time and cost of acquiring information about the German procedural requirements that have to be complied

with, simply to avoid personal liability for the debts of the deceased. Obtaining this information – as is necessary under the present rules – frequently requires retaining a lawyer both in the State of habitual residence and in the State in which the declaration has to be made, which may be quite costly, especially when considering the fact that, when waiving one's rights in a succession, one receives nothing in return. Art. 8 SP renders these expenses unnecessary or at least reduces them significantly by granting jurisdiction to the Spanish courts to receive the heir's declaration waiving rights in the succession. Accordingly, heirs and other beneficiaries can make the necessary declarations before the courts in their State of habitual residence. The heirs and other beneficiaries thus benefit from the significant advantage of acting within the legal system that they are most familiar with. As a complement to Art. 8, Art. 20 SP provides for the formal validity of such a declaration, see *infra* para. 181 seq.

Extension to declarations which do not necessarily have to be made before a court

115. The Institute proposes extending the rule to cover those cases in which the declaration does not necessarily have to be made before a court, such as for example in the Danish system or Finland, where the waiver can simply be declared in writing without the participation of a court or other authority¹⁴⁴. In such jurisdictions the beneficiary may still be interested in making a declaration before the courts of his or her State of habitual residence for reasons of legal certainty, and there is no reason for such cases to be treated differently.

Duty of transfer: the new Art. 8(2) SP

116. Art. 8(1) SP merely grants a court the competence to receive declarations. The court of general jurisdiction remains competent as far as concerns the consequences of the declaration for the succession. Therefore, it is important that the court of general jurisdiction receives the declaration made pursuant to Art. 8(1) SP in order not to base its decisions on incorrect facts. Hence, the Institute proposes to introduce a duty upon the court having jurisdiction under Art. 8 SP to transfer the received declaration to the generally competent court. The receiving court should use the European Judicial Network in order to identify the competent court within the Member State whose courts have jurisdiction according to Art. 4 seq. SP¹⁴⁵.

¹⁴⁴ Kangas, Finlande, in: Country Reports 337–374 (370).

¹⁴⁵ As to the European Judicial Network see Art. 46 SP and *infra* para. 361 seq.

The court of general jurisdiction is deemed to have received the declarations: the new Art. 8(3) SP

117. Art. 8 SP does not indicate the consequences of a declaration made before a judge whose jurisdiction is based on that provision. Such a declaration should be treated as if it had been made before the court of general jurisdiction under Art. 4 seq. SP. This amendment would clarify that, in general, for all purposes related to the existence and validity of the declaration, the receiving court under Art. 8(1) SP replaces the generally competent courts. The declarations mentioned in Art. 8(1) SP often have to be made within a certain period of time. The new Art. 8(3) SP would permit heirs and other beneficiaries to satisfy this time limit by making the declaration before the court competent under Art. 8(1) SP within the period of time prescribed by the applicable law. Absent such a rule, legal practitioners might be left in doubt as to whether the time of the declaration itself or the time at which it is received by the generally competent courts is decisive for meeting the deadline. It is therefore irrelevant for the effects of Art. 8(3) whether the court in the State of habitual residence complies with its duty to transfer the declaration to the generally competent courts according to Art. 8(2).

Linguistic changes

118. The Institute furthermore proposes rephrasing Art. 8 SP as outlined above for greater clarity. The term “competence” should be replaced with “jurisdiction” to keep the terminology consistent with the other rules on jurisdiction and hence eliminate a potential source of confusion.

Article 9 – Competence of courts in the place in which the property is located

Where the law of the Member State of the place in which property is located requires the involvement of its courts in order to take measures under substantive law relating to the transmission of the property, its recording or transfer in the public register, the courts of the Member State shall be competent to take such measures.

Article 9 – Exclusive jurisdiction Competence of courts in of the place Member State in which the property is situated located

1. Where the law of the Member State of the place in which property is situated located requires the involvement of its courts in order to take measures under substantive law *the law of property* relating to the transmission of the property, its recording or transfer in the public register, the courts of the that Member State shall be competent have exclusive jurisdiction to take such measures.

2. Where the law of the Member State in which property is situated provides for procedures pursuant to Article 21(1) or (2)(a), the courts of that Member State shall have exclusive jurisdiction for such procedures.

Summary

119. The Institute welcomes the special rule on jurisdiction of the *situs* State and proposes extending this competence to the mandatory procedures for implementation of the succession covered by Art. 21(1) and (2)(a) SP. It furthermore proposes making both heads of jurisdiction exclusive.

Comments

Exclusive jurisdiction at the situs for questions of property law

120. The transfer of an estate to the heirs and other beneficiaries frequently requires a formal procedure outside the scope of the law of succession for its completion, particularly when immovables are being transferred. In such a case, a public register may have to be updated to give effect to the transfer in ownership according to the law of succession¹⁴⁶. Those procedures should fall within the competence of the courts in the Member State where the property is situated, as they are best placed to control their national public registry and perform the necessary procedures. Where this Member State coincides with the Member State where the deceased was habitually resident, a special provision is superfluous. However, where the two States differ, an exception to the general rule on jurisdiction is required. Accordingly, Art. 9 SP creates a head of jurisdiction for the courts in the *situs* State. This competence of the courts of the *situs* State should of course remain limited to performing the necessary procedures to implement the devolution as stipulated by the *lex hereditatis*.

121. The Institute proposes making this head of jurisdiction exclusive, hence limiting the scope of the general rule on jurisdiction contained in Art. 4 SP. This restriction does not only correspond to the exclusive jurisdiction of the *situs* courts in other European instruments, for instance, in Art. 22(1) of the Brussels I Regulation. An exclusive jurisdiction would also complement the general exception for property law (cf. Art. 1(3)(j), 21(3) SP); while changes in the public registry and other, similar procedures may

¹⁴⁶ Cf., e.g., Art. 1198 of the Greek Civil Code; *Vassilakakis/Papassiopi-Passia/Institut Notarial Grec*, Grèce, in: *Country Reports* 413–461 (455).

be occasioned by a vesting of property rights according to the law of succession, they are by nature part of the law of property. A foreign court should not be competent to modify a national public registry as this could result in entries that are incompatible with the laws governing the public registry or even with the *numerus clausus* provided in the respective national law of property. It is also difficult to imagine how a foreign court could modify such a public register in practice. For these reasons, granting exclusive jurisdiction to the courts in the register State seems strongly advisable.

122. Further changes to Art. 9(1) only serve purposes of clarification. The French “droit réel” was inaccurately translated as “substantive law” in the English version, whereas it is clear from the context that the reference must be to the law of property. The Institute proposes replacing “competence” with “jurisdiction” to keep the terminology consistent with the other rules on jurisdiction and hence eliminate a potential source of confusion.

*Exclusive jurisdiction for mandatory procedures to implement the succession –
The new Art. 9(2) SP*

123. The Institute proposes to add a second paragraph dealing with the jurisdiction for mandatory procedures foreseen by the law of the *situs* State. For an explanation of those procedures see the comments on Art. 21 SP, which stipulates a corresponding exception for the applicable law. Such mandatory procedures for the implementation of the succession are best performed by the courts of the Member State in which the relevant property is situated. Therefore, an exception from the general rule on jurisdiction should be made in those cases, as proposed by the Commission. The Institute takes the view that this exceptional jurisdiction should be an exclusive jurisdiction. As mentioned above for changes to the public registry, it is difficult to imagine that a court in another Member State could perform procedures such as the *Einantwortung* under Austrian law or issue a grant of representation under English and Welsh law. Such a practice would likely result in mistakes that would run counter to the aim of facilitating the process of acquiring the estate for the heirs. Accordingly, the Commission’s proposal should be taken one step further, resulting in a parallel relationship between the applicable law and jurisdiction in all cases.

Article 10 – Seising of a court

For the purposes of this Chapter, a court shall be deemed to be seised:

(a) at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the applicant has not subsequently failed to take the steps they were required to take to have service effected on the defendant, or

(b) if the document has to be served before being lodged with the court, at the time when it is formally drawn up or registered by the authority responsible for service, provided that the applicant has not subsequently failed to take the steps that they were required to take to have the document lodged with the court.

Article 10 – Seising of a court**Article 11 – Examination as to jurisdiction**

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

Article 11 – Examination as to jurisdiction**Article 12 – Examination as to admissibility**

1. Where a defendant habitually resident in a Member State other than the Member State where the action was brought does not enter an appearance, the court with jurisdiction shall be responsible for staying the proceedings so long as it is not shown that the defendant has been able to receive the document instituting the proceedings or an equivalent document in time to defend himself or that all necessary steps have been taken to this end.

Article 12 – Examination as to admissibility

2. Article 19 of Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters shall apply instead of the provisions of paragraph 1 of this Article if the document instituting the proceedings or an equivalent document has had to be sent from one Member State to another pursuant to that Regulation.

3. Where the provisions of Council Regulation (EC) No 1393/2007 are not applicable, Article 15 of the Hague Convention of 15 November 1965 on the service abroad of judicial and extrajudicial documents in civil or commercial matters shall apply if the document instituting the proceedings or an equivalent document has to be sent abroad pursuant to that Convention.

Article 13 – Lis pendens

1. Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

2. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.

Article 13 – Lis pendens

Article 14 – Related actions

1. Where related actions are pending before courts of different Member States, any court other than the court first seised may stay its proceedings.

2. Where these actions are pending at first instance, any court other than the court first seised may also, on the application of one of the parties, decline jurisdiction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof.

3. For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together in order to avoid the risk of irreconcilable judgments resulting from separate proceedings.

**Article 15 – Provisional,
including protective, measures**

Application may be made to the judicial authorities of a Member State for such provisional or 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.

Article 14 – Related actions**Article 15 – Provisional,
including protective, measures**

Chapter III Applicable law

Chapter III Applicable law

Section I General principle

Article 16 – General rule

Unless otherwise provided for in this Regulation, the law applicable to the succession as a whole shall be that of the State in which the deceased had their habitual residence at the time of their death.

Article 16 – General rule

~~Unless otherwise provided for in this Regulation, the law governing the succession to the whole of the estate applicable to the succession as a whole shall be that of the State in which the deceased had their habitual residence at the time of their death.~~
was habitually resident at the time of their death.

Summary

124. The Institute endorses the Commission's choice of the *habitual residence* as the decisive connecting factor for the determination of the law applicable to the succession. It also approves the *monist approach* which does not distinguish between movables and immovables for choice of law purposes. The proposed changes are therefore mainly linguistic. The introductory words of Art. 16 SP ("Unless otherwise provided for in this Regulation . . .") should be deleted as they evidently express a proposition that is naturally inherent in the character of any general rule. A general rule may, of course, be derogated by special provisions, in the case of Art. 16 SP, for example, by a choice of law by the testator according to Art. 17 SP or by other special conflict rules.

Comments

Background

125. At present, two antagonistic approaches can be ascertained when it comes to determining the connecting factor of an international succession: the *nationality* principle and the *residence* principle. Many Member States still adhere to the nationality principle. They apply the law of the home country of the deceased, the law of the State whose nationality he or she possessed¹⁴⁷.

¹⁴⁷ See Sec. 28(1) in connection with Sec. 9(1) sentence 1 of the Austrian Private International Law Act; Sec. 17 of the Czechoslovakian Private International Law Act; Art. 25(1) of the German Introductory Act to the Civil Code; Art. 28 of the Greek Civil Code; Sec. 36(1) sentence 1 of the Hungarian Legislative Decree on Private International Law; Art. 46(1) of the

Member States which follow the residence principle mainly use the last domicile of the deceased as the connecting factor¹⁴⁸. But domicile is essentially a legal concept and subject to very different regulations and interpretations in the various Member States. At the instigation of the Hague Conference on Private International Law, the international community and national legislators have therefore replaced domicile with habitual residence in numerous instruments.¹⁴⁹

126. In respect of succession law, however, Bulgaria (since 2005)¹⁵⁰, Finland (since 2002)¹⁵¹ and the Netherlands¹⁵² are currently the only Member States to employ the last habitual residence of the deceased as the connecting factor. Essentially, they follow the Hague Succession Convention, which tried to strike a balance between the residence and the nationality principle. According to Art. 3(1) of the Convention, the law of the last habitual residence of the deceased applies to the succession if habitual residence and nationality coincide. If the deceased had not been a national of the country of the last habitual residence, the latter will determine the applicable law if the deceased had resided there for at least five years and was not manifestly more closely connected to the State of his or her nationality, Art. 3(2) of the Convention. Otherwise, as a matter of principle, the law of the State of which the deceased was a national at time of death applies, unless he or she was more closely connected with another State, Art. 3(3) of the Convention.

127. The situation is further complicated by the fact that a number of States still follow a *dualistic* approach whereby different connecting factors are applied to the succession in movables and immovables. While the law applicable to the movable parts of the estate is determined by the nationality or residence principle, the succession to the immovable property is governed by the law of the country in which the property is situated¹⁵³. In Latvia suc-

Italian Private International Law Act; Art. 34 of the Polish Private International Law Act; Art. 62, 31(1) of the Portuguese Civil Code; Art. 66(a) of the Romanian Private International Law Act; Art. 32(1) of the Slovenian Private International Law Act; Art. 9(1) and (8) sentence 1 of the Introductory Title to the Spanish Civil Code; Sec. 1(1) of chapter 1 of the Swedish International Successions Act.

¹⁴⁸ Art. 78 Sec. 1 of the Belgian Private International Law Act; Sec. 24 of the Estonian Private International Law Act; Art. 1.62(1) sentence 1 of the Lithuanian Code. See for France Cass.civ. 19. 6. 1939, Rev. crit. d.i. p. 34 (1939) 480; 22. 12. 1970, Rev. crit. d.i. p. 61 (1972) 467; see for Luxembourg Trib. Lux. 20. 06. 1931, Pas. 13, p. 466; see for England Rule 140 of *Dacey/Morris/Collins* (supra n. 32); see for Denmark Østre Landrets Dom 30. 4. 1940, Ugeskrift for Retsvæsen 1940, 857.

¹⁴⁹ See *infra* para. 131.

¹⁵⁰ Art. 89(1) of the Bulgarian Private International Law Code.

¹⁵¹ See Book 26 Sec. 5 of the Finnish Succession Act.

¹⁵² See Art. 1 of the Dutch International Succession Act.

¹⁵³ See, e.g., Art. 3(2) of the French Civil Code; Art. 3(2) of the Luxembourgian Civil Code; Trib. Ardt. Luxembourg 11. 6. 1913, Pas. lux. t. 9, 478; Trib. Ardt. Luxembourg 20. 11. 1965, no. 1021/96; Art. 78 of the Belgian Private International Law Act.

cession to all parts of the estate will be governed by the *lex rei sitae* of the respective property¹⁵⁴.

Dualist versus monist approach

128. The application of the *lex rei sitae* will lead to a scission of the estate if the deceased has property in more than one State. Such a scission is, however, not desirable. First, it will result in higher transaction costs. The testator will have to adjust a testamentary disposition to various laws, and the estate will have to be administered in different countries according to a different set of rules. Second, and even more importantly, the scission can lead to conflicts especially with regard to the distribution of the estate and forced heirship. The shortcomings of the dualist approach can best be illustrated by the standard textbook example of a testator with two children (A and B) who has two equally valuable premises, one located in England and one in France. If the first is devised to child A and the other to B, child A might, in principle, be able to claim a forced heirship under French law since both parts of the estate will be dealt with separately according to the respectively applicable law¹⁵⁵ and child A has not been considered in the succession to the French estate. The intention of the testator to benefit the children equally would, subject to a possible modification by compensatory provisions¹⁵⁶, thus be frustrated.

129. Proponents of the dualist approach claim that the application of the *lex rei sitae* is the best way to avoid frictions between the law of succession and the law of property, which can arise when the latter does not recognise the way in which the property is transferred by the law applicable to the succession. Those frictions can, however, also be avoided by clearly delineating the scope of the relevant conflict rules. The law applicable to the succession should cover the question of entitlement to the estate; the question whether and how the entitlement envisaged by the *lex hereditatis* can be implemented should be covered by the *lex rei sitae* as the law which is applicable to property, see Art. 1(3)(j) SP, as amended by the Institute, and the new Art. 21(3). The Institute therefore endorses the monist approach of the Succession Pro-

¹⁵⁴ Art. 16 of the Latvian Civil Code.

¹⁵⁵ See, e.g., BGH 21. 4. 1993, NJW 1993, 1920 seq.; OLG Celle 5. 8. 2003, Zeitschrift für Erbrecht und Vermögensnachfolge (ZEV) 2003, 509 seq.; *Staudinger (-Haas)*, Kommentar zum BGB, §§ 2265–2338 (Gemeinschaftliches Testament, Erbvertrag, Pflichtteil) (2006) Vorbemerkungen zu § 2303ff. BGB para. 66.

¹⁵⁶ Compensatory provisions do exist in French and Luxembourgian law, for example, the *droit de prélèvement*, see Art. 2 of the French Act of 14. 7. 1819 and Art. 1 of the Luxembourgian Act of 29. 2. 1872; see also Sec. 9 of chapter 2 of the Swedish Successions Act; Art. 2(2) of the Dutch International Successions Act. Other Member States, however, do not appear to offer any compensation in such instances see BGH 21. 4. 1993, 1920 seq.; OLG Celle 5. 8. 2003, 509 seq. (both previous note).

posal. This view is also shared by the majority of the replies to the Green Paper of the Commission¹⁵⁷. We would, however, propose a slight change of wording in order to clarify that the habitual residence as the connecting factor should determine the law applicable “to the whole of the estate”. Thus far, that notion can only be inferred from Art. 19(1) SP.

Nationality, domicile or habitual residence as the decisive connecting factor?

130. While there seems to be a majority of arguments advocating a monist approach, the antagonism between the nationality and the residence principle cannot be resolved quite as easily. The controversy between those two principles is one of the classic disputes of private international law, with the pros and cons of both connecting factors having been discussed for decades¹⁵⁸. The question which factor should determine the law applicable to the succession as a whole within the scope of the new Succession Regulation has thus raised much academic debate subsequent to the publication of the Commission’s Green Paper¹⁵⁹.

131. The present situation in the Member States is, as already shown, quite diverse. Currently the nationality approach and the residence principle seem to find equal approval in the legal systems of the Member States as far as the private international law of succession is concerned. While the prevailing connecting factor in States applying the residence principle is still domicile, conflict rules adopted more recently¹⁶⁰ show a tendency towards habitual residence. This is not only consistent with a trend at the international level, which has been mainly set by the Hague Conventions¹⁶¹; with

¹⁵⁷ See the Green Paper replies of the Austrian Chamber of Notaries p. 1, the German government p. 2, the German Federal Council p. 2, the German Federal Chamber of Notaries p. 2, the German Federal Chamber of Solicitors p. 3, the Conférence des Notariats de l’Union Européenne p. 2, the Conseil supérieur du notariat p. 10, the French Cour de Cassation p. 4, the German Solicitor Association p. 3, GEDIP p. 2, the Ulrik Huber Institute p. 3, the Finnish government p. 2, the Nederlands Vereniging voor Rechtspraak p. 2, the Dutch government p. 3, the Austrian Chamber of Solicitors p. 4, the Polish government p. 1 and the Swedish government p. 2.

¹⁵⁸ See e.g. *Cheshire/North/Fawcett* (supra n. 38) 179 seq.; *von Bar/Mankowski*, Internationales Privatrecht I² (2003) 560 seq.; *Kegel/Schurig*, Internationales Privatrecht⁹ (2004) 443 seq.; *Dicey/Morris/Collins* (supra n. 32) para. 6–123 seq.; *Kropholler*, Internationales Privatrecht⁶ (2006) 272 seq.

¹⁵⁹ See e.g. *Dutta* (supra n. 38) 560 seq. with further references.

¹⁶⁰ See Art. 89(1) of the Bulgarian Private Law Code of 2005; Book 26 Sec. 5 of the Finnish Succession Act; Art. 1 of the Dutch International Succession Act.

¹⁶¹ See Art. 1 of the Hague Convention of 5. 10. 1961 concerning the powers of authorities and the law applicable in respect of the protection of infants; Art. 4 of the Hague Convention of 2. 10. 1973 on the law applicable to maintenance obligations; Art. 3 of the Hague Succession Convention; Art 5(1) and 15(1) of the Hague Convention of 19. 10. 1996 on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children; Art. 13(1) and 5(1) of the Hague Convention

regard to choice of law and jurisdiction the habitual residence has also become a prominent connecting factor in the private international law of the European Union in general¹⁶². Concerning the law of succession, the habitual residence as connecting factor was recommended by numerous States and organisations in their replies to the Green Paper¹⁶³. The nationality approach, on the other hand, found only a few supporters¹⁶⁴.

132. In view of the majority support which is also endorsed by the Institute, it is sufficient to list the main reasons for the shift to the habitual residence as the connecting factor with regard to the law of succession. With a growing migration resulting from open borders, free movement for persons (Art. 20(1) TFEU) and workers (Art. 45 TFEU) and the freedom of establishment (Art. 49 seq. TFEU), the residence principle seems better suited to reflect the closest links of the deceased to a certain legal system. It takes account of the integration the deceased has often achieved in the legal order of the country of habitual residence as compared to the increasing loss of connections to the original home State. In general, the country of habitual residence will also have the closest factual links to the succession as a whole. The deceased will frequently have acquired property there, e.g. a family home, and potential heirs, especially a surviving spouse, will usually share his or her habitual residence. In cases of bi-national spouses, the choice of habitual residence as the common connecting factor therefore also avoids

of 13. 1. 2000 on the international protection of adults; Art. 3 of the Hague Protocol of 23. 11. 2007 on the law applicable to maintenance obligations.

¹⁶² See e.g. Art. 5(2), 13(3), 17(3) of the Brussels I Regulation; Art. 3(1)(a), 8(1), 9, 10, 12(3)(a) of the Brussels IIbis Regulation; Art. 3(a) and (b), 4(1)(a) and (c)(ii) of the Maintenance Regulation; Art. 4(1)(a), (b), (d), (e) and (f), 5(1) and (2), 6(1), 7(2) subpara. 2 and 11(2), (3), (4) of the Rome I Regulation; Art. 4(2), 5(1)(a) and (1) subpara. 2, 10(2), 11(2), 12(2)(b) of the Rome II Regulation.

¹⁶³ See the Green Paper replies of the Austrian Chamber of Notaries p. 1 (for an adoption of Art. 3 of the Hague Succession Convention), the German government p. 2, the German Federal Chambers of Notaries p. 2, the Conférence des Notariats de l'Union Européenne p. 3, the Conseil supérieur du notariat p. 12 (for an adoption of Art. 3 of the Hague Succession Convention), the French Cour de Cassation p. 4, the Finnish government p. 2 (for an adoption of Art. 3 of the Hague Succession Convention), GEDIP p. 2, the Ulrik Huber Institute p. 3, the Lithuanian government p. 2, the Nederlands Vereniging van Rechtspraak p. 2 (for an adoption of Art. 3 of the Hague Succession Convention, however, with a reduction of the minimum residence period to 3 years), the Dutch government p. 3 (for an adoption of Art. 3 of the Hague Succession Convention) and the Swedish government p. 2 (with a minimum period of residence of 2 to 5 years); for habitual residence as connecting factor also *Lehmann* (supra n. 66) 95.

¹⁶⁴ See the Green Paper replies of the German Federal Chamber of Solicitors p. 3, the German Bar Association p. 3, the Austrian Chamber of Solicitors p. 4, the Polish government p. 1. Other Green Paper replies still vote for a dualistic approach with either the habitual residence or the domicile as the connecting factor for the movable parts of the estate, see the replies of the Belgian government p. 1, the Czech government p. 2, the French government p. 2 and the Luxembourgian government p. 1; a dualist approach with the nationality as the connecting factor for movables was proposed by the reply of the Slovakian government p. 2.

problems of conflicting succession laws. Last but not least, the application of habitual residence facilitates the administration of the estate since *ius* and *forum* will as a matter of principle coincide¹⁶⁵. When it comes to the choice between domicile and habitual residence, the need for an autonomous interpretation strongly militates in favour of the use of habitual residence¹⁶⁶.

133. Addressing the concerns regarding uncertainties and possible manipulations associated with habitual residence as the connecting factor in the context of the law of succession, we discussed whether a definition of habitual residence or a certain minimum period of residence¹⁶⁷ should be included in the Succession Proposal. The Institute eventually decided against such a definition. At the international¹⁶⁸ and the European Union level¹⁶⁹ various criteria¹⁷⁰ for determining the habitual residence of a person have been elaborated. They should suffice to establish a habitual residence on a case-by-case basis with the necessary degree of flexibility. The interpretation of habitual residence within the framework of the future Succession Regulation may thereby vary from that in the context of other Regulations or Directives¹⁷¹. If the deceased has connections to more than one State, he or she is best placed to decide by a choice of the applicable law which legal system he or she is most closely connected with and which law should there-

¹⁶⁵ Chapter II of the Succession Proposal.

¹⁶⁶ See para. 125.

¹⁶⁷ See, e.g. the Green Paper replies of Austrian Chamber of Civil Law Notaries p. 1 (for an adoption of Art. 3 of the Hague Succession Convention), the Conseil supérieur du notariat p. 12 (for an adoption of Art. 3 of the Hague Succession Convention), the Finnish government p. 2 (for an adoption of Art. 3 of the Hague Succession Convention), the Nederlands Vereniging van Rechtspraak p. 2 (for an adoption of Art. 3 of the Hague Succession Convention, however, with a reduction of the minimum residence period to 3 years), the Dutch government p. 3 (for an adoption of Art. 3 of the Hague Succession Convention) and the Swedish government p. 2 (with a minimum period of residence of 2 to 5 years).

¹⁶⁸ See, e.g. Council of Europe, Committee of Ministers, Resolution No. 72-1 on the Standardisation of the legal concepts of "domicile" and of "residence", adopted on 18. 1. 1972, *Annuaire Européen* 20 (1974) 320 seq.; preliminary works to the Hague Succession Convention 1989 in *Actes et documents de la seizième Session*, ed. by Conférence de La Haye de droit international privé, 3 au 20 octobre 1988 II: Successions – loi applicable (1990) 197 seq.

¹⁶⁹ See e.g. ECJ 13. 11. 1990, Case C-216/89 (*Reibold*), E. C. R. 1990, I-4163; 8. 7. 1992, Case C-102/91 (*Knoch*), E. C. R. 1992, I-4341, para. 20 seq.; 15. 9. 1994, Case C-452/93 P. (*Fernandez*), E. C. R. 1994, I-4295, para. 22; 25. 2. 1999, Case C-90/97 (*Swaddling*), E. C. R. 1999, I-1075, para. 28 seq.; 2. 4. 2009, Case C-523/07 (*A*) para. 30 seq. (not yet in E. C. R.); see also ECJ 23. 4. 1991, Case C-297/89 (*Ryborg*), E. C. R. 1991, I-1943, para. 11 seq.; 12. 7. 2001, Case C-262/99 (*Louloudakis*), E. C. R. 2001, I-5547, para. 43 seq. on the term "normal residence" of Directive No. 83/182/ECC on tax exemptions within the Community for certain means of transport temporarily imported into one Member State from another which according to Art. 7(1) of the Directive also refers to the usual (habitual) residence.

¹⁷⁰ The centre of interests of a person, taking into account duration of residence, family ties, location of his or her assets, professional, social and economic links.

¹⁷¹ See, e.g. ECJ 12. 7. 2001, para. 58; 2. 4. 2009, para. 36 (both *supra* n. 169).

fore govern the succession¹⁷². The prescription of a minimum period of residence on the other hand would not be suitable to account for the interests of the deceased. Such a minimum period of residence would always be arbitrary since it remains a mere presumption that the integration interests of the deceased prevail over his or her connections to the original home State after the elapse of a certain amount of time of residence.¹⁷³ The concerns regarding possible manipulations by the deceased can on the other hand better be met by requiring sufficient proof of the establishment of a new centre of (lifetime) interests¹⁷⁴ through objective criteria¹⁷⁵. Within the range of these criteria the time of residence will of course have to be taken into account.

Section II

Special rules on testate succession

Article 17 – Freedom of choice

1. A person may choose as the law to govern the succession as a whole the law of the State whose nationality they possess.

Article 17 – Freedom of choice

1. A person may choose as the law to govern that the succession in part or as a whole the law of the State whose nationality they possess shall be governed by the law of a State

(a) whose nationality that person possesses or possessed, or

(b) in which that person is or was habitually resident unless that residence was immaterial, or

(c) whose law governs that person's matrimonial property regime at the time of choice provided that this regime continues to exist at the time of death, or

(d) where, as far as immovables are concerned, the property is located.

¹⁷² The Institute therefore also recommends an extension of the choice of law options, see Art. 17 SP and *infra* para. 134.

¹⁷³ The Hague Succession Convention therefore opted for a rather complicated scheme balanced by an escape clause, Art. 3(3), which failed to find sufficient support on international level; see *supra* para. 126.

¹⁷⁴ ECJ 23. 4. 1991, para. 19 *seq.*; ECJ 25. 2. 1999, para. 28 *seq.*; 12. 7. 2001, para. 55; 2. 4. 2009, para. 37 *seq.* (all *supra* n. 169).

¹⁷⁵ Such as family ties, location of assets, place of profession, place of residence, other social and economic links.

2. The law applicable to the succession must be expressly determined and included in a declaration in the form of a disposition of property upon death.

3. The existence and the validity in substantive terms of the consent to this determination shall be governed by the determined law.

4. Modification or revocation by its author of such a determination of applicable law must meet the conditions for the modification or revocation of a disposition of property upon death.

~~2. The choice of law applicable to the succession must be expressly determined and included in a declaration in the form of a disposition of property upon death satisfy the formal requirements of a testamentary disposition. The choice shall be made expressly or clearly demonstrated by the terms of the testamentary disposition or the circumstances of the case.~~

3. The existence and the validity of the choice of law in substantive terms of the consent to this determination shall be governed by the determined law chosen.

4. ~~The preceding paragraphs shall apply equally to any m~~Modification or revocation of a prior choice of law by its author of such a determination of applicable law must meet the conditions for the modification or revocation of a disposition of property upon death.

Summary

134. Art. 17 SP grants the testator¹⁷⁶ a very limited freedom to select the law applicable to the entire succession: the testator can only choose the law of the State whose nationality he or she possesses and *dépeçage* is not allowed. The Institute welcomes the decision in favour of a choice of law but suggests to reasonably broaden its scope in a way which nonetheless contains the risk that the testator may evade forced heirship granted by the State whose law would apply in the absence of choice. Thus, the two main objectives in this area are (1) to give the testator a greater freedom of choice, while (2) limiting the possibilities of circumventing mandatory family protection rules.

135. With these objectives in mind, the Institute proposes the following modifications:

– *Dépeçage allowed*: the testator may choose different laws to apply to different parts of his or her succession (see *infra* para. 139).

– *Previously held nationality*: the testator may choose the law of a State whose nationality he or she possessed before the time of choice (see *infra* para. 140 *seq.*).

¹⁷⁶ Here and in the following discussion *testator* means a person who makes a declaration of the law to apply to his or her succession – often, but not always, contained in a will.

– *Past or present habitual residence*: the testator can select the law of a State where he or she is or was habitually resident unless that residence was immaterial (see *infra* para. 142 seq.).

– *Matrimonial property law*: the testator may designate the law governing his or her matrimonial property regime at the time of designation, provided that regime continues to exist at the time of death (see *infra* para. 148).

– *Lex rei sitae*: for succession to immovable property the law of its location may be chosen (see *infra* para. 149).

– *Sufficient if choice clearly demonstrated*: it is not required that the choice be expressly stated; it is sufficient that the choice be clearly demonstrated by the terms of the testamentary disposition or the circumstances of the case (see *infra* para. 150).

Comments

Overview of the proposal

136. The Institute considers a greater freedom of choice important mainly for three reasons: first, granting the option of a *professio iuris* gives the testator a much needed tool to effectively plan his or her succession and increases legal certainty. Indeed, it has been suggested that the freedom of choice of law stands in correlation to and may even be required by the basic freedoms as it protects the stability interests of a person seeking to exercise the freedom of establishment and the freedom of movement and residence¹⁷⁷. It is certainly true that persons who are able to select the law applicable to their succession can establish a new residence without the concern that their death may trigger the application of laws that they would not have wanted to apply to their succession¹⁷⁸. Second, all Member States provide for freedom of testation. Giving testators the freedom to choose the law governing their succession may be seen as an expansion of the freedom to testate into the area of private international law¹⁷⁹. Third, freedom of choice of law in the area of succession and wills corresponds to a general trend in private international law towards the freedom of the individual to choose the applicable law¹⁸⁰.

137. Most importantly, the Institute's proposal seeks to strike a balance between a greater freedom of choice on the one hand and the protection of

¹⁷⁷ Dutta (supra n. 38) 571–573.

¹⁷⁸ According to Art. 16 SP, absent a choice the habitual residence at the time of death determines the law applicable to the succession.

¹⁷⁹ See also Dörner/Hertel/Lagarde/Riering (supra n. 116) 5.

¹⁸⁰ Basedow, Recent Developments of the Conflict of Laws, Some Comparative Observations, in: Japanese and European Private International Law in Comparative Perspective, ed. by Basedow/Baum/Nishitani (2007) 3–18 (15); Dutta (supra n. 38) 573.

legitimate expectations of third parties¹⁸¹ on the other. To achieve this purpose the Institute recommends using objective factors that provide a meaningful and stable connection to the law chosen, thus limiting the range of available laws the testator may choose from. We also discussed restricting the freedom of choice of law to true international cases using a similar control mechanism as the one in Art. 3(3) of the Rome I and Art. 14(2) of the Rome II Regulation. But this approach was rejected because of the structural differences between Art. 17¹⁸² and Art. 3 Rome I and Art. 14 Rome II. Specifically, Rome I and Rome II grant at a first level a potentially unlimited freedom of choice – a choice that somehow must be contained on a second level. By contrast, in Art. 17 the scope of available laws that may be chosen is substantially restricted¹⁸³ through the use of carefully selected connecting factors that seek to balance the interests of the testator in a freedom of choice with the legitimate expectations of third parties. While it makes perfect sense to introduce a corrective requirement when a potentially unlimited freedom of choice is granted, it would be unsound and structurally flawed to do the same where the freedom of choice is restricted *ab initio*. In addition, we discussed the possibility of making certain mandatory provisions on family protection immune from the impact of the chosen law¹⁸⁴ but rejected this idea as well – basically for the same reasons: if the granted freedom of choice is the result of having balanced the testator's interests with those of third parties, the interests of the latter have been considered and should not be taken into account twice.

138. Lastly, it should be noted that if a person is absolutely determined to evade forced heirship provisions he or she will be able to do so – even under the Commission's Proposal. All he or she has to do is to move the habitual residence to a State that does not recognise forced heirship. If death occurs after that change of habitual residence, the estate will be released from forced heirship, Art. 16 SP.

Dépeçage

139. The testator should be able to choose different laws for different parts of the estate. In the absence of a choice of law the Commission's Proposal – as well as the Institute's proposal – adhere to a monist approach and use a single connecting factor: one law applies to the succession to the entire es-

¹⁸¹ For example, family members who expect that certain forced heirship provisions will apply.

¹⁸² Art. 17 of the Succession Proposal as well as of the Institute's proposal.

¹⁸³ Only one law may be chosen according to the Succession Proposal: the law of the State whose nationality the person possesses.

¹⁸⁴ See *D. Lehmann*, Internationale Reaktionen auf das Grünbuch zum Erb- und Testamentsrecht: IPRax 2006, 204–207 (2006).

tate¹⁸⁵. And there are sound reasons for the monist approach which preserves the unity of the estate and, thereby, protects the consistency of the testator's dispositions¹⁸⁶. If the testators themselves, however, wish to designate different succession laws for different parts of their estates they need not be protected and should have that choice¹⁸⁷.

Previously held nationality

140. Art. 17 SP uses present nationality as the sole connecting factor for the testator's choice of law – that is, the nationality a testator possesses at the time of the law's designation. It is unclear from the Commission's Proposal whether the testator's nationality must continue to exist at the time of death for the choice to remain valid. What happens if the testator having designated the applicable succession law renounces this nationality? Would the choice be invalidated; must he or she make a new designation? The Institute's proposal offers a solution by allowing the designation of the law of a State whose nationality the testator/deceased previously possessed. For those concerned about including past nationality, it might be interesting to note that under the Commission's Proposal the testator may in practice already achieve what the Institute proposes: if the testator wishes to select the law of a previous nationality, all that has to be done is to backdate the designation¹⁸⁸.

141. The Institute's proposal has three main ramifications: first, if the testator chooses the law of a State whose nationality he or she possesses at the time of designation but loses this nationality before dying, that choice will remain valid; second, if the testator selects the law of a State of a previous nationality no longer held at the time of designation, that choice will be effective; third, if the testator possesses or possessed more than one nationality, he or she may select the law of any of these States.

Present or past habitual residence

142. Absent a choice, the general rule in Art. 16 SP employs the *habitual residence of the deceased at the time of death* as the connecting factor that determines the applicable law. The Institute proposes greater flexibility in this context.

¹⁸⁵ Art. 16 SP.

¹⁸⁶ The monist approach treats the estate as a unity which saves legal costs whereas the dualist approach requires a characterisation of property – movable/immovable – and the coordination of different laws, cf. *Dutta* (supra n. 38) 555.

¹⁸⁷ See *Dutta* (supra n. 38) 577–578.

¹⁸⁸ But the same question as described above would arise – namely, must the choice be invalidated because the nationality at the time of death differs from the nationality whose law was chosen?

143. Under the Institute's proposal the testator would have two options: (1) He or she can choose the law of the State where he or she habitually resides *at the time of designation*. In the absence of choice, Art. 16 SP determines the applicable law according to the habitual residence at the *time of death* whereas the connecting factor that matters for the admissibility of the testator's choice of law is the habitual residence at the *time of designation*¹⁸⁹. (2) The testator may also select the law of a State where he or she habitually resided *before* designating the law applicable to succession.

144. Where a person chooses the law of the habitual residence – past or present – that choice is *prima facie* valid provided it can be established that the place whose law was chosen satisfies all the requirements of habitual residence. But a person seeking to invalidate the testator's choice may rebut that *prima facie* presumption of validity by establishing that the residence was *immaterial*. Thus, the burden of proof is shifted to the person contesting the choice of law.

145. In detail: under the prevailing conditions of a free and unrestricted movement of persons, the connecting factor of habitual residence may be used in order to evade mandatory family provisions. Nevertheless, the testator should be able to choose the law of habitual residence as the law governing succession because habitual residence generally provides a reliable indication for a strong connection between a person and the law of that place. Moreover, the concept of habitual residence is flexible enough, allowing the courts to consider the facts and circumstances of each case and thus to exercise effective control. When determining habitual residence courts may look at a variety of factors such as the duration and continuity of presence, factual ties of the person with the place¹⁹⁰, the degree of social integration, personal and family relationships, the *milieu social*¹⁹¹, whether the place where a person claims to be habitually resident is the *centre effectif de sa vie*¹⁹² or the place with which he or she is *most closely associated in his or her pattern of life*¹⁹³.

¹⁸⁹ If residence at time of death and residence at time of designation coincide, the option to choose may still be relevant in cases of *renvoi*, which is excluded where the law has been chosen but may be available absent a choice, see *Dutta* (supra n. 38) 571–573, 576; *Dörner/Hertel/Lagarde/Riering* (supra n. 116) 5.

¹⁹⁰ Cf. Council of Europe, Committee of Ministers, Resolution No. 72–1 (supra n. 168). Rule No. 7 provides: “The residence of a person is determined solely by factual criteria”; Rule No. 9 states: “In determining whether a residence is habitual, account is to be taken of the duration and continuity of the presence as well as of other facts of a personal or professional nature which point to durable ties between a person and his residence.”

¹⁹¹ Cf. *Baetge*, *Der gewöhnliche Aufenthalt im Internationalen Privatrecht* (1994) 76.

¹⁹² Cf. for the 1961 Hague Protection of Minors Convention (supra n. 161) *von Steiger*, *Rapport explicatif*, in: *Actes et documents de la Neuvième session*, ed. by Conférence de La Haye de droit international privé, 1960 IV: Protection des mineurs (1961) 219–285 (225 seq.): “centre effective de la vie du mineur”.

¹⁹³ Cf. for the Hague Succession Convention *Waters Report* (supra n. 37) 549.

146. If the testator selects the law of habitual residence the Institute recommends giving the courts an additional device for heightened scrutiny: the habitual residence should not be *immaterial*. However, this control mechanism can only be triggered by a person seeking to invalidate the testator's choice of law. Generally, once habitual residence is established and the law chosen coincides with the law of that residence, a *prima facie* presumption arises that the choice is valid. A person seeking to invalidate that choice may then establish facts which prove that the residence was immaterial. Thus, the burden of proof shifts to the person who contests the testator's choice of law.

147. No requirement should be made with regard to the point in time that is relevant for the assessment of the immaterial character of the habitual residence for purposes of Art. 17 SP. Factors that could be considered in this analysis may include (1) whether it was fair and reasonable for the testator to choose the law under the circumstances of the case; (2) where the testator selected the law of a former habitual residence, whether ties to that former residence were maintained that – while not amounting to habitual residence – showed a continued interest in that place; (3) whether the connection between the testator and the law of the habitual residence is strong enough to outweigh expectations of third parties that a different law applies. For instance, a person may have lived at a young age in a State that does not grant forced heirship. At the time that place would have qualified as the person's habitual residence. The person moved to another State and severed all ties with the former habitual residence. Forty years later the person drafts a will selecting the law of that previous habitual residence with the intention of evading forced heirship provisions. If contested, that choice will not be upheld.

*Law governing the testator's matrimonial property regime*¹⁹⁴

148. The Institute proposes that a married testator may select the law governing his or her matrimonial property regime as the law applicable to succession provided that the matrimonial property regime continues to exist at the time of death. If the deceased is survived by a spouse, the rules on succession and the rules on the dissolution of matrimonial property regimes – in jurisdictions that recognise matrimonial property¹⁹⁵ – vie for application¹⁹⁶. The harmonisation of these rules within one legal system is difficult enough, and the application of the laws of different States to succession and matrimonial property would render the situation unnecessarily complex and should

¹⁹⁴ See discussion in relation with Art. 41 on the content of the certificate *infra* para. 306.

¹⁹⁵ Common law systems do not recognise matrimonial property as known in the civil law.

¹⁹⁶ See the introduction *supra* in para. 9 seq.

be avoided. The purpose of Art. 17(1)(c) of the Institute's proposal is to allow for a synchronisation of the succession law with the law governing the matrimonial property regime. Such a synchronisation would greatly simplify the administration of the estate. The option of choosing the law that governs the matrimonial property regime as the law governing succession is important in cases where the former is not available as a choice under Art. 17(1)(a),(b) of the Institute's proposal. If the testator designates the matrimonial property law as the law governing succession but at the time of death the matrimonial property regime no longer continues to exist – because the marriage ended in divorce, for example – the choice will not be recognised. This is based on the assumption that the testator would not have made that choice had he or she known the fate of the marriage at the time of the designation.

Lex rei sitae for succession to immovables

149. The Institute recommends that the testator may choose the *lex rei sitae* as the law governing the succession to immovables. To synchronise the succession law with the law governing immovables would simplify the administration of the estate¹⁹⁷. Again, this may lead to a scission whereby different laws apply to different parts of the estate. For the reasons set forth above¹⁹⁸, such a scission should generally be avoided. But where the testator through voluntary act produces a scission, that choice should be respected. Art. 17(1)(c) of the Institute's proposal may not be practically relevant within the European Union but is needed for immovables that are situated outside the European Union; cf. Art. 25 SP.

Sufficient if choice is clearly demonstrated

150. Art. 17(2) SP requires that the choice must be expressly determined. By contrast, the Institute proposes that it should be sufficient if the choice is clearly demonstrated by the terms of the testamentary disposition or the circumstances of the case. It is important that the courts are given a device flexible enough to determine what the testator really wanted. There may be instances where it is clear from the facts and circumstances of the case that the testator wanted a certain law to apply but failed to include an express provision designating that law. For example, reference made to certain legal concepts would point to the legal system that employs them; where a will drafted in German refers to the “*Einantwortung*” or to the estate as “*Verlassenschaft*” (instead of “*Nachlass*”), this indicates the testator's belief and inten-

¹⁹⁷ Dutta (supra n. 38) 578.

¹⁹⁸ See supra para. 128 seq.

tion that Austrian law instead of German law applies. It seems unreasonable and overly formalistic to require an express determination – an approach that carries the risk of producing unjust results.

Article 18 – Agreements as to succession

1. An agreement regarding a person's succession shall be governed by the law which, under this Regulation, would have been applicable to the succession of that person in the event of their death on the day on which the agreement was concluded. If, in accordance with this law, the agreement is not valid, its validity shall nevertheless be accepted if it is in accordance with the law which, at the time of death, is applicable to the succession under this Regulation. The agreement shall therefore be governed by this law.

2. An agreement concerning the succession of several persons shall be valid in substantive terms only if this validity is accepted by the law which, pursuant to Article 16, would have applied to the succession of one of the persons whose succession is involved in the event of death on the day on which the agreement was concluded. If the contract is valid pursuant to the law applicable to the succession of only one of those persons, that law shall apply. Where the contract is valid pursuant to the law applicable to the succession of several of these persons, the agreement shall be governed

Article 18 – ~~Agreements as to succession~~ Testamentary dispositions concerning the succession of a single person

1. ~~An agreement regarding a person's succession~~ *The existence, material validity, effects and interpretation of a testamentary disposition concerning the succession of one person only shall be governed by the law which, under this Regulation pursuant to Article 16, would have been applicable to the succession of that person in the event of their death on the day on which the agreement testamentary disposition was concluded drawn up.* If, in accordance with this law, the ~~agreement testamentary disposition~~ *is not materially valid, its validity shall nevertheless be accepted if it is in accordance with it shall be governed by the law which, at the time of death, is applicable to the succession under this Regulation. The agreement shall therefore be governed by this law.*

2. ~~An agreement concerning the succession of several persons shall be valid in substantive terms only if this validity is accepted by the law which, pursuant to Article 16, would have applied to the succession of one of the persons whose succession is involved in the event of death on the day on which the agreement was concluded. If the contract is valid pursuant to the law applicable to the succession of only one of those persons, that law shall apply. Where the contract is valid pursuant to the law applicable to the succession of several of these persons, the agreement shall be governed~~

by the law with which it has the closest links.

3. The parties may determine as the law governing their agreement the law which the person or one of the persons whose succession is involved could have chosen in accordance with Article 17.

4. The application of the law provided for in this Article shall not prejudice the rights of any person who is not party to the agreement and who, in accordance with the law determined in Article 16 or 17, has an indefeasible interest or another right of which it cannot be deprived by the person whose succession is involved.

~~by the law with which it has the closest links. Paragraph 1 shall also apply to the capacity of the testator to make a testamentary disposition. The capacity of the testator is not affected by a later change of the governing law.~~

~~3. The parties may determine as the law governing their agreement the law which the person or one of the persons whose succession is involved could have chosen in accordance with Article 17.~~

~~4. The application of the law provided for in this Article shall not prejudice the rights of any person who is not party to the agreement and who, in accordance with the law determined in Article 16 or 17, has an indefeasible interest or another right of which it cannot be deprived by the person whose succession is involved.~~

3. The testator or the parties of an agreement as to succession may determine as the law governing the testamentary disposition the law which the person whose succession is involved could have chosen in accordance with Article 17.

Article 18a – Testamentary dispositions concerning the succession of several persons

1. A testamentary disposition concerning the succession of several persons shall be deemed to exist and to be materially valid only if the existence and material validity are accepted by at least one of the laws which, pursuant to Article 16, would have been applied to the succession of the persons whose succession is involved in the event of death on the day on which the testamentary disposition was drawn up. If the existence and material validity are accepted by one of those laws only, the effects and interpretation of the testamentary disposition shall be governed by that law. If the testa-

mentary disposition is existent and materially valid pursuant to several of the laws, the law governing the effects and interpretation shall be the law of the State with which the testamentary disposition has the closest links.

2. *Article 18(2) applies accordingly.*

3. *The parties may determine as the law governing their testamentary disposition the law which one of the persons whose succession is involved could have chosen in accordance with Article 17.*

Summary

151. The Institute proposes the adoption of special conflict rules encompassing not only succession agreements but also wills and joint wills. On this account the Institute suggests the following modifications of Art. 18 SP:

- The scope of Art. 18(1) SP should be extended to wills in order to cover all kinds of testamentary dispositions concerning the succession of a *single* person.

- The scope of Art. 18(2) SP should be extended to joint wills in order to encompass all kinds of testamentary dispositions concerning the succession of *several* persons. For the sake of clarity, the rules concerning the succession of *several* persons should be shifted to a separate article (see the proposed Art. 18a).

- Art. 18(4) SP should be deleted (see *infra* para. 158).

152. Furthermore, the Institute recommends clarifying the delimitation of the general conflict rules in Art. 16, 17 on the one side and the special conflict rules for testamentary dispositions in Art. 18 SP (and the proposed Art. 18a) on the other side (see *infra* para. 154).

Comments

Need for special conflict rules covering all testamentary dispositions

153. If the general conflict rules for successions in Art. 16 SP are applied to testamentary dispositions, foreseeability interests of the testators or of parties to a succession agreement could be frustrated because they do not necessarily know where the habitual residence of the deceased will ultimately lie and, hence, which law will eventually govern the testamentary disposi-

tion¹⁹⁹. Art. 17 SP does not suffice to balance this lack of foreseeability because testators or parties to a succession agreement are not always aware of the need for a choice of law. The necessity to draw up a new testamentary disposition after a change of the habitual residence – and, hence, a change of the applicable law – would also not always be realised by the persons involved. Furthermore, it would impose upon them additional costs and psychological strain. Therefore the special conflict rules providing for the application of the law which would hypothetically govern the succession at the time the disposition was made should not be restricted to agreements as to succession, but should also cover wills and joint wills²⁰⁰. Hence, the proposed Art. 18 and Art. 18a refer to testamentary dispositions in general, as they are defined in the proposed Art. 2(c) SP.

Scope of the proposed special conflict rules

154. In the Succession Proposal the delimitation between Art. 18 and Art. 16, 17 SP is ambiguous. The wording “agreement [...] governed by the law” does not provide a clear guideline. The proposed Art. 18 and Art. 18a clarify the scope of the special conflict rule and make clear that these special provisions only determine the law governing the existence, material validity, effects and interpretation of a testamentary disposition²⁰¹. Notwithstanding the proposed Art. 18b regarding the formal validity of testamentary dispositions (see *infra* para. 159 seq.), all other matters relating to the succession shall be governed by Art. 16 and 17 SP. The implications of Institute’s proposal are demonstrated by the following example: In an agreement as to succession, the parties only appoint a legatee entitled to certain parts of the estate of one of the parties. The proposed Art. 18 determines the law applicable to this legacy. All other matters concerning the succession, e.g. the determination of the heirs, are governed by the law specified in Art. 16, 17 SP. It is neither recommendable to extend the scope of Art. 18, 18a to the succession as a whole nor to restrict it to the existence and material validity of the testamentary disposition: The extension would cause insolvable problems if a person draws up several testamentary dispositions which are compatible as to their content, e.g. if they contain different legacies. The restriction would frustrate the foreseeability interests of the person or the persons

¹⁹⁹ See *Dutta* (*supra* n. 38) 586 seq.

²⁰⁰ Cf. also the special rules for certain testamentary dispositions in Sec. 30(1) sentence 1 of the Austrian Private International Law Act; Sec. 18(1) sentence 1 of the Czechoslovakian Private International Law Act (now for the Czech Republic and Slovakia); Art. 26(5) sentence 1 of the Introductory Act to the German Civil Code; Art. 35 sentence 1 of the Polish Private International Law Act; Art. 64 of the Portuguese Civil Code; Art. 32(2) of the Slovenian Private International Law Act; Art. 9(8) sentence 2 of the Introductory Title to the Spanish Civil Code; Sec. 6 of chapter 1 of the Swedish International Successions Act.

²⁰¹ See also Art. 9(1) and 10(1) of the Hague Succession Convention.

drawing up a testamentary disposition. They are not only interested in the validity of the testamentary disposition, but also in the effects which the testamentary disposition will have; such effects should therefore be subject to the same law as the validity.

Capacity to testate

155. As clarified in the proposed Art. 18(2) sentence 1 and Art. 18a(2), the special conflict rules should also cover the capacity of the testator to testate²⁰², notwithstanding the fact that some Member State laws²⁰³ apply the general conflict rule for the capacity of a person also to the capacity to testate and notwithstanding the fact that capacity is excluded from the scope of the Hague Succession Convention²⁰⁴. The capacity to testate is a succession-related question. Different conflict rules in the Member States would endanger the uniform application of the future European conflict rules on succession and wills. The Institute basically proposes to subject the capacity to testate to the law in force at the habitual residence of the testator at the time the testamentary disposition was drawn up. Similar to what some Member State laws prescribe²⁰⁵, the Institute recommends, in the proposed Art. 18(2) sentence 2 and Art. 18a(2), that the loss of capacity to testate caused by a change of the applicable law has no impact on a capacity which was earlier recognised under a law that had previously been applicable²⁰⁶. Otherwise, a testator who had validly testated might not be able to revoke that disposition if he or she is now habitually resident in a State according to whose law he or she has no capacity to testate.

²⁰² See Green Paper replies of the Czech government p.3, the German Federal Council p.3, the Luxembourgian government p.2, the Swedish government p.3, the UK government Annex B p.7 and the Ulrik Huber Institute p.5; see also *Dutta* (supra n.38) 588 seq.; *Hayton*, Determination of the objectively applicable law governing succession to deceaseds' estates, in: *Les successions internationales dans l'UE/Conflict of Law of Succession in the European Union/Internationales Erbrecht in der EU*, ed. by Deutsches Notarinstitut (2004) 359–367 (360); *Harris* (supra n.66); *Rauscher*, Heimatlos in Europa?, Gedanken gegen eine Aufgabe des Staatsangehörigkeitsprinzips im IPR, in: FS Erik Jayme I (2004) 719–745 (729). See, however, also Art.1(2)(a) of the Rome I Regulation, which excludes capacity from the scope of the Regulation (exception: Art.13). Against a European rule are: DNotI Study p.263; Green Paper reply of GEDIP p.3; *Dörner/Hertel/Lagarde/Riering* (supra n.116) 6; *Lehmann* (supra n.66) 157.

²⁰³ See e.g. for Germany BGH 12.1.1967, NJW 1967, 1177. Cf., however, also Art.26(5) sentence 2 of the German Introductory Act to the Civil Code.

²⁰⁴ Art.1(2)(b) of the Hague Succession Convention. See also Art.5 of the Hague Form Convention.

²⁰⁵ See Sec.28(2) of the Estonian Private International Law Act; Art.26(5) sentence 2 of the German Introductory Act to the Civil Code; Art.63(2) of the Portuguese Civil Code. See also Sec.3 sentence 2 of chapter 1 of the Swedish International Successions Act.

²⁰⁶ *Dutta* (supra n.38) 589; *Lehmann* (supra n.66) 157.

The “curing” rule

156. The Institute welcomes the adoption of the “curing” rule in Art. 18(1) sentences 2 and 3 SP which can be found in other systems as well²⁰⁷. This rule is an expression of the *favor-negotii* principle which strives for the validation of wills as well. We also discussed whether the curing rule should be extended to testamentary dispositions concerning the succession of several persons. With regard to the *favor-negotii* principle such an extension would be recommendable. On the other hand, applying the curing rule to testamentary dispositions concerning the succession of several persons would cause some difficulties. One of the testators could – by changing the habitual residence – influence the application of a certain law to the succession of the *other* testator. Thus, a law would govern the effects and the interpretation of the testamentary disposition which the testator can neither influence nor foresee. Such a rule would be very questionable. Therefore, in case of an extension of the curing rule, it would be necessary to protect the interests of the testator who has not moved to the State according to whose law the testamentary disposition is valid.

Choice of law by the parties or testators

157. In accordance with Art. 18(3) SP, the proposed Art. 18(3) and 18a(3) clarify that in case of an agreement as to succession or a joint will, a choice of law only affects the applicable law if the choice is made by *all* the parties or testators. However, the testator of a will is only subject to the restrictions of Art. 17 SP.

No special protection of family members

158. Finally, the Institute suggests deleting Art. 18(4) SP. The infeasible interests and rights of the deceased’s family members are not illegitimately affected by the proposed Art. 18 and Art. 18a. The proposed sentence 1 of Art. 18(1) does not prejudice the mandatory succession rights of family members because the deceased could already have chosen the law determined by this provision according to the proposed Art. 17(1)(b). The array of laws which can be applicable according to the proposed Art. 18a(1), (3) is restricted to the laws potentially applicable under Art. 16 and 17 SP. Thus, mandatory succession rights of family members are already protected at that stage and need no further protection. If the European legislator decides, however, to retain Art. 18(4) SP, at the very least the reference to Art. 17 SP

²⁰⁷ See Sec. 30(1) sentence 2 of the Austrian Private International Law Act; Art. 9(2) of the Hague Succession Convention (for agreements as to succession involving the estate of one person only).

should be deleted. No family member has a legitimate (and compelling) interest in receiving the benefits of mandatory succession rights provided by any law the deceased could have chosen.

Article 18b – Formal validity of testamentary dispositions

1. A testamentary disposition is formally valid if its form complies with the law

(a) of the State where the testator made the disposition, or

(b) of the State of nationality possessed by the testator, either at the time when he or she made the disposition or at the time of his or her death, or

(c) of the State in which the testator, according to the law of that State, had his or her domicile either at the time when he or she made the disposition, or at the time of his or her death, or

(d) of the State in which the testator had his or her habitual residence either at the time when he or she made the disposition or at the time of his or her death, or

(e) so far as immovables are concerned, of the State where they are situated, or

(f) which governs, or would at the time of the disposition have governed, the succession by virtue of this Regulation.

2. The preceding paragraph shall also apply to testamentary dispositions revoking earlier testamentary dispositions. The revocation shall also be formally valid if its form complies with any of the laws specified in the preceding paragraph according to which the revoked testamentary disposition was valid.

3. The following issues shall also be deemed to affect formal validity:

(a) Limitations of the permitted forms of testamentary dispositions by reference to the age, nationality or other personal conditions of the testator;

(b) qualifications that must be possessed by witnesses required for the validity of a testamentary disposition;

(c) prohibitions of certain types of testamentary dispositions.

Summary

159. The Institute proposes to adopt the successful 1961 Hague Convention on the form of testamentary dispositions, however, with three modifications:

– Firstly, the scope of the conflict rule should be extended to succession agreements (see the proposed Art. 18b(1) SP and *infra* para. 162).

– Secondly, a testamentary disposition should also be formally valid if it complies with the law which according to the general conflict rule governs the succession or would have governed it at the time the disposition was made (see the proposed Art. 18b(1)(f) SP and *infra* para. 163).

– Thirdly, the prohibition of a certain testamentary disposition should be characterised as a matter of formal validity (see the proposed Art. 18b(3)(c) SP and *infra* para. 164).

Comments

160. In most legal systems testamentary dispositions are subject to certain formalities. The conflict rules for the formal validity of wills and joint wills have been harmonised for the majority of the Member States²⁰⁸ by the 1961 Hague Convention on the form of testamentary dispositions encompassing joint wills but not succession agreements²⁰⁹. According to Art. 1 of the Convention, the formal validity of a disposition is favoured by referring alternatively to different laws: A will is formally valid if its form complies with (a) the law of the place where the testator made it, or (b) the law of a nationality possessed by the testator, either at the time when he made the disposition or at the time of his death, or (c) the law of a place in which the testator had his domicile either at the time when he made the disposition or at the time of his death, or (d) the law of the place in which the testator had his habitual residence either at the time when he made the disposition or at the time of his death, or (e) as far as immovables are concerned, the law of the place

²⁰⁸ Except Bulgaria, Cyprus, the Czech Republic, Hungary, Italy, Latvia, Lithuania, Malta, Portugal, Romania, Slovakia, see *supra* n. 2.

²⁰⁹ Cf. Art. 4 of the Convention.

where the immovables are situated. All conflict rules refer to the substantive law only²¹⁰. The same list of alternatively applicable laws, in principle, applies to the revocation of a will; however, the revoking will also be formally valid if its form complies with any of the laws according to which the revoked testamentary disposition was valid²¹¹. Most of the Member States which are not bound by the 1961 Hague Convention support a formal validity of testamentary dispositions by employing similar techniques of multiple, alternative connecting factors²¹².

161. The Succession Proposal does not address the formal validity of testamentary dispositions at all, as Art. 19(2)(k) SP and Recital 19 clarify²¹³. Rather the explanatory memorandum for the Proposal assumes that the partial harmonisation achieved by the Hague Form Convention suffices. That view cannot be shared – due to two reasons. First, as already mentioned, the Hague Form Convention does not apply to all Member States. It would be not very convincing to address the conflict rules on successions in general but to neglect the practically important area of testamentary dispositions and their formal validity. Hence, at least the Hague Form Convention should be adopted for the Member States not being party to it. This view was also shared by the Commission in Art. 3.3 of the earlier Discussion Paper which incorporated the 1961 Hague Convention by reference. However, a second consideration also requires that the Succession Regulation should contain its own provisions on the law applicable to formal validity of testamentary dispositions. Although those provisions should, in general, adopt the *favor-negotii* approach taken by the 1961 Hague Form Convention²¹⁴, which the proposed Art. 18b actually does, some modifications to the Hague regime – which are not precluded by the Convention²¹⁵ – should be made²¹⁶:

162. Firstly, the scope of the rules should be extended to *succession agreements* in order to cover all testamentary dispositions, as has already been

²¹⁰ See Art. 1(1) of the Convention: “internal law”.

²¹¹ See Art. 2 of the Convention.

²¹² See e.g. Art. 90(2) of the Bulgarian Private International Law Code; Sec. 18(2) of the Czechoslovakian Private International Law Act (now for the Czech Republic and Slovakia); Sec. 36(2) sentence 2 of the Hungarian Legislative Decree on Private International Law; Art. 48 of the Italian Private International Law Act; Art. 1.61 of the Lithuanian Civil Code; Art. 65 of the Portuguese Civil Code (see, however, also Art. 2223); Art. 68(3) of the Romanian Private International Law Act.

²¹³ See also Succession Proposal p. 4.

²¹⁴ See DNotI Study p. 272 seq.; EESC Opinion para. 4.3; Parliament Report p. 6 (Recommendation 4); Green Paper replies of the Dutch government p. 4, the Estonian government p. 2, the Finnish government p. 3, the French government p. 3, GEDIP p. 3, the Luxembourgian government p. 2, the Polish government p. 2, the Swedish government p. 3, the UK government Annex B p. 7 and the Ulrik Huber Institute p. 5; see also *Dörner/Hertel/Lagarde/Riering* (supra n. 116) 6; *Dutta* (supra n. 38) 548 seq.; *Harris* (supra n. 66) 216.

²¹⁵ Cf. Art. 3 of the Convention.

²¹⁶ *Dutta* (supra n. 38) 548 seq.

done by some Member States²¹⁷ and as accomplished by the proposed Art. 18b(1) through reference to the term “testamentary dispositions” (defined as “a will, a joint will or an agreement as to succession” in Art. 2(c) SP as amended by the Institute’s proposal). It should be noted that this extension of the Hague Form Convention would also encompass the formal validity of waivers by an heir, e.g. the German *Erb-* or *Pflichtteilsverzicht*, which are also covered by the definition of “succession agreement” in Art. 2(c) SP (Art. 2(d) in the Institute’s version).

163. Secondly, the list of Art. 1 of the Hague Form Convention should be supplemented by an *additional alternative connecting factor*: A testamentary disposition should also be formally valid if it complies with the law which according to the general conflict rule governs the succession of the testator or parties or would have governed it at the time the disposition was made²¹⁸. That additional connecting factor is listed in Art. 18b(1)(f) SP. The reference to the actually or hypothetically governing succession law can point to additional laws not mentioned by the present list of applicable laws in Art. 1 of the Convention, for example, in cases of a choice of law according to Art. 17 or, with regard to third States, if the general rule will accept a renvoi and, thus, point to an additional law (see Art. 26 SP).

164. The most important change, though, relates – thirdly – to the *definition* of the term “valid as regards form” in Art. 1 of the Hague Form Convention. Joint wills and succession agreements are not accepted by all Member States’ succession laws. According to some legal systems, they are void because they are regarded as an undue limitation of the freedom to testate²¹⁹. So far, it is unclear how such prohibitions of certain testamentary dispositions have to be characterised and, in particular, whether they affect the formal²²⁰ or material²²¹ validity of the disposition or whether one has to differentiate according to the purpose of the prohibition²²². The European rules should make clear – as the proposed Art. 18b(3)(c) does – that the prohibi-

²¹⁷ See Art. 83(2) of the Belgian Private International Law Act; Sec. 27(2) of the Estonian Private International Law Act; Art. 26(4) of the Introductory Act to the German Civil Code.

²¹⁸ See Art. 26(1) sentence 1 No. 5 of the Introductory Act to the German Civil Code.

²¹⁹ See e.g. Art. 4:93 of the Dutch Civil Code; Art. 968 and Art. 1130(2) of the French Civil Code; Art. 368, 1712 and Art. 1717 of the Greek Civil Code; Art. 458 and Art. 589 of the Italian Civil Code; Art. 2028, 946 and Art. 2181 of the Portuguese Civil Code; Art. 103 of Slovenian Succession Act; Art. 669 and Art. 1271 of the Spanish Civil Code.

²²⁰ See for France TGI Paris 24. 4. 1980, Rev. crit. d.i. p. 71 (1982) 684 (as to joint wills). See, however, also Trib. Monaco 23. 2. 1995, Rev. crit. d.i. p. 85 (1996) 439 (as to succession agreements).

²²¹ See Sec. 18(1) sentence 2 of the Czechoslovakian Private International Law Act (now for the Czech Republic and Slovakia); Art. 64(c) of the Portuguese Civil Code.

²²² See for Germany as to joint wills e.g. OLG Düsseldorf 6. 2. 1963, NJW 1963, 2227; OLG Frankfurt a.M. 17. 5. 1985, IPRax 1986, 111; OLG Zweibrücken 28. 10. 1991, IPRspr. 1991 No. 149; KG 11. 4. 2000, IPRspr. 2000 No. 95.

tion of a certain testamentary disposition is always a matter of formal validity²²³ and *not* of material validity covered by Art. 18, 18a SP. That solution would not only secure predictability for the testator, but would also favour the validity of the testamentary disposition.

165. The proposed Art. 18b does not interfere with the Hague Form Convention. Art. 45(1) SP clarifies that existing conventions to which the Member States are party are not affected by the future Regulation. Nevertheless, even Member States having ratified the Hague Form Convention would be bound by the proposed modifications of the Convention by Art. 18b SP. As already mentioned, the Convention does not prohibit modifications of the conflict rules contained in the Convention by the Contracting States which – as would be done by the proposed modifications – further favour the formal validity of a testamentary disposition (cf. Art. 3 of the Convention). Hence, Art. 18b would not affect the duties of the Member States under the Hague Form Convention.

Section III General provisions

Article 19 – Scope of applicable law

1. The law determined in Chapter III shall govern the succession as a whole, from its opening to the final transfer of the inheritance to the beneficiaries.

2. This law shall govern in particular:

(a) the causes, time and place of the opening of succession;

(b) the eligibility of the heirs and legatees, including the inheritance rights of the surviving spouse, determination of the respective shares of such persons, the responsibilities imposed on them by the deceased, and the other rights governing succession which have their source in the death;

Article 19 – Scope of applicable law

~~(a) the causes, time and place of the opening of succession;~~

~~(ba) the eligibility determination of the heirs, beneficiaries, devisees and legatees, their respective shares including the inheritance rights of the surviving spouse, determination of the respective shares of such persons, and the responsibilities imposed on them by the deceased as well as and the other~~

²²³ *Dutta* (supra n. 38) 548 seq.; *Stiß*, Der Vorschlag der EG-Kommission zu einer Erbrechtsverordnung (Rom IV-Verordnung) vom 14. Oktober 2009; *Zeitschrift für die Steuer- und Erbrechtspraxis* (ZErb) 11 (2009) 342–348 (345). See also DNotI Study p. 263; Document de travail des services de la Commission, Annexe au Livre Vert sur les Successions et Testaments, SEC(2005) 270 of 1. 3. 2005, p. 14; Green Paper Replies of the French government p. 4 and the Polish government p. 2; *Dörmer/Hertel/Lagarde/Riering* (supra n. 116) 6.

(c) the capacity to inherit;
 (d) the particular causes of the incapacity to dispose or receive;

(e) disinheritance and debarment from succession;

(f) the transfer of assets and rights making up the succession to the heirs and legatees, including the conditions and effects of accepting or waiving the succession or legacy;

(g) the powers of the heirs, the executors of the wills and other administrators of the succession, in particular the sale of property and the payment of creditors;

(h) responsibility for the debts under the succession;

(i) the freely disposable portion, the reserved portions and the other restrictions on the freedom to dispose of property upon death, including the allocations deducted from the succession by a judicial authority or another authority for the benefit of the relatives of the deceased;

(j) any obligation to restore or account for gifts and the taking of them into account when determining the shares of heirs;

(k) the validity, interpretation, amendment and revocation of a disposition of property upon death, with the exception of its formal validity;

(l) sharing the inheritance.

succession rights governing succession arising by reason of death, particularly the rights of the surviving spouse, with the exception of the rights which flow from the matrimonial property regime which have their source in the death;

(*eb*) the capacity to inherit;

(*ed*) the particular causes of the incapacity to dispose or receive;

(*ed*) disinheritance and ~~debarment from succession~~ *disqualification*;

(*fe*) ~~the devolution~~ *the transfer* of assets and rights ~~making up~~ *in* the succession to the heirs, *beneficiaries, devisees* and legatees, including the conditions and effects of accepting or waiving the succession or legacy;

(*gf*) the powers of the heirs, the executors of the wills and other administrators of the succession, in particular *for* the sale of property and the payment of creditors;

(*hg*) responsibility for the debts *of the estate* ~~under the succession~~;

(*ih*) the ~~freely disposable portions of the estate freely disposable by testamentary disposition~~, the reserved portions and the other ~~restrictions on the freedom to dispose of property upon death~~ *indefeasible rights to the estate*, including the allocations deducted from the succession by a judicial authority or another authority for the benefit of the relatives of the deceased;

(*ji*) any obligation to restore or account for gifts and the taking of them into account when determining the shares of heirs, *subject to Article 19a*;

~~(k) the validity, interpretation, amendment and revocation of a disposition of property upon death, with the exception of its formal validity;~~

(*lj*) *the distribution of the estate, subject to a choice of law in accordance with Regulation (EC) No 593/2008* ~~sharing the inheritance.~~

Summary

166. Apart from some linguistic amendments the Institute proposes:

- to delete Art. 19(2)(a) SP (see *infra* para. 168),
- to clarify Art. 19(2)(b) SP, now Art. 19(2)(a) of the Institute’s proposal (see *infra* para. 170 *seq.*), and
- to allow for a free choice of the applicable law by the heirs as to the distribution of the estate in Art. 19(2)(l) SP, now Art. 19(2)(j) of the Institute’s proposal (see *infra* para. 173).

Comments

167. Art. 19 defines the scope of the law applicable to the succession. Apart from the inclusion of the administration of the estate (Art. 19(2)(f), (g), (h) and (l) SP) the provision is inspired by Art. 7 of the Hague Succession Convention. However, as has already been noted earlier, the French version of the Succession Proposal often copies the French version of the Convention whereas the English version of the Proposal deviates from the English version of the Convention. Apart from a linguistic revision caused *inter alia* by such deviations (see Art. 19(2)(b), (e) (f), (g), (h) and (i) SP and *infra* para. 169 and 172; for the changes in Art. 19(2)(j) SP see *infra* para. 174 *seq.*), the Institute recommends the following substantive amendments of the Proposal:

Causes, time and place of the opening of succession, Art. 19(2)(a) SP

168. First, the Institute proposes to delete Art. 19(2)(a) SP. It is not entirely clear to which issues exactly the Commission intends to refer with that provision. Unlike most of the other matters mentioned in Art. 19(2) SP, letter (a) has not been taken from Art. 7(2) of the Hague Succession Convention. It bears emphasis that Art. 19(2)(a) SP is *misleading*. Especially the term “causes [...] of the opening of succession” or “*les causes [...] de l’ouverture de la succession*” in the French text and “*Gründe für den Eintritt des Erbfalls*” in the German version of the Succession Proposal could be understood as referring to the death of the deceased which is the cause for the opening of the succession²²⁴. It would, however, be rather surprising to characterise the question whether, when and where a person has died as a question of the law of succession. The issue of death is a preliminary question of the legal status of a person. As a consequence, Art. 1(3)(a) SP excludes preliminary questions as to the “the disappearance, absence and presumed death of a natural person” from the scope of the future Regulation. On the other hand, if

²²⁴ See e.g. for Germany Sec. 1922(1) of the Civil Code.

Art. 19(2)(a) SP is intended to include the “opening of the succession”, the provision would be *superfluous* as Art. 19(1) SP already clarifies that the law governing the succession covers the succession from its opening to the final transfer of the estate to the heirs.

Determination of heirs, beneficiaries, devisees and legatees and their respective shares, Art. 19(2)(b) SP – the new Art. 19(2)(a)

169. Second, the English version of the Succession Proposal should adopt the terminology from the English version of the Hague Succession Convention and speak of “determination” rather than “eligibility” of the heirs. The term “eligibility” is generally associated with disinheritance and disqualification and not with the question of who is entitled to the estate. Since the Institute recommends that the scope of the Succession Proposal should include testamentary and statutory trusts created by rules of intestacy (see *supra* para. 44 seq.), “beneficiaries and devisees” should be added to the list of persons possibly entitled to the estate. This would also be consistent with Art. 7 of the Hague Succession Convention.

170. Apart from these threshold changes the Institute proposes that Art. 19(2)(b) SP (Art. 19(2)(a) as amended by the Institute) should clarify *which* rights of the surviving spouse to the estate are covered by the scope of the *lex hereditatis*. The Institute would therefore prefer to elucidate that scope by an exclusion of “the rights which flow from the matrimonial property regime”. At present the reference to “the rights of the surviving spouse” in Art. 19(2)(b) SP seems *superfluous* and could therefore give rise to misconceptions. It is common understanding in the laws of the European Union and beyond that the spouse can be an heir, beneficiary, devisee or legatee, albeit with a position which varies considerably within the different legal systems²²⁵. These positions of the surviving spouse would therefore be covered without any special reference. Indefeasible rights of the surviving spouse to the estate such as the legitimate portion²²⁶ or rights to the (usufruct of the)

²²⁵ For example, under Spanish law the surviving spouse will only have the right to a usufruct of the estate, cf. Art. 834 and 837 of the Spanish Civil Code. According to the French Civil Code the surviving spouse will have the choice between a quarter of the estate or a usufruct of the whole estate if he or she inherits together with mutual children of the deceased, and has the right to half of the estate if he or she inherits together with parents of the deceased, cf. Art. 575 and Art. 575-1 of the Civil Code. Under Dutch law the surviving spouse will inherit the whole estate if the deceased had no children, cf. Art. 4:10 of the Dutch Civil Code, and although the surviving spouse shares the estate equally with the children of the deceased, their rights are reduced to a mere monetary claim, due at the time of death of the surviving spouse, cf. Art. 4:13 of the Dutch Civil Code. In common law systems the surviving spouse will often be entitled to a certain lump sum to be paid before the distribution of the estate, see Sec. 46 seq. and Sec. 55 of the English Administration of Estates Act 1925. Cf. also Sec. 8 and 9 of the Succession (Scotland) Act 1964.

²²⁶ See *supra* n. 45.

last matrimonial home²²⁷ would fall within the scope of Art. 19(2)(h) as amended by the Institute²²⁸.

171. Rights of the surviving spouse to the estate can, however, also flow from the applicable matrimonial property regime. The matrimonial property regime does not only influence the succession indirectly by determining which assets belong to the estate of the deceased; in some cases there is also a direct impact. The surviving spouse may indeed have special rights to the estate under the specific matrimonial property regime²²⁹. The characterisation of these rights is highly debated within the field of conflict of laws²³⁰. Since all other rights of the surviving spouse are covered by either the first half-sentence of the new Art. 19(2)(a) or by Art. 19(2)(h) as amended by the Institute, the express reference to the “rights of the surviving spouse” could lead to the misconception that, despite the exclusion in Art. 1(3)(d), it refers to rights of the surviving spouse arising from a matrimonial property regime. An explicit exception of rights arising from the matrimonial property regime is therefore suggested by the Institute.

Restrictions on the freedom of testation and other indefeasible rights to the estate, Art. 19(2)(i) SP – the new Art. 19(2)(h)

172. A change of wording is also proposed for the new Art. 19(2)(h). The Institute suggests that the Succession Proposal adopts the terminology of the Hague Succession Convention here as well. In the law reforms of the last decades, the concept of limitation of the freedom of the deceased to testate, in the sense that there is a specific part of the estate that is unconditionally reserved for the heirs, has been somewhat questioned²³¹. Supplementary to, or instead of, legitimate portions, close family members or dependants of the deceased have been awarded different rights²³² to the estate that they cannot be deprived of by a testamentary disposition but that do not constitute classic legitimate portions restricting the freedom of the testator to dispose of his or her property. The wording of Art. 19(2)(h) as amended by the Institute

²²⁷ See Sec. 758 of the Austrian Civil Code; Art. 4:29 of the Dutch Civil Code; Art. 540 of the Italian Civil Code.

²²⁸ See *infra* para. 172.

²²⁹ See, for example, Sec. 1371(1) of the German Civil Code. See also *supra* para. 9.

²³⁰ See *Staudinger (-Mankowski)*, Kommentar zum BGB, EGBGB/IPR: Art 13–17b EGBGB (2003) Art. 15 EGBGB para. 341 seq.

²³¹ See, for example, the parliamentary debate during the preparation of the new Dutch Civil Code, *Burght/Ebben/Kremer*, *Parlementaire Geschiedenis van het Nieuwe Burgerlijk Wetboek* (2003) 1385 with further references.

²³² See, for example, Art. 4:29, 30 and 35 of the Dutch Civil Code granting maintenance claims or Art. 4: 38 granting rights to parts of certain business property; Australia (New South Wales) Family Provision Act 1982; English Inheritance (Provision for Family and Dependents) Act 1975; Family Law (Scotland) Act 2006.

should, in accordance with the Hague Convention, acknowledge this development by referring, subsequent to the reserved portion, to “indefeasible rights” to the estate (see also *supra* para. 34 *seq.* and *infra* para. 249).

Choice of law by the heirs as to the distribution of the estate – the new Art. 19(2)(j) SP

173. The distribution of the estate will generally be agreed upon by the several co-heirs; only occasionally will the matter be dealt with by a court in litigious proceedings. In the latter case the distribution will be subject to the law governing the whole succession under Art. 16 or Art. 17 SP. However, where an agreement on the distribution of the estate is achieved, the parties are generally free to provide for all kinds of solutions that may or may not be in line with the will of the deceased. Therefore, they should, at least to a certain extent, equally be free to choose the law applicable to that distribution as it is envisaged by some Member State laws²³³. Where the estate is connected to several States, they will most likely select a notary public for the authentication of the distribution agreement who appears to be best placed for that purpose. The notary will however often refuse to authenticate an agreement governed by a foreign law; the parties should therefore be allowed to choose the law of the notary’s State of residence as the applicable law. The reference to the Rome I Regulation is not meant to expand the scope of application of that instrument, but to clarify that the legal framework of the choice of law clause is governed by Rome I and not by the much more restrictive rules of the future Succession Regulation.

Article 19a – Restitution of gifts from the donee

1. *The restitution of a lifetime gift from a donee can be claimed under the law applicable to the succession according to this Regulation only to the extent that restitution could also be claimed under the law which would have governed the succession of the donor by virtue of this Regulation at the time the gift was made.*

2. *When applying paragraph 1, a choice of law by the donor according to Articles 17, 18(3) and 18a(3) shall only be considered if the donee knew of the choice of law at the time the gift was made.*

²³³ See e. g. Art. 4(2) sentence 1 of the Dutch International Successions Act and Art. 46(3) of the Italian Private International Law Act.

Summary

174. The Institute suggests a special conflict rule for the restitution of lifetime gifts made by the deceased in order to protect the donee and third parties from a subsequent change of the applicable succession law. A claim for restitution of the gift under the law applicable to the succession should only be allowed to the extent that the gift could also be reclaimed under the law hypothetically governing the succession of the donor at the time the gift was made.

Comments

Background

175. Almost every succession law throughout Europe provides the possibility to reclaim gifts from the donee which the donor has made during his or her lifetime as far as the restitution of the gift is necessary to satisfy mandatory succession rights of family members²³⁴. That concept, which is sometimes denoted as “clawback”, is intended to foreclose the deceased evading mandatory succession rights of family members by gifts made *inter vivos* to third persons. However, the rules on clawback differ in many respects, for example with regard to time periods in which a reclaim is possible. Some legal systems provide for fixed periods²³⁵; others, such as French and Italian law, do not provide for any time restrictions at all. Furthermore, even the persons from whom the gift can be reclaimed differ: In most legal systems the gift can only be reclaimed from the donee. In some legal systems, however, not only the donee but also third parties who acquire the object of the gift from the donee can face clawback claims²³⁶. Other major differences flow from the diverse concepts of mandatory succession rights to which the restitution of lifetime gifts is linked: Whereas spouses and descendants benefit from mandatory succession rights in most legal systems, some jurisdictions also protect parents²³⁷ or persons closely linked to the deceased who are treated as children of the deceased²³⁸. Also the extent of mandatory succes-

²³⁴ See, for example, Sec. 2325 seq. of the German Civil Code; Art. 555 seq. of the Italian Civil Code; Sec. 951, 785 of the Austrian Civil Code; Art. 923 seq. of the French Code Civil; Sec. 10 seq. of the UK Inheritance (Provision for Family and Dependents) Act 1975.

²³⁵ See e.g. Sec. 10(2)(a) of the UK Inheritance Act (six years before the death of the donor), Sec. 2325(3) of the German Civil Code (ten years before the death of the donor, however, reducing the value of the gift each year by 10 percent), Sec. 785(3)2 of the Austrian Civil Code (two years before the death of the donor for gifts made to non-family members).

²³⁶ See, for example, Art. 555(1), 560 seq. of the Italian Civil Code.

²³⁷ See Sec. 2303(2)1 of the German Civil Code; Sec. 762 of the Austrian Civil Code.

²³⁸ Sec. 1(1)(d) of the UK Inheritance Act.

sion rights – and consequently of the reclaim of gifts impairing those rights – varies considerably: Some jurisdictions award family members fixed shares of the estate²³⁹ or of its value²⁴⁰ whereas other legal systems vest the court with broad discretion to grant reasonable maintenance²⁴¹. Consequently, claims for restitution of such gifts very much depend on the applicable law.

The problem: Uncertainty of the applicable law at the time the gift is made

176. Characterised as a contractual matter related to the donation²⁴², such claims would be subject to the conflict rules for contractual obligations contained in the Rome I Regulation²⁴³. Other authors regard clawback as a property-related matter governed by the *lex rei sitae*²⁴⁴. A third and predominant opinion characterises the matter as one of succession law; this approach is shared, for example, by the Hague Succession Convention²⁴⁵, by the conflicts laws of several Member States²⁴⁶ and by the European Commission, as illustrated by Art. 19(2)(j) SP²⁴⁷. The Institute also shares the latter view: The only purpose of clawback provisions is to ensure that mandatory succession rights are not circumvented by gifts made *inter vivos* and that the claims of the deceased's family members based on those mandatory succession rights can be satisfied.

177. However, applying the general conflict rule on succession to the restitution of lifetime gifts – as it is presently done in some Member States²⁴⁸ – entails considerable uncertainty for the donee or a third person from whom the gift might be reclaimed. Neither the donee nor the third person knows, at the time the gift is made, which law will eventually govern the succession after the death of the donor. The applicable succession law might subsequently change by a later change of the donor's habitual residence (Art. 16 SP) or by a later choice of law of the donor (Art. 17 SP). Suppose a gift was made by a donor habitually resident in Austria: Under Austrian law the donee (not being a family member) could only foresee the reclaim of the gift within a period of two years after the gift was made²⁴⁹. If, however, the do-

²³⁹ Art. 913 seq. of the French Code Civil; Art. 537 seq. of the Italian Codice Civile.

²⁴⁰ Sec. 2303 of the German Civil Code; Sec. 765 of the Austrian Civil Code.

²⁴¹ Sec. 1 of the UK Inheritance Act.

²⁴² *Frankenstein*, Internationales Privatrecht IV (1935) 402, 403.

²⁴³ For purposes of the Rome I Regulation gifts are regarded as contracts, see *Giuliano/Lagarde* Report, O.J. 1980 C 282/1 (Art. 1 para. 3). Cf. Recital 9 of the Succession Proposal.

²⁴⁴ G. Miller, *International Aspects of Succession* (2000) 229.

²⁴⁵ See Art. 7(2)(c) of the Hague Succession Convention.

²⁴⁶ See Book 26 Sec. 7 No. 4 of the Finnish Succession Act; see for Germany BGH 7.3. 2001, NJW 2001, 2398; 17.4. 2002, NJW 2002, 2469.

²⁴⁷ See also Recital 9 of the Succession Proposal.

²⁴⁸ See e.g. for Germany BGH 7.3. 2001, 2398; 17.4. 2002, 2469 (both supra n. 246).

²⁴⁹ See Sec. 785(3)2 of the Austrian Civil Code.

nor subsequently relocated to a new habitual residence in France where he or she dies, the succession, under Art. 16 SP, is governed by French law which allows the gift to be reclaimed from the donee without any time restrictions. As a result, restitution could be claimed even though the donee could neither foresee nor foreclose the change of the law governing succession. The application of clawback provisions of a law which was not foreseeable at the time the gift was made is of special concern for the United Kingdom where the restitution of gifts could endanger the lifetime dispositions on trust which are common under English law²⁵⁰.

The solution: Cumulative application of the actual and hypothetical lex hereditatis

178. In order to protect the donee and third parties, the Institute proposes a special conflict rule for the restitution of lifetime gifts slightly deviating from the general conflict rules in Art. 16 and Art. 17 SP. Lifetime gifts should only be reclaimable where the specific criteria for reclaiming a gift from the donee are satisfied under two laws: the law applicable to the succession according to Art. 16 and 17 SP, and the law which would hypothetically have governed the succession in the donor's estate at the time the gift was made²⁵¹. That special conflict rule is laid down in the first paragraph of the proposed Art. 19a. Hence, the law actually governing the succession at the time of death and the law hypothetically governing at the time the gift was made apply cumulatively.

179. The cumulation of laws protects the donee against any disadvantages resulting from a later change of applicable law, but leaves the donee all advantages of such a change. In the case outlined just above in para. 177, the law actually governing succession under this Regulation would be French law, but at the time the gift was made the deceased was habitually resident in Austria, and the hypothetical *lex hereditatis* at that time was Austrian law. Art. 19a protects the donee from a reclaim he or she had no reason to expect under Austrian law²⁵². In the opposite case where the deceased made the gift at a time he or she was habitually resident in France but then moved to Aus-

²⁵⁰ See Consultation Paper CP41/09 of the Ministry of Justice on the European Commission proposal on succession and wills of 21. 10. 2009, para. 13 seq.; Statement of the Secretary of State for Justice and Lord Chancellor of 16. 12. 2009, Column. 140WS; *Harris* (supra n. 66) 195 seq.

²⁵¹ A protection of the donee is also suggested by *Harris* (supra n. 66) 199; *D. Lehmann*, Aktuelle Entwicklungen im Europäischen Internationalen Erb- und Erbverfahrensrecht, in: *Winfried-Kralik-Symposium 2006*, ed. by *Rechberger* (2007) 19–35 1–17 (11); *Dutta* (supra n. 38) 592 seq.; against the application of another succession law and against a special protection of the donee *Münch. Komm. BGB (-Birk)* (supra n. 6) Art. 25 EGBGB para. 229.

²⁵² Given the two-year time period of Sec. 785(3)2 of the Austrian Civil Code has passed.

tria, the donee had to foresee, under French law, a reclaim without any time restrictions, but Austrian law limits the reclaim from non-family members to two years after the gift was made. Due to the cumulative application of French and Austrian law the reclaim granted by French law would no longer have application. The Institute takes the view that the donee's interests in such situations should not rank behind those of persons entitled to mandatory succession rights. Since Art. 16 and Art. 17 of the Succession Proposal do not afford an impenetrable protection to mandatory succession rights, they should also be balanced against the legitimate interests of donees.

180. However, a slight modification of the proposed Art. 19a(1) is necessary for cases in which the donor has already chosen a succession law at the time the gift was made in accordance with Art. 17, 18(3) or 18a(3) SP. If the donee is aware that the donor has chosen a certain succession law, Art. 19a(1) can apply without any modifications. The donee knows that the gift can be reclaimed, in the worst case, under the law chosen. However, the donee must not necessarily have known the choice of law by the donor: The choice of law can be made unilaterally by testamentary disposition (see Art. 17(2) SP), for example, by a will. If the donee does not know about the choice, he or she will expect that the restitution of the gift will be governed by the law of the habitual residence at the time the gift was made but not under the chosen law. Therefore, the Institute proposes that – in order to protect the donee's expectations – the choice of law of the donor should only be considered when applying Art. 19a(1) if the donee knew of that choice. Otherwise the law of the country in which the deceased was habitually resident at the time of the gift should cumulatively apply with the actual *lex hereditatis*.

Article 20 – Validity of the form of the acceptance or waiver

Without prejudice to Article 19, acceptance or waiver of the succession or a legacy or a declaration made to limit the liability of the heir or legatee shall also be valid where it meets the conditions of the law of the State in which the heir or legatee has their place of habitual residence.

Article 20 – Formal validity of other acts related to a succession ~~Validity of the form of the acceptance or waiver~~

~~Without prejudice to Article 19, Declarations and transactions related to a succession other than testamentary dispositions, such as the acceptance or waiver of rights in a the succession or a legacy or a declaration made to limit the liability of the heir, beneficiary, devisee or legatee, shall also be formally valid if they satisfy the formal requirements of: where it meets the conditions of of the law of the State in which the heir or legatee has their place of habitual residence~~

- (a) the law governing the succession under this Regulation or
(b) the law of the State where they are made.

Summary

181. The Institute welcomes the idea of a *favor negotii* as expressed in Art. 20 SP and proposes extending its scope to encompass all acts related to the succession except for testamentary dispositions, which should be covered by a separate rule (see Art. 18b). The Institute furthermore proposes that these acts should be considered as formally valid where they comply either with the *lex hereditatis* or with the formal requirements of the State where the declaration or agreement is made or entered into.

Comments

182. The principle of *favor negotii* with respect to the formal validity of legal acts has a long-standing tradition in European Union instruments and can be found in Art. 11 of the Rome I Regulation and Art. 21 of the Rome II Regulation as well as in international conventions and national rules in the area of private international law. The Institute welcomes its proposed adoption.

183. Two changes to the rule are suggested:

184. First, the Institute proposes extending the scope of the rule to encompass not only declarations relating to the acceptance or waiver of rights in a succession or the limitation of liability, but also all other acts related to a succession such as contracts or unilateral acts intended to have legal effect. An exemption should apply to testamentary dispositions whose formal validity, in the opinion of the Institute, should be governed by a separate rule (cf. the proposed Art. 18b above). An extension to other succession-related acts would further advance the Commission's aim to make life easier for the persons involved in a succession by allowing them to perform such acts e.g. in the State of habitual residence and according to the conditions for formal validity imposed by the substantive law of that State. For example, if an heir would like to sell his or her share in the estate before its distribution, the contract between the heir and the buyer would be formally valid if it complied with either the formal requirements of the law applicable to the succession or the formal requirements of the State where the agreement is entered into. Other succession-related acts which should be covered by the special rule are, for example, the rescission of a testamentary disposition by

an heir or the acceptance or refusal of the position of a testamentary executor. The proposed extension would allow the persons involved in the succession to comply with formal requirements which he or she is most likely familiar with.

185. Second, the rule should be extended to let compliance with the formal rules of the State where the declaration is made suffice for its formal validity, creating a parallel rule to Art. 11 of the Rome I Regulation and Art. 21 of the Rome II Regulation. The compliance with the formal rules of that State would encompass on the one hand the situation envisaged by the Commission in its original proposal, namely declarations made by the heir or other beneficiaries in their State of habitual residence according to Art. 8 SP. On the other hand, it would permit several heirs or other beneficiaries who may be resident in different States to enter into a formally valid agreement by complying with the rules of the State where they act. The proposed extension would thus facilitate agreements and hence take the Commission's aim to facilitate the devolution and distribution of international successions one step further. The extent of the rule should be clarified by listing the two alternative possibilities for formal validity in Art. 20 itself, rather than referring to the *lex hereditatis* as it is defined in Art. 19 SP. That reference may provoke misunderstandings as Art. 19(2)(k) SP expressly excludes questions of formal validity. Accordingly, the Institute proposes incorporating the two possible sets of satisfying conditions as lit. a and b. Furthermore, the rule should in the actual text clearly limit itself to questions of formal validity, in accordance with the phrasing in Art. 11 Rome I and Art. 21 Rome II. The Institute also suggests adapting the title to match those of Art. 11 Rome I and Art. 21 Rome II, which refer to "Formal validity" rather than to "Validity of the form".

186. The material validity of the declaration, however, will be governed by the law applicable to the succession. Differences remain between Member States as to the existing types of declarations relating to a succession. For example, Spanish law, like the law of many Member States²⁵³, provides for a renunciation of rights in a succession (*repudiación de la herencia*, Art. 1008 Código civil); therefore, the Spanish courts or notaries public would be familiar with such a declaration. By contrast, something of a challenge remains for the countries which are unfamiliar with such an instrument. In Denmark, for example, there is no act governing the renunciation of rights in a succession; in practice, an heir may renounce his or her claim by means of a declaration vis-à-vis the other beneficiaries or the executor of a will, if

²⁵³ Art. 784–792 of the Belgian Civil Code; Sec. 17:1–2a of the Finnish Succession Act; Art. 804–808 of the French Civil Code; Sec. 1943–1957 of the German Civil Code; Art. 1848 of the Greek Civil Code; Art. 784–792 of the Luxembourgian Civil Code; Art. 4:190–193 of the Dutch Civil Code.

any²⁵⁴. However, since the rule limits itself to very specific unilateral declarations, this lack of familiarity should not cause excessive problems. It would be helpful if the Member States were to provide information on the material requirements for such declarations on the European Judicial Network to facilitate the work of the courts.

Article 21 – Application of the law of the State in the place in which the property is located

1. The law applicable to the succession shall be no obstacle to the application of the law of the State in which the property is located where, for the purposes of acceptance or waiver of the succession or a legacy, it stipulates formalities subsequent to those laid down in the law applicable to the succession.

2. The law applicable to the succession shall be no obstacle to the application of the law of the Member State in which the property is located where it:

(a) subjects the administration and liquidation of the succession to the appointment of an administrator or executor of the will via an authority located in this Member State. The law applicable to the succession shall govern the determination of the persons, such as the heirs, legatees, executors or administrators of the will, who are likely to be appointed to administer and liquidate the succession;

Article 21 – Application of the law of the *situs* State in the place in which the property is located

1. The law applicable to the succession shall be no obstacle to *not prevent* the application of the law of the State in which the property *an asset belonging to the estate* is located where, ~~for the purposes of acceptance or waiver of the succession or a legacy, it~~ the law of the *situs* stipulates a mandatory procedure to implement the succession formalities subsequent to those laid down in the law applicable to the succession.

2. The law applicable to the succession shall be no obstacle to *not prevent* the application of the law of the Member State in which the property *an asset belonging to the estate* is located where it:

(a) subjects the administration and liquidation of the *estate succession* to the appointment of an administrator or executor ~~of the will~~ via an authority located in this Member State. *The person or persons authorised to administer and liquidate the estate should be appointed according to the law applicable to the succession. The law applicable to the succession shall govern the determination of the persons, such as the heirs, legatees, executors or administrators of the will, who are likely to be appointed to administer and liquidate the succession;*

²⁵⁴ *Reinel*, Denmark, in: Country Reports 189–217 (215).

(b) subjects the final transfer of the inheritance to the beneficiaries to the prior payment of taxes relating to the succession.

(b) subjects the final transfer of the inheritance to the beneficiaries to the prior payment of taxes relating to the succession.

3. *Rights in rem arising under the law governing the succession cannot be exercised contrary to the law of the State where the property is situated. If the recognition of a right in rem is prevented by application of the preceding sentence, effect should be given to the objects of the right by other means under the law of the State where the property is situated.*

Summary

187. The Institute welcomes the Commission's proposal to create an exception from the law governing the succession for purposes of coordination with the internal mandatory procedures that exist in some States for the implementation of the succession. The Institute would like to propose three changes to the rule:

- a modification of Art. 21(1) SP to cover all mandatory implementation procedures (see *infra* para. 188 seq.);
- a modification of Art. 21(2) SP in order to clarify which law governs which part of the process of appointment (see *infra* para. 199 seq.) and
- the addition of a third paragraph covering the question of adaptation of rights *in rem* arising under the *lex hereditatis* to the *lex rei sitae*, where necessary (see *infra* para. 202 seq.).

Comments

A special conflict rule for mandatory administration of the estate, Art. 21(1) and (2) SP

188. Art. 21(1) and (2) SP provide for an exception from the scope of the law applicable to the succession as a whole and for the application of the law of the *situs* of property where the *situs* State provides for a special procedure to implement the succession. Such procedures are required in some Member States for the purposes of implementing the succession and result from the different approaches towards the law of succession that can be found among the Member States. These systems will be described briefly in order to explain the background to the first and second proposed modifications.

Background

189. In theory, each succession can be divided into two stages: the devolution, i.e. the creation of rights or entitlements of any kind to the estate or a part thereof, and the transmission, that is, the transfer of ownership in the estate or in a part thereof. The transmission thus serves as the implementation of the devolution²⁵⁵.

190. In several Member States, there is no differentiation between the two stages, and they take place simultaneously. Such a *direct and immediate transfer* of the estate and any debts is provided for in, for example, the laws of Germany and France. If German or French law is applicable to the succession, the ownership of the estate vests in the heir(s) directly and immediately with the passing-away of the deceased²⁵⁶.

191. In other Member States, the two phases of devolution and transmission are separate and distinct, and the second phase frequently requires the involvement of a State authority to proceed. Broadly speaking, the Member States that differentiate between the two phases generally follow one of two systems of implementing the succession: a system of direct and deferred transfer or a system of indirect and deferred transfer²⁵⁷.

192. A system of *direct and deferred transfer* can be found in Austria. According to Austrian law, the passing-away of the deceased results in an “ownerless” estate (*Verlassenschaft*), which becomes its own legal entity until it is accepted by the heir(s) or other beneficiaries, Sec. 531, 547 of the Austrian Civil Code²⁵⁸. The ownership in the whole or a part of the estate is vested in the beneficiaries at a later point by means of judicial appointment (*Einantwortung*), which takes place after a judicial examination of the entitlement of the heirs, legatees and other beneficiaries (Sec. 819 of the Austrian Civil Code). Accordingly, the transmission is direct inasmuch as no third person acquires intermediate ownership, but it is deferred since it does not take effect immediately as in the German and French systems.

193. Another set of Member States provides for a transmission of ownership to a third person upon the passing-away of the deceased. Only at a later stage is the estate transferred to the heirs and other beneficiaries, resulting in an *indirect and deferred transfer*. This system is in place, for example, in Ire-

²⁵⁵ *Ferid*, Le rattachement autonome de la transmission successorale en droit international privé: Recueil des Cours 142 (1974-II) 71–202 (92).

²⁵⁶ Sec. 1922 of the German Civil Code; Art. 724, 1004 and 1006 of the French Civil Code.

²⁵⁷ *Leleu*, La transmission de la succession en droit comparé (1996) 25 seq.; *Wenckstern*, Erbschaftsannahme/-ausschlagung, in: Handwörterbuch des Europäischen Privatrechts (supra n. 8) 425–428.

²⁵⁸ *Giesinger*, Österreichisches Erbrecht, in: Grenzenloses Erbrecht – Grenzen des Erbrechts, ed. by *Breitschmid* (2004) 160–200 (186).

land²⁵⁹, where the estate of the deceased vests in his or her personal representatives who discharge the liabilities (private debts and taxes) and then distribute the remaining estate among the beneficiaries, as well as in England and Wales, where the procedure is much the same²⁶⁰.

The need for a special rule

194. The latter two models, which involve a deferral of the transfer of ownership, require a special procedure to effect the transfer in ownership, which leads to conflicts where the two systems of immediate and deferred transfer collide. Take the example of a person habitually resident in Germany who owned, in addition to property located in Germany, an apartment situated in London and who leaves behind a single heir. Absent a choice, German law would govern the succession, automatically vesting the heir with all assets and debts of the deceased on death. From the perspective of UK authorities, however, the heir would not acquire ownership of the London apartment immediately; rather, the property vests in a personal representative on the death of the deceased. This personal representative would transfer ownership to the heir once the debts (if any), as outlined above, are paid.

195. The private international law of successions has to take account of these differences. In principle, there are two possible solutions:

- to force the States that differentiate between the devolution and the implementation to recognise the immediate transfer in ownership resulting from the law governing the succession; or
- to accept the existence of such special procedures by making an exception from the law applicable to the succession as a whole.

196. The first option would result in an automatic vesting of the London property in the heir. It has been advocated by several commentators who have justly pointed out that a scission in the applicable law would present a significant encumbrance to the beneficiaries in practice and detract from the Commission's goal to facilitate access to the estate for the beneficiaries²⁶¹. Furthermore, it is argued that this scission would bring about problems of characterisation, as the courts would have to distinguish carefully between rules concerning the administration of the estate and rules governing the rest of the succession²⁶².

197. However, the first solution has two significant disadvantages: First, it would significantly impact the national substantive rules of those countries

²⁵⁹ Sec. 10 of the Irish Succession Act 1965.

²⁶⁰ *Denker*, England, in: *European Succession Laws*, ed. by *Hayton* (1998) 67–83.

²⁶¹ Cf. *Dutta* (supra n. 38) 601, for a synopsis of the arguments and further references see *ibid.* at n. 343.

²⁶² *Dutta* (supra n. 38) 602.

which follow the two-step system of succession. If, as in the example cited above, the law applicable to the succession as a whole provides for an automatic vesting of ownership, then the other State's national system of implementation of the succession would be disrupted. The affected countries would be forced to change their substantive law to account for the resulting different variations in transfer of ownership by means of a succession. Second, it may force the Member States that provide for a special administration procedure to change their rules on the heirs' liability. At present, because of the special administration procedure, debts are paid from the estate before the transfer of ownership to the heir(s) and, correspondingly, the heirs' liability is limited to the value of the estate²⁶³. In several of the Member States whose succession laws are based on the Roman law tradition, the heir(s) acquire the assets as well as the debts of the deceased at the time of death and hence are personally liable for all debts of the deceased unless they take steps to limit liability to the value of the estate²⁶⁴. These systems of liability are closely connected to the way in which the implementation of the succession is handled. Where the succession is administered to the benefit of both the creditors and the heirs by a third, neutral party who has to pay all debts before distributing the remainder of the estate, the liability of the heir(s) can be limited to the value of the estate from the beginning. Where the heirs themselves are immediately vested with the estate at the moment of death, the heirs' liability is greater and potentially unlimited as a consequence of their being able to immediately mix their own private assets with those of the estate, even to the detriment of the creditors of the deceased. If the proposed regulation were to essentially eliminate the administration procedure, the Member States where it is practiced would be forced to rethink their liability regimes.

198. Therefore, a compromise along the lines of Art. 21 SP should be found. The Institute accordingly advocates maintaining Art. 21 SP in principle, but limiting it to mandatory procedures. This change would have the advantage of limiting the exception to the narrow range of mandatory implementation procedures which exist only in a few Member States, e.g. England and Wales or Austria. Such a limitation would avoid a scission in the applicable law in all but those cases where States provide for mandatory procedures, allowing a uniform application of the *lex hereditatis* and thus avoiding problems of delimitation between the realms of application of several laws in all but a few cases. At the same time, it would allow those States that currently have a differentiated system of mandatory procedures to imple-

²⁶³ *Albury/Ingham/Matthews/Morgan*, Royaume-Uni, in: Country Reports 669–706 (704 seq.).

²⁶⁴ See, for example, Sec. 801 of the Austrian Civil Code; Sec. 1967 seq. of the German Civil Code; Art. 1884 of the Greek Civil Code (partial liability); Art. 998, 1010 seq. of the Spanish Civil Code.

ment successions, along with the corresponding liability regimes, to maintain those systems.

199. Second, the Institute proposes to change the second paragraph in order to allow for appointment of the personal representative according to the law applicable to the administration, but with regard being had to the law applicable to the succession as a whole. The current Commission proposal would result in a significant reduction of the exception by subjecting the appointment to the law governing the succession as a whole.

200. In the view of the Institute, it would be more practical to provide for a mandatory consideration of the law governing the succession and to determine the administrator or executor in accordance with the law applicable to the succession, wherever possible. A mandatory consideration of the *lex hereditatis* would facilitate the distribution of the estate, as this would lead – where possible – to the appointment of the person(s) competent under the *lex hereditatis* to administer and distribute the estate and thus to a uniform competence of the same person(s) for its administration and distribution in all Member States. The only remaining practical difference would be the appointment procedure. A similar procedure is in fact already applied in many cases in England and Wales, by virtue of the current rule in Sec. 30 of the Non-Contentious Probate Rules 1987²⁶⁵. This rule governs cases in which the deceased was domiciled outside of England and Wales at the time of death. In such cases, the registrar as the authority in charge of appointing the administrator may appoint at his or her discretion:

- “a) [...] the person entrusted with the administration of the estate by the court having jurisdiction at the place where the deceased died domiciled; or
- b) where there is no person so entrusted, to the person beneficially entitled to the estate by the law of the place where the deceased died domiciled or, if there is more than one person so entitled, to such of them as the registrar may direct; or
- c) if in the opinion of the registrar the circumstances so require, to such person as the registrar may direct.”

201. Therefore, the rule as modified would not result in a significant change to the current procedure in England and Wales²⁶⁶, which may facilitate acceptance.

²⁶⁵ Statutory Instrument 1987 No. 2024 (L. 10); cf. also *Cheshire/North/Fawcett* (supra n. 38) 1256; *Dicey/Morris/Collins* (supra n. 32) Rule 130 and para. 26–008 seq.

²⁶⁶ *Harris* (supra n. 66) 190–194.

Rights in rem arising under the lex hereditatis not known to the lex rei sitae – the new Art. 21(3) SP

202. The Institute furthermore proposes to add a third paragraph dealing with rights *in rem* that are not known as such by the law at the *situs* of the property concerned. The delimitation between the law governing property and the law applicable to the succession is, in general, not easy. As already mentioned with regard to the property law exception in Art. 1(3)(j) SP, the law applicable to succession should deal with the question of entitlement to the estate. The question whether and how the form of entitlement envisaged by that law can be implemented has to be answered by the *lex rei sitae* as the law applicable to property. The new Art. 21(3)1 shall clarify this precedence of the *lex rei sitae*. As far as the law applicable to succession creates rights *in rem*, e.g. usufructs of the surviving spouse, statutory trusts in favour of certain heirs, etc., the new Art. 21(3)1 makes clear that those rights *in rem* shall not be exercised contrary to the *lex rei sitae*. Rather the law of the State where the property is situated has the final word on how to deal with the unknown property right created by the succession.

203. However, in order not to frustrate the solutions envisaged under the law applicable to succession, any unknown right *in rem* which cannot be recognised according to Art. 21(3)1 should be transposed to the closest equivalent under the *lex rei sitae*. For example, a trust created by succession law with regard to property situated in Germany could be transposed to a *Vor- und Nacherbschaft* or a *Dauerstestamentsvollstreckung*. This duty of transposition by the judge – especially by the judge competent under Art. 9 SP – is laid down in a new second sentence of Art. 21(3) which was inspired by Art. 15(2) of the Hague Trust Convention. Against this background, concerns that succession-related conflict rules for testamentary trusts in a European Regulation would force the Member States to recognise unknown foreign property rights²⁶⁷ and, thus, potentially encroach on the Member States' competence with regard to property ownership (Art. 345 TFEU = Art. 295 EC)²⁶⁸ do not seem to be justified. Such a transposition of a foreign property right created by the governing succession law might also require the judge to adapt the applicable succession law – which creates that right – to the transposed right *in rem*.

²⁶⁷ Harris (supra n. 66) 202 seq.

²⁶⁸ Parliament Report p. 8 (Recommendation 9).

Article 22 – Special succession regimes

The law applicable in accordance with this Regulation shall not prejudice the special succession regimes to which certain immovable property enterprises, enterprises or other special categories of property are subjected by the law of the Member State in which they are located on account of their economic, family or social purpose where, according to that law, this regime is applicable irrespective of the law governing the succession.

Article 22 – Overriding mandatory provisions ~~Special succession regimes~~

1. *Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a State for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable under this Regulation.*

2. *Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum.*

3. *The law applicable in accordance with this Regulation shall not prejudice the special succession regimes to which certain immovable property enterprises, enterprises or other special categories of property are subjected by the law of the Member State in which they are located on account of their economic, family or social purpose where, according to that law, this regime is applicable irrespective of the law governing the succession. under this Regulation does not affect the application of the overriding mandatory provisions of the State where certain immovables, enterprises or other special categories of assets are situated, insofar as these rules institute a particular succession regime in respect of such assets.*

4. *Effect may be given to the overriding mandatory provisions of a State to which the deceased was closely connected, such as provisions which render a testamentary disposition or any other act relating to succession unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application.*

Summary

204. The Institute generally endorses the basic approach taken by Art. 22 SP which should, however, also encompass overriding mandatory provisions in general. In the interest of further clarification, the Institute considers some changes necessary:

- Given that overriding mandatory provisions of the *lex fori* as well as of other States may influence international successions, Art. 22 SP should be modelled on Art. 9 Rome I Regulation rather than on Art. 15 of the Hague Succession Convention (see *infra* para. 206 seq.).

- Under exceptional circumstances, the court should be able to resort to overriding mandatory provisions of the *lex fori*, e.g. rules excluding certain persons as heirs, provisions prohibiting the succession in special immoveable property or rules combating discrimination (see the proposed Art. 22(2) SP and *infra* para. 208 seq.).

- A court may give effect to the overriding mandatory provisions of the law of a country to which the deceased was closely connected if these rules invalidate dispositions in acts relating to succession that are deemed illegal or fraudulent under the law of that country (see the proposed Art. 22(4) SP and *infra* para. 211).

- However, a court shall not resort to overriding mandatory provisions on the sole ground that the provisions of the law applicable regarding the reserved portion and other indefeasible rights to the estate differ from those in force in the forum or in another State (see the proposed Recitals 24 and 34 and *infra* para. 212 seq.).

Comments

A general provision on overriding mandatory provisions

205. Art. 22 SP, reserving the application of special succession regimes regardless of the law applicable to succession under the future Regulation, may turn out to be both too narrow and too wide. It is too narrow because it only addresses special succession *regimes*, such as those existing for farms in some parts of Germany where the transfer to a single heir is prescribed in order to protect the earning potential of the farm which would otherwise be impaired by a distribution among several heirs²⁶⁹. *Single provisions* of a mandatory nature, however, are not covered by Art. 22 SP, although there may be good reasons to grant them priority or to take them into account under the circumstances of the case, see *infra* para. 208 seq. Art. 22 SP is also too wide because its wording might be misunderstood as a gateway for any na-

²⁶⁹ Höfeordnung, consolidated version promulgated on 26 July 1976, BGBl. 1976 I 1933.

tional succession regime, jeopardizing the Regulation's monist approach according to which the succession should generally be governed by a single law²⁷⁰. Misinterpretation is especially likely to occur in countries that traditionally resort to a dualist choice of law regime distinguishing between the succession in immovable property and in other assets. The wording of Art. 22 SP does not specify whether special succession regimes may also result from divergent conflict rules. This question could arise where the Regulation leads to the application of the law of a non-Member State whose private international law provides a different succession regime for all immovable property, as is, for example, the case in the United States. In view of the monist approach taken by the Succession Proposal, special succession regimes established by different conflict rules should not fall within the scope of Art. 22 SP. They should not matter unless declared relevant by Art. 26 SP regarding *renvoi*²⁷¹.

206. As a consequence, the Institute proposes to redraft Art. 22 SP, giving limited priority to overriding mandatory provisions which serve economic, social and family purposes. Under the existing European Regulations relating to private international law²⁷² as well as under ECJ case law²⁷³, national provisions that apply regardless of the law designated by the general conflict rules for reasons of public interest are characterised as overriding mandatory provisions. The proposed approach is compelling particularly since the Succession Proposal itself mentions first and foremost provisions relating to family farms and other special immovable property²⁷⁴. The relevant national rules, e.g. in Germany and in Austria, are considered as overriding mandatory provisions²⁷⁵.

207. For purposes of consistency, the Institute proposes to adopt the definition of overriding mandatory provisions as already provided by Art. 9(1) of the Rome I Regulation. A clearly defined framework set forth in the amended Art. 22(1) SP prevents excessive derogations from the general choice of law rules. Moreover, the future Regulation would be consistent

²⁷⁰ For the differentiation between the monist and dualist approaches see *Dutta* (supra n. 38) 554 seq.

²⁷¹ See infra 232 seq. (comments on Art. 26 SP).

²⁷² See Art. 9(1) of the Rome I Regulation and Art. 16 of the Rome II Regulation.

²⁷³ See ECJ 23. 11. 1999, para. 30; 19. 6. 2008, para. 29 (both supra n. 78).

²⁷⁴ Succession Proposal p. 7. Cf. DNotI Study p. 323.

²⁷⁵ See as to the Austrian special succession regimes for agriculturally used land OGH 24. 4. 2003, SZ 2003/44 and for overriding mandatory provisions regarding other immovable property OGH 8. 10. 1991, IPRax 1993, 255. See for the application of similar German provisions (supra n. 269) regardless of the law otherwise applicable under the conflict rules BGH 14. 7. 1965, MDR 1965, 818; 5. 4. 1968, BGHZ 50, 63. See further *Kegel/Schurig* (supra n. 158) 426 seq.; *Staudinger (-Dörner)* (supra n. 39) Art. 25 EGBGB para. 582 seq. See as to Art. 619 seq. of the Swiss Civil Code *A. Bucher, Droit International Privé Suisse II* (1992) para. 987. Similar provisions regarding farms and other agricultural property can be found, for instance, in Belgium, Denmark, Italy, Spain, Finland, Greece, Luxembourg. See DNotI Study p. 323.

with other European instruments and the guidelines defined by ECJ case law²⁷⁶. This fosters an autonomous and coherent concept of overriding mandatory provisions in the Union's private international law.

Overriding mandatory provisions of the lex fori – the new Art. 22(2) SP

208. While the Succession Proposal adopts Art. 15 of the Hague Succession Convention²⁷⁷ and limits Art. 22 SP to provisions of the State in which certain assets are located, the Institute would emphasise that overriding mandatory provisions of the *lex fori* may equally have an impact on international successions²⁷⁸. Some national laws, for example, prohibit testamentary dispositions in favour of persons performing certain functions regardless of the law otherwise applicable to the succession. The law of the forum may, for example, prohibit in the public interest wills that are beneficial to employees of nursing and retirement homes²⁷⁹. Other mandatory provisions relate to the capacity of notaries, confessors or clerics to inherit²⁸⁰. Accordingly, the Institute proposes that Art. 22 SP should be modelled on Art. 9 Rome I Regulation rather than on Art. 15 of the Hague Succession Convention. Pursuant to a new Art. 22(2) SP, a court may apply its overriding mandatory provisions whenever the case is closely connected to the State of the forum²⁸¹. Such a close connection can, for example, be assumed if a testator

²⁷⁶ See Art. 9(1) of the Rome I Regulation, Art. 18 of the Rome II Regulation. See also ECJ 23. 11. 1999 (supra n. 78) para. 30. Cf. *Dutta* (supra n. 38) 557 seq.

²⁷⁷ Yet the Commission's proposal does not reproduce the English wording of Art. 15 but seems instead to be based on a translation of the French version of the Convention, cf. supra para. 3.

²⁷⁸ See *Dutta* (supra n. 38) 558, 589; *Harris* (supra n. 66) 219.

²⁷⁹ See, with regard to the overriding mandatory provisions in Sec. 14 of the German Nursing Home Act, e.g. OLG Oldenburg 19. 2. 1999, FamRZ 1999, 1312; *Mankowski*, Anmerkung zu OLG Oldenburg 19. 2. 1999 – 5 W 29/99; FamRZ 1999, 1313 et seq.; *Staudinger (-Dörner)* (supra n. 39) Art. 25 EGBGB para. 131.

²⁸⁰ See e.g. Art. 752 seq. of the Spanish Civil Code. The same may apply to rules prohibiting wills in favour of doctors or other medical personnel. See, however, Art 3.6.2(d) of the Discussion Paper. See for overriding mandatory provisions in matters relating to succession under Art. 17 of the Italian Code on Private International Law *Kruis*, Das italienische internationale Erbrecht (2005) 104, 200 seq. See e.g. with regard to Art. 540 of the Swiss Civil Code *Bucher* (supra n. 275) para. 987.

²⁸¹ Taking into consideration the ruling of the ECJ 9. 11. 2000, Case C-381/98 (*Ingmar*), E. C. R. 2000, I-9305, a connection to the EU might be sufficient where overriding mandatory rules of Union Law are at stake. Art. 3(4) of the Rome I Regulation and Art. 14(3) of the Rome II Regulation address similar questions with regard to mandatory rules of EU law. As already advocated by the Institute with regard to Art. 9 Rome I Regulation, a parallel should be drawn regarding overriding mandatory provisions of Union law, see Max Planck Institute, Comments on the European Commission's Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I): RabelsZ 71 (2007) 225–334 (315 seq.). Such provisions might, for example, relate to certain forms of discrimination in the context of succession and wills, see *infra* para. 210.

has chosen a law according to Art. 17 SP for the sole purpose of circumventing the overriding mandatory provisions of the *lex fori* which would otherwise prohibit testamenting in favour of the personnel of the forum State nursing home where the testator resides.

209. The Institute, furthermore, points to the fact that various countries and especially some of the new Member States impose restrictions regarding the capacity of non-residents to acquire immovable property such as land²⁸² – provisions which can also be found in the laws of many non-Member States, e.g. Switzerland²⁸³. The application of such overriding mandatory provisions should be addressed by the Regulation given that these rules effectively frustrate the transmission of immovable property upon death to a non-resident or non-national of the State in which the property is located²⁸⁴.

210. Overriding mandatory provision may also be of a European rather than a national origin. The Institute notes that according to Recitals 24 and 34, the future Regulation should be applied by the courts of the Member States in compliance with Art. 21 of the Charter of Fundamental Rights of the European Union, which states that discrimination based on any ground shall be prohibited. In recent rulings, the European Court of Human Rights considered discriminatory testamentary dispositions void for breach of the principle of non-discrimination set forth by Art. 14 of the European Human Rights Convention²⁸⁵. Arguably, non-discrimination rules may, in principle, be characterised as overriding mandatory provisions. To the extent that a choice of law in testamentary dispositions would lead to the application of provisions contrary to the principle of non-discrimination, the overriding mandatory provisions of the law of the forum court might thus be applied on the basis of the new Art. 22(2) SP in order to avoid discrimination within the European Union²⁸⁶.

²⁸² Poland, Slovenia, Bulgaria and Romania, for instance, negotiated exceptions regarding the free movement of capital and in particular the acquisition of land and other immovable property by non-residents, see O.J. 2003 L 236/878 and 909 as well as O.J. 2005 L 157/282 and 315. The same applies to several Nordic countries, cf. for Denmark O.J. 1992 C 191/68 and O.J. 2007 C 306/163.

²⁸³ See Art. 1 seq. of the Bundesgesetz über den Erwerb von Grundstücken durch Personen im Ausland of 16. 12. 1983, AS 1984 1148.

²⁸⁴ See e.g. *Ferid/Firsching/Dörner/Hausmann*, Internationales Erbrecht (looseleaf) Schweiz para. 32.

²⁸⁵ See for discriminatory wills ECHR 13. 7. 2004 (*Puncernau*), E. C. H. R. 2004-VIII, 215. See as to discriminations of children born out of wedlock e.g. ECHR 13. 6. 1979 (*Marckx*), Ser. A No. 31; 29. 10. 1987 (*Inze*), Ser. A No. 126; 28. 5. 2009 (*Brauer*), ZEV 2009, 510.

²⁸⁶ Arguably, this solution is appropriate in cases closely connected to the forum and where a foreign law has only been chosen in order to circumvent the non-discrimination provisions of the forum State. Yet, in other cases, Art. 27 may be applied, see *infra* para. 250 (comments on Art. 27). See for the overriding mandatory character of non-discrimination provisions Art. 3(1)(g) of the Directive 96/71/EC of the European Parliament and of the Council of

Overriding mandatory provisions of other States – the new Art. 22(4) SP

211. Within the limits set by the proposed Art. 22(4) SP, a court should be able to give effect to the overriding mandatory provisions of the law of other States to which the deceased was closely connected. The judge shall, in particular, take into account all effects of an application or non-application of these rules²⁸⁷. This approach has already been adopted in Art. 9(3) of the Rome I Regulation and Art. 7(1) of the Rome Convention. This solution guarantees flexibility and enhances the acceptance of judgments in the State of the overriding mandatory provisions. A decision is far more likely to be recognised and enforced if it respects the public interest of the State of recognition. In the context of acts relating to succession, overriding mandatory provisions of other States might, for example, invalidate the succession in certain pieces of art or historical artefacts that are protected as part of the cultural heritage of that State²⁸⁸. One could also think of a person entitled as an heir under the law of a Member State determined in accordance with Art. 16 or 17 SP who is a citizen of, and habitually resident in, a third State whose laws prohibit the acquisition of the estate for reasons of religious divergence. Where, due to the lack of a sufficient connection to the EU, the Charter of Fundamental Rights of the European Union does not present an obstacle, there may be good reasons for a court of a Member State to take laws on religious divergence into account, at least to the extent that assets belonging to the estate are located in the third State²⁸⁹.

Limitations regarding the reserved portion and other indefeasible rights to the estate – Recitals 24 and 34

212. While the courts may generally apply overriding mandatory provisions in the situations mentioned above, Recitals 24 and 34 should clarify that the mere fact that the rules otherwise applicable pursuant to Art. 16 or 17 regarding the reserved portion and other indefeasible rights to the estate differ from those of the forum or of another State should not, in itself, justify applying the overriding mandatory provisions of that State²⁹⁰. This

16. 12. 1996 concerning the posting of workers in the framework of the provision of services, O.J. 1997 L 18/1. See in general *Lüttringhaus*, Grenzüberschreitender Diskriminierungsschutz (2010) 216 seq.

²⁸⁷ *Dutta* (supra n. 38) 557 seq. Cf. Art. 9(3) of the Rome I Regulation.

²⁸⁸ See regarding provisions of foreign law e.g. BGH 22. 6. 1972, NJW 1972, 1575 (1576 seq.); *Islamic Republic of Iran v. The Barakat Galleries Ltd*, [2007] EWCA Civ 1374.

²⁸⁹ See for such rules on religious divergence in Egypt and Tunisia *Gallala*, Religionsfreiheit und islamisch geprägtes Erbrecht, Gesetzliche Regelungen und Rechtsprechungsauslegung im heutigen Ägypten und Tunesien, in: *Islam and Human Rights*, ed. by *Elliesie* (2010) 499–521.

²⁹⁰ Yet, the role of overriding mandatory provisions in this field is rather limited, see Green Paper reply of GEDIP p. 5. *De Boer*, Unwelcome Foreign Law: Public Policy and Other Means

streamlines Art. 22 with the limitations under the public policy exception in Art. 27(2) SP²⁹¹. The Institute stresses that, when it comes to the reserved portion and other infeasible rights to the estate, derogation from the choice of law rules of this Regulation should be subject to similar conditions, regardless whether Art. 22 SP or Art. 27 SP is applied.

213. With regard to the public policy exception in the Brussels Convention, the ECJ has repeatedly held that, while it is not for the Court of Justice to define the content of the respective national public policy, it is nonetheless required to review the limits within which the courts of a Member State may have recourse to that concept²⁹². The Succession Proposal regarding Art. 27(2) SP applies this idea to the public policy exception in choice of law by providing autonomous guidelines for the interpretation and limits of “public policy” regarding the reserved portion and other infeasible rights to the estate. The Institute suggests that the same approach be adopted by Recitals 24 and 34 with regard to overriding mandatory provisions.

Article 23 – Simultaneous death

Where two or more persons whose successions are governed by different laws die in circumstances which do not allow the order of death to be determined and where the laws deal with the situation through provisions which are incompatible or which do not settle it at all, none of the persons shall have any rights regarding the succession of the other party or parties.

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Summary

214. The Institute proposes two minor changes to the wording of Art. 23 SP.

to Protect the Fundamental Values and Public Interests of the European Community, in: *The External Dimension of EC Private International Law in Family and Succession Matters*, ed. by *Malatesta/Bariatti/Pocar* (2008) 295–330 (311 seq.), is sceptical whether provisions on forced heirship might fall within this category.

²⁹¹ See *infra* para. 249 (comments Art. 27).

²⁹² See ECJ 28.3. 2000, Case C-7/98 (*Krombach*), E.C.R. 2000, I-1935, para. 22 seq.; 11.5. 2000, Case C-38/98 (*Renault*), E.C.R. 2000, I-2973 para. 27 seq.

Comments

Introduction

215. The question of simultaneous death (*commorientes*) concerns cases where two or more persons have died under circumstances which do not allow ascertainment of who died last and may therefore have inherited from someone who died before. This issue should indeed be included in the scope of application of the Succession Proposal²⁹³. Art. 23 SP provides for a substantive rule which reconciles two or more applicable laws that lead to a contradictory result (*Anpassung*) or fills a gap where the applicable laws do not yield any solution at all for simultaneous death. Pursuant to Art. 23 SP, the mutual succession of the simultaneously deceased is excluded, along the lines of Art. 13 of the Hague Succession Convention²⁹⁴. Since Art. 23 SP is an auxiliary rule meant to ensure the operation of the choice of laws rules of the Succession Proposal, the legislative competence of the European Union should be affirmed despite its substantive character²⁹⁵.

Proposal

216. The Institute welcomes the substantive law solution proposed in Art. 23 SP²⁹⁶. Only two minor changes of its wording are suggested. The original wording seems to presuppose that there are “provisions which [address but] do not settle the question of simultaneous death at all”. This wording seems contradictory. It should be changed to indicate cases where the applicable laws “make no provision at all”.

Application of Art. 23 SP

217. With regard to the question of simultaneous death, Member States and other countries have adopted different rules in determining the order of death between two or more persons in light of their eligibility to succession.

218. Most Member States (France [since 2001], Germany, Italy among many others) establish a presumption that the persons involved died simultaneously. Consequently, mutual succession is excluded²⁹⁷. The UK, on the

²⁹³ See supra para. 29 seq. (comments on Art. 1 (3)(c) SP).

²⁹⁴ See also Green Paper para. 2.3. and Art. 3.9 of the Discussion Paper.

²⁹⁵ See supra para. 15 seq. (Introduction).

²⁹⁶ The choice of law solution suggested by some Member States in their replies to the Green Paper would unnecessarily complicate the law application.

²⁹⁷ See, inter alia, Sec. 11 of the Austrian Declaration of Death Act; Sec. 11 of the German Missing Persons Act; Art. 725–1 of the French Civil Code (since 2001); Art. 4 of the Italian Civil Code; Art. 33 of the Spanish Civil Code; Art. 2 of the Annex to the 1972 Benelux Con-

other hand, generally follows the seniority principle, presuming that the younger survived the elder²⁹⁸. Until 2001, France used to establish a combined presumption of who died first, depending on whether the deceased were under, between or above the age of 15 or 60, with the rules partly giving priority to the male²⁹⁹. Outside the European Union, a number of countries establish the presumption of simultaneous death³⁰⁰, while some common law jurisdictions follow the seniority principle³⁰¹. The US Uniform Probate Code Art. II provides that only a person who has survived the others for more than 120 hours is entitled to the succession. The testators can, however, deviate from this rule by stipulating differently in their wills³⁰². Similarly, the intestate succession law of Manitoba, Canada requires 15 days of survival³⁰³.

219. In so far as two or more laws applicable to succession provide for the same presumption, they can be applied without difficulties. Such would be the case in the following example: Husband A and Wife B were involved in a deadly car accident that gave no indication of who died first. The intestate succession of 42-year-old A is subject to Italian law and that of 45-year-old B to German law. Since both governing laws establish the presumption of simultaneous death, mutual succession is excluded. Adjustment by Art. 23 SP is not required.

220. Similarly, suppose the testate succession of 42-year-old A is governed by English law and that of 45-year-old B by German law. A and B were mutually named as one of the heirs in their respective wills. B did not survive A pursuant to the English seniority principle, nor did A survive B pursuant to the German rule on simultaneous death. Since it is a matter of the entitlement of the person concerned to the succession of the other, the English law only determines whether B was entitled to A's succession, and German law whether A was entitled to B's succession. Hence, the multiple governing laws are applied in a "distributive" way, not in a "cumulative" way as

vention on Commorientes, which was adopted in Art. 721 of the Belgian Civil Code, Art. 4:878(1) and Art. 4:941(1) of the Dutch Civil Code and Art. 720 of the Luxemburgian Civil Code.

²⁹⁸ See, for England, Sec. 184 of the Law of Property Act 1925 (exception in Sec. 46(3) of the Administration of Estates Act 1925); see also Sec. 31(1)(b) of the Succession (Scotland) Act 1964.

²⁹⁹ See the former Art. 720–722 of the French Civil Code (until 2001); for further detail, see *supra* n. 36.

³⁰⁰ See, *inter alia*, Art. 32(2) of the Swiss Civil Code; Art. 616 of the Quebec Civil Code; Art. 1287 of the Mexican Civil Code; Art. 8 of the Brazilian Civil Code; Art. 32bis of the Japanese Civil Code; Art. 30 of the Civil Code of the Republic of Korea.

³⁰¹ *Inter alia*, New South Wales and Victoria, Australia (cf. *Ferid/Firsching/Dörmer/Hausmann* [*supra* n. 284] Australia para. 76); Sec. 2(1) of the British Columbia Survivorship and Presumption of Death Act 1996; Sec. 21 of the Indian Hindu Succession Act of 1956.

³⁰² Art. II. Sec. 2–104 and 2–702 of the US Uniform Probate Code.

³⁰³ Art. 6(1) of the Intestate Succession Act of Manitoba.

was presupposed by Art. 13 of the Hague Succession Convention³⁰⁴. In the underlying case, both governing laws reach the same result, namely the exclusion of mutual succession, albeit by different routes. There is thus no need for any adjustment under Art. 23 SP.

221. How should one then proceed when the applicable laws yield different solutions? Suppose Husband C and Wife D were aboard an aircraft that crashed and instantly killed all the passengers. The testate succession of 55-year-old C is subject to English law and that of 52-year-old D to New Jersey law which has adopted the US Uniform Probate Code³⁰⁵. C and D were mutually named as one of the heirs in their respective wills. By way of a “distributive” application of the governing laws, D is presumed to have survived C under the English seniority principle and therefore eligible to C’s succession, whereas C failed to fulfil the 120-hour requirement of survival under New Jersey law. Despite their different outcomes, both governing laws are compatible, as only D is entitled to C’s succession and not conversely. The estate can be distributed accordingly. Art. 23 SP does not apply in this case, either.

222. Following this reasoning, the application of multiple governing laws is incompatible only when they entitle the persons involved to inherit from each other³⁰⁶. Suppose C was 55 years and 11 months old, and D 55 years and 2 months old. The testate succession of C is governed by English law and that of D by French law prior to the reform of 2001. While D is presumed to have survived C under the English seniority principle, C is presumed to have survived D pursuant to *ex-Art. 722* of French Civil Code due to the priority of the male³⁰⁷. Hence, C and D are supposed to inherit from each other. The same person is then regarded as a predeceased successor by one law and, concurrently, as a surviving heir by the other law. This logical contradiction hinders the distribution of the estate and requires an adjustment. In such a rare case, Art. 23 SP applies and provides for a substantive solution, excluding the mutual succession of all the persons involved.

223. Where the governing laws do not make any provision at all concerning the question of simultaneous death, Art. 23 SP applies to fill that gap as well.

³⁰⁴ The explanatory report of Art. 13 of the Hague Succession Convention suggests a “cumulative” application of governing laws, see *Waters Report* (supra n. 37) 584. Following its reasoning, A would have survived B under the English seniority principle and would, thus, be entitled to B’s succession in the case at hand, even if not actually eligible under German law. Due to the different outcomes, Art. 13 would apply and exclude the mutual succession. The English law should, however, only govern A’s succession and not decide “whether A was entitled to B’s succession”.

³⁰⁵ New Jersey Statute Sec. 3B:3–32 (2010).

³⁰⁶ *Dutta* (supra n. 38) 599.

³⁰⁷ For further detail, see supra n. 36.

Article 24 – Estate without a claimant

Where, in accordance with the law applicable in accordance with this Regulation, there is neither an heir nor a legatee as determined by a disposition of property upon death and where no natural person is an heir by operation of law, the application of the law thereby determined shall not be an obstacle to the right of a Member State or a body appointed in accordance with the law of the Member State in question to seize the succession property located on its territory.

Article 24 – Estate without a claimant

~~Where,~~ *To the extent that,* in accordance with the law applicable ~~in accordance with~~ *by virtue of* this Regulation, there is neither an heir, *a beneficiary, a devisee* nor a legatee as determined by a ~~disposition of property upon death~~ *testamentary disposition*, and where no natural person is an heir by operation of law, ~~the application of the law thereby determined shall not be an obstacle to the right of a Member State or a body appointed in accordance with the law of the Member State in question to seize the succession property located on its territory~~ *the law of the State where the estate is respectively situated shall govern the succession.*

Summary

224. The Institute welcomes the attention given by the Succession Proposal to the issue of heirless estates. However, a slightly different approach and a change of the connecting factor are proposed in order to solve not only positive conflicts between the different ways of dealing with heirless estates in substantive law, but negative conflicts as well.

Comments

225. It is a common principle that the State claims the estate if there is no statutory or testamentary heir. The legal concepts providing access to an heirless estate, however, vary substantially in the different legal systems. Some laws provide that in cases where no one else would be heir by operation of law or testamentary disposition, the State itself is the *final heir*³⁰⁸. There, the succession to the estate is characterised as an issue of private law, and in cross-border situations those legal systems consequently apply the

³⁰⁸ See, for example, Sec. 1936 of the German Civil Code; Art. 1824 of the Greek Civil Code; Art. 565, 586 of the Italian Civil Code; Art. 935 Sec. 3 of the Polish Civil Code; Art. 2152 seq., 2133(1)(e) of the Portuguese Civil Code; Art. 956 seq. of the Spanish Civil Code.

general conflict rules for successions also to heirless estates. Other legal systems provide that the State appropriates heirless estates as a matter of public law by exercising a regalian right³⁰⁹. Consequently, in cross-border successions the *appropriation* of an heirless estate will be regarded by such legal systems as a matter of public and not of private international law. Since the enforcement of claims based on public law will generally be denied by foreign courts, the power to appropriate heirless estates by those States is effectively limited to assets that are situated within their own territory.

Conflicts of the different approaches

226. In cross-border situations these different approaches can lead to positive and to negative conflicts. A *positive* conflict can arise if the general conflict rules for succession point to the law of a “final heir” State, but parts of the estate are situated in an “appropriation” State. The assets situated in the “appropriation” State would then be claimed by both States. A *negative* conflict will arise if the general conflict rules for succession point to the law of an “appropriation” State, but parts of the estate are located within the territory of a “final heir” State. In this case, due to the territorial limits of claims based on public law no State could effectively claim the estate situated in the “final heir” State.

Solutions

227. The special conflict rule contained in Art. 24 SP would solve the described positive conflicts. Similar to Art. 16 of the Hague Succession Convention, it provides for a precedence of the law of the “appropriation” State in the case of a conflict. The claim of the “final heir” State based on its position as an heir by operation of private law for property situated outside its territory will have to give way to the right of the “appropriation” State to seize the property situated on its own territory. The proposal of the Commission – and the same applies to the solution of the Hague Succession Convention – would, however, not be able to solve negative conflicts. The special rule in Art. 24 SP addresses only cases where two States claim the estate. In the case where the assets are located within the territory of a “final heir” State while the general conflict rules point to the law of an “appropriation” State, no State would be able to claim the estate. To solve both conflicts a more comprehensive solution should be envisioned.

³⁰⁹ See, for example, Sec. 760 of the Austrian Civil Code; Art. 768 seq. of the French Civil Code; Art. 9 of the Slovenian Succession Act; Sec. 1 of chapter 5 of the Swedish Succession Act; Sec. 46(1)(vi) of the UK Administration of Estates Act.

228. The problem of heirless estates in cross-border situations has already been addressed by some legal systems within the European Union. The acts on private international law of Belgium and Romania characterise the access to heirless estates as an ordinary issue of succession law regardless of how the substantive law is shaped³¹⁰. Therefore, the matter of heirless estates is always subjected to the generally applicable law of succession. This rather straightforward solution would however fail to solve conflicts arising in relation to third States, since those States would not be bound by such a uniform characterisation as the Member States would be. Another problem would be whether an “appropriation” State could, according to its internal law, appropriate an heirless estate located outside its borders if the European conflict rule points to its law.

229. Another solution for the coordination of the different approaches can be found in English law. English law characterises the succession to heirless estates according to the *lex causae*: If the law applicable to succession is the law of a “final heir” State, that law shall apply; but if that State is an “appropriation” State, the *lex* or *leges rei sitae* of the assets shall apply³¹¹. However, apart from possible doctrinal criticism³¹², this rule would from its onset fail to avoid positive conflicts in relation to third States. Where the general conflict rules point to the law of a “final heir” State but some of the property is located in an “appropriation” third State, both States would claim the estate.

230. In contrast, a good example for a more comprehensive approach, dealing with negative as well as positive conflicts, can be found in Austrian law. Sec. 29 of the Austrian Private International Law Act regards the succession to heirless estates as a special issue and subjects that issue to the *lex rei sitae* of the estate³¹³. Within the European Union, such a conflict rule would avoid all positive and negative conflicts. If the law of succession of the State where assets of the estate are located provides for a final heirship of the State, the “final heir” State could claim the estate. If the State where the estate is located follows, however, an “appropriation” approach that State can appropriate the estate as far as it is located within its territory. Only in relation to third States could a negative conflict still arise in cases of a renvoi. If assets are located within a “final heir” third State, but the general conflict rules for

³¹⁰ Art. 80 Sec. 1 No. 3 of the Belgian Private International Law Act and Art. 67(g) of the Romanian Private International Law Act.

³¹¹ See *In the Estate of Maldonado*, [1954] 2 W.L.R. 64 (CA).

³¹² See *Lipstein*, Private International Law, Bona Vacantia and Ultimus Heres: Cambridge L.J. 1954, 22–26 (25 seq.).

³¹³ Traces of that solution can also be found in other legal systems, cf., for example, Art. 92 of the Bulgarian Private International Law Code; Book 26 Sec. 14(2) of the Finnish Succession Act; Art. 49 of the Italian Private International Law Act; Art. 1.62(3) of the Lithuanian Civil Code; Sec. 11 of chapter 1 of the Swedish International Successions Act.

successions in that State would point to an “appropriation” State³¹⁴, still no State would be able to effectively claim the estate. These cases cannot, however, be solved by a European conflict rule which – by its very nature – would not be binding for the third States involved. The Institute therefore suggests that the Succession Proposal should adopt the Austrian approach.

231. The Institute is aware of the fact that this rule would lead to a scission of the estate in cases where assets are situated in more than one State. This scission is however tolerable. Since there are no other heirs or claimants to the estate besides the involved States, problems otherwise associated with a dualistic approach cannot arise, e.g. difficulties with regard to the coordination of the different applicable laws especially in the field of legitimate portions and increased legal costs for estate planning due to the applicability of more than one legal system.

Article 25 – Universal nature

Any law specified by this Regulation shall apply even if it is not the law of a Member State.

Article 25 – Universal nature

Article 26 – Referral

Where this Regulation provides for the application of the law of a State, it means the rules of law in force in that State other than its rules of private international law.

Article 26 – *Renvoi* Referral

1. Where this Regulation provides for the application of the law of a Member State, it means the rules of law in force in that State other than its rules of private international law.

2. *Where this Regulation provides for the application of the law of a non-Member State, the rules of private international law of that State shall apply where they designate, as to matters of succession, the law of any Member State; the law of that Member State shall apply except for its rules of private international law.*

3. *Notwithstanding the preceding paragraphs, where Article 17, 18(3), 18a(3), 18b or 20 provides for the application of the law of a State, it means the rules of law in force in that State other than its rules of private international law.*

³¹⁴ A *renvoi* which could be accepted according to the Institute’s proposal for Art. 26 SP, see *infra* para. 232 *seq.*

Summary

232. As to renvoi the Institute proposes the following modifications of Art. 26 SP:

– For the sake of clarity and uniformity the official heading of Art. 26 SP should be changed to “renvoi” instead of “referral” (see *infra* para. 233).

– Art. 26(1) SP should be narrowed down and exclude renvoi only where the Regulation provides for the application of the law of a Member State (see *infra* para. 236 seq.).

– Art. 26(2) SP should address the case where the Regulation provides for the application of the law of a non-Member State whose private international law refers, as to the succession, to the law of the forum State or any other Member State. This reference should be accepted, and the internal law of the Member State referred to should be applied (see *infra* para. 238 seq.).

– Art. 26(3) SP clarifies that in the case of a choice of law by the deceased or in the case of special conflict rules using alternative connecting factors and subjecting an issue to several alternatively applicable laws, the internal law of the State referred to shall apply (see *infra* para. 243 seq.).

Comments

Linguistic changes in the heading

233. The first modification proposed by the Institute concerns the naming of Art. 26 SP. In accordance with Art. 20 of the Rome I Regulation, Art. 24 of the Rome II Regulation, Question 12 of the Green Paper and Art. 3.7 of the Discussion Paper the official heading of Art. 26 SP should be changed to “renvoi” for the sake of clarity and unity within the system of European private international law. Renvoi in this context should be understood as general term covering both a remission (*renvoi au premier degré*, *Rückverweisung*) as well as a transmission (*renvoi au second degré*, *Weiterverweisung*)³¹⁵.

Substantive changes

234. The Institute proposes to introduce a basic distinction into the discussion on whether to allow or exclude renvoi. In stark contrast to Art. 26 SP, a clear line should be drawn between designations of the law of a Mem-

³¹⁵ See *Dicey/Morris/Collins* (*supra* n. 32) para. 4–008, who call this the doctrine of single renvoi distinguishing it from the doctrine of double renvoi, i.e. the foreign court rule.

ber State (i.e. system-internal referrals) and designations of the law of a non-Member State (i.e. system-external referrals)³¹⁶.

235. Four examples, each from the point of view of a judge faced with a transnational succession issue and situated in a Member State (MS₁), should help to illustrate the amendments proposed by the Institute:

– *Example 1*: The Regulation refers to the law of another Member State (MS₂);

– *Example 2*: The Regulation refers to the law of a non-Member State (nMS), e.g. New York. However, the conflict rules of that nMS refer back to the law of the European forum State (MS₁);

– *Example 3*: The Regulation refers to the law of a non-Member State (nMS), e.g. New York. However, the conflict rules of that nMS refer to the law of another European Member State (MS₂);

– *Example 4*: The Regulation refers to the law of a non-Member State (nMS), e.g. New York. However, the conflict rules of that nMS refer either to the law of another non-Member State, e.g. Brazil, or to its own internal law.

Reference to the law of a Member State: Art. 26(1) SP

236. In case of a reference by the Regulation to the rules of law in force in another Member State (*Example 1*), both possible solutions – a reference to the rules of law including its rules of private international law or solely a reference to the internal law of that Member State – would lead to the application of the internal law of that State, as far as the Member State of the forum and the Member State whose internal law should apply are bound by this Regulation. Thus, a judge (hypothetically) faced with the issue in MS₂ would also apply the internal law of MS₂. Hence, in that respect Art. 26(1) SP has only declaratory functions.

237. Since Art. 1(2) SP provides, that “in this Regulation, ‘Member State’ means all the Member States with the exception of Denmark, [the United Kingdom and Ireland]”³¹⁷, it is ensured that judges faced with a reference to the law of a Member State will apply the same internal law throughout the European Union.

³¹⁶ This dichotomy seems to be acknowledged also by the Commission; see Question 12 of the Green Paper on whether to allow renvoi if the harmonised conflict rules *designate the law of a third country*.

³¹⁷ As to the Succession Proposal the United Kingdom has, so far, not opted-in, cf. press statement (supra n. 250).

Reference to the law of a non-Member State: Art. 26(2) SP

238. The proposed Art. 26(2) contains the main modification proposed by the Institute. It deviates from the Succession Proposal since it does not generally exclude renvoi in case of a referral by this Regulation to the law of a non-Member State (system-external reference)³¹⁸. The Institute is well aware that the tendency evidenced by the European instruments and legislative discussions has hitherto been a reluctance towards the doctrine of renvoi³¹⁹. However, in the context of successions the more compelling reasons militate in favour of a limited allowance of renvoi.

239. As the examples mentioned above have shown, there are three different scenarios that might occur when the law of a non-Member State is designated by this Regulation (*Examples 2-4*). Firstly, the Institute would like to leave the final case (*Example 4*) open for discussion and prefers to vest the matter in the judge who is faced with the issue. The judge should decide whether the assertion of the chosen connecting factor or the international harmony of decision³²⁰ should be the decisive factor in the case at hand. This degree of uncertainty is acceptable, as a transmission to the law of a second non-Member State seldom occurs. Moreover, a clear-cut rule on this point would raise the additional question as to the significance of further renvoi, by the law of the second non-Member State, to the law of the first or a third non-Member State. The solution of such rare fact situations should be found in light of the circumstances of the single case.

240. In the cases described in *Examples 2 and 3*, however, the Institute opts to challenge the general repudiation of renvoi³²¹ and proposes to implement

³¹⁸ It is a general question of European private international law whether renvoi by third states should be accepted. Thus, the issue should be contained in a future European instrument on general questions of the conflict of laws; see *Heinze* (supra n. 7) 115 seq.

³¹⁹ See Art. 24 of the Rome II Regulation; Art. 20d of the Proposal for a Council Regulation amending Regulation (EC) No. 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters, COM(2006) 399 final of 17. 7. 2006; Art. 6 of the Proposal for a Council Regulation (EU) implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, COM(2010) 105 final of 30. 3. 2010, as well as the conditional exclusion in Art. 20 of the Rome I Regulation and the *lex fori* approach in case of renvoi in Art. 19(2) of the Proposal for a Council Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, COM(2005) 649 final of 15. 12. 2005.

³²⁰ It is the laudable objective of the doctrine of renvoi to ensure that the same decision shall be given on the same disputed facts, irrespective of the country in which the case is heard, see *Kropholler* (supra n. 158) 166 seq.

³²¹ See also Parliament Report p. 6 and the Green Paper replies of the Dutch government p. 6, the Finnish government p. 5, GEDIP p. 6, the German government p. 6, the German Federal Council p. 6, the Lithuanian government p. 5, the Luxembourgian government p. 5, the Polish government p. 6, the Slovak government p. 4 and the UK government Annex B p. 17. Against an acceptance of renvoi are the Green Paper replies of the Estonian government p. 4, the Swedish government p. 5 and the Ulrik Huber Institute p. 9.

a rather broad understanding of the notion of remission. While the allowance of renvoi to a certain extent weakens the connecting factors laid down in the Regulation, it would have two main advantages: It would help to promote an international harmony of decision, and it would facilitate the adjudication of such cases. In *Example 2* as well as *Example 3* a court (hypothetically) faced with the issue in New York would, according to its private international law, not apply its own internal law, but refer to the law of MS₁ or MS₂. Having that in mind, it would only be consistent to integrate this hypothetical reference into the own legal system of the Union by accepting the remission. This could be understood as a new European concept, which might help to endorse the unity of the European Union and to guarantee legal certainty. In this vein, it should moreover be noted that it might also ease decision-making for the court seised, as it might be easier for the forum court to ascertain the law of another Member State than the law of a non-Member State. This is particularly true in the case of *Example 2*, where the judge will finally apply the *lex fori*. But the progress to be expected from the European Judicial Network in terms of information about the foreign Member States also favours the allowance of renvoi in *Example 3*.

241. Thus, the Institute proposes that such a referral to the law of any Member State (be it a remission *stricto sensu* [*Example 2*] or be it a reference to any other Member State [*Example 3*]) should be allowed and lead to the application of the internal law of that Member State. This would break the inextricable circle and call a halt to the game of legal “ping-pong”.

242. One controversial point which came up during the consideration of the matter and should be recorded here for further discussion is the possible impact of renvoi on the monist approach taken by the Succession Proposal (see Art. 16 and Art. 19(1) SP and *supra* para. 128 seq.). Notably, a partial renvoi by the conflict rules of a dualist non-Member State – which distinguish between the succession in movables and immovables – can cause a scission of the estate where, for example, the European monist conflict rule points to the law of such a non-Member State whose dualist conflict rule refers to the *lex rei sitae* for the succession in immovables. Hence, it has been argued, that if at all, only a total renvoi by the law of a non-Member State should be allowed³²². A general allowance of renvoi would indeed promote the intentional harmony of decisions but only at the cost of giving up the monist position which might be an unreasonable price. The Institute is well aware of this problem. Nonetheless, it rates the above-mentioned advantages to be gained by an implementation of the doctrine of renvoi higher than the possible disadvantageous impact on the monist principle³²³.

³²² Cf. *Dutta* (*supra* n. 38) 559; *Lehmann* (*supra* n. 66) 110.

³²³ See also GEDIP Reply 6; *Bauer*, Neues europäisches Kollisions- und Verfahrensrecht auf dem Weg, Stellungnahme des Deutschen Rates für IPR zum internationalen Erb- und Scheidungsrecht: IPRax 2006, 202–204 (203); *Mansel* (*supra* n. 66) 215.

Freedom of choice of law and alternative connecting factors

243. The Succession Proposal does not explicitly state that in case of a choice of law pursuant to Art. 17, 18(3) or 18a(3) or in case of an alternative referral to the rules of law in force in more than one State, such as in Art. 18b or 20, it is the internal law of that State which should apply. Namely, there was no need for such an explicit statement since the Commission's Proposal excludes renvoi altogether. The partial allowance of renvoi by the Institute would generate the need for a clear exception in this respect. Therefore, the proposed Art. 26(3) adds to the goal of indicating as clearly as possible which legal system should furnish the final solution to the issue, and it explicitly provides for the application of the internal law of the State the Regulation refers to.

244. As far as a choice of law is concerned, this is in line with the choice of law rules in both the European³²⁴ and the national systems³²⁵ of private international law and helps to achieve legal certainty. The choice of law should prevail regardless of the circumstances due to the fact that any average person choosing a law to govern his or her succession has to be reasonably assumed to be choosing the internal law of a State and not its rules of private international law³²⁶. It might otherwise be impossible for the person choosing the law to foresee the legal consequences of his or her choice of law.

245. As far as an alternative referral leads to the application of a law of a State, it is the *telos* of the provision itself (for instance, in the case of Art. 18b the healing of the formal validity of testamentary dispositions) which inevitably aims for the same result. The allowance of renvoi might be incompatible with the purpose of an alternative referral, which is to boost the likelihood of a certain substantive result. Such a referral would be pointless, if – despite a connection of the matter to different States – only one internal law would be applied due to the fact that all relevant conflict rules of the designated States refer to it³²⁷. It can be generally said that in case of an alternative designation, renvoi might only be allowed *in favorem*, i.e. where it broadens the possible options. The doctrine of renvoi has to be repudiated if it thwarts the favoured result³²⁸. A reference to the internal law of a State in case of an

³²⁴ See for the tendency in European instruments towards a general exclusion of renvoi *supra* para. 238.

³²⁵ For example Art. 4(2) of the Introductory Act to the German Civil Code and Art. 13(2)(a) of the Italian Private International Law Act.

³²⁶ Cf. *Kropholler* (*supra* n. 158) 175 seq.

³²⁷ For Germany, see the report of the Committee on Legal Affairs, BT-Drucks. 10/5632, p. 39.

³²⁸ Cf. *Kropholler* (*supra* n. 158) 171 seq.; *von Overbeck*, Les questions générales du droit international privé à la lumière des codifications et projets récents: cours général de droit international privé: Rec. des Cours 176 (1982-III) 127–167 (Chapitre V – Le renvoi); *Keller/Siehr*, Allgemeine Lehren des Internationalen Privatrechts (1986) 477; *Palandt (-Thorn)* (*supra* n. 39) Art. 4 EGBGB para. 6.

alternative referral seems to be the best solution³²⁹, which, moreover, fosters legal clarity.

Article 27 – Public policy

1. The application of a rule of the law determined by this Regulation may be refused only if such application is incompatible with the public policy of the forum.

2. In particular, the application of a rule of the law determined by this Regulation may not be considered to be contrary to the public policy of the forum on the sole ground that its clauses regarding the reserved portion of an estate differ from those in force in the forum.

Article 27 – Public policy of the forum

1. The application of a ~~rule provision~~ *rule provision* of the law ~~determined of any State specified~~ *determined of any State specified* by this Regulation may be refused only if such application is *manifestly* incompatible with the public policy (*ordre public*) of the forum.

2. In particular, the application of a rule of the law determined by this Regulation may not be considered to be contrary to the public policy of the forum on the sole ground that its clauses regarding the reserved portion *or other inalienable rights to the estate* ~~of an estate~~ differ from those in force in the forum.

Summary

246. The Institute supports the Succession Proposal and recommends only minor linguistic changes in order to harmonise Art. 27 SP with the concepts of public policy adopted in other European instruments, namely Art. 21 of the Rome I and Art. 26 of the Rome II Regulation. Moreover, Art. 27(2) SP should refer to “the reserved portion or other inalienable rights to the estate” as a more comprehensive and more general term than “reserved portion of the estate”.

³²⁹ For a general exclusion of renvoi in the case of an alternative reference see e. g. Art. 13(2)(b) of the Italian Private International Law Act. Other legal systems do not apply renvoi where it would lead to the illegitimacy of a status, cf. e. g. Art. 19(1) Portuguese Civil Law Act, Art. 13(3) of the Italian Private International Law Act (for international child matters).

Comments

Technical changes: Harmony with Art. 21 Rome I and Art. 26 Rome II Regulation

247. The Commission's proposal is based on Art. 18 of the Hague Succession Convention. However, a different European concept of public policy exceptions has already been established in other European instruments, namely in Art. 21 of the Rome I and Art. 26 of the Rome II Regulation. For the sake of consistency in the Union's conflict of laws, Art. 27 SP should adopt the wording of Art. 21 Rome I and Art. 26 Rome II. The Institute stresses the importance of developing consistent rules for general questions of private international law such as public policy.

248. In matters relating to succession, the courts are sometimes confronted with concepts of foreign law which violate fundamental principles of the forum, e.g. religious laws containing discriminatory provisions with regard to the capacity of members of another religious group to inherit³³⁰. Keeping in mind that Recitals 24 and 34 of the Succession Proposal refer to the Charter of Fundamental Rights of the EU, Art. 27(1) SP is not limited to the mere policies of the forum State, but also encompasses the public policy of the European Union as an integral part of the forum's policies³³¹. Hence, Art. 27(1) SP must be applied by the courts of the Member States in observance of the rights and principles contained in the Charter of Fundamental Rights³³².

A special limitation of the public policy exception – Art. 27(2) SP

249. There is a danger that the choice of law rules of the Regulation could be circumvented by courts having excessive recourse to exceptions based on public policy or overriding mandatory provisions in order to protect the principles of the forum State with regard to mandatory succession rights³³³. As a matter of fact, however, only a few Member States consider their national provisions on mandatory succession rights as an integral part of their

³³⁰ See e.g. for Egyptian law OLG Hamm 28.2. 2005, IPRax 2006, 481. See further for discrimination based on gender under Iranian law OLG Düsseldorf 19.12. 2008, IPRax 2009, 520. Recourse to public policy is possible if the case has a sufficient connection to the forum State. Yet, in case of a very strong or particularly unique connection to the territory of the Member State or the Member States of the EU, non-discrimination rules in particular might apply as overriding mandatory provisions addressed by Art. 22 SP, see supra para. 210 (comments on Art. 22 SP).

³³¹ See Recitals 24 and 34. Cf. for the public policy of the EU with regard to the Rome I Regulation Max Planck Institute (supra n. 281) 337 seq. See as to overriding mandatory provisions derived from European Union law supra para. 210 (comments on Art. 22 SP).

³³² See Recitals 24 and 34.

³³³ See supra para. 212 seq. (comments on Art. 22 SP).

respective public policy³³⁴. Case law on this issue is sparse³³⁵. For example, in Germany, even though the German Constitutional Court has held that the reserved portion, the German *Pflichtteil*, is based on fundamental rights³³⁶, there is apparently no published court decision in Germany expressly stating that the reserved portion is to be protected by the public policy exception³³⁷. Moreover, even though a succession law designated by this Regulation might not, or at least not to the same extent, rely on the concept of indefeasible rights to the estate, the succession laws of many legal systems provide for some kind of compensation of individuals in need³³⁸. In these situations, it is rather unlikely that a violation of the public policy of the forum would occur, given that the result obtained by the applicable law often does not substantially differ from that of the forum³³⁹. Against this background, the limitation of the court's recourse to Art. 27(1) SP as proposed by the Commission in para. 2 seems adequate and acceptable in most situations. The Institute recommends only a minor change: The provision should refer to "the reserved portion or other indefeasible rights to the estate" as the more comprehensive and more general term, thus covering different national concepts such as forced heirship and allocations deducted from the succession by a judicial authority for the benefit of the relatives of the deceased³⁴⁰.

250. Finally, the Institute underlines that Art. 27(2) SP does not prevent the courts from resorting to the public policy exception where the testator, for example, modifies the connecting factor for the sole purpose of circumventing the provisions on forced heirship of the State to which the case is predominantly connected (*fraus legis*)³⁴¹. Moreover, Art. 27(2) SP implies that the public policy exception may take effect whenever the exclusion of the reserved portion or of other indefeasible rights to the estate does not constitute the "sole ground" but is rather intermingled with other elements

³³⁴ According to the synopsis regarding public policy in Annex III to the DNotI Study Austria is the only Member State participating that considers the exclusion of forced heirship contrary to its public policy. Yet, the country report itself does not mention a single decision of an Austrian court to this end, see *Bajons/Welser*, Autriche, in: Country Reports 57–145. See also *Süß, Österreich*, in: *Handbuch Pflichtteilsrecht*², ed. by *Mayer/Süß/Tanck/Bittler/Wälzholz* (2010) 1041–1050 (1041 seq.).

³³⁵ Cf. the synopsis regarding public policy in Annex III to the DNotI Study. See, however, as to French law e.g. TGI Paris 3. 12. 1973, Rev. crit. d.i. p. 63 (1974) 653.

³³⁶ BVerfG 19. 4. 2005, BVerfGE 112, 332.

³³⁷ See, however, the *obiter dictum* in OLG Düsseldorf 19. 12. 2008, IPRax 2009, 520.

³³⁸ For instance, in the UK, rights might be granted to persons in need under the Inheritance (Provision for Family and Dependents) Act 1975 Act. See also *Staudinger (-Dörner)* (supra n. 39) Art. 25 EGBGB para. 731.

³³⁹ See *Mansel* (supra n. 66) 216 seq.

³⁴⁰ See e.g. for the UK, the Inheritance (Provision for Family and Dependents) Act 1975 Act. See also supra para. 34 seq. and para. 172.

³⁴¹ To this end see Spanish reply to the Green Paper p. 15. See as to *fraus legis* in matters relating to succession e.g. Cass. civ. 20. 3. 1985, Rev. crit. d.i. p. 75 (1986) 66.

which creates a fundamental contradiction with the public policy of the forum State, e.g. when combined with a discriminatory purpose. Thus, for instance, if the testator intended to exclude certain persons because of their gender or religion by choosing a foreign law that prevents this group of heirs from participating in the estate, Art. 27(1) SP could apply³⁴².

Article 28 – States with more than one legal system

1. Where a State comprises several territorial units each of which has its own rules of law in respect of succession to the estates of deceased persons, each territorial unit shall be considered as a State for the purpose of identifying the law applicable under this Regulation.

2. A Member State within which different territorial units have their own rules of law in respect of successions shall not be required to apply this Regulation to conflicts of law arising between such units only.

Article 28 – States with more than one legal system

**Chapter IV
Recognition and enforcement**

Article 29 – Recognition of a decision

A decision given pursuant to this Regulation shall be recognised in the other Member States without any special procedure being required.

Any interested party who raises the recognition of a decision as the principal issue in a dispute may, in accordance with the procedures provided for under Articles 38 to 56 of Regulation (EC) No 44/2001, apply for that decision to be recognised. If the outcome of the proceedings in a court of a

**Chapter IV
Recognition and enforcement**

Article 29 – Recognition of a decision

³⁴² See for the prohibition of discrimination Recitals 24 and 34.

Member State depends on the determination of an incidental question of recognition, that court shall have jurisdiction over that question.

Article 30 – Grounds of non-recognition

A decision shall not be recognised in the following cases:

(a) where it was given in default of appearance, such recognition is manifestly contrary to public policy in the Member State in which recognition is sought, it being understood that the public policy criterion may not be applied to the rules of jurisdiction;

(b) 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;

(c) if it is irreconcilable with a decision given in a dispute 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 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 addressed.

Article 30 – Grounds of non-recognition

(a) ~~where it was given in default of appearance,~~ if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought, it being understood that the public policy criterion may not be applied to the rules of jurisdiction;

(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;

Summary

251. The Institute generally welcomes the adoption, by the Succession Proposal, of the established Brussels I rules on recognition and enforcement of judgments. Apart from rectifying two minor mistakes in copying the Brussels I regime, no further amendments have to be made.

Comments

252. The English text of Art. 30(a) and (b) SP apparently suffers from two mistakes made in the process of copying the parallel provisions in Art. 34(1) and (2) of the Brussels I Regulation. The Institute assumes it was intended that public policy is to remain a ground for non-recognition in itself without stipulating an additional prerequisite of default of appearance. Instead, default of appearance is related to Art. 30(b), according to which recognition will be refused if the defendant was not served with the document instituting proceedings.

Protection of third parties in non-contentious proceedings

253. The Institute underlines that with respect to the protection of persons adversely affected by non-contentious proceedings, special attention has to be paid at not too narrowly interpreting public policy in Art. 30(a) SP. The group debated whether the Succession Proposal should be supplemented by a provision along the lines of Art. 23(d) of the Brussels IIbis Regulation³⁴³. In respect of the constitutional guarantees of due process and the right to a fair hearing³⁴⁴, it is arguable that a decision should not be recognised if it directly affects a person's right under the succession and it was made without him or her having been given an opportunity to be heard. However, a rigid rule could impair legal certainty severely; consider, for instance, that after a decision on the appointment of an executor was made, it turns out that an heir, hitherto unknown, claims to be adversely affected by that decision. If that decision was not recognised, this could influence the validity of legal actions by executors and inappropriately undermine legal

³⁴³ See Art. 23 of the Brussels IIbis Regulation: "A judgment relating to parental responsibility shall not be recognised [...] (d) on the request of any person claiming that the judgment infringes his or her parental responsibility, if it was given without such person having been given an opportunity to be heard."

³⁴⁴ Art. 6 European Convention of Human Rights; Art. 47 Charter of Fundamental Rights of the European Union, O.J. 2000 C 364/1; cf. ECJ 2 4. 2009, Case C-394/07 (*Gambazzi*) (not yet in E.C.R.) para. 28; 2.5. 2006, Case C-341/04 (*Eurofood*), E.C.R. 2006, I-3813, para. 65; 28.3. 2000 (supra n.292) para. 38. See also *Heinze*, *Europäisches Primärrecht und Zivilprozess*: EuropaR 2008, 654–690 (667 seq.).

certainty. Other cases, however, may require a different treatment, particularly such proceedings which affect or exclude third parties' claims against the heirs provided that the claims have not been formally registered with the court³⁴⁵. If a third party is habitually resident in another Member State and could not reasonably have learned of the commencement of such proceedings, consideration has to be given to the circumstances of the individual case including whether the court knew about creditors in other Member States being affected by the proceedings.

254. According to Art. 30(b) SP, recognition of a judgment shall be refused if the "defendant" was not served with the document which instituted the proceedings. This provision should under no circumstances be read as exhaustive³⁴⁶ in relation to the position of third parties in non-contentious proceedings who cannot be considered defendants within the formal meaning of that provision³⁴⁷. Third parties can be protected adequately if Art. 30 (a) SP is not interpreted in an excessively narrow manner. It has been the traditional function of the procedural *ordre public* in private international law to deal with such peripheral cases which are difficult to foresee and, therefore, cannot be covered by an explicit and specific rule.

Article 31 – No review as to the substance of a decision

Under no circumstances may a foreign decision be reviewed as to its substance.

Article 31 – No review as to the substance of a decision

Article 32 – Stay of proceedings

A court of a Member State in which recognition is sought of a decision given in another Member State may stay the proceedings if an ordinary appeal against the decision has been lodged.

Article 32 – Stay of proceedings

³⁴⁵ See e.g. in Germany Sec. 433 seq. and Sec. 454 seq. of the Act on Family and Non-Contentious Proceedings on the so-called "Aufgebotsverfahren".

³⁴⁶ See for contentious proceedings ECJ 10. 10. 1996, Case C-78/95 (*Hendrikman*), E. C. R. 1996, I-4934, para. 23.

³⁴⁷ Cf. *Bork/Jacoby/Schwab (-Dutta)*, FamFG, Kommentar zum Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit (2009) § 433 FamFG para. 18, 21.

Article 33 – Enforceability of decisions

Decisions given in a Member State and enforceable there and legal transactions shall be carried out in the other Member States in accordance with Articles 38 to 56 and 58 of Regulation (EC) No 44/2001.

Article 33 – Enforceability of decisions

**Chapter V
Authentic instruments**

Article 34 – Recognition of authentic instruments

Authentic instruments formally drawn up or registered in a Member State shall be recognised in the other Member States, except where the validity of these instruments is contested in accordance with the procedures provided for in the home Member State and provided that such recognition is not contrary to public policy in the Member State addressed.

**Chapter V
Authentic instruments**

Article 34 – Recognition of authentic instruments

~~Authentic instruments formally drawn up or registered in a Member State shall be recognised in the other Member States, except where the validity of these instruments is contested in accordance with the procedures provided for in the home Member State and provided that such recognition is not contrary to public policy in the Member State addressed.~~

Summary

255. The Institute proposes to delete Art. 34 SP entirely.

Comments

Unclear scope: Which authentic instruments are covered?

256. The scope of Art. 34 SP is unclear and potentially misleading. Art. 34 generally speaks of the recognition of authentic instruments as defined in Art. 2(h) SP. At first sight, one could think that Art. 34 covers the recognition of authentic instruments on a person's civil status, such as birth, marriage, death or adoption certificates or divorce decrees. All those documents are highly relevant for answering preliminary questions in succession matters; however, they are excluded by Art. 1(3)(a) SP from the substantive

scope of the future Regulation. In that context it should be noted that an automatic cross-border recognition of such documents is not without problems. Unlike court decisions, authentic instruments are drawn up by a great variety of authorities in the Member States; therefore, it will be quite difficult for the recognising authority to verify whether a certain document is authentic and was issued by the competent authority. Therefore, the European legislator should not prematurely abolish established and successful means of recognitions, in particular the apostil requirement.

257. Moreover, Art. 34 SP is not applicable to court decisions which will be recognised and enforced pursuant to Art. 29 seq. SP. This is also true in respect of the European Certificate of Succession whose recognition within the European Union is addressed by Art. 38 seq. SP.

258. Consequently, Art. 34 SP might primarily apply to instruments drawn up by notaries public such as, for example, testamentary dispositions in the sense of Art. 2(c) SP, as amended by the Institute. But a closer look discloses that such testamentary dispositions are not a proper object of recognition under Art. 34 SP either.

What does “recognition” mean?

259. Whereas the *enforcement* of notarial instruments – as far as they are enforceable – is easy to understand and dealt with by Art. 35 SP, Art. 34 SP does not clarify what exactly is meant by the “recognition” of such instruments. Unlike court decisions which might turn the object of the dispute into a *res iudicata*, authentic instruments can in most jurisdictions be reviewed by the courts comprehensively, as is also acknowledged in Recital 26. Whether an authentic instrument drawn up by a notary public is valid depends on the law applicable pursuant to the relevant choice of law rules – a law which also governs the effects of the instrument. If, for example, a notary public draws up a will for a testator, that will – which might be an authentic instrument in the sense of Art. 2(h) SP – should not be automatically recognised as valid within the European Union, not even within the State where the notary public has its seat. Rather, the formal validity of the will would be subject to the law designated by Art. 18b SP, as amended by the Institute. The existence and validity of the will in substance, its effects and interpretation would be governed by the law applicable according to the proposed Art. 18 SP. Those choice of law rules and the power of the courts to review authentic instruments should not be curtailed by a duty to automatically recognise the instrument.

260. It is therefore no surprise that the Brussels I Regulation does not contain any provisions on the recognition of authentic instruments, but rather restricts its rules to the enforcement of enforceable authentic instruments, see Art. 57 of the Brussels I Regulation. The same applies, in fact,

also to Art. 46 of the Brussels IIbis Regulation and Art. 48 of the Maintenance Regulation which – although ordering a “recognition” of authentic instruments – are restricted to enforceable instruments, unlike Art. 34 SP. The use of the term “recognition” has already been criticised with regard to the Brussels IIbis and the Maintenance Regulation³⁴⁸. It should not be extended to non-enforceable authentic instruments in a future Succession Regulation.

261. Finally, Recital 26 does not clarify the exact meaning of “recognition” either. It states that the authentic instruments shall “enjoy the same evidentiary effect with regard to their contents and the same effects as in their country of origin, as well as a presumption of validity which can be eliminated if they are contested”. The evidentiary effects of authentic instruments, however, differ considerably between the Member States. They should be determined by the law applicable to the substantive effects of the instrument under the future Regulation and by the procedural rules of the *lex fori* rather than only by the law of the country of origin.

Article 35 – Enforceability of authentic instruments

A document which has been formally drawn up or registered as an authentic instrument and is enforceable in one Member State shall be declared enforceable in another Member State, on application made in accordance with the procedures provided for in Articles 38 to 57 of Regulation (EC) No 44/2001. The court with which an appeal is lodged in accordance with Articles 43 and 44 of this Regulation shall refuse or revoke a declaration of the enforceability if enforceability only of the authentic instrument is manifestly contrary to public policy in the Member State addressed or if contestation of the validity of the instrument is pending before a court of the home Member State of the authentic instrument.

Article 35 – Enforceability of authentic instruments

³⁴⁸ Hess/Pfeiffer/Schlösser (supra n. 138) para. 628.

Comments

262. See comments on Art. 34 SP supra in para. 255 seq.

Chapter VI
European Certificate of
Succession

Chapter VI
European Certificate of
Succession

Comments

The need for a European Certificate of Succession

263. In most Member States the settlement of an estate does not necessarily involve the participation of a court. In practice, however, there is a need for heirs to prove their position, e.g. in order to receive payments from a bank account held by the deceased. In this context, it can be an advantage for an heir to have available some kind of official confirmation of his or her position, i.e. a certificate issued by a credible authority giving evidence of his or her status every time the proof is needed. Such certificates of inheritance exist in the legal systems of many Member States.

264. A large number of successions in the European Union are not limited to one Member State but have cross-border implications. However, national certificates of succession issued in one Member State are, in most cases, not recognised in other Member States. One main reason is that the legal nature as well as the conditions and effects of such certificates vary greatly (see infra para. 266–269). Additionally, national certificates of succession are closely connected to the method of acquiring property upon death as foreseen by the substantive law of the respective Member State³⁴⁹. In practice, individuals or entities presented with such certificates (referred to in the following as “presentees”) do not know what value they can attach to the document. For example, a German bank being confronted with a German *Erbschein*, issued according to Sec. 2353 seq. of the German Civil Code, can be sure that, in general, a payment made to the heir indicated in the document will discharge the bank’s respective obligation because the heir displayed in the certificate is presumed to be the true heir. If, however, a foreign certificate of succession is submitted to this bank, it does not know the legal nature of the document and the issuing authority and – above all – the effects of the certificate as compared to those of its German equivalent. The bank will therefore most probably ask for additional evidence to ensure

³⁴⁹ Cf. *Wenckstern*, Erbnachweis, in: Handwörterbuch des Europäischen Privatrechts (supra n. 8) 413.

that the payment is made to the real heir. Thus, a certificate of inheritance issued under national law does not have the legal and practical effects intended if used abroad; it will normally be downgraded to a simple component of evidence which can be useful, but is generally not sufficient to prove the quality of being an heir.

265. The Institute therefore generally welcomes the idea of introducing a European Certificate of Succession having the same requirements, content and effects irrespective of where it is being issued and being accepted in all Member States without further formalities. However, some unresolved issues, most of them arising from the close links between the content and effects of such certificates and the applicable substantive law, have to be addressed.

A brief overview of the instruments existing in the Member States

266. In a comparative perspective there are basically three different types of certificates in the Member States depending on the issuing body: Judicial certificates, certificates issued by notaries public and private affirmations³⁵⁰. However, even within these groups the concepts differ considerably.

267. Judicial certificates can be found, for instance, in Austria, Germany and the United Kingdom. In Austria, a devolution order of a court, the *Einantwortungsbeschluss*, accomplishes the transfer of ownership of the estate to the heirs with the *Einantwortungsurkunde* serving as the respective certificate. In Germany a specific judicial certificate of succession (*Erbschein*) displays the heirs and their respective shares and protects third parties by a rebuttable presumption that the persons named in the certificate as heirs are the true heirs. In the United Kingdom, the grant of a letter of administration by a court has a function comparable to that of a certificate of succession, although it does not display the heirs, but only the personal administrator.

268. Most other countries do not use judicial certificates of succession. In France a notarial certificate of inheritance protects third parties who act on the certificate in good faith. Spain has a comparable instrument; a notarial certificate is sufficient in all cases of testamentary or statutory succession where close relatives or spouses are the heirs.

269. Some countries like Sweden and Finland provide for private inventories of the estate primarily serving tax purposes, but also providing good faith protection for third persons acquiring parts of the estate from persons registered in the inventory. Finally, the laws of some other countries, like Italy, do not provide for a general certificate of succession at all.

³⁵⁰ Cf. in detail DNotI Study p. 277–289.

Changes and challenges

270. The great diversity of solutions may explain why the vast majority of answers to the Green Paper have opted in favour of a European Certificate of Succession³⁵¹. The Institute, too, welcomes the idea of introducing such a European Certificate serving as proof of the status of heir in all Member States and establishing a rebuttable presumption that its content is accurate. However, some inconsistencies of the Succession Proposal have to be addressed. Some of them may be resolved by the amendments outlined below. Others are of a more fundamental nature.

Duty to inform (Art. 40(4)) and a separation of the contents and grounds (Art. 41 and 41a)

271. A first substantial modification is the introduction of a duty for the issuing court to inform any known persons potentially entitled to the succession (see Art. 40(4) as amended by the Institute).

272. The Institute also proposes a division of the certificate itself (see Art. 41 SP) and its grounds (Art. 41a). The former may be presented to third parties such as banks, potential buyers, creditors and virtually any other affected party, whereas the latter will only be available to interested parties on application and not circulate freely with the certificate itself. This will help to keep personal data confidential.

Interaction with rules of matrimonial property regime

273. An essential deficit in the present conception of a European Certificate of Succession is its interaction with questions of matrimonial property law which are excluded from the scope of the Succession Proposal according to its Art. 1(3)(d) SP (see also, in general, *supra* para. 9 *seq.* and para. 171). The courts of different Member States will therefore apply their national rules of private international law to questions concerning matrimonial property and, in doing so, potentially come to different results concerning the applicable law. This might result in situations in which the courts of different Member States come to different results as to the respective share of each heir (see more details *infra* para. 322 *seq.*).

Good faith protection and the rectification of the Certificate (Art. 43 and 44a)

274. Concerning the rectification and cancellation of a European Certificate of Succession, the question of authentic copies and their effects, in par-

³⁵¹ See the Commission staff document available at <ec.europa.eu/justice_home/news/consulting_public/successions/contributions/summary_contributions_successions_fr.pdf>.

ticular in cases where they no longer correspond to the original certificate must be addressed. The period of validity of three months as defined in Art. 43(2) SP can be very short, on the one hand, where procedures such as entries in land registers are concerned. On the other hand, if in the meantime the original certificate has been rectified or cancelled, a maximum period of three months during which the authentic copies are presumed accurate appears to be very long and will create a considerable amount of uncertainty in legal relations.

275. The Institutes proposes to resolve this issue via the use of an electronic register for certificates of succession, see the new Art. 44a. Such a register, which would have the main function of coordinating the activities of the courts in different Member States, could also serve as a medium for good faith protection, ensuring that the presentee presented with a copy of the Certificate of Succession always has the opportunity to check whether the certificate in his or her hands still corresponds with the original certificate deposited at the issuing court. For that purpose, every European Certificate of Succession would be accessible online via a personal reference code provided to persons having a legitimate interest, thereby allowing for a straightforward checking of the validity of a copy at any time and making a bona fide function of the copies themselves redundant (see *infra* para. 336).

European Certificates of Succession and national certificates

276. A last issue that has to be addressed is the relationship between the European Certificate of Succession and national certificates. The Succession Proposal promised to resolve this question in its Recital 27 (last sentence). However, the actual rules in Chapter VI do not mention the question at all. As the use of the European Certificate is not obligatory, it will not be exclusive and it is possible that national certificates of succession will be issued before or after the issue of a European Certificate. This could happen within the same Member State as well as in different Member States, since there are cases in which the courts of several Member States may consider themselves competent. This latter aspect may also lead to several European Certificates being issued. At the current stage, it appears difficult to give final answers to these questions. The Institute has therefore only formulated some guidelines on what would be conceivable to deal with such cases in practice (see *infra* para. 327–332).

**Article 36 – Creation
of a European Certificate
of Succession**

1. This Regulation introduces a European Certificate of Succession, which shall constitute proof of the capacity of heir or legatee and of the powers of the executors of wills or third-party administrators. This certificate shall be issued by the competent authority pursuant to this Chapter, in accordance with the law applicable to succession pursuant to Chapter III of this Regulation,

2. The use of the European Certificate of Succession shall not be obligatory. The certificate shall not be a substitute for internal procedures. However, the effects of the certificate shall also be recognised in the Member State whose authorities have issued it in accordance with this Chapter.

**Article 37 – Competence to issue
the certificate**

1. The certificate shall be issued upon application by any person obliged to provide proof of the capacity of heir or legatee and of the powers of the executors of wills or third-party administrators.

2. The certificate shall be drawn up by the competent court in the Member State whose courts are competent pursuant to Articles 4, 5 and 6.

**Article 36 – Creation
of a European Certificate
of Succession**

1. This Regulation introduces a European Certificate of Succession, which shall constitute proof of the capacity of heir, *beneficiary*, *devisee* or legatee and of the powers of the executors of wills or third-party administrators. ~~This certificate shall be issued by the competent authority pursuant to this Chapter, in accordance with the law applicable to succession pursuant to Chapter III of this Regulation,~~

2. The use of the European Certificate of Succession ~~shall~~ *is not* be obligatory. The certificate shall not be a substitute for internal ~~procedures~~ *certificates*. However, the effects of the certificate shall also be recognised in the Member State whose authorities have issued it in accordance with this Chapter.

**Article 37 – Competence to issue
the certificate**

1. The certificate shall be issued upon application by any person ~~claiming to be an obliged to provide proof of the capacity of heir, beneficiary, devisee, or legatee, and of the powers of the executors of the wills or third-party administrators. These persons are obliged to provide proof of their respective capacity.~~

2. The certificate shall be ~~drawn up~~ *drawn up* issued by the competent court ~~in the Member State whose courts are competent pursuant to Articles 4, 5 and 6 Chapter II of this Regulation in accordance with the law applicable to succession pursuant to Chapter III of this Regulation.~~

Summary

277. The Institute agrees with the content of Art. 36 and Art. 37 SP and only proposes minor changes to improve the clarity of the two provisions.

Comments

278. Art. 36 and Art. 37 SP essentially define the central objective of the European Certificate of Succession as well as the entitled persons and determine the applicable law and competent court for the issue of the Certificate.

279. The Institute agrees with the central objective of the European Certificate of Succession stated in Art. 36(1)1 SP, namely to prove the entitlement to a succession, and supports the referral to the general provisions of the Regulation in Chapter III for the determination of the applicable law. Where the applicable law is the law of another Member State, the court, before issuing the Certificate, should be given the opportunity to overcome potential uncertainties by obtaining the relevant information from an authority of the respective jurisdiction through the European Judicial Network in civil and commercial matters³⁵², see Art. 46(2) as proposed by the Institute. A similar provision can be found in Art. 5 of the 1973 Hague Administration Convention³⁵³.

280. The Institute approves the optional character of the European Certificate of Succession, see Art. 36(2)1 SP. The applicant may choose the national or the European certificate. It follows that the European Certificate does not replace national certificates of succession, Art. 36(2)2 SP. But the provision requires greater precision: What the European Certificate of Succession shall not substitute for, is an “internal *certificate*”, not an “internal *procedure*”. Moreover, the effects of the European Certificate shall not be limited to other Member States, but shall also be recognised, as stipulated in Art. 36(2)3 SP, in the Member State where it was issued³⁵⁴.

281. The Institute approves of the idea of the European Certificate of Succession being issued only upon application as stipulated in Art. 37(1) SP. The Institute further agrees with the reference to the general provisions in Chap-

³⁵² Council Decision of 28. 5. 2001 establishing a European Judicial Network in civil and commercial matters (2001/470/EC), O.J. 2001 L 174/25, as amended by Decision No. 568/2009/EC of the European Parliament and of the Council of 18. 6. 2009, O.J. 2009 L 168/35.

³⁵³ See also DNotI Study p. 313 seq.

³⁵⁴ Regarding the problematical relation between conflicting national and European certificates see *infra* para. 326 seq.

ter II in Art. 37(2) SP for determining the competent court, because an isolated competence for the issue of the Certificate should be prevented³⁵⁵.

Persons entitled to apply for a Certificate, Art. 37(1) SP

282. Art. 37(1) SP displays some inaccuracies regarding the definition of potential applicants for a European Certificate of Succession. To avert misinterpretations, it should be made clear that any heir, beneficiary, devisee, legatee, executor of will or third-party administrator is entitled to apply for a Certificate. A further extension to creditors of the estate is not desirable. The benefit and necessity of creditors being provided a right to apply for a Certificate are doubtful. It is improbable that a Certificate will convince an heir to pay a debt he or she previously refused to pay, and the creditor will consequently have to take legal action anyway. In addition, on request of the creditor the court has to decide on the opponent's capacity as heir in the course of the creditor's action for payment. Such an extension would moreover be inconsistent with the objective of the European Certificate, which is to provide proof of an entitlement to a succession rather than the enforcement of claims of creditors.

283. Art. 37(1) SP seems to suggest that the applicant is under some obligation towards third parties to prove his or her entitlement to a right flowing from the succession, and that the application can only be successful if that obligation as against the third party has been assessed by the court. This assessment concerning a third-party relation of the applicant is, however, not the purpose of the application procedure. It should be sufficient that the applicant *wishes* to prove his or her capacity e.g. as an heir towards a third party, for allowing an application for a European Certificate of Succession. However, the applicant has to assert before the competent court that he or she holds the capacity to be certified and is obliged to provide proof in support of *this* assertion. For the sake of clarity, the Institute suggests splitting para. 1 into two sentences.

Jurisdiction and the applicable law, Art. 37(2) SP

284. The Institute further proposes to relocate the content of Art. 36(1)2 SP to Art. 37(2) SP for two reasons. First, this modification would avoid the

³⁵⁵ Cf. German Notary Association (Deutscher Notarverein; DNotV), [Stellungnahme zum] Vorschlag für eine Verordnung des Parlaments und des Rates über die Zuständigkeit, das anzuwendende Recht, die Anerkennung und die Vollstreckung von Entscheidungen und öffentlichen Urkunden in Erbsachen sowie zur Einführung eines Europäischen Nachlasszeugnisses, of 19.1. 2010, available at <www.dnotv.de/_files/Dokumente/Stellungnahmen/ErboVO_StellungnahmeDNotV_clean_VersandVO.pdf>, p. 30 seq. (cited: DNotV).

potentially confusing³⁵⁶ reference to the “competent authority *pursuant to this Chapter*”: This wording suggests the establishment of separate jurisdictional rules, although Art. 37(2) SP, the only provision in Chapter VI dealing with jurisdiction, merely refers to the general provisions in Art. 4 seq. SP. Second, it seems more appropriate to regulate jurisdiction and the applicable law in the same provision and, thereby, convert Art. 36(1) SP into the preamble of the following provisions. In addition to relocating the content of Art. 36(1)2 SP, the Institute proposes some minor changes. Instead of the expression “competent *authority*” in Art. 36(1)2 SP, the provision should – as in the current Art. 37(2) SP – refer to the “competent *court*”. Since “court” is broadly defined in Art. 2(b) SP, covering all forms of authorities³⁵⁷, this slight modification will prevent misinterpretations. Deviating from the current Art. 37(2) SP, the referral to the general provision on jurisdiction (Art. 4, 5 and 6 SP) should be extended to Chapter II in its entirety. In order to unify the wording, the Institute proposes a slight change from “drawn up” to “issued” in Art. 37(2) SP.

Article 38 – Content of the application

1. Any person applying for the issue of a certificate of succession shall provide, via the form a model of which is provided in Annex I, where such information is in their possession:

(a) information concerning the deceased: surname, forename(s), sex, civil status, nationality, their identification code (where possible), address of last habitual residence, date and place of their death;

(b) the claimant’s details: surname, forename(s), sex, nationality, their identification code (where possible), address of last place of habitual residence and relationship to the deceased;

(c) the elements of fact or law which justify their right to succession and/or right to administer and/or execute the succession. Where they are aware

Article 38 – ~~Details~~ Content of the application

(b) the ~~claimant’s~~ *applicant’s* details: surname, forename(s), sex, nationality, their identification code (where possible), address ~~of last place of habitual residence~~ and relationship to the deceased;

(c) the elements of fact or law which justify their right to succession and/or right to administer and/or execute the succession *including any conditions or*

³⁵⁶ See also DNotV (previous note) 30.

³⁵⁷ Cf. *supra* para. 55.

of a disposition of property upon death, a copy of the disposition shall be attached to the application;

(d) if they are replacing other heirs or legatees and, if so, the proof of their death or any other event which has prevented them from making a claim to the succession;

(e) whether the deceased has stipulated a marriage contract; if so, they must attach a copy of the marriage contract;

(f) if they are aware that the succession rights are being contested.

2. The applicant must prove the accuracy of the information provided by means of authentic instruments. If the documents cannot be produced or can be produced only with disproportionate difficulties, other forms of evidence shall be admissible.

3. The competent court shall take the appropriate measures to guarantee the veracity of the declarations made. Where its domestic law allows, the court shall request that such declarations are made on oath.

restrictions. In case the applicant is in possession of a testamentary disposition, where they are aware of a disposition of property upon death, a copy of the disposition shall be attached to the application; where the applicant lacks possession but is aware of such a disposition, they shall indicate where it can be found;

(d) if they are replacing other heirs, beneficiaries, devisees or legatees and, if so, the proof of their death or any other event which has prevented them from making a claim to the succession;

(e) whether the deceased ~~has stipulated a marriage contract~~ *was party to a marital agreement*; if so, ~~they~~ *the marital agreement must be attached a copy of the marriage contract*; ~~where the applicant lacks possession but is aware of such an agreement, they shall indicate where it can be found;~~

2. The applicant must prove the accuracy of the information provided by means of authentic instruments. If the documents cannot be produced or can be produced only with disproportionate difficulties, other forms of evidence *accepted by the domestic law of the competent court* shall be admissible.

Summary

285. The Institute mainly agrees with the content of Art. 38 SP. It suggests enhancing the standard of proof in two instances, whereas the other modifications only serve clarification purposes.

Comments

286. Art. 38 SP defines the requirements of an application for a European Certificate of Succession and determines the standard of proof for the accuracy of the information furnished. The Institute agrees with the broad lines of this provision: The applicant has to provide the competent court with all relevant facts he or she is aware of; the required information corresponds to what is required by the applicable law. The model application form in Annex I to the Regulation should be adapted to the proposed changes of Art. 38(1) SP. In general, “authentic instruments” (Art. 38(2)1 SP) constitute necessary and sufficient proof for the accuracy of the application requirements. Where the required document can only be produced with disproportionate difficulties or not at all, reference to the *lex fori* as a subsidiary solution is appropriate and should be made explicit. The same applies to the discretion the competent court is granted by Art. 38(3) SP in terms of taking the appropriate measures to guarantee the truth of the applicant’s declarations, including the request of making the declarations on oath if provided for under the *lex fori*.

Proposed changes to the list in Art. 38(1) SP

287. Regarding the list of required information in Art. 38(1) SP, the Institute proposes the following changes. First, “*claimant’s details*” in (b) should be replaced by “*applicant’s details*” because Art. 38 SP relates to an application and not a claim. Second, the expression “of last place of habitual residence” in Art. 38(1)(b) SP concerning the applicant’s address should be deleted. In this context, the only relevant information is where the applicant can be contacted. His or her habitual residence may be in a different city or country and bears no relevance insofar as the application is concerned. It may only matter in the case of a transfer of competence based on Art. 5(2)(b)³⁵⁸ in the form proposed by the Institute. Yet these rare occasions do not justify the introduction of a mandatory information requirement of this kind for every application.

288. The proposed amendment of Art. 38(1)(c)1 SP is meant to clarify that the applicant, given the far-reaching effects of a European Certificate of Succession, has to provide the competent court not only with the elements of fact or law which justify his or her inheritance rights but also – contrary to his or her own interests – with any information regarding “conditions or restrictions” of his or her rights. The Institute further recommends using, in Art. 38(1)(c)2 SP, the expression “testamentary disposition”, as defined in the new Art. 2(c), instead of “disposition of property upon death”. The oth-

³⁵⁸ Cf. *supra* para. 78 seq.

er proposed changes are meant to modify the content of this sentence. The current version allows the applicant to attach a simple copy of a testamentary disposition and, therewith, constitutes an exception from the standard of proof defined in Art. 38(2) SP. Given the significance of a testamentary disposition and the effects of a European Certificate of Succession, this exception does not seem justified³⁵⁹. In fact, the applicant should attach the original of the disposition if its production does not cause disproportionate difficulties in the sense of Art. 38(2)2 SP. Following a proposal of the Association of German Notaries³⁶⁰, the Institute further suggests that in case the applicant is not in possession of an existing testamentary disposition, the applicant should be obliged to provide the competent court with all information regarding the whereabouts of the disposition. The same applies, in principle, to the documents named in Art. 38(1)(e) SP.

289. Regarding Art. 38(1)(e) SP the Institute prefers the broad term “marital agreement” to the imprecise term of “marriage contract” as this would allow the court to take account of any implications of the matrimonial property regime of the deceased on the rights of the persons entitled to a succession, which is the main purpose of this requirement.

Further modifications

290. The recommended amendment in Art. 38(2)2 SP is meant to clarify that it is a question of the *lex fori* to decide which forms of evidence shall be admissible to prove the accuracy of the application requirements. Finally, the Institute suggests changing the heading from “*content* of the application” to “*details* of the application” because some aspects of Art. 38 SP such as the standard of proof do not relate to the content of the application.

Article 39 – Partial certificate

1. A partial certificate may be applied for and issued to attest to:

(a) the rights of each heir or legatee, and their share;

Article 39 – Partial certificate

~~1. A partial certificate may be applied for and issued to attest to~~ *The competent court shall issue a partial certificate having the same effects as the regular certificate (Article 42) in those cases where the applicant only applies for the attestation of:*

(a) the rights of each heir, legatee, executor of the will or third-party administrator and their respective share;

³⁵⁹ DNotV (supra n. 355) 33.

³⁶⁰ DNotV (supra n. 355) 33.

(b) the devolution of a specific item of property, where this is allowed under the law applicable to the succession;

(c) administration of the succession.

(b) the rights of each beneficiary, devisee and legatee and their respective share to the extent that they have a right in rem or

~~(b)(c)~~ (c) the devolution of a specific item of property, where this is allowed under the law applicable to the succession.

~~(c) administration of the succession.~~

Summary

291. The Institute approves of the idea of a partial certificate and suggests, besides modifications in wording, a specification of the persons entitled to the certificate as proposed in Art. 41 SP. The Institute further recommends changing the order of the provisions and locating Art. 39 SP after Art. 41 SP for systematic reasons.

Comments

292. Art. 39 SP provides the applicant with the opportunity to limit the scope of a European Certificate of Succession to certain information such as the rights of the entitled person or the devolution of a specific item of property. Some modifications in wording are recommended for reasons of clarification:

293. The proposed rewording of the opening paragraph reflects no changes in content. It shall mainly clarify that the partial certificate has the same effects as a regular certificate³⁶¹ regarding the information provided. The recommended modifications of Art. 39(a) SP and the newly added lit. b are based on the same reasons as in the new Art. 41(e) and (f)³⁶². With the adoption of the proposed extension of entitlement to executors of wills and third-party administrators, the current Art. 39(c) SP, which utilises the less precise³⁶³ term of “administration of the succession”, is dispensable and should be deleted.

294. The partial certificate is a European Certificate of Succession for the purposes of other provisions of Chapter VI; those provisions are meant to apply to the partial certificate as well. Consequently, and in accordance with the suggested modifications of Art. 41(2)(c) SP, the partial certificate should

³⁶¹ For the effects of a regular certificate see *infra* para. 319 seq.

³⁶² See *infra* para. 310 seq.

³⁶³ See DNotV (*supra* n. 355) 34.

conspicuously communicate information on the law applicable to the succession in accordance with this Regulation³⁶⁴ in order to inform the presentee (see para. 264) of its legal background and allow for an examination of any restrictions of the stated rights.

295. Finally, the Institute suggests relocating the provision on the partial certificate following the provision on the content of the “regular” certificate (Art. 41 SP); Art. 39 SP deals with the content of, rather than with the application for, a certificate³⁶⁵. The partial certificate represents an exception to Art. 41 SP and, therefore, should be placed in that context.

Article 40 – Issue of the certificate

1. The certificate shall be issued only if the competent court considers that the facts which are presented as the grounds for the application are established. The competent court shall issue the certificate promptly.

2. The competent court shall carry out, of its own accord and on the basis of the applicant’s declarations and the instruments and other means of proof provided by them, the enquiries necessary to verify the facts and to search for any further proof that seems necessary.

3. For the purposes of this Chapter, the Member States shall grant access to the competent courts in other Member States, in particular to the civil status registers, to registers recording acts and facts relating to the succession or to the matrimonial regime of the family of the deceased and to the land registers.

Article 40 – Issue of the certificate

1. The certificate shall be issued only if the competent court considers that the *requisite* facts ~~which are presented as the grounds for the application~~ are established. The competent court shall issue the certificate promptly.

4. *The issuing court shall individually inform any known persons potentially entitled to the succession about an application lodged in accordance with Article 38 and the issue of a certificate in accordance with paragraph 1.*

³⁶⁴ See in detail *infra* para. 309.

³⁶⁵ DNotV (*supra* n. 355) 34.

4. The issuing court may summon before it any persons involved and any administrators or executors and make public statements inviting any other beneficiaries to the succession to assert their rights.

4.5. The issuing court may summon before it any persons involved and any administrators or executors and may make public statements inviting any other *beneficiaries persons entitled* to the succession to assert their rights.

Summary

296. The Institute agrees with the content of Art. 40 SP in general but proposes, besides some clarifying modifications in wording, including an obligation for the competent court to inform any known persons entitled to the succession of both the application for the Certificate and its issue.

Comments

297. Art. 40 SP defines the requirements for the issue of a Certificate and stipulates the court's obligation to conduct an official enquiry in order to verify the necessary facts. Furthermore, the Article stipulates that the competent court shall be given access to the registers of other Member States for their enquiries. In addition, the competent court may summon before it any person involved or make public statements designed to invite other persons entitled to the succession to come forward and be heard.

298. The Institute agrees with the Commission's approach of imposing upon the competent court an obligation to issue the European Certificate of Succession once it considers the required facts established. Regarding Art. 40(1) SP, the recommended modifications are intended to prevent misinterpretations. A literal reading of the provision could lead to the conclusion that the competent court is obliged to issue a Certificate whenever the facts actually presented in the application are considered established, irrespective of which facts are required and whether such facts have been established completely. The added term "*requisite facts*" clears up this possible misunderstanding. The Institute also approves of the obligation to promptly issue the Certificate. An important amendment to the process of issuing a European Certificate of Succession outlined in the Succession Proposal should, however, be preliminarily raised at this point. With a view to avoiding conflicting certificates of succession, the Institute's proposed Art. 44b(1) obliges the competent court to consult the European register for certificates of succession³⁶⁶ before issuing the European Certificate in order to find out

³⁶⁶ See *infra* para. 351.

whether any other certificates have already been issued in the same succession matter.

299. Also to be approved are both the issuing court's obligation under Art. 40(2) SP to conduct, *ex officio*, an enquiry into the material facts as well as the stipulation in Art. 40(3) SP which ensures that the competent court has access to the relevant registers in other Member States; both measures will facilitate the ascertainment of the necessary information. The organisation of the information exchange between the different Member States falls under the scope of the European Judicial Network.

300. Art. 40(4) SP grants the competent court the power to summon any persons involved or to make public statements inviting persons with possible rights to the succession. Alongside similar provisions in the laws of procedure of the various Member States, it should be noted that this rule is arguably redundant. Furthermore, the Commission uses the term "beneficiaries" in the broader sense of "persons entitled to the succession". Since "beneficiary" is a legal term, e.g. in English law, which the Institute recommends using in its technical sense in several provisions of the Regulation, it should be replaced here by "persons entitled to the succession" to avoid confusion.

Obligation to inform any known entitled persons – the new Art. 40(4)

301. The Institute's main proposal for an amendment to Art. 40 SP concerns the introduction of the court's duty to inform in writing any person known to the court who is potentially entitled to the succession of an application made for a European Certificate of Succession as well as – at a later stage – the fact that it has been issued. In view of the far-reaching effects of a European Certificate of Succession, the proceedings leading to the issue of the Certificate should help the court as much as possible in determining the true factual basis for its decision. This aim can be served best if all persons who are possibly entitled have the opportunity to join the proceedings and introduce relevant information. Information on an application received by the court constitutes the earliest possible point in time at which these persons could be included in the proceedings. Where a European Certificate of Succession certifies a false legal status despite the court's best efforts, informing the same individuals of the issue of the Certificate creates the opportunity to challenge the issued Certificate at the earliest stage possible. If notice of the application has for some reason not reached the persons potentially entitled to the succession the subsequent information about the issue of the Certificate gives those persons a second chance to become aware of their rights and the situation. Accordingly, the dual stages of notification ensure that a "false" Certificate is valid for the shortest period of time possible. In addition, the procedural principle of fair trial and the fundamental right to

be heard³⁶⁷, both accepted in the European Union, support the introduction of the proposed obligation to inform.

Article 41 – Content of the certificate

1. The European Certificate of Succession shall be issued using the standard form in Annex II.

2. The European Certificate of Succession shall contain the following information:

(a) the issuing court, the elements of fact and law for which the court considers itself to be competent to issue the certificate and the date of issue;

(b) information concerning the deceased: surname, forenames, sex, civil status, nationality, their identification code (where possible), address of last habitual residence, date and place of death;

(c) any marriage contracts stipulated by the deceased;

(d) the law applicable to the succession in accordance with this Regulation and the circumstances in fact and in law used to determine that law;

(e) the elements in fact and law giving rise to the rights and/or powers of heirs, legatees, executors of wills or third-party administrators: legal succession and/or succession according to the will and/or arising out of agreements as to succession;

(f) the applicant's details: surname, forename(s), sex, nationality, their identification code (where possible), address and relationship to the deceased;

Article 41 – Content of the certificate

~~(a) the issuing court, the elements of fact and law for which the court considers itself to be competent to issue the certificate and the date of issue;~~

~~(c) any marriage contracts stipulated by the deceased;~~

~~(d)(c) the law applicable to the succession in accordance with this Regulation, this information to appear conspicuously on the certificate and the circumstances in fact and in law used to determine that law;~~

~~(e) the elements in fact and law giving rise to the rights and/or powers of heirs, legatees, executors of wills or third-party administrators: legal succession and/or succession according to the will and/or arising out of agreements as to succession;~~

~~(f)(d) the applicant's details: surname, forename(s), sex, nationality, their identification code (where possible), address and relationship to the deceased;~~

³⁶⁷ See DNotV (supra n. 355) 35, also considering a court duty to inform individuals entitled to the succession other than the applicant.

(g) where applicable, information in respect of each heir concerning the nature of the acceptance of the succession;

(h) where there are several heirs, the share for each of them and, if applicable, the list of rights and assets for any given heir;

(i) the list of assets or rights for legatees in accordance with the law applicable to the succession;

(j) the restrictions on the rights of the heir in accordance with the law applicable to the succession in accordance with Chapter III and/or in accordance with the provisions contained in the will or agreement as to succession;

(k) the list of acts that the heir, legatee, executor of the will and/or administrator may perform on the property to the succession pursuant to the law applicable to the succession.

~~(g) where applicable, information in respect of each heir concerning the nature of the acceptance of the succession;~~

~~(h)(e) where there are several the heirs, executors of wills and/or administrators and their respective share for each of them and, if applicable, the list of rights and assets for any given heir;~~

~~(i)(f) the list of assets or rights for legatees in accordance with the law applicable to the succession; the beneficiaries, devisees and legatees and their respective share to the extent that they have a right in rem;~~

~~(g) whether the rights under paragraph 2(e) and (f) also derive from a matrimonial property regime and, if so, the respective legal basis;~~

~~(j)(h) the restrictions on the rights of the heir, beneficiary, devisee, legatee, executor of the will and/or administrator in accordance with the law applicable to the succession in accordance with Chapter III and/or in accordance with the provisions contained in the will or agreement as to succession;~~

~~(k) the list of acts that the heir, legatee, executor of the will and/or administrator may perform on the property to the succession pursuant to the law applicable to the succession.~~

3. Information in respect of paragraph 2(c), in particular concerning restrictions, may be obtained through the European Judicial Network.

Article 41a

Grounds for issuing the certificate

1. The competent court shall state its grounds for issuing the certificate, including:

(a) the facts and law which establish the court's competence to issue the certificate;

(b) the law applicable to the succession in accordance with this Regulation and the circumstances in fact and in law used to determine that law;

(c) the elements in fact and law giving rise to the rights and/or powers of heirs, beneficiaries, devisees, legatees, executors of wills or third-party administrators; legal succession and/or succession according to the will and/or arising out of agreements as to succession;

(d) the elements in fact and law giving rise to conditions or restrictions of the rights and/or powers of heirs, beneficiaries, devisees, legatees, executors of wills or third-party administrators.

2. The grounds for its issue shall be made accessible to any interested party upon application.

3. The grounds for its issue are not part of the European Certificate of Succession.

Summary

302. Regarding the content of the European Certificate of Succession, the Institute proposes several significant changes to Art. 41 SP. The content should be reduced to the essential information necessary to prove a person's entitlement to a succession. Therefore and most importantly, the grounds for issuing the Certificate should not appear in the Certificate itself but should be stated separately by the court. The Institute recommends regulating the latter aspect in a new Art. 41a.

Comments

303. Art. 41 SP defines the mandatory content of the European Certificate of Succession. The Institute welcomes the establishment and the use of a standard form in Annex II of the Regulation (Art. 41(1) SP), although this form should be revised according to the proposed modifications to Art. 41(2) SP. Using a standard form helps to overcome language barriers within the European Union, as it allows every citizen within the Union to understand the Certificate's content irrespective of the language in which it was issued. However, the standardised form fails to serve this function when the Certificate contains additional and specific information, e.g. on restrictions on

the certified rights pursuant to Art. 41(2)(j) SP. The question arises whether that additional information has to be translated into the official language of the Member State where the Certificate is used. The Institute does not see a need for such an explicit provision on translation requirements: If the Certificate is presented to a private person, the parties' interests will solve the problem; it is up to the presentee to insist on a translation or to trust the bearer of the Certificate. As far as the Certificate constitutes a basis allowing for the transcription or entry of the inherited property in public registers according to Art. 42(5) SP, the translation requirements should be left to the national provisions on the register proceedings.

304. Regarding the particular proposals for the designated content of the Certificate pursuant to Art. 41(2) SP, the Institute recommends some elementary changes and proposes the introduction of a new Art. 41a listing grounds the court must specify upon the issuance of a Certificate. The current Art. 41(2) SP has two essential deficits. First, the provision requires the inclusion of extensive and sometimes complex information which is unessential and only complicates the Certificate's use³⁶⁸. Secondly, the Certificate is meant to contain an exhaustive list of acts the entitled persons may perform as well as information on the possible restrictions on the rights of the entitled persons. The Institute doubts the feasibility of such an exhaustive listing and sees great danger for legal relations in light of the effects of the Certificate³⁶⁹, in particular its presumption of accuracy and the deemed authority of the persons named on the Certificate to convey property and to release debtors to the estate from their obligations in case they pay or transfer property.

Limiting the content of the Certificate, Art. 41(2) SP

305. The Institute's proposal to reduce the content of the European Certificate of Succession is based on considerations regarding its purpose. The Certificate is meant to prove the entitlement to a succession in order to secure legal relations. Taking into account the circle of persons who will deal with the European Certificate – i. e. primarily employees of (public) registers, banks and other companies – the Certificate has to state as succinctly, clearly and coherently as possible who is entitled to the succession and to what extent in order to fulfil its purposes³⁷⁰.

306. In particular, the inclusion of the legal arguments and factual circumstances on which the court's decision is based, or any other explanation of *why* the court finds the persons named in the Certificate to be entitled to

³⁶⁸ See also DNotV (supra n. 355) 35 seq.

³⁶⁹ See in detail infra para. 319 seq.

³⁷⁰ See DNotV (supra n. 355) 35 seq.

the specified extent, will only result in increased intricacy and confusion and raise questions regarding the scope of the effects of the Certificate stated in Art. 42(3) and (4) SP³⁷¹. The Institute, therefore, recommends excluding any such information from the Certificate itself and instead introducing a court obligation in a new Art. 41a³⁷² to state the grounds for the issuance of the Certificate in a separate decision³⁷³. In the Institute's opinion, this distinction between the decision whether or not to issue a European Certificate of Succession and the issue of the Certificate itself seems to be the most promising way to serve the Certificate's fundamental function: securing clarity in legal relations³⁷⁴. A similar, well-tried and reliable two-stage procedure can be found in Germany regarding the issue of a national certificate of succession³⁷⁵. The Certificate itself should only contain information as concerns the issuing court, the date of issue and the law applied; the deceased and the applicant(s); the rights of the persons entitled and the scope of these rights; and – given the current situation regarding the (still) unharmonized private international law of matrimonial property regimes³⁷⁶ – the influence of a matrimonial property regime on the rights of the persons entitled.

Relocating parts of Art. 41(2) SP to the new Art. 41a

307. Against this background, the Institute proposes relocating the following terms from Art. 41(2) SP to the list of grounds which are to be specified upon the issuance of the Certificate as stipulated in a new Art. 41a: First, the facts and law which establish the court's competence to issue the Certificate (Art. 41(2)(a) SP) as they bear no relevance to the proof of the entitlement. Instead, only the identification of the issuing court and the date of issue should be displayed. Second, the circumstances in fact and in law used by the court to determine the law applicable to the succession (Art. 41(2)(d) SP) have no significance for individuals and entities who will potentially be presented with the Certificate. Only the law finally applied is of importance. Third, the elements in fact and law giving rise to the rights and powers and their restrictions and conditions of the persons entitled under Art. 41(2)(e) SP should, for the same reasons, instead be included in the specification of grounds.

³⁷¹ Regarding the latter see DNotV (supra n. 355) 35 seq.

³⁷² See in detail *infra* para. 313 seq.

³⁷³ Cf. also DNotV (supra n. 355) 36.

³⁷⁴ See also DNotV (supra n. 355) 36.

³⁷⁵ Cf. Sec. 352 of the German Act on Family and Non-Contentious Proceedings.

³⁷⁶ See in detail *infra* para. 312.

Further limitations

308. The Institute further recommends deleting Art. 41(2)(c) SP entirely as the knowledge of any marriage contracts stipulated by the deceased – irrespective of the unclear meaning of the term “marriage contract” – has no relevance to persons presented with the Certificate, but see *infra* para. 312, 322 seq. The same applies to information on the nature of an acceptance of the succession as specified in Art. 41(2)(g) SP. No Certificate of succession can be issued without acceptance if the applicable law requires such acceptance. Hence, the mere existence of the Certificate proves the occurrence of the required acceptance³⁷⁷.

Including restrictions of the certified rights, Art. 41(2) SP and a new Art. 41(3)

309. Regarding the second essential deficit of Art. 41(2) SP mentioned above³⁷⁸ – the exhaustive list of acts the entitled persons may perform (Art. 41(2)(k) SP) as well as information on the possible restrictions on the rights of the entitled persons (Art. 41(2)(j) SP) – the Institute proposes deleting Art. 41(2)(k) SP because of its questionable feasibility and the resulting risks. For the same reasons, the current Art. 41(2)(j) SP should be limited to those restrictions on the rights of the persons entitled which are contained in the will or agreement as to succession. Only under these particular circumstances is an exhaustive listing certain. Therefore, the Institute suggests deleting the reference to restrictions in accordance with the applicable law. Moreover, instead of having such an enumeration in the Certificate, the Institute recommends that the presentee (see *supra* para. 264) be referred, by the new Art. 41(3), to a competent authority of the Member State whose law is applicable in order to obtain information on the restrictions stipulated in their particular law. The Commission should make use of the European Judicial Network. Through the EJN channels, persons presented with a European Certificate of Succession should have the opportunity to reliably inform themselves about the existing restrictions of the rights of the persons entitled to the succession. The Institute further proposes adding the term “conspicuously” in the current Art. 41(2)(d) SP to help ensure that individuals presented with a Certificate will identify those instances where the applicable law is not the law of their own Member State. This is meant to underline the importance of obtaining information on the applicable law.

³⁷⁷ See DNotV (*supra* n. 355) 35.

³⁷⁸ See *supra* para. 304.

Further modifications to Art. 41 SP

Art. 41(2)(h) SP

310. The opening words of Art. 41(2)(h) SP (“*where there are several heirs*”) should be deleted to clarify that the sole heir and his or her share have to be listed as well. The provision’s requirement that the Certificate contains “if applicable, a list of rights and assets for any given heir” should be deleted because those rights and assets depend not only on the position of heirs, executors and administrators, but also on the ownership of the deceased which, even if contested, is not litigated and established in the proceedings leading to the issue of a European Certificate of Succession; proceedings concerning those rights and assets will generally be conducted by courts having jurisdiction under the Brussels I Regulation. Therefore, a list such as the one contemplated in Art. 41(2)(h) SP would extend the effects of the Certificate laid down in Art. 42 SP, especially the good faith that results from its presumed accuracy, beyond the capacity of the heir to a matter which has not been verified by the court in the succession proceedings, namely the ownership of the respective property.

Art. 41(2)(i) SP

311. The revised version of the current Art. 41(2)(i) SP should limit the persons named in the Certificate to those beneficiaries, devisees or legatees who have a right *in rem*. A right *in rem* compared to a right *in personam* is a right directly related to the property which is enforceable against third parties³⁷⁹. With this proposed restriction, the Institute aims to limit the scope of the Certificate to what is necessary and to prevent misunderstandings given that several jurisdictions, e.g. Germany³⁸⁰, grant the legatee only a right *in personam* against the heir. In such a bilateral relation the presumption of accuracy connected to the Certificate is not needed. It is needed when a legatee, e.g. under Italian law³⁸¹, claims a right *in rem* flowing from the succession as against third parties not involved in the succession, e.g. the lessee of property. If a European Certificate of Succession based on German substantive law links a certain asset to a legatee, the use of the Certificate by the heirs in a jurisdiction that grants the legatee a right *in rem* might lead to confusion, as the individual presented with the Certificate might wonder why he or she should hand over a certain object to the heir although the object is listed as an asset of the legatee³⁸². The proposed list of assets or rights

³⁷⁹ See ECJ 17. 5. 1995, Case C-294/92 (*Webb ./. Webb*), E. C. R. 1994, I-1717 para. 15.

³⁸⁰ See Sec. 2174 of the German Civil Code.

³⁸¹ See Art. 649 of the Italian Codice civile.

³⁸² See DNotV (supra n. 355) 36.

in Art. 41(2)(i) SP raises the same concerns as illustrated above and should therefore be deleted.

The new Art. 41(2)(g)

312. In an international succession, the private international law regarding matrimonial property regimes may affect the shares of the heirs of a married deceased³⁸³. But since this part of private international law is still not harmonised, the outcome may differ from Member State to Member State. A European Certificate of Succession issued in one Member State may therefore set forth entitlements to and shares in the estate which would have been different had the court in another Member State issued a European Certificate of Succession concerning the same deceased. Individuals presented with Certificates should be made aware of this risk. Therefore, the Institute further recommends adding a new Art. 41(2)(g) which, for the sake of clarification, requires it to be stated whether the rights of the entitled persons derive not only from the national law governing succession under Chapter III SP, but also from a matrimonial property regime and, in case they do, to provide the respective legal basis.

Segregating the European Certificate from the decision it is based upon – the new Art. 41a

313. As mentioned above³⁸⁴, the Institute proposes to separate the decision on issuing a European Certificate of Succession inclusive of the respective grounds from the act of issuing the Certificate itself. The objective here is to improve the Certificate's usability and to safeguard clarity in legal relations. Technically, this should be done by drafting a new Art. 41a establishing the court's duty to state the grounds for issuing a Certificate. The Institute considers that obligation desirable for two main reasons. First, given the far-reaching effects of the European Certificate of Succession, there is a clear necessity for verifying the reasons for its issue, especially in light of the widespread reservation towards the rulings of other Member States' courts. Second, the obligation to justify the decision compels the competent court to examine the facts and the legal basis thoroughly and, thereby, serves as an indication for the decision's reliability. Especially because of the latter, the Institute is unwilling to waive the duty to state the grounds in those cases where the court's decision does not contradict the manifested will of any party to the proceedings, as is done, for example, in German law³⁸⁵.

³⁸³ See in general supra para. 9 seq. and, in detail, infra para. 322 seq.

³⁸⁴ See supra para. 306.

³⁸⁵ Cf. Sec. 352 in connection with Sec. 38 of the German Act on Family and Non-Contentious Proceedings.

The content of the decision, Art. 41a(1)

314. Regarding the required content of the justifying grounds, the Institute proposes relocating the provisions of the current Art. 41(2)(a), (d) and (e) SP to Art. 41a(1)(a)–(c) as already discussed above³⁸⁶. The amended Art. 41a(1)(d) clarifies that the competent courts should also state which elements in fact and law give rise to conditions or restrictions of the rights and powers of the persons entitled.

Separation of the decision and access to the grounds, Art. 41a (2) and (3)

315. The grounds should not be attached to the Certificate and, thereby, made public to persons other than the ones involved in the proceedings. First, the grounds can quite often contain private information concerning the persons involved, e. g. the content of witness statements or other personal information worthy of protection such as the court's evaluation of the credibility of a witness. Therefore, attaching the grounds to the Certificate would arguably be inconsistent with the strict data protection under the law of the European Union and with the fundamental right to privacy. Second, there is no practical need for allowing individuals presented with a Certificate to examine its grounds. Instead, it is sufficient to limit their possible inspection to interested parties upon application as proposed by the Institute in Art. 41a(2).

316. The term “interested party” in Art. 41a(2), which is also used in Art. 29 SP and Art. 43(3) SP, leaves margin for interpretation. The Institute suggests clarifying that there has to be a *legitimate* interest in inspecting the underlying justification for the Certificate, these interests – concededly – varying considerably depending on the particular case. Especially creditors to the estate should generally be allowed access as they can have a strong interest in challenging a Certificate given the deemed authority of the listed persons to convey property to persons acting in good faith. Of course, reservations have to be made regarding interests worthy of protection that cannot be secured otherwise. The Institute advocates leaving a further substantiation to the courts.

317. With the proposed clarification that the grounds are not to be made part of the European Certificate of Succession in Art. 41a(3), the Institute wishes to emphasise that the effects of Art. 42 SP, especially para. 3 and 4, do not extend to the grounds.

³⁸⁶ See *supra* para. 307.

**Article 42 – The effects
of the European Certificate
of Succession**

1. The European Certificate of Succession shall be recognised automatically in all the Member States with regard to the capacity of the heirs, legatees, and powers of the executors of wills or third party administrators.

2. The content of the certificate shall be presumed to be accurate in all the Member States throughout the period of its validity. It shall be presumed that the person designated by the certificate as the heir, legatee, executor of the will or administrator shall hold the right to the succession or the powers of administration stated in the certificate and that there shall be no conditions or restrictions other than those stated therein.

3. Any person who pays or passes on property to the bearer of a certificate who is authorised to carry out such acts on the basis of the certificate shall be released from their obligations, unless they know that the contents of the certificate are not accurate.

4. Any person who has acquired succession property from the bearer of a certificate who is authorised to possess the property in accordance with the list attached to the certificate shall be considered to have acquired it from a person with the authority to possess the property, unless they know that the contents of the certificate are not accurate.

**Article 42 – The effects
of the European Certificate
of Succession**

1. The European Certificate of Succession shall be recognised automatically in all the Member States with regard to the capacity of the heirs, *beneficiaries*, *devisees*, legatees, and powers of the executors of wills or third party administrators.

2. The content of the certificate shall be presumed to be accurate in all the Member States throughout the period of its validity *until the contrary is proven*. It shall be presumed that the person designated by the certificate as the heir, *beneficiary*, *devisee*, legatee, executor of the will or administrator shall hold the right to the succession or the powers of administration stated in the certificate and that there shall be no conditions or restrictions other than those stated therein *and those following from the applicable law*.

3. ~~Anyone person~~ who pays or passes on property to ~~a person the bearer of a certificate~~ who is authorised to carry out such acts ~~according to on the basis of the~~ a European eCertificate of Succession and the applicable law shall be released from their obligations, unless they know that the contents of the certificate are not accurate.

4. ~~Anyone person~~ who has acquired succession property from ~~a person the bearer of a certificate~~ who is authorised to possess the property in accordance with ~~the list attached to the~~ a European eCertificate of Succession and the applicable law shall be considered to have acquired it from a person with the authority to possess the property, unless they know that the contents of the certificate are not accurate.

5. The certificate shall constitute a valid document allowing for the transcription or entry of the inherited acquisition in the public registers of the Member State in which the property is located. Transcription shall take place in accordance with the conditions laid down in the law of the Member State in which the register is held and shall produce the effects specified therein.

5. The certificate shall constitute a valid ~~document~~ *basis* allowing for the transcription or entry of the inherited acquisition in the public registers of the Member State in which the property is located. Transcription shall take place in accordance with the ~~conditions~~ *requirements* laid down in the law of the Member State in which the register is held and shall produce the effects specified therein.

Summary

318. The Institute endorses the provision on the effects of the European Certificate of Succession stipulated in Art. 42 SP and, besides minor modifications in wording, only recommends not making the deemed authority stipulated in Art. 42(3) and (4) SP dependent upon the specific knowledge of the content of the Certificate.

Comments

319. Art. 42 SP defines the effects of the European Certificate of Succession. To begin with, the Institute agrees with the Commission's proposal laid down in Art. 42(1) SP to provide the Certificate with the effect of legitimacy by obliging all Member States and their authorities to automatically recognise the capacities of the persons stated therein, especially for the modification of public registers (Art. 42(5) SP). The Institute further welcomes the proposed presumption of accuracy of the Certificate's content until the contrary is proven (Art. 42(2) SP). Closely connected therewith, the Institute approves the established protection of good faith in the content of the Certificate in Art. 42(3) and (4) SP. In addition, the Institute would like to point out that its understanding of "property" in the sense of Art. 42(3) SP is a broad one, including especially claims of the estate towards third parties.

320. The modifications recommended in Art. 42(1) and (2) SP affect the extension of the circle of the entitled persons who are named in the Certificate. The proposed amendment of the term "and those following from the applicable law" at the end of Art. 42(2)2 SP serves as an adjustment to the suggested deletion of the referral to restrictions in accordance with the applicable law in Art. 41(2)(j) SP³⁸⁷. An adjustment should also be made by

³⁸⁷ See *supra* para. 309.

adding the expression “and the applicable law” in Art. 42(3) and (4) SP, as restrictions on the rights of the persons entitled according to the Certificate may also derive from the applicable law. The Institute further recommends deleting the term “bearer of a certificate” as the recipient of a payment or of property in Art. 42(3) and the transferor of property in Art. 42(4) SP, as it could be understood as a requirement to present the Certificate itself, which would limit the possibility of a disbursement or an acquisition in good faith in those cases³⁸⁸. Such a limitation is absent in the French version, which only speaks of the “*titulaire*”, meaning the person entitled according to the Certificate instead of the person necessarily presenting it. The Institute favours permitting the possibility of an effective disbursement or acquisition in good faith without the need to have seen the Certificate itself or to know of its existence. This approach, which can be found e.g. in German law³⁸⁹, enhances the practical value of the Certificate, the more so as it will be very difficult to prove later on whether an individual had knowledge of the Certificate. Furthermore, this approach is in line with granting the presumption of accuracy, Art. 42(2) SP, and the effects of good faith stipulated in Art. 42(3) and (4) SP only to the original certificate and not to the authentic copies³⁹⁰.

321. Replacing the word “person” by “anyone” at the beginning of Art. 42(3) and (4) SP only serves to avoid a repetition. The deletion of the words “*the list attached to the certificate*” results from the objections explained above against the presumption that the listed persons have the authority stated in the Certificate in the capacity as owner of property³⁹¹. The suggested replacements of “valid *document*” by “valid *basis*” and “conditions” by “requirements” in Art. 42(5) SP are mere clarifications. The term “document” seems to be an unfitting term and the word “conditions” has been used in the Regulation in the context of restrictions (Art. 42(2)2 SP) and, therefore, with a different connotation compared to the use of that expression here.

³⁸⁸ Regarding the German language version see similarly Austrian Chamber of Notaries Public: Österreichische Notariatskammer, Stellungnahme zum Vorschlag für eine Verordnung des Europäischen Parlaments und des Rates über die Zuständigkeit, das anzuwendende Recht, die Anerkennung und Vollstreckung von Entscheidungen und öffentlichen Urkunden in Erbsachen sowie zur Einführung eines Europäischen Nachlasszeugnisses, of 25. 11. 2009, available at <notar08.connexcc-hosting.net/uploads_neu/nk_stgn_bundesrat_25_nov_09.pdf>, p. 9 (cited: Austrian Chamber of Notaries Public).

³⁸⁹ Cf. Sec. 2366 of the German Civil Code.

³⁹⁰ See *infra* para. 336

³⁹¹ See *supra* para. 310.

The European Certificate of Succession and national conflict rules for matrimonial property regimes

322. The problematic interaction between the European Certificate of Succession and rules of matrimonial property as an area where the conflict rules are not yet harmonised, is illustrated by the following examples: Suppose the deceased is survived by a spouse and one child and the law applicable to the succession and to the matrimonial property regime would be German law. According to the German law of succession (Sec. 1924, 1931 of the German Civil Code), the respective shares will be $\frac{1}{4}$ for the spouse and $\frac{3}{4}$ for the child. However, the German default provision on matrimonial property in case of death (Sec. 1371(1) German Civil Code) provides for an increase of the share of the surviving spouse in the amount of another $\frac{1}{4}$ with the result that both the spouse and the only child will be heirs with a share of $\frac{1}{2}$ each. If Art. 36(1) SP is to be understood in the sense that the certificate of inheritance shall only be based on the law applicable to succession and exclude the law applicable to matrimonial property, a German court would have to issue a certificate displaying – from a German perspective – incorrect shares of the heirs. But even if the court, when issuing the Certificate, considers the increase of the share of the surviving spouse ordered by the law applicable to matrimonial property, this would not solve the problem. In that case, from the perspective of another Member State whose conflict rules do not designate German law as the law applicable to matrimonial property, the European Certificate of Succession issued by the German court could be incorrect if the law applicable to matrimonial property under the conflict rules of that other Member State does not provide for the same increase of the surviving spouse's share. Contrariwise, a Certificate issued in that other Member State would be incorrect in Member States applying German law to matrimonial property because the share of the surviving spouse would be too small. Therefore, notwithstanding Art. 1(3)(d) SP, for purposes of the European Certificate the implications of the applicable matrimonial property law cannot be ignored when determining the shares of the persons entitled, see the new Art. 41(2)(g).

323. These observations entail grave consequences for the European Certificate of Succession. If the presumption of accuracy laid down in Art. 42(2) SP applies to the rights held by the heir and thereby to his or her respective share as shown in the certificate according to Art. 41(2)(h) SP (converted into Art. 41(2)(e) by the Institute), the conflict rules of the forum for matrimonial property are imposed on other Member States; this seems to be unacceptable as long as no common conflict rules on matrimonial property have been adopted in the European Union. The Institute therefore proposes that the European Certificate of Succession contain an indication of the extent to which rules of a matrimonial property regime have been applied

by the court in determining the heirs' shares, Art. 41(g); this would enable individuals presented with the certificate to determine if and to what extent the certificate is to be recognised in the respective country. This will allow the certificate to be effective to the greatest extent possible in the current environment of private international law.

324. Another possible solution would be to suspend Chapter VI of the Succession Proposal until a European instrument with common conflict rules concerning questions of matrimonial property is adopted. However, there is no fixed date for the adoption of such an instrument³⁹², and the European Certificate of Succession is a key element in the concept of facilitating the handling of transnational successions. Moreover, a major part of the successions do not give rise to the problems outlined above since the deceaseds were not married or the legal systems involved do not produce the tensions described in the preceding paragraphs. A suspension of Chapter VI SP would capture those successions, too, and deprive them of the beneficial effects of the European Certificate of Succession. Such suspension should therefore only be considered as a last resort in case no satisfying interim solution can be found.

325. A third, intermediary solution would be to allow for special procedures of recognition at the national level of the Member States under which the European Certificate of Succession would have to be ratified and – where appropriate – rectified in each Member State as to the implications of matrimonial property law before the certificate could be used there. These procedures would be left to the national legislators and their task would be to reconcile the certificate with the national rules lying at the intersection of succession law and matrimonial property law.

European and national certificates of succession: Questions of priority

326. As pointed out above (supra para. 276), the relationship between the European Certificate of Succession and national certificates is not regulated and therefore unclear. The same is true for the relationship of several European Certificates among each other. Where more than one certificate exists, questions arise as to their respective priority, validity and scope. The Institute would like to outline some possible scenarios and their potential outcome, without however suggesting a general solution in terms of all-embracing rules to be adopted in the Regulation. These scenarios will be rare and can be left to case law. Once again, the Institute wants to emphasise the importance of the publication of both European and national certificates of succession in the European Judicial Network, see the new Art. 44a.

³⁹² A Green Paper (supra n. 9) was issued in 2006, but a proposal by the European Commission is still awaited.

What happens in practice?

327. What happens if two or more certificates of succession coexist? In practice, this case will usually be based on a mistake made by one of the courts because, normally, the competence to issue a certificate of succession (be it a European or a national one) will lie with the courts of one single Member State: for the European Certificate Art. 37(2) SP refers the question of competence to the rules on jurisdiction in Chapter II of the Succession Proposal, which will directly apply to the issue of a national certificate of succession. According to these rules, generally, only the courts of a single Member State will have jurisdiction (see also *infra* para. 339). Where in exceptional circumstances (cf. Art. 6(c) SP or Art. 6(b)/(c) of the Institute's proposal) the courts of several Member States are competent, Art. 14 SP on related proceedings will apply and often prevent the issue of a second certificate of succession. This solution would also apply to cases where the courts of different Member States consider themselves competent because they come to different conclusions as to where the deceased habitually resided; however, such questions would, in the medium-term, have to be resolved via a preliminary question to the European Court of Justice to ensure an autonomous and uniform interpretation of this concept.

328. Therefore, it can be said that in cases where all courts act in accordance with the future Regulation, the courts of a single Member State will generally be competent to issue certificates of succession. Within that Member State, there will be an interest to come to coherent decisions, and therefore it can be assumed that a prior national certificate of succession will be cancelled before a European certificate will be issued. Where a European certificate exists first, a national certificate will no longer be issued.

329. Where courts of different Member States have issued different certificates (be it one national and one European certificate or be it even two European certificates) at least one court has not acted in accordance with the Regulation. One might think of drafting a rule for the Succession Proposal specifically dealing with this situation. Possible provisions could consist either in letting the prior certificate prevail or in regarding both as invalid and inapplicable. Where a national certificate prevails over a European certificate, its priority could be restricted to the Member State where it has been issued, whilst the European certificate could be residually valid in other Member States.

330. But how could such rules work in practice? One hypothetical scenario is that of an individual or entity to whom only one of the certificates is presented and who does not know about the other one. Should he or she be deprived of the benefit of good faith protection normally attributed to the certificate? And if yes, should priority in time always prevail, even if the court issuing the first certificate did not act in accordance with the Regula-

tion and the court issuing the second certificate was actually competent?³⁹³ Could an individual actually presented with both certificates be expected to make a judgment on the matter?

331. Individuals presented with both certificates, however, are very unlikely to decide at their own risk which certificate prevails, even if the Regulation contained specific rules for this situation. Much more likely the presentees will seek clearance by a court. This court would then, on its own, reassess the rights displayed in the diverging certificates and not base its judgment simply on one of the certificates. Moreover, the issuing courts will be inclined to reconsider their respective decisions and rectify or cancel an issued certificate.

332. The Institute concludes that rules on priority are only a second-best solution. They would likely give rise to more confusion than they could help to clear up, and they would in particular not reduce the amount of litigation. What is needed is the cooperation of the courts within the single Member States and also between the courts of different Member States in order to avoid the issue of conflicting certificates *ex ante*. It is this goal that has induced the Institute to suggest a European register for certificates of succession as a platform of judicial cooperation within the Union, see *infra* Art. 44a and 44b.

**Article 43 – Rectification,
suspension or cancellation of
the European Certificate of
Succession**

1. The original of the certificate shall be retained by the issuing court, which shall issue one or more authentic copies to the applicant or to any person having a legitimate interest.

2. The copies issued shall have the effects provided for in Article 42 for a limited period of three months. Once this period has elapsed, the bearers of the certificate or any other interested persons must request a new authentic copy from the issuing court in order to assert their rights to succession.

**Article 43 – Rectification,
suspension or cancellation of
the European Certificate of
Succession**

~~2. The copies issued shall have the effects provided for in Article 42 for a limited period of three months. Once this period has elapsed, the bearers of the certificate or any other interested persons must request a new authentic copy from the issuing court in order to assert their rights to succession.~~

³⁹³ Cf. the related problems in the Brussels I Regulation and the “competence–competence” for its rules on jurisdiction in general: ECJ 9.12. 2003, Case C-116/02 (*Erich Gasser GmbH ./. MISAT Srl*), E. C. R. 2003, I-14693.

3. The certificate shall, at the request of an interested party addressed to the issuing court, or spontaneously by the authority in question:

(a) be rectified in the case of material error;

(b) have a comment entered into its margin suspending its effects where it is contested that the certificate is accurate;

(c) be cancelled where it is established that it is not accurate.

4. The issuing court shall note in the margin of the original of the certificate its rectification, the suspension of its effects or its cancellation and shall notify the applicant(s) thereof.

3-2. The certificate shall, at the request of an interested party addressed to the issuing court, or spontaneously by ~~the authority in question~~ *that court*:

(b) have a comment entered into its margin suspending its effects where it is contested that the certificate is ~~ae~~*accurate in accordance with the provisions of this Regulation or the applicable law*;

(c) be cancelled where it is established that it is not ~~ae~~*accurate in accordance with the provisions of this Regulation or the applicable law*.

4.3. The issuing court shall note in the margin of the original of the certificate its rectification, the suspension of its effects or its cancellation and shall notify the applicant(s) thereof. *In any of those cases, the issuing court shall declare all issued authentic copies invalid and recollect them.*

Summary

333. The Institute endorses Art. 43 SP in general. However, the Commission's proposal of granting issued copies of a European Certificate of Succession the effects of the original and providing them with a three-month period of validity should not be maintained.

Comments

334. Art. 43 SP defines the requirements and the enforcement of a rectification, suspension or cancellation of the European Certificate of Succession. As laid down in Art. 43(1) SP, the Commission's proposal that the issuing court shall retain the original of the Certificate and only hand out authentic copies on application by the applicant or any other person having a legitimate interest basically reflects a sound decision.

335. The protection of good faith as ensured by Art. 42(3) and (4) SP can only be derived from the original Certificate and its electronic version stored at the European register for certificates of succession (see Art. 44a(1)(a))³⁹⁴. It

³⁹⁴ See in detail *infra* para. 344.

is therefore of utmost importance that the issuing court remains able to immediately rectify material errors, suspend the Certificate's effects or cancel it altogether. It also follows that the issuing court with exclusive access to the original has sole competence for the rectification, suspension or cancellation. As laid down in Art. 43(3) SP these decisions should be made on the application of an "interested party"³⁹⁵ or spontaneously on the court's own initiative. The suggested modification in Art. 43(3) SP only serves clarification purposes. The term "accurate" in Art. 43(3)(b) and (c) SP would appear to refer to a factual assessment exclusively while the entries in the Certificate also result from legal considerations; it should therefore be replaced by "in accordance with the provisions of this Regulation and the applicable law".

336. The Institute disagrees with the Commission's proposal in Art. 43(2) SP to extend the effects of Art. 42 SP, especially the presumption of the accuracy of the content, to any authentic copies issued and to provide the copies with a validity period of three months. It is true that an authentic copy of the European Certificate of Succession carrying the effects of Art. 42 SP would facilitate the settlement of estates, as an individual presented with a copy could presume its accuracy without further investigation. But if a Certificate turns out to be incorrect immediately after an authentic copy has been issued, that copy is, although only for the period of three months, presumed accurate and may, for example, serve as the basis for an effective acquisition made in good faith under Art. 42(4) SP, notwithstanding the lack of legal authority by the seller listed in the Certificate. In light of that risk, the Institute prefers and recommends that individuals presented with a copy of a Certificate contact the European register for certificates of succession to check whether the competent court has rectified, suspended or cancelled the Certificate, and if that is the case, to find out whether the reasons for that new determination affect their matters³⁹⁶. Therefore, Art. 43(2) SP should be deleted. This approach would also save the applicants of the Certificate from time-consuming and costly subsequent applications for additional authentic copies as a three-month validation period will often not suffice to settle the estate³⁹⁷. Of course, the proposed solution presupposes the existence of a European register for certificates of succession.

337. Closely connected to the deletion of Art. 43(2) SP, the Institute recommends introducing in Art. 43(4)2 SP a duty for the court to recollect any issued copies if any modifications have been made to the Certificate or to its effects and to declare all such copies invalid.

³⁹⁵ Cf. *supra* para. 316.

³⁹⁶ See in detail *infra* para. 348.

³⁹⁷ See DNotV (*supra* n. 355) 38 seq. See also Austrian Chamber of Notaries Public (*supra* n. 388) 9.

Article 44 – Methods of appeal

Each Member State shall organise the methods of appeal against the decision to issue or not to issue, to rectify, to suspend or to cancel a certificate.

Article 44 – Methods of appeal**Article 44a – Register for certificates of succession**

1. The European Judicial Network in civil and commercial matters established by Decision 2001/470/EC shall install and maintain, in cooperation with the Commission, an electronic register for certificates of succession. The register shall provide information on the issue, rectification, amendment, suspension, and cancellation of:

(a) European certificates of succession including the relevant grounds pursuant to Article 41a;

(b) the national certificates of succession specified in Annex III. Where the relevant national law requires the communication of grounds, the grounds shall also be available through the register.

2. The register shall be accessible solely to courts. Persons entitled to obtain an authentic copy of a European certificate of succession in accordance with Article 43(1) may access the content of the certificate as determined by Article 41.

Article 44b – Duties of courts in connection with the register

1. Before issuing a European Certificate of Succession or an instrument specified in Annex III, the court shall consult the register for any other certificates issued in the same succession matter.

2. The courts shall promptly report the information referred to in Article 44a(1) to the register.

Summary

338. The Institute proposes to the European Union to establish an electronic register for certificates of succession. The main purpose of the new Art. 44a and 44b SP is to avoid that different courts, unbeknown to each other, issue divergent certificates of succession. Moreover, the register should also serve as an information system for the public and, thus, replace the authentic copies of the certificate referred to in Art. 43(1) SP.

Comments

Background: Risk of conflicting certificates of succession

339. The competence for the issue of certificates of succession, whether European or national, lies with the courts of the Member State having jurisdiction over the succession in accordance with Art. 3 seq. SP. This follows from the fact that the issue of succession certificates is a “matter of succession” in terms of Art. 4 SP. As the Commission has pointed out in the Succession Proposal³⁹⁸, the rules on jurisdiction are designed to avoid positive conflicts of competence among the Member States. Thus, generally the courts in only *one* Member State have jurisdiction over the succession – usually those in the State where the deceased was habitually resident at the time of death (see Art. 4 SP). The concentration of jurisdiction in one Member State, however, does not eliminate the risk that different courts deem themselves competent and issue, unbeknown to each other, conflicting certificates of succession (see also supra para. 326 seq.). Such a clash may result due to several reasons. For example, as mobility increases in the internal market, a growing number of people have homes in two or even more Member States. With regard to these persons, it is quite possible that courts in different Member States all conclude that the place of last habitual residence was in their own territory. Likewise, the deceased may have submitted the succession to the jurisdiction of a State other than the State of the last habitual residence, on the basis of a choice of court declaration according to the new Art. 6a(1) SP proposed by the Institute: in such a scenario, it may happen that the will containing the declaration is found only at a later stage after a court in the State of the last habitual residence, being unaware of the choice of jurisdiction, has already issued a certificate of succession. Moreover, the conflict of competence may also arise among courts in the *same* Member State. This is the case where the internal rules on territorial jurisdiction confer competence on more than one court³⁹⁹.

³⁹⁸ Succession Proposal p. 5.

³⁹⁹ See e.g. in Germany Sec. 343(1) of the German Act on Family and Non-Contentious Proceedings in connection with Sec. 7(2) of the German Civil Code.

340. The circulation of inconsistent certificates threatens the position of parties relying on the content of the instrument, as the following example illustrates. A court issues a certificate designating X as the person entitled to dispose of the estate, whereas another court issues a certificate designating Y as the person entitled. If both X and Y convey, independently from each other, the same asset to two different transferees, it is evident that only one of the transactions can be effective. In other words, in one of the two transactions, the certificate of succession fails to produce the effects provided for by Art. 42 SP. This risk may undermine reliance on certificates of succession and, thus, render the whole instrument useless.

The establishment of a European register for certificates of succession

341. In the Institute's view, the risk of conflicting succession certificates could be considerably reduced by establishing a common European register. In essence, the proposed register is designed to keep track of all certificates issued within the European Union. Before issuing a certificate, the courts are required, under the new Art. 44b(1) SP, to consult the register to make sure that no other certificates have been issued previously in the same succession matter.

Scope of the register

342. According to the proposed Art. 44a(1)(a) SP, the register provides information on the issue of *European certificates of succession* as well as subsequent amendments or cancellations. In particular, the information available through the register covers not only the *content* of the certificate pursuant to Art. 41 SP, but also the relevant *grounds* as defined by the new Art. 41a SP. The possibility to access the grounds facilitates the coordination of proceedings in different Member States. Thus, for example, the new Art. 41a(1)(a) SP requires the court to state the facts as well as the legal basis from which it derives the competence to issue the certificate. If, subsequently, in connection with the same succession matter, an application for a certificate is filed in a different Member State, the court deciding on the application will take into account the grounds on which the foreign court had previously deemed itself competent. Based on this information, the court may arrive at the conclusion that, indeed, only the foreign court has jurisdiction and, hence, dismiss the application. Alternatively, the court may consider itself competent and set out precisely the reasons why the foreign court was wrong to exercise jurisdiction. This may, in turn, give rise to an action before the foreign court for the cancellation of the previous certificate in accordance with Art. 43 SP. As the example illustrates, the disclosure of the grounds permits the courts to engage in a sort of judicial dialogue, which promotes consist-

ency in the application of the Regulation and makes conflicts of competence less likely.

343. In addition, the register encompasses *national certificates of succession* (see the proposed Art. 44a(1)(b) SP). The reason for extending the register to national instruments is that divergent *national certificates*, too, may impair the effectiveness of a *European certificate*. Thus, it is equally important to prevent conflicts between European and national certificates. For the sake of clarity, the Institute proposes specifying the national instruments to be covered by the register in an annex to the Regulation⁴⁰⁰. As with the European certificates, the register should also provide access to the grounds for issuing the national certificate. However, the Institute is aware that in some Member States the courts are not required to give the grounds for issuing a national certificate⁴⁰¹. In order not to interfere with the procedures for the national instruments, the register should provide information on the grounds only where the relevant national laws prescribe the articulation of grounds.

Electronic register maintained by the European Judicial Network

344. In order to facilitate access and to speed up the transmission of information, the register should be based on an electronic system. The creation of a computerised register could be integrated into the “European e-Justice Programme”⁴⁰², which seeks to expand the use of new technologies in the field of justice in order to enhance cross-border judicial cooperation⁴⁰³.

345. The Institute suggests charging the European Judicial Network in civil and commercial matters⁴⁰⁴ (EJN) with the establishment of the register. The Network would lend itself particularly well to the task as it is specifically designed as a mechanism for the exchange of information between the judiciaries of the Member States. For the technical aspects of the register, it seems wise to involve the Commission in the project.

⁴⁰⁰ Examples for national instruments are, for example, the *acte de notoriété* in France (Art. 730–1 seq. of the French Civil Code), the *Erschein* in Germany (Sec. 2353 seq. of the German Civil Code), the *κληρονομητήριο* (*klironomitirio*) in Greece (Art. 1956 seq. of the Greek Civil Code), the *verklaring van erfrecht* in the Netherlands (Art. 4:187 seq. of the Dutch Civil Code).

⁴⁰¹ In Germany, for instance, no articulation of grounds is required if none of the parties to the proceedings objects to the content of the certificate, see Sec. 38(4) of the German Act on Family and Non-Contentious Proceedings.

⁴⁰² See for an overview the Council’s Multi-Annual European e-Justice Action Plan 2009–2013, O.J. 2009 C 75/1.

⁴⁰³ Currently, the Action Plan (previous note) encompasses a number of initiatives such as the interconnection of the Member States’ land registers, insolvency registers and criminal records.

⁴⁰⁴ Council Decision 2001/470/EC (supra n. 352).

Right to access the register

346. For privacy reasons, the register should not be accessible to the public at large. Rather, access should be limited to courts and, subject to certain limits, to the persons entitled to obtain an authentic copy of the certificate in accordance with Art. 43(1) SP.

347. As was stated at the outset, the main purpose of the register is to avoid the issuing of conflicting certificates. Thus, the register is primarily designed to be used by *courts*. In this context, it is important to reiterate that the term “court”, as defined by Art. 2(b) SP, covers not only judicial bodies, but also other authorities performing judicial functions in succession matters such as, for example, notaries public. In a number of Member States, the competence for the issue of certificates of succession lies with notaries public⁴⁰⁵. Thus, it is crucial to grant them access to the register.

348. Moreover, the Institute takes the view that *private parties* as well should have limited access to the register. The electronic register could thus replace the authentic copies of the certificate of succession referred to in Art. 43(1) SP. One possible scenario is that the applicant for the certificate or any other person having a legitimate interest (see Art. 43(1) SP) is provided with a personal access code which permits them to retrieve the content of the certificate via the internet. If, for instance, someone needs to prove his or her capacity as an heir or administrator to a bank, he or she may – instead of presenting an authentic copy of the certificate – communicate the access code to the bank. The bank can then access the content of the certificate online. One major advantage of this method is that the party relying on the certificate can take notice of any recent amendment or cancellation. The authentic copy, by contrast, reflects the content of the certificate at the time the copy was released and, thus, always involves the risk of being outdated the moment it is presented. Hence, the register is a much more reliable source of information as it is continuously updated.

349. It must be stressed, however, that private parties should not have *full* access to the register. As the use of the register is meant to be a substitute for authentic copies, only the *content* of the certificate, pursuant to Art. 41 SP as amended by the Institute, should be made available. Moreover, the proposal for the public use of the register solely relates to the *European* certificate of succession. It is for the individual Member States, finally subject to an approximation of their laws, to decide whether they also want to grant access to the information on their national instruments.

⁴⁰⁵ For example, in France and the Netherlands, references *supra* in n. 400.

Duties of the national courts

350. The proposed Art. 44b SP sets out the responsibilities of the national courts in connection with the register. Here, again, the term “court” refers to the definition contained in Art. 2(b) SP and, hence, encompasses any authorities performing judicial functions in succession matters.

351. Of course, the register is useless if the courts fail to take notice of it. Thus, the proposed Art. 44b(1) SP provides what should be obvious: before issuing a certificate of succession, courts have to consult the register for other certificates issued in the same succession matter. Given that the new Art. 44a and 44b SP seek to avoid any conflict between certificates of succession, the duty should also apply to proceedings for the issue of *national* certificates of succession.

352. The proposed Art. 44b(2) SP requires the courts to report to the EJN all relevant information to be fed into the register, i.e. any issue, amendment, rectification, suspension or cancellation of a certificate of succession including, where applicable, the grounds for such measure. To ensure the effectiveness of the register, it is particularly important that the courts communicate the information as quickly as possible.

Chapter VII
General and final provisions

**Article 45 – Relations
with existing international
conventions**

1. This Regulation shall not affect the application of the bilateral or multilateral conventions to which one or more Member States are party at the time of adoption of this Regulation and which relate to the subjects covered by this Regulation, without prejudice to the obligations of the Member States pursuant to Article 307 of the Treaty.

2. Notwithstanding paragraph 1, this Regulation shall take precedence as between Member States over conventions which relate to subjects governed by this Regulation and to which the Member States are party.

Chapter VII
General and final provisions

**Article 45 – Relations
with existing international
conventions**

Comments

353. Several Member States have concluded bilateral treaties that deal, *inter alia*, with the private international law of succession. Some of these treaties are outdated, lead to inconveniences and cannot be reconciled with the principles of the Succession Proposal. The Institute suggests a renegotiation of such treaties, see *supra* para. 19 seq.

Article 45a – Insolvent estates

1. *This Regulation shall not affect the application of Council Regulation (EC) No 1346/2000 on insolvency proceedings. For the purpose of Article 3(1) of that Regulation the centre of main interests is determined with reference to the deceased.*

2. *As soon as insolvency proceedings on estates become effective, the administration of succession in another Member State shall be stayed.*

Summary

354. The Institute proposes to tackle the problem of insolvent estates by implementing a provision on the delimitation of succession and insolvency law. Though the complex interaction between the Succession Proposal and the European Insolvency Regulation might not be determined down to the last detail, the Institute endorses the regulation of a basic guideline.

– The European Insolvency Regulation should principally apply to insolvent estates provided that the liquidation of the estate is ordered in insolvency proceedings falling within the scope of that Regulation. It should be clarified that the debtor's centre of main interests is to be determined with reference to the deceased (see *infra* para. 355, 361).

– Taking into account the interests of the deceased's creditors, insolvency proceedings should prevail over the administration of an estate in another Member State (see *infra* para. 358).

Comments

Preference: European Insolvency Regulation

355. It is generally assumed that insolvency proceedings with regard to estates fall within the scope of the European Insolvency Regulation provided that they comply with the definition of insolvency or winding-up proceedings as laid down in Art. 2 of the Insolvency Regulation and that they are covered by the national proceedings enumerated in Annex A to the Insolvency Regulation⁴⁰⁶. The Institute supports that approach. Taking into account the similarities between the connecting factors of the last habitual residence (Art. 4 and 16 SP) and the centre of main interests (COMI) in Art. 3 and 4 of the Insolvency Regulation, the applicable law under the Succession Proposal and the Insolvency Regulation will coincide in most cases. Yet, they will diverge if the deceased's last habitual residence and COMI do not concur or if the deceased has made a choice of law (Art. 17 SP) in favour of a State other than his or her COMI. Though the national laws of succession will often provide for particular proceedings regarding insolvent estates, the Institute advocates the application of the law applicable to the insolvency. The concept of COMI achieves the protection of the creditors much more adequately: It creates a foreseeable and objective forum which is more closely connected with the relations between the deceased and his or her creditors⁴⁰⁷.

Clash between insolvency and succession law

356. The institutions of the Union should be aware of the risk of jurisdiction conflicts arising from the different Member States' approaches in dealing with insolvent estates. If the applicable succession and insolvency laws do not coincide, frictions as to the interaction between the administration of an estate and the opening of insolvency proceedings will inevitably be entailed. Suppose that the deceased lived in Colmar (France) but ran a business across the Rhine in Breisach (Germany). His last habitual residence was located in France whereas his centre of main interests was situated in Germany⁴⁰⁸. With respect to the succession and the administration of the estate, French courts will be competent and apply French law (Art. 4 and 16 SP). Under French law, insolvency proceedings against an estate⁴⁰⁹ come within the

⁴⁰⁶ DNotI Study p. 230. The issue was raised but not decided by BGH 14. 1. 2010, ZInsO 2010, 348.

⁴⁰⁷ See ECJ 2. 5. 2006 (supra n. 344) para. 33; 17. 1. 2006, Case C-1/04 (*Staubitz-Schreiber*), E. C. R. 2006, I-733, para. 27.

⁴⁰⁸ See *Virgos/Schmit*, Report on the Convention on Insolvency Proceedings, EU Council reference 6500/1/96 of 8. 7. 1996, para. 75.

⁴⁰⁹ See Annex A to the Insolvency Regulation: Liquidation judiciaire, redressement judiciaire avec nomination d'un administrateur.

scope of the Insolvency Regulation only in those instances where the deceased was running an independent personal activity and died in a State of cessation of payments⁴¹⁰. Otherwise, the administration of insolvent estates is subject to the benefit of inventory (*“bénéfice d’inventaire”*)⁴¹¹ under succession law. If in the process of the administration it turns out that the deceased was insolvent on a balance sheet basis but the deceased did not die in a State of cessation of payments, the liquidation under French law will continue to be governed by the succession rules on the administration of estates. Yet, according to Art. 3 and 4 of the Insolvency Regulation, both jurisdiction and applicable law are governed by the debtor’s centre of main interests provided that Member State’s insolvency proceedings are covered by Annex A of the Regulation. This holds true for German proceedings on insolvent estates⁴¹². Considering the different approaches taken by in France and Germany, conflicts of jurisdiction and applicable law will arise as soon as parallel proceedings are instituted. In the example given above it does not seem clear whether preference will be given to French succession or German insolvency law. The difficult relations between succession and insolvency law can be further illustrated by focusing on English law. Thereunder, the administration of insolvent estates may be carried out in three different ways⁴¹³: Only one of them, the administration by a trustee in bankruptcy, is covered by the European Insolvency Regulation⁴¹⁴. In contrast, the usual method of liquidating an insolvent estate under English law, i.e. the administration by a personal representative⁴¹⁵, falls outside the scope of that Regulation. Further still, if an English national has chosen English succession law (Art. 17 Succession Proposal) but had his last habitual residence and COMI in Germany, it is open to question whether the personal representative can liquidate the insolvent estate according to English law.

357. The preceding examples illustrate that with regard to the winding-up of insolvent estates the scope of the Insolvency Regulation will differ from country to country. If no provision was adopted in the Succession Proposal it would remain uncertain which proceedings were to be preferred.

⁴¹⁰ Art. L 631–3 and L 640–3 of the Code de commerce (loi no. 2005–845 du 26. 7. 2005), cf. *Arteil*, Redressement ou liquidation judiciaire du débiteur décède: quel intérêt pour les héritiers?: Defrénois 2008, Art. 38709, no. 2, 145 seq.; cf. from a comparative perspective *Bünning* (supra n. 101) 34 seq.

⁴¹¹ Art. 793 seq. of the French Civil Code.

⁴¹² See supra n. 409 and Sec. 315 seq. of the German Insolvency Act.

⁴¹³ See *Parry/Kerridge*, *The Law of Succession*¹² (2009) para. 21–79; *Barlow/King/King*, *Wills, Administration and Taxation*⁸, A practical guide (2003) para. 15.024.

⁴¹⁴ See Administration of Insolvent Estates of Deceased Persons Order of 1986 (SI 1986/1999) Sch 1 (II) para. 2.

⁴¹⁵ See supra n. 413.

Creditor Protection

358. The Institute endorses the predominance of the Insolvency Regulation: The need for effective creditor protection requires objective criteria and the reference of the liquidation to the law with the closest connection to creditor interests. The administration of estates, whether solvent or not, should be principally covered by the Succession Proposal. Yet, the Insolvency Regulation should take priority where in accordance with its scope insolvency proceedings are opened. Thus, the administration of the estate should be stayed as soon as insolvency proceedings become effective in another Member State. This basic guideline will simultaneously guarantee legal certainty and creditor protection.

359. The Institute realises that not all cases will fit neatly into that scheme. Consider a German national with his COMI in France choosing German law to control his succession. It might be said that neither German law nor French law will apply as to insolvency proceedings – the application of German insolvency law depends on the COMI being located within Germany (Art. 4 of the Insolvency Regulation); French succession law is referred to neither under the Succession Proposal nor under the Insolvency Regulation. If, however, in line with the Institute's guideline a concept was adopted according to which succession law residually governs the administration of solvent and insolvent estates and is replaced only to the extent that the Insolvency Regulation applies, the solution will be found in the application of the laws addressing insolvent estates as indicated by the Succession Proposal.

360. A final comment on the relation between insolvency and succession law shall be made here: As soon as insolvency proceedings become effective, insolvency law might operate retrospectively, especially when it comes to setting aside legal acts (see Art. 4(2)(m) of the Insolvency Regulation). The application of insolvency law will, however, be no obstacle to the consistency of the administration under the applicable succession law. According to Art. 13 of the Insolvency Regulation, legal acts by administrators or executors will not be voidable if the applicable *lex causae* does not allow any means of challenging. Thus, for the purpose of legal certainty no supplementary rules have to be added to the Succession Proposal.

Determining debtor's COMI

361. According to Art. 3 and 4 of the Insolvency Regulation, the centre of the debtor's main interests (COMI) governs both jurisdiction and the applicable law on insolvency proceedings. Most commentators agree that the COMI is determined with reference to the deceased⁴¹⁶. This, however, is

⁴¹⁶ Münch. Komm. BGB (-Birk) (supra n. 6) Art. 25 EGBGB para. 371; Staudinger (-Dörner) (supra n. 39) Art. 25 EGBGB para. 905. Cf. BGH 14. 1. 2010 (supra n. 406).

not entirely clear as in some legal systems the heir is deemed to be “debtor” of the insolvency⁴¹⁷. If, for example, the deceased had his or her COMI in Germany whereas his or her successor’s COMI is located within France, French courts might be competent under Art. 3 of the Insolvency Regulation. For the sake of clarity, the Institute suggests the introduction of a rule according to which the COMI is to be determined with reference to the deceased⁴¹⁸. Relying again on the need of protecting third parties, creditors should not be placed in a situation different from the opening of the insolvency proceedings during the deceased’s lifetime.

Article 46 – Information made available to the public

The Member States shall provide within the framework of the European Judicial Network in civil and commercial matters a description of the national legislation and procedures relating to the law on succession and the relevant texts, with a view to their being made available to the public. They shall notify any subsequent amendments to these provisions.

Article 46 – Judicial cooperation through the European Judicial Network Information made available to the public

1. The Member States shall provide within the framework of the European Judicial Network in civil and commercial matters a description of the national legislation and procedures relating to the law on succession and the relevant texts, with a view to their being made available to the public. They shall notify any subsequent amendments to these provisions.

2. *Where the law of another Member State is applicable, the competent court may apply, pursuant to Article 3(2)(b) Decision 2001/470/EC as amended by Decision 568/2009/EC, to the European Judicial Network in civil and commercial matters for information on the content of that law. The request shall be processed as rapidly as possible.*

Summary

362. The Institute welcomes the Commission’s efforts to facilitate access to the Member States’ internal rules of succession law. The framework of the European Judicial Network in civil and commercial matters (EJN) is indeed

⁴¹⁷ See for Germany Münchner Kommentar zur Insolvenzordnung² (-Siegmann) III (2008) § 315 InsO para. 1.

⁴¹⁸ Cf. Sec. 315 of the German Insolvency Act.

a useful mechanism for the exchange of information on national legislation and case law. In its current version, Art. 46 SP only refers to the Network's role as an information resource for the *public*. The Institute suggests adding a new paragraph to Art. 46 SP as a reminder that *courts* as well can make enquiries to the EJN to obtain information on foreign law.

Comments

The application of foreign law under the Regulation

363. As a general rule, the Regulation provides that the succession is subject to the jurisdiction and the law of the State in which the deceased was habitually resident at the time of death (Art. 4 and 16 SP). Under this rule, the competent courts apply their own law and the application of foreign law is not in question. However, since the testator has some degree of freedom to choose the courts having jurisdiction and the law governing the succession, forum and applicable law may diverge in some cases. Here, courts face the task of having to ascertain the content of foreign law⁴¹⁹.

Information on foreign law through the European Judicial Network

364. Where the choice of law rules under the Regulation point to the succession law of another Member State, the courts can resort to the EJN to establish the content of that law. The European legislator created the Network with a view to enhance judicial cooperation within the European Union and, in particular, to facilitate the application of foreign law⁴²⁰. The recent reform of the Network has placed an even stronger emphasis on this role⁴²¹. Thus, within the EU, the EJN is now an alternative mechanism to the European Convention of 1968 on Information on Foreign Law. However, a survey conducted by the Commission in 2006 has found that the courts in the Member States are often unaware of the possibility of consult-

⁴¹⁹ Note, however, that where the succession is governed by a law other than the *lex fori*, the court seised may, subject to certain conditions, transfer the proceedings to a court in the Member State of the applicable law (Art. 5 SP).

⁴²⁰ The legal basis of the EJN is provided in Council Decision 2001/470/EC (supra n. 352). See for the activities of the Network and the recent reform *Fornasier*, *Europäisches Justizielles Netz für Zivil- und Handelssachen*, in: *Handwörterbuch des Europäischen Privatrechts* (supra n. 8) 536–540; *id.*, *Auf dem Weg zu einem europäischen Justizraum, Der Beitrag des Europäischen Justiziellen Netzes für Zivil- und Handelssachen*: ZEuP 2010 (forthcoming); *Matyk*, *Das Europäische Netz des Notariats, Ein Beitrag zum Ausbau des Europäischen justiziellen Netzes*: ZEuP 2010 (forthcoming); *Melin*, *Das Europäische Justizielle Netz für Zivil- und Handelssachen*: DRiZ 2010, 22–26.

⁴²¹ See Art. 3(2)(b) of Council Decision 2001/470/EC (supra n. 352).

ing the Network⁴²². Thus, in the Institute's view, it might be wise to include a reminder in the Regulation to draw more attention to the role of the EJN.

365. In practice, a court being confronted with the law of another Member State can address the Network's contact points, which in turn establish a direct contact to a court or other authorities in the State of the applicable law. The foreign institution will then reply to the inquiry and provide the necessary information. To avoid undue burdens on the parties to the proceedings, the request should be processed as quickly as possible. The Institute is aware that Art. 8(1) Decision 2001/470/EC as amended by Decision 568/2009/EC requires, as a general rule, a reply within fifteen days. However, since the complexity of the legal questions involved in a succession matter may vary considerably from case to case, we preferred not to set a precise time limit for the response.

Article 47 – Amendments to the forms

Any amendment to the forms referred to in Articles 38 and 41 shall be adopted in accordance with the consultative procedure set out in Article 48(2).

Article 47 – Amendments to the forms

Article 48 – Committee procedure

1. The Commission shall be assisted by the committee established by Article 75 of Regulation (EC) No 44/2001.

2. Where reference is made to this paragraph, Articles 3 and 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.

Article 48 – Committee procedure

⁴²² Report from the Commission to the Council, the European Parliament and the European Economic and Social Committee on the application of Council Decision 2001/470/EC establishing a European Judicial Network in civil and commercial matters, COM(2006) 203 final of 16. 5. 2006, p. 5 seq.

Article 49 – Review clause

By [...] at the latest, the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a report on the application of this Regulation. The report shall be accompanied, where appropriate, by proposed amendments.

Article 49 – Review clause**Article 50 – Transitional provisions**

1. This Regulation shall apply to the successions of persons deceased after its date of application.

2. Where the deceased had determined the law applicable to their succession prior to the date of application of this Regulation, this determination shall be considered to be valid provided that it meets the conditions listed in Article 17.

3. Where the parties to an agreement as to succession had determined the law applicable to that agreement prior to the date of application of this Regulation, this determination shall be considered to be valid provided that it meets the conditions listed in Article 18.

Article 50 – Transitional provisions

2. Where the deceased *has chosen* ~~had determined~~ the law applicable to their succession prior to the date of application of this Regulation, this *choice determination* shall be considered to be valid provided that it *either* meets the conditions *that were applicable prior to the date of application of this Regulation in the forum State or the conditions* listed in Article 17.

3. ~~Where the parties to an agreement as to succession had determined the law applicable to that agreement prior to the date of application of this Regulation, this determination shall be considered to be valid provided that it meets the conditions listed in Article 18.~~ *The existence, material validity, effects and interpretation of a testamentary disposition drawn up prior to the date of application of this Regulation are governed by the law that was applicable prior to the date of application of this Regulation in the forum State provided that the testamentary disposition is valid according to that law.*

Summary

366. The Institute generally endorses Art. 50 SP but suggests adding language to the effect that a previously valid choice of law or testamentary disposition remains valid even if it fails to meet the conditions of the new Regulation.

Comments

Transitional provision for choices of law, Art. 50(2) SP

367. Under the Succession Proposal a choice of law made before the date of application of the Regulation is valid if the choice meets the conditions of Art. 17. This is appropriate where (1) the choice was also valid prior to the Regulation; and (2) to the extent that Art. 50(2) and 17 validate a choice of law that would have been invalid under the previous regime. The latter situation would probably be the most common application for Art. 50(2) because most Member States fail to recognise the freedom to choose the law applicable to succession while Art. 17 SP does allow a choice – albeit in very limited circumstances⁴²³.

368. But Art. 50(2) SP also carries the risk of invalidating a choice that prior to the Regulation would have been considered valid. That this risk is real can be demonstrated by the fact that Belgium, the Netherlands and Finland, for instance, have adopted a more liberal approach and allow the testator a greater freedom of choice than Art. 17 SP⁴²⁴. This is problematic. It would be unjust and undermine legal certainty to subject a testator and his or her will to conditions not in existence at the time of the testamentary disposition. If the choice of law was valid under the regime in place when the choice was made, that choice should remain valid even if it is in conflict with the requirements of the new Art. 17. The Institute's proposal applies the rule of validation, i.e. the maxim *in dubio pro validitate*.

Transitional provision for testamentary dispositions, Art. 50(3) SP

369. The same concerns regarding the validity of choice of law clauses permissible under previous law apply for testamentary dispositions which will have been drawn up before the future Regulation will take effect. A testamentary disposition that is valid under the old conflict rules should remain valid once the Regulation will have entered into force as made clear by the new Art. 50(3). If the testamentary disposition is valid according to

⁴²³ Cf. Dutta (supra n. 38) 569.

⁴²⁴ Dutta (supra n. 38) 570.

the old regime, that law should also govern the effects and interpretation since a restriction on the validity would frustrate legal certainty and the stability interest of the person or the persons drawing up a testamentary disposition. The testator will not only be interested in the validity of the testamentary disposition, but also in the effects which the testamentary disposition would have under the old law; such effects should therefore be subject to the same law that governs the validity. If, however, the testamentary disposition is invalid under the old conflict rules, Art. 50(3) does not apply. According to the general transitional provision contained in Art. 50(1) SP, the future Regulation will apply and, in particular, the proposed Art. 18, 18a and 18b.

Article 51 – Entry into force

This Regulation shall enter into force on the twentieth day following its publication in the Official Journal of the European Union.

This Regulation shall apply from [one year after the date of its entry into force].

This Regulation shall be binding in its entirety and directly applicable in all the Member States in accordance with the Treaty establishing the European Community.

Article 51 – Entry into force

