

Art. 31 Succession Regulation (650/2012) – a first look at a mysterious provision

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I. What is the problem?

- Succession necessarily entails transfer of rights *in rem* (from estate of deceased to various beneficiaries)
- Succession law governs
 - *Determination* of rights accruing to heirs-legatees
 - *Transfer* of rights (and obligations) to heirs-legatees (art. 23 par. 2-e Reg.)

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I. What is the problem?

- “Nature” of the rights *in rem* vested and transferred by succession law : **outside** Regulation (art. 1 par. 2-k Reg.)
- In many cases, no difficulties as succession law *coincides* with law of MS where right *in rem* is relied upon (not necessarily *lex rei sitae*)

I. What is the problem?

- In some cases, no such '*Gleichlauf*'
- distinction between succession law
and law of country where right is
exercised – *e.g.*
 - Estate includes assets in other
MS than that of habitual
residence of deceased
 - Succession of 3rd country
national with choice of law (art.
22)

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I. What is the problem?

- In case succession law and law of country where right *in rem* is relied diverge, possible 'short-circuit'
- Problem could arise for both *movables* and *immovables* (compare situation under current regime - in some States, local immovables are never subject to foreign law *e.g.* Belgium)

II. The Regulation's answer

- Art. 31 : 'adaptation' as answer:
- “Where a person invokes a right *in rem* to which he is entitled under the law applicable to the succession and the law of the Member State in which the right is invoked does not know the right *in rem* in question, that right shall, if necessary and to the extent possible, be adapted to the closest equivalent right *in rem* under the law of that State, taking into account the aims and the interests pursued by the specific right *in rem* and the effects attached to it”

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II. The Regulation's answer

- Two questions:
 - When is Art. 31 relevant?
 - How does it work?
- How to resolve these questions?

II. The Regulation's answer

- Proposed guidelines when applying Art. 31:
 - Art. 31 is not a 'wild card' allowing general application of *lex rei sitae* over and above succession law
 - Art. 31 offers MS a limited possibility to deviate, in limited number of circumstances, from normal application of succession law

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II. The Regulation's answer

- Why 'modest' application of Art. 31?
 - Art. 23 grants succession law very wide scope - 'monopoly' of succession law in succession matters, Art. 31 is a nuance
 - Regulation is strikingly less tolerant of 'deviation' than the many exceptions included in Insolvency Regulation for rights *in rem* (artt. 5-7-8-11)
 - Regulation based on *mutual trust* between MS - MS should not undermine *effet utile* of Regulation

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III. When is Art. 31 relevant?

- Threshold question : when is Art. 31 relevant?
- Art. 31 kicks in if right *in rem* is “unknown”
- What is standard?

III. When is Art. 31 relevant?

- 1) Art. 31 not relevant if difference as to 'mode of transfer' to heirs-legatees ('*saisine*' - 'administration' - '*Einantwortung*', etc.)
- 2) Art. 31 not applicable if right *in rem* is known by law of State, but not granted *ex lege* (or even *ex successione*) to heir/legatee (*e.g.* usufruct granted to surviving spouse in FR/BE and not in DE)

III. When is Art. 31 relevant?

- 3) Art. 31 does not require analysis of position of heir/legatee if law of 'art. 31 State' had applied to succession (*e.g.* succession under French law - legatee has a 'right *in rem*' - *per vindicationem* - asset in Germany where succession law would give legatee only personal right)

III. When is Art. 31 relevant?

- 4) Analysis should focus *not* on 'technicalities' of rights *in rem* (rights *in rem* are creation of the law → always differences → general application of Art. 31) but remain on level of principles and focus on '*outcome*' (actual position of holder of right *in rem*)
- See Recital 16 : "... account should be taken of the aims and the interests pursued by the specific right *in rem* and the effects attached to it"

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III. When is Art. 31 relevant?

- 5) Art. 31 only relevant if *significant* differences between rights *in rem* – *e.g.*
 - If succession law and Art. 31 law grants usufructee different prerogatives (may usufructee assign his right : FR yes, DE no) : not 'unknown'
 - If differences between prerogatives is *significant*, art. 31 may be applied (art. 3-215 NBW – '*vruchtgebruik met interingsbevoegdheid*')

III. When is Art. 31 relevant?

- (provisional) Conclusion
 - In some cases application of Art. 31 *obvious* (*e.g.* if under applicable succession law, deceased has created a trust and assets held in Belgium)
 - In many cases : gray zone (*e.g.* what if deceased created a trust and assets held in Lxbg?)

IV. How does Art. 31 work?

- Heart of the mechanism :
'adaptation' to the closest equivalent
right *in rem*
- Not a novelty : see recognition of
foreign security interests

IV. How does Art. 31 work?

- What Art. 31 does *not* entail :
 - 1) Art. 31 does not introduce a distinction between *creation* of the *right* (succession law) and exercise (falling under *lex rei sitae*)
 - 2) Art. 31 does not allow pure and complete application of '*lex rei sitae*' to all 'incoming' rights

IV. How does Art. 31 work?

- What Art. 31 does *not* entail :
 - 3) Art. 31 does not introduce possibility to refuse altogether effect to foreign right *in rem* – even in case foreign right *in rem* is truly 'foreign'

IV. How does Art. 31 work?

- Why no possibility to refuse effect?
 - Existence of Art. 31 entails *obligation* to use adaptation (“... ce droit ... *est adapté* au droit réel équivalent” / “that right *shall* ... be adapted to the closest equivalent right...” / “...so *ist* dieses Recht ... am ehesten vergleichbare Recht anzupassen...”)
 - No possibility to refuse right *in rem* (Recital 16 trumps Recital 15)
 - Public policy? Much higher threshold

IV. How does Art. 31 work?

- If no refusal, what solution? → Adaptation
- How to adapt? *Hinnahmetheorie* or *Transpositionslehre*?
- Art. 31 leaves MS freedom to choose
 - Finding equivalent in local law
 - Recognize foreign right *in rem* in 'reduced' fashion

By way of conclusion

- Many open questions
- Clear role for comparative property law:
 - Clarify threshold issue ('*unknown*')
 - Provide guidelines for adaptation work

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