

First CJEU Ruling on the Succession Regulation. Case C-218/16

The first ruling on Regulation (EU) No 650/2012 was rendered on Thursday 12. These are the facts of the case as summarized by the Court:

Ms Kubicka, a Polish national resident in Frankfurt an der Oder (Germany), is married to a German national. Two children, who are still minors, were born from that marriage. The spouses are joint owners, each with a 50% share, of land in Frankfurt an der Oder on which their family home is built. In order to make her will, Aleksandra Kubicka approached a notary practising in Slubice (Poland).

Ms Kubicka wishes to include in her will a legacy 'by vindication', which is allowed by Polish law, in favour of her husband, concerning her share of ownership of the jointly-owned immovable property in Frankfurt an der Oder. She wishes to leave the remainder of the assets that comprise her estate in accordance with the statutory order of inheritance, whereby her husband and children would inherit it in equal shares.

She expressly ruled out recourse to an ordinary legacy (legacy 'by damnation'), as provided for by Article 968 of the Civil Code, since such a legacy would entail difficulties in relation to the representation of her minor children, who will inherit, as well as additional costs.

On 4 November 2015, the notary's assistant refused to draw up a will containing the legacy 'by vindication' stipulated by Aleksandra Kubicka on the ground that creation of a will containing such a legacy is contrary to German legislation and case-law relating to rights *in rem* and land registration, which must be taken into consideration under Article 1(2)(k) and (l) and Article 31 of Regulation No 650/2012 and that, as a result, such an act is unlawful.

The notary's assistant stated that, in Germany, a legatee may be entered in the land register only by means of a notarial instrument containing an agreement between the heirs and the legatee to transfer ownership of the immovable property. Foreign legacies 'by vindication' will, by means of 'adaptation', be

considered to be legacies 'by damnation' in Germany, under Article 31 of Regulation No 650/2012. This interpretation is clear from the explanatory memorandum of the German law which amended national law in accordance with the provisions of Regulation No 650/2012 (Internationales Erbrechtsverfahrensgesetz (Law on international succession proceedings), of 29 June 2015, BGBl. I p. 1042).

On 16 November 2015, Aleksandra Kubicka submitted to the notary an appeal pursuant to Article 83 of the Law on notaries against the decision refusing to draw up a will containing such a legacy 'by vindication'. She claimed that the provisions of Regulation No 650/2012 should be interpreted independently and, in essence, that none of those provisions justify restricting the provisions of succession law by depriving a legacy 'by vindication' of material effects.

Since her appeal to the notary was not upheld, Aleksandra Kubicka brought an appeal before the Sad Okregowy w Gorzowie Wielkopolskim (Regional Court, Gorzów Wielkopolski, Poland).

The referring court considers that, pursuant to Article 23(2)(b) and (e) and Article 68(m) of Regulation No 650/2012, legacies 'by vindication' fall within the scope of succession law. However, it is uncertain to what extent the law in force in the place where the asset to which the legacy relates is located can limit the material effects of a legacy 'by vindication' as provided for in the succession law that was chosen.

Given that, under Article 1(2)(k) of Regulation No 650/2012, the 'nature of rights *in rem*' is excluded from the scope of the regulation, legacies 'by vindication', as provided for by succession law, cannot create for an asset rights which are not recognised by the *lex rei sitae* of the asset to which the legacy relates. However, it is necessary to determine whether that same provision also excludes from the scope of the regulation possible grounds for acquiring rights *in rem*. In that regard, the referring court considers that the acquisition of rights *in rem* by means of a legacy 'by vindication' is governed exclusively by succession law. Polish legal literature on the matter takes the same position, while the explanatory memorandum of the German draft law on international succession law and amending the provisions governing the certificate of succession and other provisions (Gesetzesentwurf der Bundesregierung, BT-Drs. 17/5451 of 4 March 2015) provides that it is not obligatory, in the context of Regulation No 650/2012,

for German law to recognise a legacy 'by vindication' on the basis of a will drawn up according to the law of another Member State.

Referring to Article 1(2)(l) of Regulation No 650/2012, the referring court also wonders whether the law governing registers of rights in immovable or moveable property may have an impact on the effect of a legacy under succession law. In that regard, it states that if the legacy is recognised as producing material effects in matters relating to succession, the law of the Member State in which such a register is kept would govern only the means by which the acquisition of an asset under succession law is proven and could not affect the acquisition itself.

As a result, the referring court considers that the interpretation of Article 31 of Regulation No 650/2012 also depends on whether or not the Member State in which the asset to which the legacy relates is located has the authority to question the material effect of that legacy, which arises under the succession law that has been chosen.

In those circumstances the *Sąd Okręgowy w Gorzowie Wielkopolskim* (Regional Court, Gorzów Wielkopolski, Poland) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Must Article 1(2)(k) and (l), and Article 31 of Regulation (EU) [No 650/2012] be interpreted as permitting refusal to recognise the material effects of a legacy 'by vindication' (*legatum per vindicationem*), as provided for by succession law, if that legacy concerns the right of ownership of immovable property located in a Member State the law of which does not provide for legacies having direct material effect?'

The CJEU answer is:

Article 1(2)(k) and (l) and Article 31 of Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 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 must be interpreted as precluding refusal, by an authority of a Member State, to recognise the material effects of a legacy 'by vindication', provided for by

the law governing succession chosen by the testator in accordance with Article 22(1) of that regulation, where that refusal is based on the ground that the legacy concerns the right of ownership of immovable property located in that Member State, whose law does not provide for legacies with direct material effect when succession takes place.

Conclusions were written by Advocate General Y. Bot and delivered on May 17, 2017; C. Toader acted as Rapporteur.