

HABITUAL RESIDENCE AS A SINGLE CONNECTING FACTOR UNDER THE SUCCESSION REGULATION¹

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Abstract

This paper focuses on the notion of habitual residence as a general connecting factor for determining both jurisdiction and the applicable law under the Succession Regulation. First, the scope and the objectives of the Regulation providing uniform rules for jurisdiction, applicable law, recognition and enforcement of judgements and of authentic instruments are briefly introduced. The core of the paper consists in analysis of the notion of habitual residence in terms of cross-border succession matters. It aims to evaluate advantages and disadvantages of use of this criterion as a connecting factor and to assess its suitability and the ability to meet the ambitious goals of the Regulation, in particular to considerably simplify the settlement of cross-border successions within the EU and to provide for legal certainty of the deceased and of the heirs.

Keywords: *Cross-border succession; Succession Regulation; habitual residence; autonomous interpretation*

1. Introduction

In 2012, the EU adopted the Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (hereinafter “Regulation”).² The Regulation covers all aspects (jurisdiction, applicable law, recognition and enforcement and administrative measures) of cross-border successions within the EU, and will be applicable in all Member States³ as of 17 August 2015.⁴

¹ This paper was created within the project: “Dědictví v přeshraničním kontextu pohledem evropské unifikované úpravy”.

² Regulation (EU) No 650/2012 of the European Parliament and the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession. In *EUR-lex* [online]. EU Publications Office (further cited as “Regulation”).

³ Except in Denmark, the United Kingdom and Ireland. The position of Denmark is regulated by Protocol (No 22) on the position of Denmark. In *EUR-lex* [online]. EU Publications Office. Denmark is not bound by

By introducing habitual residence of the deceased as a general connecting factor for the purposes of determining both jurisdiction⁵ and the applicable law,⁶ the Regulation aims to substantially simplify the settlement of cross-border successions in Member States. The objective of this paper is to analyse the notion of habitual residence, and to verify its suitability as a connecting factor in matters of succession, especially in terms of the goals of the Regulation. After a brief introduction of the Regulation as a new instrument in the area of judicial cooperation in civil matters, the paper focuses on interpretation and the criteria for determination of the deceased's habitual residence under the Regulation. Last, advantages and disadvantages of this notion as a connecting factor are evaluated.

2. Briefly about the Regulation

The Regulation was adopted in June 2012⁷ after several years of work and discussions. The most general aim of the Regulation is to overcome the obstacle to the free movement of persons within the EU caused by the existing diversity of rules concerning succession matters in Member States.⁸ The free movement of persons results in growing number of cross-border successions within the EU. The increasing number of unions between nationals of different Member States is often accompanied by the acquisition of property in several Member States.⁹ However, there are still big differences between the legal regulations of succession across the Member States which considerably limit the effectiveness of the cross-border successions' settlement. These differences concern not only substantive regulations, but also rules on the applicable law and jurisdiction.

Article 81 of the Treaty on the Functioning of the European Union (further cited as "TFEU"). The United Kingdom and Ireland have the opt-in right under Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice. In *EUR-lex* [online]. EU Publications Office. Regarding the Regulation, the United Kingdom and Ireland have not used their opt-out possibility.

⁴ According to its Article 83(1), the Regulation shall apply to succession of persons who die on or after 17 August 2015.

⁵ Article 4 of the Regulation provides that "*the courts of the Member State in which the deceased had his habitual residence at the time of death shall have jurisdiction to rule on the succession as a whole.*"

⁶ Under the general rule in Article 21(1) of the Regulation, "*the law applicable to the succession as a whole shall be the law of the State in which the deceased had his habitual residence at the time of death.*"

⁷ The legislative basis for the Regulation is Article 81 of the TFEU.

⁸ Proposal for 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, COM(2009) 154 final, 14.10.2009. In *EUR-lex* [online]. EU Publications Office (further cited as "Proposal"). Explanatory memorandum, point 1.2.

⁹ Green Paper Succession and Wills, COM(2005) 65 final, 1 March 2005. In *EUR-lex* [online]. EU Publications Office (further cited as "Green Paper"), point 1 Introduction.

As the unification of substantive law is neither possible,¹⁰ nor necessarily desired, the Commission has focused on the unification of conflict-of-law rules. The determination of applicable law shall be accompanied by uniform rules on jurisdiction and recognition and enforcement of judgements. As most successions are settled on a non-contentious basis, the EU instrument shall also cover the recognition of specific judicial documents. Last but not least, the new instrument aims to remove existing administrative barriers. Therefore, the establishment of the European Certificate of Succession is envisaged.¹¹

The Regulation applies to succession to the estates of deceased persons.¹² When defining the material scope, the questions excluded by Articles 1(1) and 1(3) have to be born in mind. Application of the Regulation is limited to successions with cross-border implications.¹³ However, the Regulation does not provide any guidelines for what cross-border element may consist in. While determining the cross-border element, it is necessary to examine four aspects: authority having jurisdiction, deceased person, property, and heirs. If all these elements are located in one state, the relationship is a domestic one. On the other hand, if they are located in more than one state, cross-border implication is present. While determining the cross-border implication, all circumstances must be taken into account.

Concerning the personal scope, the jurisdictional rules are applicable to deceased persons who have their habitual residence within the EU at the time of their death, as well as persons who do not have their habitual residence in the EU.¹⁴ The same is true for the part concerning the applicable law, as it is of universal nature.¹⁵ Part IV concerning the recognition and enforcement applies only to the decisions rendered in Member States.

The principal goal of the Regulation is to facilitate the settlement of successions with cross-border implications within the EU. The new uniform rules shall make it easier for EU

¹⁰ The EU does not have competence in this regard. See e.g. VERBEKE, A., LELEU, Y. Harmonization of the Law of Succession in Europe. In HARTKAMP, A. et al. (eds.). *Towards a European Civil Code*. Fourth Revised and Expanded Edition. The Hague: Kluwer Law International, 2011, p. 472.

¹¹ Green Paper, point 1 Introduction.

¹² Article 1 of the Regulation. Article 3(a) of the Regulation defines the notion succession as “*succession to the estate of a deceased person and covers all forms of transfer of assets, rights and obligations by reason of death, whether by way of a voluntary transfer under a disposition of property upon death or a transfer through intestate succession.*”

¹³ Although Article 1 concerning the material scope of application does not even mention the cross-border element, it is still necessary to bear in mind that the Regulation is based on Article 81 of the TFEU. Article 81 gives the EU the power to regulate only the matters with cross-border element.

¹⁴ See Article 10 of the Regulation. In this case there have to be other connections with the EU.

¹⁵ Article 20 of the Regulation.

citizens¹⁶ to handle the legal side of cross-border successions and wills and to foster legal certainty, and predictability of the settlement.¹⁷ The scheme of the Regulation can be characterised as follows:

- each succession shall be treated coherently,
- under single applicable law and by a single competent authority,
- party autonomy with regards to the applicable law shall be respected,
- parallel proceedings and conflicting decisions shall be avoided,
- mutual recognition of decisions and authentic instruments shall be ensured.

3. Habitual Residence as a Connecting Factor

3.1 Reasons for Implementing Habitual Residence as a Connecting Factor in Succession Matters

The Regulation employs the notion of “habitual residence” of the deceased at the time of death as a general connecting factor for the purposes of determining both jurisdiction and the applicable law. In succession and family law, the most common connecting factors are habitual residence and nationality.¹⁸ The Green Paper on Succession and Wills suggested both of them as possible connecting factors.¹⁹ In reply to the Green Paper, numerous states and organisations recommended the use of habitual residence rather than nationality.²⁰ As a result, the criterion of habitual residence was implemented into the Proposal for the Regulation.

According to the Explanatory Memorandum, habitual residence better “*coincides with the centre of interests of the deceased and often with the place where most of his property is located, since it reflects the increasing mobility of citizens within the EU. Such a connection is more favourable to integration into the Member States of habitual residence and avoids any discrimination regarding persons who are resident there without possessing*

¹⁶ It would be more precise to say “persons residing in the EU” instead, since the Regulation does not require the deceased to be a citizen of any Member State.

¹⁷ New EU rules to ease cross-border successions. *European Commission: Civil Justice* [online]. European Commission, DG Justice, 2013 [cit. 2015-01-31].

¹⁸ BOELE-WOELKI, K. International Private Law in China and Europe: A Comparison of Conflict-of-Law Rules Regarding Family and Succession Law. In BASEDOW, J., PISSLER, K. *Private International Law in Mainland China, Taiwan and Europe*. Tübingen: Mohr Siebeck, 2014, p. 313.

¹⁹ Green Paper, point 1 Introduction.

²⁰ 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. *RabelsZ*, 2010, Vol. 74, p. 604 (further cited as “Max Planck Comments”).

the relevant nationality.”²¹ Additionally, habitual residence has been long retained in both national laws of Member States and international conventions.²²

3.2 Interpretation of the Notion of Habitual Residence

The concept of habitual residence is not a new one in the area of private international law. After its introduction within the Hague Conference on Private International Law,²³ it also became part of the EU measures – first in the field of social security and labour law, soon after in the area of judicial cooperation in civil matters. In particular, it is known from the Brussels IIbis Regulation,²⁴ the Rome I Regulation,²⁵ or the Maintenance Regulation.²⁶ However, none of them provide either a definition, or any guidelines for the interpretation of habitual residence as a connecting factor. This has been a legislators’ intention since the Hague Conference, though. Contrary to nationality or domicile, habitual residence is deemed to be a factual criterion, requiring closer inspection of circumstances of each individual case; not a legal concept.

The Court of Justice of the EU (hereinafter “CJEU”) interpreted the notion of habitual residence in relation to the Brussels IIbis Regulation²⁷ in its well-known case *C-523/07 A*.²⁸ It first emphasised the need for autonomous interpretation of this concept, i.e. in light of the scheme and objectives of the entire instrument.²⁹ No reference to national law can be made in this regard. Further, it held that physical presence itself is not sufficient to establish person’s habitual residence. Instead, all circumstances specific to each case shall be taken into account. The CJEU laid down several criteria courts shall assess while determining habitual residence of a child: degree of integration in social and family environment, duration,

²¹ Proposal. Explanatory memorandum, point 4.3; Recital (23) of the Regulation.

²² *Ibid.*

²³ Within the Hague Conference, habitual residence as a connecting factor for determining applicable law was firstly used in the Convention of 15 June 1955 on the Law Applicable to International Sales of Goods. Hague Conference on Private International Law [online].

²⁴ Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and matters of parental responsibility, repealing Regulation (EC) No 1347/2000. In *EUR-lex* [online]. EU Publications Office (further cited as “Brussels IIbis Regulation”).

²⁵ 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). In *EUR-lex* [online]. EU Publications Office.

²⁶ Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations. In *EUR-lex* [online]. EU Publications Office.

²⁷ In particular, it interpreted the notion „habitual residence of a child“ for the purposes of Article 8 of Brussels IIbis Regulation.

²⁸ Judgement of the Court of Justice of 2 April 2009. A. C-523/07. In *EUR-lex* [online]. EU Publications Office further cited as „C-523/07 A.“).

²⁹ Judgement of the Court of Justice of 14 October 1976. LTU Lufttransportunternehmen GmbH & Co. KG v Eurocontrol. Case 29/76. In *EUR-lex* [online]. EU Publications Office.

regularity, conditions and reasons for stay in the territory of a Member State, child's nationality, place and conditions of school attendance, linguistic knowledge, family and social relationships.³⁰

Although this interpretation is tied to the particular provision and shall not be used outside the scope of the Brussels IIbis Regulation, the requirement of uniform interpretation justifies its use at least as a guideline for interpretation and application of other regulations in the area of judicial cooperation in civil matters. Nevertheless, the Succession Regulation is the first EU Private International Law instrument which explicitly provides a list of criteria that should be taken into account while determining the deceased's habitual residence in order to find a competent court and to determine the applicable law.

3.3 Definition of Habitual Residence under the Regulation

The Proposal for the Regulation originally did not contain any definition or guidelines for the interpretation of the notion of habitual residence. National courts applying the Regulation were intended to determine each person's habitual residence on a purely case-by-case analysis. Due to the lack of any interpretation rules, the Proposal became subject to some criticism. The Council therefore suggested a list of criteria for the purpose of determining habitual residence of a deceased person to be included into the Regulation.³¹

While determining the habitual residence of the deceased (for the purposes of finding both jurisdiction and the applicable law), the authority dealing with the succession "*shall make an overall assessment of the circumstances of the life of the deceased during the years preceding his death and at the time of his death, taking account of all relevant factual elements, in particular the duration and regularity of the deceased's presence in the State concerned and the conditions and reasons for that presence.*"³² The notion of habitual residence shall thus reveal "*a close and stable connection with the State concerned,*"³³ in line with the specific aims of the Regulation. This provision was clearly inspired by the CJEU's ruling in the above-mentioned case *C-523/07 A*.

³⁰ C-523/07 A., points 33 – 44.

³¹ This request was reflected in the compromise package of the Presidency's Political guidelines – Proposal for 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 – Political Guidelines for the future work, 6 June 2011. Compromise package, points 10 – 11 (hereinafter as the "Compromise Package"). Finally, two recitals (No 23 and No 24) were added into the Regulation, providing guidelines for determining habitual residence of a deceased person.

³² Recital (23) of the Regulation.

³³ *Ibid.*

The Regulation also remembers utmost situations when – despite following the introduced guidelines – determination of the deceased’s habitual residence proves to be complex. Such a situation may occur where, for example, the deceased had gone to live abroad for professional or economic reasons, even for a longer period of time, but maintained a close and stable connection to his or her State of origin; or where the deceased had lived in several States alternately or travelled from one State to another without settling permanently in any one of them. For such cases, the Regulation provides specific rules.³⁴

It shall be also born in mind that the notion of habitual residence conceptually differs from the notion of domicile. The latter has been traditionally used as a connecting factor in conflict-of-law rules of common-law countries.³⁵ It currently serves as a connecting factor for determining jurisdiction for example under the Brussels Ibis Regulation, as well.³⁶

3.4 Criticism of the Criterion of Habitual Residence, Advantages, and Disadvantages of Its Use

Regardless of the inclusion of the guidelines for determination of the deceased’s habitual residence into the Regulation, the notion was still criticized for its assumed vagueness and for the absence of its uniform meaning in the EU legislation.³⁷ Allegedly, the criterion of habitual residence would enable the testator to intentionally change his place of residence in order to avoid application of some mandatory rules of the otherwise applicable law. Further, the law of the state of deceased’s habitual residence may be rather incidental, with no real connection to deceased’s social and economic relationships, and the deceased may not be familiar with that law at all.³⁸

The authors consider all these allegations quite excessive. Firstly, the notion of habitual residence has been used as a connecting factor for determining both jurisdiction

³⁴ Recital (24) of the Regulation stipulates that “*the deceased could, depending on the circumstances of the case, be considered still to have his habitual residence in his State of origin in which the centre of interests of his family and his social life was located. Further, if the deceased was a national of one of the States at stake or had all his main assets in one of those States, his nationality or the location of those assets could be a special factor in the overall assessment of all the factual circumstances.*”

³⁵ O'BRIEN, J. *Conflict of Laws*. 2nd ed. London: Cavendish Publishing Limited, 1999, pp. 65 - 66.

³⁶ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (recast). In *EUR-lex* [online]. EU Publications Office. For determining natural person’s domicile see Article 62 thereof.

³⁷ Especially on the part of German practitioners, since German conflict-of-law rules on succession traditionally uses the criterion of nationality. See also TRAI SCI, F.P. Which Future for the European Law of Successions? In MOCCIA, L. (ed.) *European Private Law: Why, How, What and Who?* Munich: Sellier European Law Publishers, 2013, p. 166.

³⁸ PFEIFFER, M. Několik úvah nad rozhodným právem v rámci připravované úpravy evropského dědického práva [Several Remarks on the Applicable Law under the Proposed EU Regulation of Succession Law]. *Ad Notam*. 2011, Vol. 17, No. 1, p. 12.

and the applicable law in various instruments over decades. Further, the adjective *habitual*³⁹ implies certain degree of stability, continuance, and certain period of duration, i.e. it establishes a close connection between a person and the territory of his or her residence. Finally, any possible misuse of this criterion in order to designate a more favourable applicable law may be prevented by the so-called escape clause.⁴⁰

In fact, the criterion of habitual residence embraces several advantages, especially when compared to the criterion of nationality. It better reflects the social and economic reality of today's world, in particular within the EU. More and more citizens still live outside the State of their nationality. As a result, the residence principle corresponds to the closest link of a deceased to a particular legal system better than the nationality principle. Habitual residence is a factual, objective criterion, allowing for all relevant circumstances of each individual case. It is often regarded as an effective connecting factor, simple to apply and flexible enough to determine the most suitable forum, and eventually the applicable law.⁴¹ Its use also prevents possible difficulties arising out of multiple or no citizenship. For all these reasons, it is compatible with the current trends at national, international, as well as EU level.⁴²

The only aspect that might be disadvantageous is that the use of habitual residence as the connecting factor imposes higher standards on a court when assessing circumstances of each case in order to establish its jurisdiction and to determine the applicable law.

4. Conclusion

In terms of today's globalised world, especially the EU's internal market which is characterised by free movement of its citizens, the criterion of habitual residence constitutes a suitable and better connecting factor for the purposes of determining jurisdiction of the competent authority, as well as for designating the applicable law. It offers enough flexibility to reflect the economic reality and needs of the EU citizens. At the same time, the notion itself requires that presence of the deceased within a territory becomes a matter of routine. In our opinion, this sufficiently eliminates the risk of a purpose-built change of the place of residence intended to change the law applicable to the succession. In any case, the Regulation provides mechanisms, such as the escape clause, to determine the law which has the real closest link to the deceased's estate.

³⁹ See also other language versions; for example the expression "*gewöhnlicher Aufenthalt*" in German version.

⁴⁰ Article 21(2) and Recital (25) of the Regulation.

⁴¹ LAMONT, R. Habitual Residence and Brussels IIbis: Developing Concepts for European Private International Family Law. *Journal of Private International Law*. 2007, Vol. 3, no. 2, p. 263.

⁴² Max Planck Comments, p. 603 – 605.

The use of habitual residence as a general connecting factor for determining both jurisdiction and the applicable law will in most cases result in a desirable situation when the competent authority applies its national substantive law. Such approach is expected to considerably simplify and accelerate the settlement of cross-border successions. Additionally, as it requires an objective assessment of all relevant circumstances of each case, and leads to a single forum and single applicable law, it underlines the legal certainty, and provides for predictable solutions.

In conclusion, the adoption of habitual residence as a connecting factor in matters of cross-border successions, instead of nationality, corresponds with the current challenges and conforms to the trends in private international law, at national, international, and EU level.

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