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P+P SEMINAR: EUROPEAN REGULATION ON SUCCESSIONS

- Many cases of successions have an international aspect, i.e. connections to more than one state.
- An international or **cross-border estate** may arise, for example, in the following situations:
 - The deceased person has a foreign nationality or another one in addition to the domestic nationality.
 - The deceased person has his last residence or habitual residence in a foreign country.
 - Parts of the estate are in a foreign country (e.g. holiday home, bank account).
 - At least one of the individuals involved (e.g. heir, legatee, executor) has a foreign nationality or lives in a foreign country.
 - The marriage of the deceased person was contracted in a foreign country.
- In all of these cases the question arises, which is the applicable inheritance law and which state has the jurisdiction?

- Currently, the applicable law is determined primarily by limited **international treaties**. For example, the Hague Convention of 5 October 1961 on the conflicts of laws relating to the form of testamentary dispositions, which has been ratified by 16 EU-Member States.
- If a treaty does not exist or if it does not apply to the case, the applicable law is determined by the **national conflict-of-law rules**.
- Every state has its own conflict-of-law rules to determine which state and court have the jurisdiction, which inheritance law shall apply and which decisions of foreign courts will be recognized and enforced.
- The conflict-of-law rules are often complicated and differ very widely in terms of the connecting factor.

- Examples:
 - According to **German** conflict-of-law rules, the connecting factor to determine the applicable law and the jurisdiction is the **nationality of the deceased person** at the time of death.
 - Under **Swiss** conflict-of-law rules, the connecting factor is the **last residence of the deceased person** at the time of death.
 - According to **English** conflict-of-law rules, the connecting factor relating to movable assets is the **domicile of the deceased person** at the time of death and relating to immovable assets it is the **place where the assets are located**.
- Depending on which court accepts jurisdiction ('forum shopping') and in which state assets are located, different results relating to the applicable inheritance law can occur.
- There are no common rules to resolve conflicts between different conflict-of-law rules.

- 4th July 2012: Adoption of the **Regulation (EU) No. 650/2012** 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.
- The Regulation will apply to the succession of persons who die on or after **17th August 2015**. The purpose is to **harmonize the conflict-of-law rules** of the EU Member States.
- The EU Member States Denmark, Ireland and the United Kingdom are not parties of the Regulation.
- The Term “**succession**” means 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** (Art. 3 para. 1 (a)).
 - „Disposition of property upon death“ means a will, a joint will or an agreement as to succession (Art. 3 para. 1 (d)).

Principles:

- Lois uniformes – approach: no difference between successions inside the EU or outside the EU
- Unity of succession
- Habitual residence as key concept
- Limited choice of law
- European certificate of succession

I. Applicable law

- As a general rule, the law applicable to the succession as a whole shall be the law of the State in which the deceased person had his **habitual residence at the time of death** (Article 21 para. 1).
- The term “**last habitual residence**” is undefined in the Regulation.
- It is not the same as the “domicile” in Anglo-American Law or “domicile” in Swiss law.
- 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 person 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 accounting the specific aims of this Regulation (Whereas No. 23).

I. Applicable law

- Two examples following Whereas No. 24 illustrate the potential complexity:

Example 1:

Thomas, a German national, went to France for professional reasons. He became interim manager of a German car manufacturer in France. He liked the job so much that he decided to stay in France until his retirement in 5 years. In his job he speaks German or English. He maintains a close and stable connection with Germany: He spends most weekends in Germany. His family continues to live there. In France, he lives in a serviced apartment of a hotel.

In such a case, Thomas can still be considered to have his **habitual residence** in Germany where the centre of interests of his family and his social life is located.

I. Applicable law

Example 2:

In the past few years, Karina lived in several States alternately without settling permanently in any of them. Karina is an IT advisor and helps clients all over Europe to implement new software products into their IT systems. She spent several months in Spain and Austria. Since 2013 she works and lives in Sweden. However, her nationality is German and she invests all her savings into German real estate in Frankfurt where she continues to have a flat.

Nationality or the location of the assets could be a special factor in the overall assessment of all the factual circumstances. Karina retains her **habitual residence** in Germany.

I. Applicable law

- Where, by way of exception, it is clear from all the circumstances of the case that, at the time of death, the deceased person was **manifestly more closely connected with a State** other than the State in which the deceased person had his last habitual residence, the law applicable to the succession shall be the law of that other state (Article 21 para. 2).
- The Regulation does not define what constitutes “**close connection**”.

Example:

Franz, a German national and President of a professional football club in Munich, moved his main home to Kitzbühel in Austria a year ago. He drives to Munich almost on a daily basis and has most social contacts there. He stayed at his Munich apartment more than 100 days last year. Franz asks you which inheritance law would apply if something happened to him in the near future (Whereas No. 25).

- That manifestly closest connection should, however, **not be resorted to as a subsidiary connecting factor** whenever the determination of the habitual residence of the deceased at the time of death proves complex (Whereas No. 25).

II. Choice of law

- Testators may opt for the application to their succession of their law of nationality.
- This **choice of law** is, however, restricted to the **law of nationality** of the deceased person
 - a) at the time of making the choice or
 - b) at the time of death

and should be made expressly (or demonstrated by the terms) in the **form of a disposition of property upon death** (Article 22 para. 1 and 2).

- A person possessing **multiple nationalities** may choose the law of the States whose nationality he possesses at the time of making the choice or at the time of death (Article 22 para. 1).

III. Trusts

- The creation, administration and dissolution of **trusts** shall be excluded from the scope of the Regulation (Article 1 para. 2 (j)).
- This should not be understood as a general exclusion of trusts. Where a trust is created under a will or under statute in connection with intestate succession the law applicable to the succession under this Regulation should apply with respect to the devolution of the assets and the determination of the beneficiaries (Whereas No. 13).
- This is an interaction between the Regulation and the 1985 Hague Convention. The EU Member States which signed the Convention are Italy, Luxembourg, Malta, the Netherlands and the United Kingdom.

IV. Ordre public

- The application of a provision of the law of any State may be refused only if such application is manifestly incompatible with the public policy (**ordre public**) of the forum (Art. 35).
- However, the courts or other competent authorities should not be able to apply the public policy exception in order to set aside the law of another state or to refuse to recognise or, as the case may be, accept or enforce a decision, an authentic instrument or a court settlement from another Member State when doing so would be contrary to the Charter of Fundamental Rights of the European Union, and in particular Article 21 thereof, which prohibits all forms of discrimination (Whereas No. 58).

V. Jurisdiction

- 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 (Art. 4).
- If the deceased person has chosen his national law and if this is the law of a Member State, the parties concerned may agree that a court or the courts of that Member State are to have exclusive jurisdiction to rule on any succession matter (Art. 5 para. 1). Such a **choice-of-court agreement** shall be expressed in writing, dated and signed by the parties concerned (Art. 5 para. 2).
- Where a court of a Member State is seised of a succession matter over which it has no jurisdiction, it shall declare of its own motion that it has no jurisdiction (Art. 15).

V. Jurisdiction

- The courts of a Member State shall have jurisdiction to rule on the succession as a whole, if **assets of the estate are located in that Member State** and **the deceased person had his habitual residence at the time of death not in any Member State** and
 - a) the deceased had the **nationality of that Member State** at the time of death or
 - b) the deceased had his **previous habitual residence in that Member State** but not more than five years previous (Art. 10 para. 1).

V. Jurisdiction

Example (“French Piano Can”):

Philippe, a French national, had his last habitual residence in Switzerland. Before he went to Switzerland, he moved his piano to his sister’s apartment in Paris and encouraged his musically gifted niece to play on it. All other assets are located outside the European Union.

In such a case, the courts of France shall have jurisdiction to rule on the succession as a whole but the French court shall apply Swiss inheritance law.

If Philippe does not have the French nationality, the courts of France shall nevertheless have jurisdiction to rule on the piano (Art. 10 para. 2).

V. Jurisdiction

- Where **no court of a Member State has jurisdiction**, the courts of a 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 (Art. 11). This jurisdiction should, however, be exercised only if the case has a sufficient connection with the Member State of the court seised (Whereas No. 31).