



Hrvatska javnobilježnička komora



NOTARSKA
ZBORNICA
SLOVENIJE



REPUBLIKA HRVATSKA
VRHOVNI SUD REPUBLIKE HRVATSKE

Project CISUR – Enhancing Judicial Cooperation on the Implementation of the Succession Regulation in Croatia and Slovenia / CISUR – Jačanje pravosudne suradnje u primjeni Uredbe o nasljeđivanju u Hrvatskoj i Sloveniji

Coordinator: Croatian Law Centre (HR). Other beneficiaries: Peace Institute (SI), Ministry of Justice of the Republic of Croatia (HR), Croatian Notaries Chamber (HR) and Chamber of Notaries of Slovenia (SI). Associate: Supreme Court of the Republic of Croatia (HR)

Sladana Aras Kramar and Katarina Vučko

DESK RESEARCH REPORT ON THE REGULATORY AND INSTITUTIONAL FRAMEWORK FOR THE IMPLEMENTATION OF THE REGULATION IN CROATIA AND SLOVENIA

Summary

April 2019



This project is co-funded by the European Union's Justice Programme (2014-2020), Croatian Law Centre, Peace Institute, Ministry of Justice of the Republic of Croatia, Croatian Notaries Chamber.
The contents of this publication are the sole responsibility of Croatian Law Centre.

Copyright © 2019
Slađana Aras Kramar, Katarina Vučko

INTRODUCTION

Regulation (EU) No 650/2012 Of the European Parliament and of the Council 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: Succession Regulation) was adopted on 4 July 2012. Prior to its adoption, long-standing activities and discussions took place in the European Union (EU).

As early as 1998, the adoption of a European instrument in the field of succession was a priority in the framework of the "Vienna Action Plan". Next was followed by the "Hague Program: Strengthening Freedom, Security and Justice in the European Union" of 2004, which also stressed the need to adopt a European instrument governing law issues applicable to inheritance, jurisdiction, mutual recognition and the enforcement of succession decisions and the creation of a European Certificate of Succession. The "Stockholm Program - an open and secure Europe that serves and protects its citizens" from 2009 is a step forward, inter alia by expanding the proposal and the principle of mutual recognition of succession decisions and wills, taking into account the specificities of Member States' legal systems.

The "Green Paper on Succession and Wills" was published on 1 March 2005 and included the Questionnaire on the Principles and Rules of Applicable Law on jurisdiction, recognition and enforcement of succession decisions that should be taken into account in the creation of a European Instrument for inheritance. Then, in 2009, the Proposal for a Decree on jurisdiction, applicable law, and the recognition and enforcement of judgments and authentic acts in matters of succession and the introduction of a European Certificate of Succession.

Regulation no. 650/2012 on succession contains provisions on jurisdiction, applicable law, recognition or, if so, acceptance, enforceability and enforcement of decisions, public documents and judicial settlements in matters of succession and the establishment of a European Certificate of Succession. Objective of Regulation No. 650/2012 on succession, as emphasized in the Preamble, is to facilitate the proper functioning of the internal market by removing obstacles to the free movement of persons who are currently experiencing difficulties in exercising their rights in the context of inheritance with a cross-border element.

For the correct and uniform application of the Succession Regulation, The Commission Implementing Regulation (EU) No 1329/2014 of 9 December 2014 was adopted. The latter established the forms set out in Regulation (EU) No 650/2012.

On 12 December 2014, the Act Implementing Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 was adopted in Croatia. The Act

defines the territorial jurisdiction to decide on the estate, the competent bodies and procedures within the scope of the Succession Regulation.

Slovenia generally does not adopt specific implementing measures for the implementation of European procedural regulations in national law. However, if this is the case, it is, as a rule, a partial, but not a complete regulation of the implementation. Such an example of partial regulation of the implementation is also the Act Amending the Inheritance Act (ZD-C), which added to the law an additional chapter, titled "Provisions for implementing the Regulation 650/2012/EU", in particular for determining the competent authorities for its implementation.

A. SCOPE

The scope of the Regulation is very broad. It covers all civil matters related to succession to the estates of deceased persons, that is, all forms of transfer of property, rights and obligations due to death, whether by way of a voluntary transfer under a disposition of property upon death or a transfer through intestate succession. It should not apply to revenue matters or to administrative matters of a public-law nature; and also not to areas of civil law other than succession or questions relating to matrimonial property regimes, including marriage settlements as known in some legal systems to the extent that such settlements do not deal with succession matters, and property regimes of relationships deemed to have comparable effects to marriage.

The Regulation applies in all Member States, with the exception of the United Kingdom, Ireland and Denmark. These Member States were not taking part in the adoption of this Regulation and are not bound by it or subject to its application.

The Regulation applies to the succession of persons who die on or after 17 August 2015.

B. JURISDICTION

The second chapter of the Regulation regulates the field of jurisdiction as one of the most important institutes of private international law. The Regulation stipulates 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. The aim of this rule of general jurisdiction is to prevent several succession proceedings before the competent authorities in several different Member States. To ensure that a genuine connecting factor exists between the succession and the Member State in which jurisdiction is exercised, the Regulation

provides that the general connecting factor for the purposes of determining both jurisdiction and the applicable law should be the habitual residence of the deceased at the time of death.

The rules of this Regulation are devised so as to ensure that the authority dealing with the succession will, in most situations, be applying its own law. If the deceased had chosen as the law to govern his succession the law of a Member State of which he was a national, the Regulation allows the parties concerned to conclude a choice-of-court agreement in favour of the courts of the Member State of the chosen law. Such a choice-of-court agreement must be expressed in writing, dated and signed by the parties concerned.

The Regulation also determines when a court which has already commenced proceedings on the basis of general jurisdiction or subsidiary jurisdiction may decline jurisdiction if the deceased in accordance with Article 22 of the Regulation has chosen the applicable law.

In addition to the general jurisdiction relating to the habitual residence of the deceased, the Regulation also provides for the subsidiary jurisdiction of the courts of the Member States if the habitual residence of the deceased at the time of death is not in one of the Member States but in a third country. Subsidiary jurisdiction comes into play if he 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 seised, a period of not more than five years has elapsed since that habitual residence changed.

The Regulation provides for a *forum necessitatis* to prevent cases of denial of justice so that the court of a Member State may exceptionally decide on a succession closely linked to a third country. Member State may, on an exceptional basis, rule on the succession if proceedings cannot reasonably be brought or conducted or would be impossible in a third State with which the case is closely connected.

The Regulation includes other provisions to eliminate difficulties in asserting the rights of persons in the context of cross-border succession: on Limitation of proceedings (regarding assets located in a third state); on Acceptance or waiver of the succession, of a legacy or of a reserved share; on seising of a court; examination as to jurisdiction (where a court of a Member State is seised of a succession matter over which it has no jurisdiction under this Regulation, it shall declare of its own motion that it has no jurisdiction); Examination as to admissibility (the court having jurisdiction stays the proceedings so long as it is not shown that the defendant habitually resident in another State has been able to receive the document instituting the proceedings); Lis pendens; Related actions (Where related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings); Provisional, including protective, measures.

C. APPLICABLE LAW

Unless otherwise provided for in this Regulation, the law applicable to the succession as a whole is the law of the State in which the deceased had his habitual residence at the time of death (general rule). Bearing in mind that there are no uniform positions in the conflicting laws of the Member States, the principle of the unity of inheritance is the most important achievement of the European legislator: “For reasons of legal certainty and in order to avoid the fragmentation of the succession, that law should govern the succession as a whole, that is to say, all of the property forming part of the estate, irrespective of the nature of the assets and regardless of whether the assets are located in another Member State or in a third State.” The Regulation does not favour the law of Member States, as it stipulates that Any law specified by this Regulation shall be applied whether or not it is the law of a Member State.

However, the Regulation also provides for the possibility that a person chooses the law to govern his succession as a whole (choice of law). A person may choose the law of the State whose nationality he possesses at the time of making the choice or at the time of death. As the Regulation aims to ensure that the authority dealing with the succession will be applying its own law, it allows the parties concerned to conclude a choice-of-court agreement in favour of the courts of the Member State of the chosen law.

The general rule, which according to the Regulation is the last habitual residence of the deceased (if the person has not chosen the law), cannot answer all questions of inheritance. Specific connecting factors are needed to respond to individual aspects of inheritance law. Therefore, the Regulation includes additional rules to determine applicable law: for the dispositions of property upon death other than agreements as to succession; Agreements as to succession; rules on substantive validity of dispositions of property upon death; Formal validity of dispositions of property upon death made in writing; Validity as to form of a declaration concerning acceptance or waiver; Special rules on the appointment and powers of an administrator of the estate in certain situations; Adaptation of rights *in rem*; rules regarding Commorientes; Estate without a claimant; Estate without a claimant; Public policy (*ordre public*); and rules regarding states with more than one legal system – territorial conflicts of laws and states with more than one legal system – inter-personal conflicts of laws.

D. RECOGNITION, ENFORCEABILITY AND ENFORCEMENT OF DECISIONS

In the light of its general objective, which is the mutual recognition of decisions given in the Member States in matters of succession, irrespective of whether such decisions were given in contentious or non-contentious proceedings, the Succession Regulation lays down rules relating to the recognition, enforceability and enforcement of decisions in succession matters similar to those of other Union instruments in the area of judicial cooperation in civil matters. In accordance with the Succession Regulation, 'decision' means any decision in a matter of succession given by a court of a Member State, whatever the decision may be called, including a decision on the determination of costs or expenses by an officer of the court.

The Succession Regulation respects the different systems for dealing with matters of succession applied in the Member States. For the purposes of the Regulation, the term 'court' should therefore be given a broad meaning so as to cover not only courts in the true sense of the word, exercising judicial functions, but also the notaries or registry offices in some Member States who or which, in certain matters of succession, exercise judicial functions like courts, and the notaries and legal professionals who, in some Member States, exercise judicial functions in a given succession by delegation of power by a court. All courts as defined in the Regulation are bound by the rules of jurisdiction set out in the Regulation. Conversely, the term 'court' does not cover non-judicial authorities of a Member State empowered under national law to deal with matters of succession, such as the notaries in most Member States where, as is usually the case, they are not exercising judicial functions.

The Regulation allows all notaries who have competence in matters of succession in the Member States to exercise such competence. Whether or not the notaries in a given Member State are bound by the rules of jurisdiction set out in the Regulation depends on whether or not they are covered by the term 'court' for the purposes of the Regulation. Acts issued by notaries in matters of succession in the Member States should circulate under the Regulation. When notaries exercise judicial functions they are bound by the rules of jurisdiction, and the decisions they give should circulate in accordance with the provisions on recognition, enforceability and enforcement of decisions. When notaries do not exercise judicial functions they are not bound by the rules of jurisdiction, and the authentic instruments they issue should circulate in accordance with the provisions on authentic instruments.