The European Regulation EU No. 650/2012 and its effects regarding legal cases with cross-border issues

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Insofar as this article adverts to provincial rules, it is usually the case that these rules refer specifically to the Province of Ontario where one-third of the population of Canada lives. These rules may vary from those of other provinces.

We strongly recommend that you seek professional legal advice from a qualified lawyer to resolve your particular legal problem.

* A "Rechtsreferendar" is a German trainee lawyer receiving practical training in judicial and other legal work having completed at least five years of formal legal studies at university and having passed the first of two state examinations for admission to the legal profession (as a judge, lawyer, state attorney, etc.).

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I. Introduction

A growing number of German citizens have transferred either their place of residence or assets to another country. Cross-border issues also arise due to marriage to a spouse, who has a different citizenship. Either way, cases regarding the law of succession are inevitably increasing.

The European Regulation EU No. 650/2012[1] (hereinafter referred to as "EURegNo.650/2012" or "the Regulation"), which came into force on August 16, 2012 in most European countries (excluding Great Britain, Ireland and Denmark) will cause significant changes to the present legal situation, although it will not come into full force and effect until August 17, 2015 (cf. Art. 84 Sec. 2 of EURegNo.650/2012).

This essay summarizes the content of the EURegNo.650/2012 and points out the consequent changes, compared to the present legal situation.

II. Goals of the European Regulation EU No. 650/2012

The primary objective of the EURegNo.650/2012 is to minimize legal uncertainty and unnecessary administrative burdens in cases of cross-border issues where law of succession is of relevance.

Thereby, the testator is given the opportunity to take care of his or her estate planning in an anticipatory manner regardless of the fact that cross-border issues might become relevant. At the same time, national statutory rights of inheritance are not being altered.

Additionally, legal successors benefit from the regulation in that making claims regarding processes of inheriting becomes easier and less bureaucratic within the European Union.

III. Content of the European Regulation EU No. 650/2012

Prior to the legal text itself, the Regulation contains 83 recitals concerning further interpretation of the law. These recitals have to be taken into account in order to ensure an interpretation that is in accordance with the law.

Due to its legal nature, the Regulation does not require any further legal implementation, but is legally effective in all member states of the European Union (EU), excluding – in this case – Great Britain, Ireland and Denmark.

[1] available at:
http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012R0650&qid=1409077775729&from=EN

Chapter I of the EURegNo.650/2012 determines the Scope of Application and contains a definition of terms.

The International Jurisdiction on a case-by-case basis is determined in Chapter II, while Chapter III points out definitions regarding the applicable law.

Chapter IV deals with recognition and enforcement of judgments, while enforcement based on authenticated documents or court settlements is determined in Chapter V.

Chapter VI contains legal requirements for the European Certificate of Succession; Chapter VII covers general information as well as final provisions.

IV. Scope of Application of the European Regulation EU No. 650/2012

1. Material Scope of Application

Art. 1 Sec. 1 of the EURegNo.650/2012[2] states that the Regulation applies to the succession of the estates of deceased persons regardless of whether intestate or testamentary succession applies. In the light of Art. 3 Sec. 1 lit. a), this includes 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.

Excluded from the scope of Application are in particular the status of natural persons, family relationships and the legal capacity of natural persons as well as questions relating to matrimonial property regimes, c.f. Art. 2 Sec. 2 lit a) – l)[3].

2. International Scope of Application

The EURegNo.650/2012 is applicable in all member states of the EU except Great Britain, Ireland and Denmark (c.f. recital No. 82 and 83 of the regulation).

In addition, Art. 20 provides for a so called universal application: Any law specified by the regulation shall be applied whether or not it is the law of a member state.

However, Art. 34 must be taken into account, which article contains a *Renvoi*, if a third state is involved.

[2] Unless marked otherwise, all Articles mentioned relate to the EURegNo.650/2012.
[3] Discussed extensively by: *Simon/Buschbaum* in NJW 2012, 2393.

Further, it has to be pointed out, that international treaties – for example, those between Germany and Turkey or the successor states of the former Soviet Union – are not affected by the regulation, but enjoy precedence of application[4].

3. Temporal Scope of Application

As mentioned above, the EURegNo.650/2012 has come into force on August 16, 2012. However, this regulation is applicable only to a succession involving the death of a person on or after August 17, 2015, cf. Art. 83 Sec. 1. The background to this is that a testator, who has already made a disposition of property upon death or has declared a choice of law, shall not be disadvantaged by the change of law[5].

3. Functional Competence

Art. 2 specifies that the EURegNo.650/2012 does not affect the competence of the authorities of member states with regard to dealing with matters of succession.

V. International Jurisdiction

Art. 4 et seq. 2 in conjunction with recitals No. 20 et seq. determine international jurisdiction.

Judicial decisions concerning the succession as a whole are generally in the hands of the courts of the member state where the testator had his or her *habitual residence* at the time of death. This marks a significant change compared to former legislation, which was focused exclusively on the citizenship of the testator.

Although the term *habitual residence* is not legally defined in the regulation, recital No. 23 does contain remarks regarding its determinability:

> *"In order to determine the habitual residence, the authority dealing with the succession should 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. The habitual residence thus determined should reveal a close and stable connection with the State concerned taking into account the specific aims of this Regulation."*

Ultimately, a decision on a case-by-case basis has to be made, which means all relevant facts of each case lead to a decision regarding the determination of the habitual residence. Of special

[4] See on the overall topic: Völkl in AnwZert ErbR 8/2013, available at: https://www.juris.de/jportal/prev/jazo-AZOER00001513

[5] See also: *Janzen* in DNotZ 2012, 484.

significance are duration and continuity of the stay[6]. This of course leads to a degree of uncertainty, which must have been obvious to the regulatory authority and will require a number of judgments to develop reliable case law.

Basically, the following applies: A German citizen, who relocated his or her entire life to another member state of the EU (except Great Britain, Ireland and Denmark), must be aware that matters of inheritance will most likely be under the jurisdiction of the courts of the country where he or she had his or her habitual residence at the time of death regardless of German citizenship.

However, a testator now has the opportunity to influence the law applicable in his or her case by means of 'choice of law'. Due to Art. 5 and 22, a testator may choose as the law to govern his or her succession as a whole the law of the State whose nationality he or she possesses at the time of making the choice or at the time of death. The choice of law has to be part of a disposition of property upon death or must be derived from such a disposition. The material validity of the disposition has to meet the statutory regulations of the chosen law.

VI. Subsidiary Jurisdiction

Relevant in this regard is also Art. 10, which deals with a subsidiary jurisdiction. The following has to be taken into account, when the testator's habitual residence at the time of death is not in a member state of the EU:

> *"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 in which assets of the estate are located shall nevertheless have jurisdiction to rule on the succession as a whole in so far as:*
>
> *- the deceased had the nationality of that Member State at the time of death; or, failing that,*
>
> *- the deceased had his previous habitual residence in that Member State, provided that, at the time the court is seized, a period of not more than five years has elapsed since that habitual residence changed."*

Scenario 1 becomes relevant if, for example, a German citizen has his habitual residence at the time of death in a third state, but assets of the estate are still located in Germany. German courts will have jurisdiction in this matter.

Scenario 2 would require, for example, an Austrian citizen, who has her habitual residence at the time of death in a third state, but assets of her estate are located in Germany, which has also been

[6] Cf. recital 23 of the EURegNo.650/2012.

her former habitual residence within the last five years (between changing the habitual residence). Regardless of the Austrian citizenship, German courts will have jurisdiction in this matter as well.

In both scenarios the assets of the estate must be (still) located in a member state of the EU. This is the crucial point when applying Art. 10.

VII. General Rule of Conflict

Art. 21 Sec. 1 stipulates that the law applicable to the succession as a whole shall be the law of the member state in which the deceased had his or her habitual residence at the time of death, unless otherwise specified in the regulation.

Art. 21 Sec. 2 states the following exception: if it is clear from all circumstances of the case, that at the time of the testator's death, he or she was manifestly more closely connected with a state other than the one whose law would be applicable (in view of the habitual residence), the law applicable regarding the succession will be the law of that other state. The basic purpose behind this regulation is avoidance of parallel proceedings in numerous states.

In this context, Art. 17 (*lis pendens*) becomes relevant as it determines that:

> *"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 seized shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seized is established."*

VIII. Choice of Law

As mentioned above (see V.), a testator is free to choose as the law to govern his or her succession as a whole the law of the state whose nationality he or she possesses at the time of either declaring the choice of law or at the time of death, Art. 22. The habitual residence of the testator is in that case not relevant for the matters of succession.

The substantive validity of such dispositions of property upon death is determined by Art. 26, in particular, the capacity of the testator to make such a decision, particular reasons that bar the testator from making such dispositions, the admissibility of representation for the purpose of making a disposition upon death, and the interpretation of the disposition itself.

Changes to or withdrawal of choice of law require a new declaration in the form of a disposition of property upon death.

This means that a German citizen has the option to choose German law to be applicable regarding the matters of succession, even though her or his habitual residence is not in Germany, but in another member state. The material validity in this case will follow German law of succession.

IX. The European Certificate of Succession

Another new feature is the European Certificate of Succession, legally prescribed in Art. 62 and summarized here. It is an authentic instrument, which the heirs can use to invoke their status and to exercise their rights in order to ensure fast and efficient processing. The certificate is issued for use in other member states and in order to minimize bureaucracy in cross-border matters regarding inheritance law[7].

The use is optional and the certificate is only issued upon application (Art. 65).

The certificate achieves its legal effects in all member states; an additional recognition procedure is not necessary (Art. 69 Sec. 1). It does however not replace a certificate of inheritance and its particular required proceedings based on national law – such as the German "Erbschein" (Art. 62 No.3).

Art. 69 Sec. 2 points out that the certificate accurately demonstrates elements which have been established and that the person mentioned in the certificate as the heir has that status without conditions and / or restrictions other than those stated.

Based on Section 3, any person acting on the basis of information certified in the European Certificate of Succession can make payments or pass on property to a person mentioned in the certificate. These procedures will be considered legally effective unless the person knows that the contents of the certificate are not accurate or is unaware of such inaccuracy due to gross negligence. Under the same conditions, a *bona fide* purchase is legally effective.

X. Legal Situation in Canada

At this point, a brief overview of the inheritance law in Canada (with regard to the law of Ontario) appears reasonable. Due to the fact that the EURegNo.650/2012 is limited to member states of the European Union, it does not have direct effects on the legal framework in Canada. Nevertheless, some of the changes specified above lead to a – *de facto* – legislative approximation in some parts.

[7] Cf. *Janzen*, a.a.O., 484, 492f.

Just like the legal requirement in Art. 4 of the regulation, the inheritance law of Ontario states that decisions concerning succession as a whole are generally in the hands of the courts of the Province, where the testator had his or her habitual residence at the time of death, cf. Section 36 Subsection (2) of the Succession Law Reform Act[8]. However, this only applies to movable assets; the manner and formalities of making a will and its essential validity and effect regarding interests in land are governed by the internal law of the place where the land is situated, cf. Section 36 Subsection (1) of the Succession Law Reform Act.

A choice of law is permitted in so far as the testator can choose the law of a third country to be applicable by means of an expressed disposition or by a disposition interpreted by reference to the circumstances, but this only affects interpretation regarding the content of a disposition of property upon death.

Keeping that in mind, it may be noted that the EURegNo.650/2012 will lead after all to a legislative approximation to Canadian law of succession regarding the international jurisdiction and the choice of law.

Whether the European Certificate of Succession is going to have any effects on Canadian inheritance law is not clear at present. At this stage, it can only be pointed out that national certificates relating to the status of heirs are usually not being recognized by Canadian courts. It is at present not foreseeable whether this might change after the European Certificate of Succession becomes available. In any case, heirs should - in their own interest - not reasonably rely on that.

XI. Conclusion

The EURegNo.650/2012 certainly marks an important step towards ongoing simplification when it comes to cross-border issues regarding inheritance law within the European Union. It remains to be seen how this turns out in practice.

Determining the habitual residence of a testator can – depending on the circumstances of the case – become difficult since the regulation does not define this term. Especially at the beginning, there is a slight danger of inconsistent judicial decisions that could lead to legal uncertainty. On the other hand, the choice of law seems to be an appropriate instrument to minimize such difficulties. The complexity of the interactions between different statutes and jurisdictions with respect to these issues means that consultation with a legal expert is strongly recommended.

The implementation of the European Certificate of Succession can become a real simplification for heirs in terms of enforcing their claims and rights throughout the European Union.

[8] Available at: http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90s26_e.htm

However, as soon as Canadian law becomes relevant, the regulation does not have any direct effects on the matter of succession regardless of the *de facto* approximation in some parts.

XII. Bibliography

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2. Canada

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