The Rise of Freedom of Estate Planning. When Will it Fall?

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Panel

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The Topic and its Context

"The rules of private international law should, generally speaking, use criteria which are capable of internationalization, i.e., which lend themselves, in particular, to adoption in international conventions, thus avoiding the danger of conflicting solutions of a given case in different countries."

(Siena Session 1952, Institut de Droit international, Tableau général des résolutions (Basel 1957) No 84)

"The most elementary and undisputed principles of fiscal justice, therefore, required that the experts should devise a scheme whereby all income would be taxed once and only once."

(Report prepared by the Committee of Experts on Double Taxation and Tax Evasion (League of Nations Publications, 1927), p. 23)

The Topic and its Context

- In contrast to international tax law, private international law is formalistic and not driven by the result.
- Therefore, the current developments at the international level in tax policy do not seem to effect the private law of cross-border estate planning.
- In a cross-border context, there exists a rise of freedom of estate planning, in particular because an increasing number of jurisdictions now admit party autonomy as to the choice of law governing contractual matters, alimentary obligations, matrimonial regimes, separation and divorce, choice of jurisdiction, succession, trusts, succession agreements, interpretation or construction of wills, donations, and matrimonial regimes, will substitutes and succession substitutes (trusts and foundations).

The Topic and its Context

- From an estate planner's perspective, the challenge is to use party autonomy directly or structure the wealth transfer in a way to try to achieve a uniform solution in all jurisdictions which have links with the deceased in particular where he has property.

- The law governing inter vivos donations is an important question in estate planning in a cross-border context. As a contract in accordance with the doctrine of party autonomy parties can usually designate the law applicable to their contract which choice is in principle recognized and enforced in a cross-border context.

- In any event, the law governing the succession of a party applies to determine whether the liberality is subject to a claw back to protect the imperative rules under the law governing succession or to ensure equality of treatment of heirs, depending upon the situation.

Content

Overview

- Official name: 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.
- Only inheritance law is affected by the Regulation.
- It will apply to the succession of persons who die on or after 17 August 2015.

Overview

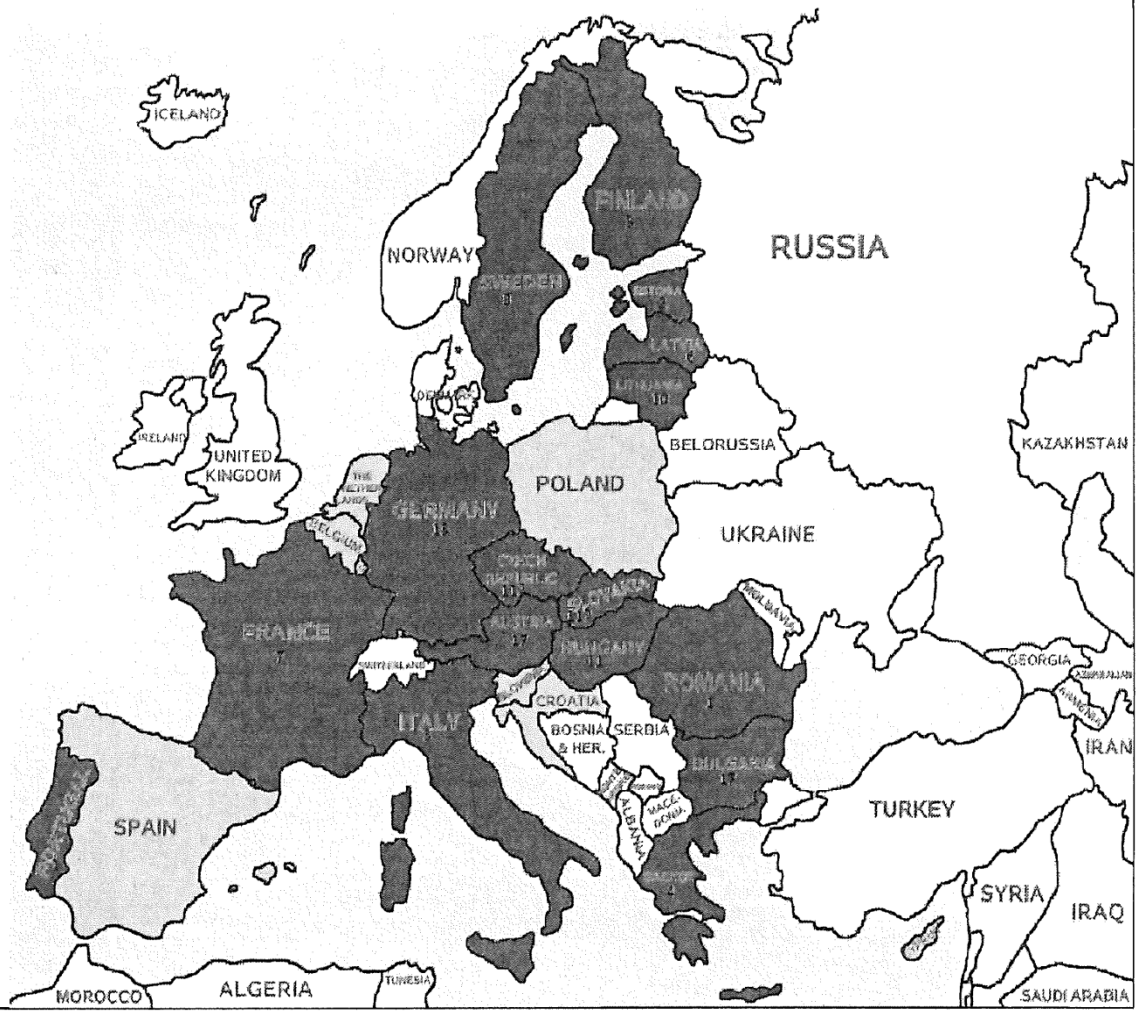
- EU Succession Regulation is designed to make it easier to settle cross-border successions by implementing a single criterion for determining the jurisdiction and the applicable law: **the deceased's habitual residence at the time of his death**.
- Anyhow, the deceased can choose the law of the state whose nationality he or she possesses.
- Even third States, like USA, Switzerland or Israel, are affected by the EU Succession Regulation, eg. if a national of a third State has his habitual residence in a Member State, if a person has his habitual residence in a Member State but owns assets situated in a third State, or if a deceased has his habitual residence in a third State but owns assets situated in a Member State.

Conventions

- Article 75 says that the EU Succession Regulation shall not affect existing international conventions to which one or more Member States are party.
- Firstly, it does not affect those states that have ratified the Hague Convention 1961.
- Additionally, there are a number of other relevant Conventions.

5. Tool 3: Bilateral treaties and article 75 of the Regulation

- Marked in **green**: Participating member states without international treaties (which prevail subject to Art. 75 EU Succession Regulation)
- Marked in **red**: Participating member states with international treaties (number of contracting treaty partners below name of country)



5. Tool 3: Bilateral treaties and article 75 of the Regulation

- **Austria**
  - Yugoslavija [**Bosnia and Herzegovina, Macedonia, Montenegro**] (16 Dec. 1954)
  - Sowjet Union [**Armenia, Azerbaidshan, Georgia, Kasachstan, Kirgistan, Moldavia, Russia, Tadshikistan, Ukraine, Usbekhistan, Belorussia**; not: Estonia, Latvia, Lithuania] (28 Feb. 1959)
  - Persian Empire [**Iran**] (9 Sep. 1959)
  - **Tunesia** (23 June 1977)
  - **Turkey** (23 May 1989)
- **Bulgaria** (dates unknown)
  - Sowjet Union [**Armenia, Azerbaidshan, Georgia, Kasachstan, Kirgistan, Moldavia, Russia, Tadshikistan, Ukraine, Usbekhistan, Belorussia**; not: Estonia, Latvia, Lithuania]
  - **Algeria**
  - **Kuwait**
  - **Libya**
  - **Syria**
  - **Turkey**
  - **Tunesia**
- **Estonia**
  - **Russia** (26 Jan. 1993)
  - **Ukraine** (15 Feb. 1995)
- **Finland**
  - **Danmark, Iceland, Norway** (19 Nov. 1934)
- **France**
  - **Denmark** (23 Aug. 1742) – uncertain, if still in force
  - **Dominican Republic** (9 Sep. 1882)
  - Persian Empire [**Iran**] (12 July 1885)
  - **Cambodia** (8 Nov. 1949)
  - **Tunesia** (9 Mar. 1957)
  - **Algeria** (18 Mar. 1962)
  - **Togo** (10 July 1963)
- **Germany**
  - Persian Empire [**Iran**] (17 Feb. 1929)
  - **Turkey** (28 May 1929)
  - Sowjet Union [**Armenia, Azerbaidshan, Georgia, Kasachstan, Kirgistan, Moldavia, Russia, Tadshikistan, Ukraine, Usbekhistan, Belorussia**; not: Estonia, Latvia, Lithuania] (25 Apr. 1958)
- **Greece**
  - Ottoman Empire [**Turkey**] (20 July 1881 / 1 Nov. 1913)
  - Czchoslovakia [**Czechia and Slovakia**] (7 Apr. 1927)
  - **Switzerland** (1 Dec. 1927)
- **Hungary**
  - Sowjet Union (date unknown) [**Russia, Belorussia, Armenia, Moldavia**]
  - Yugoslavija [**Bosnia and Herzegovina, Macedonia, Montenegro**] (1969)
  - **Mongolia** (1969)
  - **North Corea** (1971)
  - **Iraq** (1978)
  - **Turkey** (1992)
- **Italy**
  - **Switzerland** (22 July 1868)
  - **Peru** (23 Dec. 1874)
  - **Turkey** (9 Sept. 1929)
- **Latvia**
  - **Russia** (3 Feb. 1993)
  - **Moldavia** (14 Apr. 1993)
  - **Belorussia** (21 Feb. 1994)
  - **Ukraine** (24 May 1995)
  - **Usbekhistan** (23 May 1996)
  - **Kirgistan** (10 Apr. 1997)
- **Lithuania**
  - **Russia** (21 July 1992)
  - **Berlorussia** (20 Oct. 1992)
  - **Moldavia** (9 Feb. 1993)
  - **Ukraine** (7 July 1993)
  - **Kasachstan** (9 Aug. 1994)
  - **Turkey** (19 Sep. 1995)
  - **Usbekhistan** (20 Feb. 1997)
  - **PR China** (20 Mar. 2000)
  - **Azerbaidshan** (23 Oct. 2001)
  - **Armenia** (25 Sep. 2003)
- **Sweden**
  - **Denmark, Iceland, Norway** (19 Nov. 1934)
- **Slovakia**
  - Sowjet Union (date and details unknown)
- **Czech Republic**
  - Sowjet Union (date and details unknown)
- **Romania**
  - **Switzerland** (14 Feb. 1880)
- **Portugal**
  - **Switzerland** (27 Aug. 1883)

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Conventions

Example

The Turkish national Ismail dies with last habitual residence in Germany. He owns movable and immovable assets in Germany and in Turkey. Does the Regulation apply?

EU Succession Regulation does not apply because of the Treaty between Germany and Turkey. According to the Treaty, in general, Turkish laws will apply to the succession because of the deceased's nationality. Regarding the immovable assets, the Treaty says that the laws of the state will apply where the assets are situated. Therefore, Turkish law will govern the immovable assets in Turkey and all movable assets, whereas German law will govern the immovable assets in Germany.

Additionally, it has to be kept in mind that Conventions also override the choice of law provision.

Traditional Connecting Factors

- Currently, the different legal systems are using different connecting factors, e.g.:
  - English common law → Domicile
  - Swiss law → Residence
  - German Law → Nationality
  - Israel → Residence
  - USA → Domicile of choice
- The EU Succession Regulation aims to harmonise the connecting factor for the contracting parties to the EU Succession Regulation
  - EU Succession Regulation → Habitual Residence (articles 4 and 21).

Traditional Connecting Factors

A. English Common Law – Domicile

- Domicile = permanent home of a person.
- Three different types of domicile: domicile of origin, domicile of choice and domicile of dependence.
- Domicile of Origin
  - Every person acquires a domicile at birth.
  - Domicile of origin is unchangeable for life (exception is made for adopted children).
  - Domicile of origin is determined by the domicile of the relevant parent (in England & Wales of the father if legitimate).
  - Domicile of origin is presumed to continue until it is proved otherwise.

Traditional Connecting Factors

A. English Common Law – Domicile

– Domicile of Choice

- A person who turns sixteen is entitled to choose its own domicile of choice (cf. sec 3 (1) Domicile and Matrimonial Act (1973)).
- Domicile of origin can be abandoned, if person resides in another district with the intention to stay there permanently → domicile of choice.
- Domicile of choice is abandoned, if the person ceases to reside in the law district and ceases to intend to stay there permanently → domicile of origin revives until the person chooses a new domicile of choice (cf. position in many other common law jurisdictions).

Traditional Connecting Factors

A. English Common Law – Domicile

- Domicile of Choice
  - Two Elements: fact of residence and intention to stay permanently or indefinitely
    - Residence: freely chosen physical presence as a resident in a law district (not a mere tourist or traveller).
    - Intention to reside: fixed and unconditional intention for the indefinite future. Intention need not be irrevocable, but an intention to return on the occurrence of a vague possibility is not enough to prevent acquisition of a domicile of choice.
  - An overall assessment of all circumstances of the person's life is required
    - Relevant factors: declaration of intention, duration, possession of property, residence of family, employment.

Traditional Connecting Factors

A. English Common Law – Domicile

- Domicile of Dependence
  - Applies to persons regarded as dependent by operation of law (e.g. children younger than 16, mentally handicapped persons, persons who are legally incapable pursuant to national law).
  - Children's domicile of dependence is determined by the parent's domicile (in England whether of the father or mother depends upon legitimacy, or home with which parent if divorced).
  - Domicile of dependence of mentally handicapped persons and persons who are legally incapable pursuant to national law:
    - Person is unable to determine its domicile before the age of 16 → Domicile of Dependence. This also applies when the person turns 16.
    - Person loses the ability after the age of 16 → last domicile.

Traditional Connecting Factors

B. Swiss law – Residence

- Residence: place where a person is present with the intention to remain permanently.
- This means the place where a person has his centre of life (in particular, the family relationships are important).
- The Suisse Federal Tribunal notes that the intention of remaining permanently shall be demonstrated through objective circumstances (cf. BGE 119 II 167).

Traditional Connecting Factors

B. Swiss law – Residence

– If a person does not have a residence, the connecting factor is his habitual residence

- Habitual residence: place where a person lives for a longer period without the intention to stay there permanently.
- “Habitual residence” means the place where a person stays even if the stay is limited in time (art. 20 (1) b) Code on Private International Law).

Traditional Connecting Factors

C. Israeli law

- Section 137 of the Succession Law 1965 provides the general principle that an estate is subject to the laws of the jurisdiction in which a testator **resides** at the time of the testator's death.
- Where the laws of the deceased's country of residence refer to foreign laws, the reference will be ignored and the laws of the deceased's country of residence will be followed by the Israeli probate court.
- If the foreign law refers to Israeli law, the Israeli court will accept and rule based on Israeli law.
- Israeli probate courts will not rule based on foreign laws contradicting public policy if such laws discriminate based on issues such as religion, race or nationality.

Traditional Connecting Factors

C. Israeli law

- For the purpose of the Succession Law, one's residence is defined as the place of the individual's center of life.
- While the center of life is not defined in the Succession Law, it is defined by the Tax Ordinance 1961.
  - rebuttable presumption based on the number of days spent in Israel whereby an individual is presumed to be an Israeli resident if he is present in Israel for 183 days per year or 30 days in the current tax year and 425 days cumulatively during the previous two years.
  - Notwithstanding, an individual is an Israeli resident if his "**centre of life**" is deemed to be in Israel.

Traditional Connecting Factors

C. Israeli law

– Centre of life is based on facts, such as:

- the place of the individual's permanent home;
- the place of residence of family members;
- the individual's place of business or his place of employment;
- the individual's place of economic and social interests and activities and
- the place in which the individual is active in various organizations.

Traditional Connecting Factors

D. US law

- Fundamental form of domicile is “domicile of choice”.
- Children take the domicile of their custodial parent; once an adult, the person can take the domicile of choice.
- Sec. 103 (15) NY Surrogate’s Court Procedures Act
  - Domicile: Fixed, permanent and principal home to which a person wherever temporarily located intends to return.
- The U.S. Internal Revenue Code defines residence, for purposes of the U.S. estate and gift tax (but not for purposes of U.S. income tax), for non-U.S. citizen resident decedents in terms of domicile.

Traditional Connecting Factors

D. US law

- Matter of Newcomb (1908) NY Court of Appeal
  - Residence means living in a particular locality, but domicile means living in that locality with intent to make it a fixed and permanent home. Residence simply requires bodily presence as an inhabitant in a given place, while domicile requires bodily presence in that place and also intention to make it one's domicile.
- Older NY cases refer to a domicile of origin, but it is not the same as in the UK
  - One's domicile of origin is not a form of default domicile as it appears to be under UK law.

Traditional Connecting Factors

E. German law – Nationality

- Under German conflict-of-law rules, the nationality is the main connecting factor (cf. article 25 Introductory Act to the Civil Code).
- If a person has in addition to the German nationality the nationality of another state, the German nationality is dominant (cf. article 5 (1) 2 Introductory Act to the Civil Code).
- After the EU Succession will have full effect, the connecting factor will be the **habitual residence**.

Habitual Residence

A. Overview

- The last habitual residence of the deceased is the key factor determining which courts have jurisdiction and what law is applicable to a cross-border inheritance .
- “Habitual Residence” is not defined by the EU Succession Regulation.
- “Habitual residence” or “habitually resident” has become one of the core elements in private international law, e.g. Brussels IIa, Rome I, II, and III, but there is no clear definition in these regulations.
- Habitual residence for the purpose of the EU Succession Regulation has to be in line with the Regulation’s objective and other EU law but will clearly be a narrower definition requiring more of a connecting than in other Regulations.

Habitual Residence

B. General Rule

– In particular, recitals 23 to 25 are guidelines to determine the term “habitual residence”.

Example 1

The Italian deceased Leonardo was living in France for ten years until his death. He worked in France and his family still lives in France. Where is his habitual residence?

Habitual Residence

B. General Rule

Example

Recital 23 serves as a guideline. In order to determine the habitual residence of a person, it is necessary make an overall assessment of the circumstances of the deceased person's life during the years preceding his death and at the time of his death and taking into account all relevant factual elements. The habitual residence determined should reveal a close and stable connection with the state concerned.

In this case, Leonardo was familiarly, socially and professionally integrated in France. Leonardo can be considered to have his habitual residence in France where the centre of his family, social and professional life is located.

Habitual Residence

B. General Rule

Example

What will happen if Leonardo lived in France for nine months per year for professional reasons, but his family lives in Italy and Leonardo is still member of a local tennis club in Italy?

- Concerning this example, the usability of recital 23 is limited – does Leonardo have a close connection to France (work) or to Italy (family), and what is the meaning of “close and stable connection”?
- In this case, recital 24 provides some guidelines.

Habitual Residence

B. General Rule

– Recital 24 (part 1):

> "In certain cases, determining the deceased's habitual residence may prove complex. Such a case may arise, in particular, where the deceased for professional or economic reasons had gone to live abroad to work there, sometimes for a long time, but had maintained a close and stable connection with his State of origin. In such a case, 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. (…)"

– Recital 24 comprises these cases where the deceased was manifestly closer connected to a state than to the state in which the deceased spent most of the year.

Habitual Residence

B. General Rule

Example

In this case, the applicable law has to be determined. Leonardo worked in France and spent several months per year there. Even though Leonardo lived most of the year in France, the majority of his family and social connections were still in Italy. It can be concluded from recital 24 that the family and social integration plays an important role to determine the habitual residence. Having taken all relevant circumstances into account, it shall be concluded that the habitual residence of Leonardo is Italy.

Habitual Residence

B. General Rule

– In exceptional cases, it may be justified to detach from the “habitual residence” as connecting factor (cf. article 21(2) and recital 25)

  - For example, the deceased had moved to the State of his habitual residence recently before his death and all the circumstances of the case indicate that he was manifestly more closely connected with another State.

Habitual Residence

C. Judgments of the ECJ

– In regard to “habitual residence” for the purpose of Regulation (EC) 2201/2003, the ECJ has ruled that habitual residence means the

> “place which reflects some degree of integration by the child in a social and family environment (…) **it must be stated that the stay must have a certain duration which reflects an adequate degree of permanence**. However, the Regulation does not lay down any minimum duration. (…) it is of paramount importance that the person concerned has it in mind to establish there the permanent or habitual centre of his interests**, with the intention that it should be of a lasting character**. Accordingly, the duration of a stay can serve only as an indicator in the assessment of the permanence of the residence, and that assessment must be carried out in the light of all the circumstances of fact specific to the individual case.”
>
> (cf. Case C-497/10 *Mercredi* ECR I-14309 [47] and [51])

Habitual Residence

C. Judgments of the ECJ

- However, this finding does neither fully nor automatically apply to all cases where the term “habitual residence” has to be determined.
- The ECJ ruled that its meaning and scope must be determined in the light of every regulation in question.
- Anyhow the term “habitual residence” must be determined similarly within the private international law, because private international law shall establish uniform standards.
- Consequently, the term “habitual residence” for the purpose of the EU Succession Regulation must be defined in line with the EU Succession Regulation but not fully detached from other EU interpretations.

Habitual Residence

D. Individual Questions

Example

Ariel lives in Israel. His son Daniel decides that Ariel is going to stay in a nursing home in France. Some years later, Aries dies in the nursing home. Where is Ariel's habitual residence?

First of all it has to be kept in mind that is difficult for elderly people to socialise with other people if they are not in a good physical condition. In this case, it is necessary to examine carefully to which extent the people in question intended to stay. If the person intended to stay only temporarily, e.g. for rehabilitation measures, it is unreasonable to assume that the person has acquired a new habitual residence even if the rehabilitation measure takes longer than expected.

Habitual Residence

D. Individual Questions

"Habitual residence" also requires the intention to stay permanently. In principle, an intention to stay is also possible for persons who are legally unable to create their own volition pursuant to national law.

Only, if the person is absolutely unable to create his own will, it is up to a close person to decide on the elderly person's habitual residence.

According to Israel case law, the deceased's intention does not influence the centre of his life. Only factual circumstances determines the deceased's centre of life.

If Ariel has acquired residence in France, both the EU Succession Regulation and Israeli law will state that French law will govern the succession.

Habitual Residence

D. Individual Questions

Example

The French François retired some years ago. Due to the cold winter in La Plagne, he decided to stay in Italy from October until the end of March. The rest of the year he spent in La Plagne. Some years later, he died in Austria where he had a stopover. Where is François' last habitual residence?

Recital 24 (part 2):

> " (…) Other complex cases may arise where the deceased lived in several States alternately or travelled from one State to another without settling permanently in any of them. If the deceased was a national of one of those States 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."

Habitual Residence

D. Individual Questions

Example

In principle, the EU Succession Regulation aims to detach the deceased's nationality as connecting factor for the applicable law. However, as mentioned in recital 24, the nationality of the deceased can be a special factor to determine the deceased's last habitual residence.

Anyhow, the nationality as a special factor must be limited to complex cases – the introduction of recital 24 makes that clear.

In this case, François had close connections to France and to Italy. It seems reasonable to determine François' habitual residence by referring to his nationality. Therefore, François' habitual residence is France.

Habitual Residence

E. Conclusion

- The intention to stay must be demonstrated and manifested in an objective way.
- The understanding of “habitual residence” has to be in line with the purpose of the EU Succession Regulation and with the basic structure of other EU interpretations.
- A reasonable definition seems to be: **Habitual residence means the objective outcome of the intention to stay not only temporarily at the place where a person has his family, social and professional closest connection.**

Choice of Law

- Unless otherwise provided, the habitual residence of the deceased determines the applicable law.
- This rule does not apply, if
  - it is clear from all the circumstances of the case that the deceased was manifestly more closely connected at death with another state; in this case, the law of that state applies (cf. article 21 (2)), or
  - the deceased has made a **choice of law under article 22**.

Choice of Law

- Article 22 allows the choice of law that governs the succession as a whole
  - The choice is limited to the laws of the state whose nationality the person possesses.
  - It allows the determination of the applicable law without the difficult determination of the habitual residence.
  - If the testator possesses more than one nationality, he may choose the law of any state whose nationality he possesses.

Choice of Law

- Validity of the choice of law?
  - the choice of law shall be made expressly in a declaration in the form of a disposition of property upon death, or
  - shall be demonstrated by the terms of such a disposition.
- Which law governs the validity of the choice of law?
  - the substantive validity is governed by the chosen law (article 22 (3)).

Choice of Law

- Choice of law before 17 August 2015?
- Article 83 focuses on this matter:
  - According to article 83 (2), a choice shall be valid if it meets the conditions laid down in the Regulation or the conditions of the private international law of this State in which the deceased had his habitual residence or whose nationality he possessed.
  - But, if a disposition of property upon death was made prior to 17 August 2015 in accordance with the law which the deceased could have chosen in accordance with the Regulation, that law shall be deemed to have been chosen as the law applicable to the succession (article 83 (4)).
  - A deemed choice is probably overridden by an explicit choice under article 83 (2).

Choice of Law

- Recognition of choice of law by third States
  - The problem may, inter alia, arise if a citizen of a Contracting state makes use of the choice of law provision, and then he moves to a third State where he dies.
  - From an EU law perspective, the choice of law provision remains valid.
  - third States will of course continue to apply their own private international law rules. If those rules direct the applicable law back to the EU, and accept a renvoi, then the choice of law, may be accepted and valid.
  - If not, then they will not accept the choice of law.

Choice of Law

- Under Israeli law, a choice of law provision is common practice in an individual's last will and testament.
- The Supreme Court ruled that sec. 137 of Succession Law 1965 establishes the choice of law relating to inheritance and succession matters in Israel.
- The legislature established the principles that the place of residence of the testator is central to the choice of law.

Choice of Law – Supplement

- Article 24 entitles a testator to draw up his dispositions of property upon death in a will.
- Admissibility and substantive validity is governed by the law which would have been applicable to the succession if the deceased had died on the day on which the disposition was made.
- A problem may arise, if a testator has drawn up his will forty years ago and a judge has to determine forty years later where was the testator's habitual residence at the time of the will.
- To avoid such problematic situations, it is recommended to make use of the choice of law provision article 24 (2).
  - If the testator rejects to make use of the choice of law provision, it is highly recommended to insert indications of the habitual residence in the will.

EU Succession Regulation and UK, Ireland and Denmark

- UK and Ireland have individual continuing opt in choices in relation to matters within Title V Area of Freedom, Security and Justice under Protocol 21 annexed to TEU and to TFEU.
- The UK and Ireland separately decided not to opt in to the Succession Regulation, whereas Denmark decided to opt out.
- The UK and Ireland may, under Art.4 of Protocol 21, still opt in at a later stage.

EU Succession Regulation and UK, Ireland and Denmark

- Due to the provisions in relation to clawback and other matters, the UK Government decided not to opt in.
- It is important to understand that the Succession Regulation will govern the Private international Law for succession in the Succession Regulation Zone, not only between participating Member States but also between both participating Member States and non-participating Member States and also participating Member States and third States.

EU Succession Regulation and UK, Ireland and Denmark

- The question that arises is whether UK, Ireland and Denmark are regarded as Member States or third States.
- A main point of uncertainty relates to the question of renvoi as Art. 34 (1) only applies to third States.
- The implication, therefore, is that it does not apply to Member States not bound by the Regulation and that therefore is to be no renvoi from Denmark, Ireland or the United Kingdom to other Member States, but the point is not clear. Art. 34 (2) would seem to apply in all circumstances, so that a choice of law under Art. 22 will certainly be a choice of the internal law with no renvoi.

EU Succession Regulation and UK, Ireland and Denmark

- Other Regulations, eg. Brussels I and Rome I, include definitions of the term “Member State”.
- Generally speaking, these Regulations state that Member State shall mean Member State to which the regulation in question applies.
- Additionally, the proposal of the Commission COM (2009) 154, included a provision which stated that “In this Regulation ‘Member State’ means all the Member States with the exception of Denmark [the United Kingdom and Ireland].”
- This provision has not survived the legislative process and does not appear in the Regulation.

EU Succession Regulation and UK, Ireland and Denmark

- However, it has to be kept in mind that the legislative history does not form an accepted method of interpretation of EU law.
- In particular, the English literature says that UK, Ireland and Denmark shall be treated as Member States for the purpose of the EU Succession Regulation, but they are not bound by it.
- However, this finding would result in different conclusions, e.g. participating states might have to accept decision of UK courts, whereas UK authorities not be bound by decision of courts of participating states.

EU Succession Regulation and UK, Ireland and Denmark

- In particular regarding the situation under article 34 and, therefore, in order to avoid legal uncertainty, persons with connections to UK, Ireland or Denmark, whose succession might be subject to a renvoi under article 34, should make use of the choice of law provision.
- Large parts of the German literature argue that the UK, Ireland and Denmark are third States.
- Also the legislative proposal, published by the German government, mentions explicitly that those states are not Member States of the EU Succession Regulation.

Clawbacks under the Regulation

- Clawbacks arise when a person benefiting from a forced inheritance is able to make a claim for that inheritance from the lifetime gifts made by the deceased.
- Whether clawbacks are covered by the EU Succession Regulation is not clear.
- Even if it might be arguable with recital 14 and articles 1 (2) g) and 23 (2) i) that clawbacks are excluded from the scope of the Regulation, the UK argues says that clawbacks might be included into the scope of the Regulation.
- In the UK it is argued that such a reclaim would be contrary to the certainty of property rights.

Succession Agreements

- Article 3 contains several definitions for the purpose of the Regulation.
- “Agreement as to succession” → agreement, including an agreement resulting from mutual wills, which, with or without consideration, creates, modifies or terminates rights to the future estate or estates of one or more persons party to the agreement.
- “Joint will” → will drawn up in one instrument by two or more persons.

Succession Agreements

- Distinction between “mutual will” and “joint will”
  - The distinction is important, because a “joint will” is governed by article 24, whereas a “mutual will” is governed by article 25.
  - Only article 25 mentions explicitly the law that shall govern the binding effects of the will, whereas this point is rather unclear in regard to article 24.
  - If two testaments are written down in one document, but do not have any other connections, these testaments shall be treated as a joint will.
  - If two testaments are written with reciprocal dispositions, these wills shall be treated as an agreement as to succession, irrespective of whether these wills are written down in a single document or not.

Ordre Public

- Recital 58 states that the invocation of the *ordre public* must be limited to exceptional circumstances.
- In particular, the different understanding of forced heirship may result in conflicts.
- Whether the term *ordre public* is rather defined in an European understanding or in a national understanding, is not totally clear.
- Large parts of the German literature say that the national courts have to take into account fundamental principle of EU law when applying the national *ordre public* of the *forum*.
- This understanding is supported by the wording of sentence 2 of recital 58.

Ordre Public

- From a German perspective, the Federal Constitutional Court's judgment from 19 April 2005 is important
  - In this decision, the Federal Constitutional Court ruled that the minimum economic participation of the children in the estate, which is in principle inalienable, is protected by the guarantee of the right of inheritance.
  - The decision requires the general participation of the children in the estate – the legislator retains a broad margin of discretion to determine the participation of descendants. This must also apply to a foreign law provision dealing with forced heirship.

Ordre Public

- Therefore, it must be concluded that only the total exclusion of a descendant from a forced heirship is contrary to the German *ordre public.*
- Because of the fact that no EU Member State rejects in total the participation of the heirs in the estates of the deceased, it seems unlikely that the *ordre public* will be relevant in EU cases.
- *Ordre public* could come in if laws have to be applied which substantially deviate from basic principles of the participation of the descendants (e.g. Thailand).

Ordre Public

Example

The US national James dies leaving his surviving spouse Aubrey and his 20-year-old twin daughters Emily and Naomi. James' last habitual residence is Germany. Aubrey and Emily are still living in Germany, whereas Naomi has recently moved to New York. James has chosen New York law, in accordance with article 22 of the EU Succession Regulation, as the law to govern his succession as a whole. In his Will he appoints Naomi as his sole inheritor.

How will a German court decide on this matter?

Ordre Public

Example

If a national court decides on the basis of foreign law, the court, which has jurisdiction, may decline the foreign law if the applicable law is contrary to the *ordre public.*

If a German court decides on the case, it will take into account the *ordre public*. It is a fundamental principle of German law, that descendant has a forced heirship. According to the New York law, neither the spouse nor children are completely excluded from the estates of the deceased. In such a case, it seems unlikely that a German court will invoke the *ordre public*.

Note: While the New York law have a family exclusion under EPTL Section 5-3.1, it only applies to children under the age of 21 and is essentially capped at $25,000 for the surviving spouse and surviving children of the family.

Jurisdiction

A. General Jurisdiction

– EU Succession Regulation aims to connect the law that governs the jurisdiction with the law that governs the succession as a whole.

– Therefore, the deceased's **habitual residence** determines, in principle, the jurisdiction of the courts.

– The term "court" is broadly defined and comprises any judicial authority and other judicial authorities with competence in matters of succession which exercise judicial functions or act under control of a judicial authority.

Jurisdiction

B. Exceptions to the general rule

– To ensure that jurisdiction and applicable law corresponded with each other, article 5 allows the parties concerned to make a choice-of-court agreement.

- The agreement shall be made in writing (cf. article 5 (2)).
- As a result, the court which had jurisdiction will decline its jurisdiction (cf. article 6 (b)).

Jurisdiction

B. Exceptions to the general rule

– If the deceased has chosen a law of the Member State that governs his succession pursuant to article 22, the court may decline its jurisdiction in accordance with article 6.

– The parties may expressly accept the jurisdiction of the court applied to in a Member State other than the one of the last habitual residence

  - Limited to the courts in the Member States whose law had been chosen by the deceased (cf. article 7(c)).

Jurisdiction

B. Exceptions to the general rule

Example

Antoine is a French national with last habitual residence in Germany. In his will, he made a choice of law in favor of French law (article 22).

Whereas French law will be applied to the succession, German courts have jurisdiction.

If a choice-of-court agreement was made between the parties concerned in accordance with article 5, French courts would have jurisdiction.

Jurisdiction

B. Exceptions to the general rule

Example

If no choice-of-court agreement existed and a German court would be applied to by one of the parties, another party may request the German court to decline jurisdiction. Following such a request, the German court decides whether it considers French courts to be better placed (article 6).

In any case, if a French court would be applied to by one of the parties and all parties involved expressly accept the jurisdiction of the French court, the French court will decide on the matter (article 7 c)).

Jurisdiction

C. Subsidiary jurisdiction and forum necessitatis (Articles 10, 11)

- If the habitual residence of the deceased at the time of death is not located in a Member State, the courts of a Member State will have jurisdiction if the assets are located in these Member States and
  - the deceased had the nationality of that Member State or
  - the deceased had his previous habitual residence in that Member State at some point during the last five years before his death.
- If none of these points apply, the courts in a Member State will have jurisdiction to rule on the assets that are located in this Member State (article 10 (2)).
- If no court of a Member State has jurisdiction, the courts of a Member State may rule on the case in the circumstances mentioned in article 11.

Jurisdiction

Example

Philippe is a French national who had his habitual residence in Switzerland. Before he went to Switzerland, he lived in Marseille and moved his piano to his sister's apartment in Paris and encouraged his niece to play the piano. All other assets are located outside the EU. Two years after he moved from Marseille to Switzerland, he died.

Jurisdiction

Example

In this case, French courts will have jurisdiction in accordance with article 10. They will apply Suisse inheritance law. Philippe is a French national and has lived in France (Marseille) for two years before he died.

Even if Philippe did not have the French nationality, the courts of France would have jurisdiction to rule on the piano (art. 10 (2)).