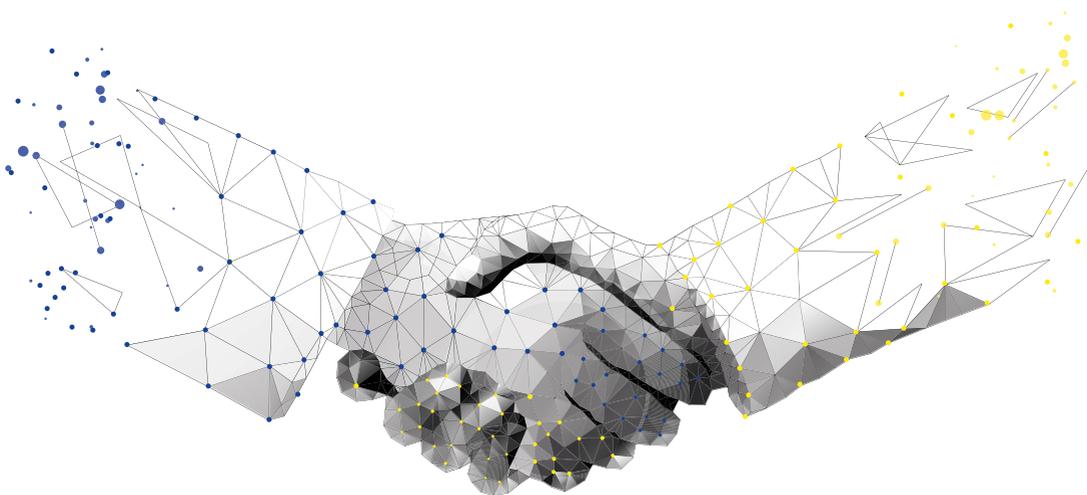


Mediation in cross-border succession conflicts and the effects of the EU Succession Regulation – Research Report

Gernot Barth, Jonathan Barth,
Bernhard Böhm, Judith Pfützenreuter (Eds.)



Funded by
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FOMENTO
FOSTERING MEDIATION IN CROSS-BORDER
CIVIL AND SUCCESSION MATTERS

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Gernot Barth, Jonathan Barth, Bernhard Böhm, Judith Pfütenreuter (Eds.)
Mediation in cross-border succession conflicts and the effects of the EU Succession
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Abstract

The two years FOMENTO project '*Fostering Mediation in cross-border civil and succession matters*' – aims to contribute to conflicts prevention in cross-border succession matters. To reach a deeper understanding and impulses for a correct implementation of Directive 2008/52/EC ('*Mediation Directive*') and of Regulation (EU) No. 650/2012 ('*Succession Regulation*') the effects of both regulations have been analyzed in this research study. Therefore, country reports about the implementation of the Succession Regulation and the Mediation Directive in six European countries (Austria, France, Germany, Italy, Poland and Sweden) have been assembled.

In the second part of the study we gathered quantitative and qualitative data to show real-life implications of the juridical changes in these fields. The quantitative part – based on collected statistical figures and on an online survey with 752 participants (mostly jurists and mediators) – underlines the increasing importance of cross-border succession cases. For the qualitative part, 105 expert interviews with lawyers, notaries, judges and mediators have been conducted and analyzed.

To summarize, it can be said that the Succession Regulation brought many changes (general jurisdiction attributed on the basis of the deceased's habitual residence, choice of law, European Certificate of Succession) for succession cases with a cross-border connection. At the same time, the Regulation and its effects are still quite unknown among citizens. Mediation is not yet very common in the field of inheritance disputes as well. And yet, there are many advantages to conduct or even prevent a conflict, especially in such a complicated field. The concrete advantages, challenges and suggestions for improving mediation in cross-border succession conflicts can be found in the results of this research study.

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The project team of FOMENTO

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1 Introduction

The European integration process has been developing for decades. This integration is taking place while the world we live in is changing rapidly, which causes new challenges for politicians, families, organizations, consumers and of course European citizens that need to be addressed in ever shorter time frames. In terms of economic integration, the European Union has already established a fairly stable environment on which market players can rely. However, other aspects of life still suffer a lack of integration and harmonization of principles and methods. One of these was the field of succession in the European Union (EU) that has been analyzed within the EU-funded project 'FOMENTO – *Fostering mediation in cross-border civil and succession matters*', which has carried out the research and is also responsible for the publication of this research report.

Due to the principle of free movement of persons and to the absence of borders that people have known for centuries, procedures for dealing with inheritance matters had become increasingly difficult to handle. The European commission identified the problem of cross-border disputes in hereditary matters in the increased mobility of persons¹ and implemented '*Regulation 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*' in 2012. One of the main readjustments defined by the Succession Regulation is that it is no longer the principle of the deceased's citizenship to determine the applicable law, but that of his habitual residence. Another elementary reform is that of the choice of law, which enables individuals to choose the law applicable to their inheritance before their death. Furthermore, the European Certificate of Succession has been introduced, harmonizing national differences in the inheritance administration.

The FOMENTO-project initiative researches the impact of the regulation on succession cases and investigates possible interdependencies and links of the mentioned Regulation No 650/2012 with Directive 2008 / 52 / EC on certain aspects

1 European Migration Network (2016): Migration and Migrant Population Statistics in EU-28, available at: https://ec.europa.eu/eurostat/statistics-explained/index.php/Migration_and_migrant_population_statistics [2018-09-25].

of mediation in civil and commercial matters². The Mediation Directive aims to introduce mediation in the European Union as a cost-effective method that offers a quick extra-judicial resolution of disputes, particularly in cross-border conflicts. The Commission put a special focus on the application of mediation in civil and commercial matters while introducing the directive in 2008.

The FOMENTO research is aimed at identifying aspects and situations in which mediation can foster conflict resolution in cross-border succession matters, which are directly related with civil matters, and therefore joins the goals of the Succession Regulation and the Mediation Directive.

Within the research and the project scope, succession cases with cross-border implications are defined as situations in which the heirs live in different countries (than the successor) or the heritage is located abroad. Cross-border mediation is likewise a structured conflict resolution method that is led by a neutral person who assists two or more conflicting parties living in different countries by finding a conflict solution that is in line with their individual interests and needs.

In order to reach the mentioned research goals, research was conducted on six member states of the European Union (Austria, France, Germany, Italy, Poland and Sweden) to assess how they implemented both the Regulation 650/2012 and the Mediation Directive into their national law.

As a next step, qualitative and quantitative data were collected, on the one hand, by surveying 752 individuals about the knowledge of the corresponding EU legislation and, on the other, interviewing 105 experts in the field of cross-border succession and cross-border mediation cases within the EU. The method applied to analyze the data collected through the expert interviews was the one of qualitative content analysis (Gläser & Laudel, 2010). In a first step, the interviews were put into written text via transcription. Afterwards, these texts were analyzed in order to find typical statements and general argumentation patterns. Gathered data were then categorized and concentrated using SWOT analysis (Armstrong & Kotler, 2009, p. 50) in order to evaluate the possible fields of application of mediation in succession matters. This way the research provides valuable data

2 DIRECTIVE 2008/52/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 21 May 2008 on certain aspects of mediation in civil and commercial matters, further referred as 'Mediation Directive'.

for mediators and legal practitioners, delivering best practices and professional advice for handling cross-border disputes, academics and policymakers, delivering scientific data on cross-border mediation and succession cases, as well as for European citizens, informing about alternative and more efficient ways to resolve cross-border conflicts in succession matters.

After the completion of the present research report, the EU-funded project FOMENTO (2017–2019) aims:

- to support a better access to the mediation instruments in cross-border civil matters by **supporting the correct and wide implementation** of EU Directive 52/2008 and Regulation 650/2012;
- **to build a wide European network** of mediation centers and relevant stakeholders to pave the way to future cooperation actions;
- **to train professional mediators** on technical and quality aspects of Alternative Dispute Resolution (ADR) and Online Dispute Resolution (ODR) in order to handle cross-border hereditary conflicts;
- **to raise awareness among EU citizens** about the opportunities and advantages of using mediation for cross-border hereditary matters;
- **to deliver recommendations to policy-makers** to improve cross-border cooperation in mediation services.

Bibliography

Armstrong, K. / Kotler, P. (2009): Marketing Management. Upper Saddle River / New Jersey: Prentice-Hall.

Gläser, J. / Laudel, G. (2010): Experteninterviews und qualitative Inhaltsanalyse. Wiesbaden: VS Verlag für Sozialwissenschaften.

2 Theoretical part

2.1 Implementation of Directive 2008/52/EC ('Mediation Directive')

2.1.1 Mediation system in Austria (by Sascha Ferz & Christine Mattl)

Mediation law

It has been a while since the Austrian legislator set out to make mediation acceptable in the present understanding. It acted neither cautiously nor thematically restricted. This initiative was launched in the field of criminal law. The legal recognition of mediation or mediative instruments began as early as 1988 in the Juvenile Courts Act. In the context of the settlement of crimes, i. e. the assisted mediatory conflict management between the victim and the accused, the function of conflict regulator was already known. It was extended to 'adult criminal law' with an amendment to the Code of Criminal Procedure in 1999.

Just as quickly, mediation was taken into account by law at the level of civil law and civil procedure law as an additional instrument of action. Based on the positive results of the pilot project in the mid-1990s titled 'Family counselling in court, mediation and child support in the case of separation and divorce of parents', mediation in divorce matters was first transformed into substantive law with § 99 EheG, newly introduced by the Marriage Registry Act 1999, and § 39c FLAG, the scope of which was extended to matters of child law less than two years later with the Child Registry Act 2001.

Then, the family law norms paved the way for an extension of this form of conflict resolution to other legal matters of a civil law nature. Finally, the provisional highlight of this 'early phase' of the legislative development towards mediation is the Civil Law Mediation Act (ZivMediatG), which supersedes the individual provisions. In this legal text – although limited to civil law disputes and without guarantees of exclusivity – an initial approach to the professionalization of independent mediators can be identified.

The individual regulation ranges from the requirements and the administrative procedure for the registration of mediators, training institutions and courses in lists to be kept by the Federal Minister for the Constitution, Reforms, Deregulation and Justice, to the rights and obligations (secrecy, further training) of registered mediators and up to the legal consequences (suspension of deadlines) of mediation. This is also accompanied by amendments to corresponding provisions in the Code of Civil Procedure (e. g. prohibition on taking evidence) and the Code of Criminal Procedure (right to award certificates).

However, since the legal scope of action of the Civil Law Mediation Act is limited to mediation in conflicts for whose decision – ultimately and abstractly – the ordinary civil courts are responsible and the legislature, as mentioned above, has deliberately waived exclusivity, it is therefore possible for mediators – even in civil law matters – to act without being registered under the Civil Law Mediation Act. We are talking here about the ‘unregistered’ mediators, whose professional law foundations are, however, derived from existing regulatory regimes (GewO and liberal professions).

Motivated by the implementation of this legislative project, the legislator used mediation at various points and, as will be shown later on, used it as a dispute resolution clause.

However, a still quite ‘young’ normative body of regulations must be mentioned immediately as well. This is the EU Mediation Act, which implements the provisions of Mediation Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters. The special feature here is that this law joins the existing Civil Law Mediation Act and thus introduces a further level of regulation.

The Civil Law Mediation Act

In fact, the Civil Law Mediation Act promulgated in 2003 must be regarded as the central mediation-specific regulation. This early advocacy of a top-down approach to regulating mediation is the result of a paternalistic consideration. With regard to the question of whether the functioning of mediation actually requires a particular normative regulator, for example, the legislature has stated that mediation is still a very new method of conflict resolution, and the general public is only insufficiently informed about its foundations, fields of application,

processes and success. To rely on the forces of a completely free market and to think that the need for sensibly used, professional mediation will be sufficiently satisfied within the framework of the game of supply and demand, seems to be wrong. What is needed is a quality assurance system for mediation, through which the conflict parties are protected. Under these premises, the Civil Law Mediation Act thus creates a legal framework for mediation. On the one hand, in the interest of its functionality and on the other hand to ensure a sufficient quality standard by defining a professional profile with several requirements.

In order to achieve this, the participation in a mediation training course from 220 to 365 units is mandatory (§§ 10 in conjunction with 29 ZivMediatG). In addition, a certain amount of life experience should be guaranteed, which is why a minimum age of 28 years is required. The integrity as well as the conclusion of a liability insurance completes the program of the registration requirements. The latter, in turn, is managed by the administrative authorities (§ 9 ZivMediatG). Incidentally, it does not remain at a single entry. Rather, the legislator opted for a continuous revision system that works through a subsequent submission of applications (for the first time after five years and thereafter every ten years). Besides, this is accompanied by the need for further training, which must comprise 50 training units every five years. Speaking of registration procedures: This also applies to training institutions and courses in the field of mediation (§§ 23 et seq. ZivMediatG).

In addition to the training questions for mediators, however, there are also other quality assurance measures. This refers to incompatibility regulations (e. g. prohibition of representation pursuant to § 16 (1) ZivMediatG), the duty of confidentiality, specific obligations of mediators such as the duty of documentation and archiving (§ 17 ZivMediatG), as well as the clarification of legal consequences of mediation (suspension of time limits).

A particular emphasis should be placed on the need for secrecy on the one hand and on the other hand on the need to grant a negotiation buffer in the form of suspension of time limits.

According to § 18 Civil Law Mediation Act, mediators are in any case obliged to maintain secrecy about the facts entrusted to them in the course of mediation or otherwise known by them. They must treat the documents prepared or handed

over to them in the course of mediation as confidential. This level of regulation also extends to assistants and trainees involved in mediation. A breach of duty cannot merely lead to the removal from the list of mediators (14 ZivMediatG), but the non-observance of the duty is punishable (§ 31 (1) ZivMediatG). Despite infringement, however, no punishment shall be imposed if disclosure or exploitation is justified in content and form by a public or private interest (§ 31 (2) ZivMediatG).

The consequence of mediation conducted by registered mediators, declared as suspension of continuation (§ 22 ZivMediatG), is the suspension of the beginning and continuation of the limitation period as well as other substantive-legal periods (also preclusive periods) for asserting the rights and claims affected by mediation during the duration of a mediation procedure. The deadline will therefore continue after mediation has ceased. While in the case of family law issues the suspension is granted in respect of all rights and claims of the mediation parties, all other disputes require a written agreement of the parties whereby it is established that the suspension also includes other claims existing between the conflicting parties that are not affected by mediation.

Federal Act on certain aspects of cross-border mediation in civil and commercial matters in the European Union (EU Mediation Directive)

As already stated in the introduction, the EU Mediation Act supplements the Austrian mediation law with a further regulatory layer. This level, which is based on the Mediation Directive 2008/52/EC, concerning certain aspects of mediation in civil and commercial matters as a starting point, will be added to the existing regulations, as will be shown below.

The central concern of the Austrian legislator is to secure what has been achieved so far in the Austrian mediation system. However, since the Mediation Directive does not offer a level of quality comparable to that of the Civil Law Mediation Act, but merely seems satisfied with a rudimentary description of the activities of mediators, the legislature has seen the need to implement the Mediation Directive. It is even stated in the Explanatory Report, that it is to be implemented 'only

to the absolutely necessary extent to maintain the high Austrian standard' and without amending the existing relevant regulations.

The actual implementation has taken the form of a separate law, whose territorial and material scope extends exclusively to cross-border disputes in civil and commercial matters within the meaning of the Mediation Directive. Accordingly, the vast majority of the content of the Mediation Directive is neither adopted for domestic matters that have already largely been regulated by the Civil Mediation Act, nor does it extend the territorial scope to third countries. The only exceptions with regard to national applicability are the provisions on the 'enforceability' of written mediation agreements. As will be shown in more detail, they have been incorporated into the Austrian Code of Civil Procedure, in addition to the existing provisions on the pretoric settlement (§ 433a leg cit). Therefore, they apply to all mediations, i. e. also to purely national mediations.

Aside from the enforceability rule, the content of the EU Act creates a new legal layer. On the one hand, depending on the choice of registered mediators or unregistered mediators there are different effects on the mediation process and, on the other hand, it requires to give consideration to whether there is a conflict to be submitted to the procedure that has a 'European Union reference'.

As has already been indicated, the national implementation measures are largely oriented towards the mandatory requirements of the Mediation Directive. Only selective adaptations become visible. The scope of application (§ 1 EU Mediation Directive) and the definitions of the concepts of mediation, cross-border disputes and place of residence are adopted in the same wording by the Mediation Directive (§ 2 (1) line 1, 3 and 4 EU Mediation Directive). Amendments are introduced in connection with the concept of mediator (§ 2 (1) point 2 EU Mediation Directive). Accordingly, not only the parties must have their residence or habitual abode in an EU member state, but also do the mediators. This clarification is primarily intended to ensure that the mediators are subject at least to the quality assurance required by Article 4 of the Mediation Directive by the Member States. In the sense of a minimum implementation, the Austrian legislator also dispenses with new approaches regarding the demand for bridging the interfaces between court and mediation.

However, it is worth mentioning the provisions of confidentiality and the statute of limitations laid down in §§ 3 et seq. EU Mediation Act, as well as the order concerning the relationship between EU Mediation Act and Civil Law Mediation Act, which is not easy to dissolve.

§ 3 EU Mediat Act is oriented in any case to the minimum level of protection of confidence specified by the Mediation Directive and thus to a personal, but not subject-related approach. From the perspective of the relevant Austrian provisions, it is of importance that the national legislator does not create a traditional obligation of confidentiality, which can usually be found in conventional professional law rules. Rather, it should create a more restricted, special type of procedural law right to refuse to testify for mediators and ‘their’ assistants in court and in arbitration proceedings in the special case of ‘border crossing’. Furthermore, the mediation parties are given the opportunity to release the mediators and the persons involved in the mediation process from their duty of confidentiality through a consensual declaration of the parties. In this case, the mediators will also make a statement in accordance with § 321 Code of Civil Procedure. In addition, the Austrian legislature adopts the reservation clauses of Art 7 (1) lit a and b of the Mediation Directive independent of an existing delivery – and without any necessity whatsoever. Consequently, for reasons of public order, for example, a statement may become necessary despite being in connection with the implementation or enforcement of the mediation agreement.

In addition, it is necessary to underline the suspension of the expiry of the terms for rights and claims as stipulated in § 4 EU Mediation Act. It is in question a suspension of the deadline known by the court valid for the settlement negotiations, which explicitly includes both periods of limitation and other periods, such as short exclusion periods. A consensual extension of the suspension to further claims, as is known in the Civil Law Mediation Act, is just as little intended as an obligation to document the concrete dates of the agreement on mediation and, above all, its termination.

However, § 5 EU Mediation Act constitutes a national peculiarity, according to which ‘the provisions of the Civil Law Mediation Act shall apply to cross-border mediations carried out by’ the mediators registered under § 13 Civil Law Mediation Act. It can be deduced from this that, on the one hand, a distinction is made

between registered and non-registered mediators and, on the other hand, for registered mediators, the orders concerning secrecy apply according to § 18 Civil Law Mediation Act and § 320 Z 4 Code of Civil Procedure, and not according to § 3 EU Mediation Act. Similarly, the provisions on suspension of time limits under § 22 Civil Law Mediation Act take precedence over those under § 4 EU Mediation Act. In addition, all other regulations of the Civil Law Mediation Act that cannot be found in the EU Mediation Act apply. This affects, for example, the duties of clarification, documentation and safekeeping as well as the order to take out liability insurance.

For non-registered mediators, this regulation, in turn, has the consequence that the EU Mediation Act applies to them in cross-border mediation procedures; a circumstance about which non-registered mediators must also expressly inform the parties pursuant to § 5 (2) EU Mediation Act. In this way, the Austrian legislature hopes that the mediation parties will become aware that the mediator they have chosen does not meet the obligations imposed on a registered mediator with the Civil Law Mediation Act.

However, § 5 (1) EU Mediation Act should be read in such a way that, in the case of a ‘mixed’ co-mediation, formed by a registered mediator and an unregistered mediator from the EU, the mediators entered in the BMVRDJ list and the mediation procedures carried out by them are without exception subject to the provisions of the Civil Law Mediation Act. In connection with the confidentiality obligation, it can therefore be assumed that the mediators will be treated differently and that the level of protection will vary. Only in relation to the suspension of time limits, whose regulation is primarily aimed at the rights of the parties, § 22 Civil Law Mediation Act, in conjunction with § 5 (1) EU-Mediation-Act, has a strong impact in order to avoid competition for standards.

The Industrial Code

In this context, it is necessary to mention two regulated professions in which the activity of mediation is taken into account. This refers to the profession of life and social counselling (§ 94 point 46 GewO) as well as that of management consultancy, including business organization (§ 94 point 46 GewO). Indeed, both

trades allow the exercise of mediation without registration according to the Civil Law Mediation Act.

The former business includes mediation as one of its core activities or in any case contains mediation in the specific ordinance regulating the conditions of access to the profession (§ 18 (1) GewO). A definition of the above-mentioned profession cannot be made out directly. Rather, § 119 (1) Industrial Code lists the fields of activity requiring further classification. In any case, mediation is included in the scope of communication counselling (at least in the case of partnership and educational problems). Accordingly, the owners of the life and social counselling business are allowed to practice mediation without further training.

The same can be assumed for the business owners of a management consultancy, including the business organization, although the scope of business and the job description are very difficult to identify, because they are not explicitly mentioned in § 136 Industrial Code. However, the decisive factor in this context is the consulting know-how, regardless of whether it is process and development-oriented or functional and target-oriented. Effective communication is essential in all areas. Promoting and strengthening these attributes is virtually immanent in the advisory activities of the industries under discussion in this area. In conflict situations in particular, management consultants must be allowed to use mediation as a conflict management tool. Consequently, the activity of mediation is part of the consultancy business as long as it takes place within the framework of the consultancy of a company. If, on the other hand, 'private individuals' are the focus of mediative conflict management, the existence of the professional entitlement of life and social counselling must be requested.

Regarding the question of training in mediation, it can now be deduced from the following information that the scope and orientation of the current Ordinance on Access to Employment can only be inferred. For the life and social counselling trade, the appendix to the Life and Social Counselling Ordinance should be consulted. This includes 240 hours of training for the 'methodology of life and social counselling'. One of the six thematic blocks contains the 'Introduction to special fields of consulting such as supervision, self-awareness, coaching, mediation'. The unquantified training scope of the mediation method thus represents only a fraction of the entire training part. Finally, the information in the Management Consultancy Ordinance is even more sparse. It does not regulate any spe-

cific training content, but is based on the evidence of different training courses. To what extent these courses – sometimes in combination with a ‘relevant professional activity’ – include mediation in the program can only be determined by an individual case analysis.

The above-mentioned access to commercial mediation can be considered as a partial activity drawn from a comprehensive bundle of activities, which ultimately describes the entire trade. However, a further option for action can be generated by means of individual proof of qualification (§ 19 GewO), according to which the knowledge, skills and experience required for the respective business practice can be proven by evidence provided and can also be limited to partial activities of the respective business. In principle, it can therefore be assumed that the authority should pronounce such a restriction of the trade to partial activities if the qualification can only be proven with respect to certain activities. In the present case, this must be done when ‘only’ the training in mediation is available. Since the activity of mediation – as already shown – constitutes a partial activity in the trades of life and social counselling as well as management consultancy and management organization, a restriction of the wording of the trade to the partial activity, i. e. in ‘life and social counselling restricted to mediation’ and ‘management consultancy including management organization restricted to mediation’ must be carried out.

However, the knowledge, skills and experience required for the exercise of the trade must be taken into account for the individual case examination. In the present case, the requirements of the ZivMediat-AV serve as a helpful qualification yardstick. Consequently, the proof of 365 AU in mediation is required for a positive official decision.

The liberal professions and their regulations – notaries, lawyers and the professions of commercial trustees

The notaries, lawyers, accountants and tax advisors are among the liberal professions, all of which are subject to an independent regulatory regime. Therefore, the application of the trade law requirements is not an option in these cases. All activities belonging to and within the scope of the exercise of the profession are covered (§ 2 (1) point 10 GewO). Thus, mediation – insofar as it is classified as an

activity associated with the exercise of the profession – is also conducted as an ancillary business and is subject to professional law and not to trade law regulations. In this case, registration under the Civil Law Mediation Act is not required.

The provisions in § 5 (4b) NO state that notaries, insofar as they act as mediators, must also comply with the professional duties applicable to them as notaries. Thus, it is now roughly said that the performance of a mediation is part of the professional activity of the notaries and therefore does not constitute a secondary activity. In addition, this does not confer any special authority to act as mediator. The NO (Professional Code of Conduct for Notaries) does not contain any further regulations. Instead, the corresponding professional guideline must be consulted. This means that a mere professional qualification is not enough; independent training is also needed to acquire the required knowledge and techniques. The reference in point 33 of STR 2000 can be used as an indication of the content and scope. Accordingly, a notary may exercise mediation or call himself a mediator if he is registered as a mediator in the list to be maintained by the Minister of Justice pursuant to § 8 Civil Law Mediation Act or in a list maintained by a representative association (§ 4 (2) points 1 and 3 ZivMediatG) in the field of mediation or if he has acquired the knowledge and techniques required for this in a curriculum recognized by the Austrian Academy of Notaries.

As well as § 5 (4b) Notaries' Code, § 8 (5) RAO provides that lawyers may act as mediators. However, the professional duties of a lawyer must be observed. As far as training is concerned, however, no training aspects can be inferred from the central source of the professional law in question. However, the provisions of § 5 (1) of the existing Guideline Federal Lawyers' Act of 1977, which were spun off, adapted and implemented at the beginning of 2016 as independent Guideline mediation, explicitly provide that the lawyer's work as a mediator requires a knowledge of the nature and the techniques of mediation. Thus, it requires training that supplements the professional qualification. The decision to what extent and in what way this knowledge is to be conveyed cannot be taken from these rules and regulations. It is rather outsourced by leaving it to the Austrian Bar Association. The latter only establishes principles of training for mediation for lawyers and trainee lawyers after consulting the Lawyers' Association for Mediation and Cooperative Procedure (AVM) (§ 5 (2) RL-Mediation). By the way, the last recommendation issued in this regard dates from the 1990s and thus from the

early days of mediation in legal professions. This means that 120 hours of basic training and 80 hours of advanced training seminars are mandatory.

This leaves us with the auditing professions. According to § 1 (1) WTBG, these liberal professions also include auditors and tax advisors. They are permitted to practice mediation as persons entitled to exercise their profession in the sense of a comprehensive entrepreneurial advisory approach, whereby the professional obligations must be respected (§ 82 (2) WTBG) and the recognized techniques and rules of mediation must be observed and applied (§ 30 S 2 WT-ARL 2003). In contrast to the other two legal professions (lawyers and notaries) however, neither the WTBG nor the relevant professional guidelines explicitly prescribe that auditors must complete independent training in this area.

Integration of mediation in legal proceedings / judicial system

At the same time or shortly after the creation of the Civil Law Mediation Act 2003, the Civil Procedure Code, the Dispute Resolution Act and the Criminal Procedure Code were supplemented with mediation-specific content. This points in three main directions – which include the protection of confidentiality, the ‘exit scenarios’ and the ‘obligatory arbitration clauses’.

As already indicated, in connection with the Civil Law Mediation Act and the EU-Mediation-Act, the Austrian procedural law provides normative safeguards for the legally recognized duty of confidentiality of (registered) mediators. Under civil procedure law, the provisions of § 320 Z 4 Code of Civil Procedure for registered mediators (prohibition to take evidence) and those of § 321 (1) Z 3 Code of Civil Procedure for non-registered mediators – who are subject to a statutory duty of confidentiality (right to refuse to give evidence) – are used for this purpose. Furthermore, in cross-border mediations, the draft regulation of § 321 Code of Civil Procedure is supplemented by that of § 3 EU-Mediation-Act together with the restrictions already mentioned above. In terms of criminal procedure, only the registered mediators have the right to refuse to give evidence (§ 157 (1) Z 3 StPO).

Civil judges have the normatively secured right to point out those institutions that are suitable for the consensual resolution of conflicts, i. e. also for mediation. Thus, they create the possibility of ‘suspending’ the judicial procedure for

the use of such institutions. This refers to the corresponding reference in § 204 Code of Civil Procedure and § 13 (3) and § 29 AußStrG, which allow the court to work towards an amicable regulation, to refer to institutions which are suitable for the amicable solution of conflicts, and, finally, to pause the proceedings by the court for a maximum period of 6 months. These arrangements should enable the court and parties to consider alternative procedures. Finally, in this regard, reference should be made to the Child and Name Right Amendment Act – Kind-NamRÄG 2013. A new chapter of mediation-specific procedural culture has been opened with § 107 AußStrG in this package a. Accordingly, since February 2013, the judge has been allowed to ‘order’ measures such as participation in an initial meeting via mediation in proceedings on custody or on personal contacts to safeguard the welfare of the child vis-à-vis the parties.

The third thematic approach is the regulation of dispute resolution in the run-up to a civil dispute in selected cases. These are regulations in genetic engineering law, regulations concerning neighbourly disputes in the event of deprivation of light and air, and those relating to the implementation of the contents of the package on equal opportunities for people with disabilities. What all these areas have in common is the obligation to seek an amicable settlement in front of a conciliation body or through mediation before bringing an action.

Besides, the development of apprenticeship training determines a special case of compulsory dispute resolution. In connection with the extraordinary termination of an apprenticeship by a licensed teacher, the use of a mediation procedure is now mandatory. However, it should at least be mentioned at this point that this, in itself a wise mediative impulse, can in practice be avoided by means of other measures (in particular by means of the ‘amicable’ dissolution of the training relationship).

For the sake of completeness, references should be made to the Austrian administrative law, which has taken the first normative approaches to mediation with regard to ‘major conflicts of interest’ between the project applicant and the other parties since the amendment to the Environmental Impact Assessment Act 2000 came into force. The incentive here is the creation of a time window during an ongoing official procedure that can be interrupted for the undisturbed execution of a mediation.

Institutional incentive system

If the proactive reference, information and transfer scenarios described above are not taken into account, financial incentives can only be discovered through close monitoring. In Austria, legal aid or sanction systems such as the distribution of legal costs are not sought in any case.

However, with § 39c of the Family Burden Compensation Act (FLAG) and the implementation of the guideline for mediation based on it, a legal and administrative basis for the financial support of qualitative requirements of corresponding family mediation was created. According to § 1 (1) Förder-RL, the aim of the promotion of mediation is to secure a mediation offer which is oriented to qualitative standards and adapted to the needs of family and child law conflicts cases. The purpose is 'to support those directly affected by divorce, separation or custody and visiting rights issues, and in particular to support them in maintaining parental responsibility in the best interests of the child, and above all to enable them to make (self-)responsible decisions to reorganize their lives in connection with divorce or separation'. This can be done by providing appropriate technical guidance in their efforts to find a more responsible solution to conflicts. Funding is granted for a maximum of twelve hours of mediation and is due according to family income and number of children entitled to maintenance in accordance with a tariff table drawn up by the Federal Chancellery. The mediations have to be carried out by a co-mediation team, which must be composed of professionals in the psychosocial field as well as in the legal field (§ 3 (2) Förder-RL).

A similar possibility of support is provided by the Ministry of Social Affairs Service within the framework of a conciliation procedure in disputes related to the disability equality package. After the first conciliation meeting in the Social Ministry Service, the parties are asked if they want to make use of the mediation on a voluntary basis which is free up to ten hours. In these cases, the aim is to locate and deal with any conflicts that are hidden behind the perceived discrimination.

Enforceability of mediation agreement

In connection with the remarks on the EU Mediation Act, reference has already been made to the new regulation of 'making mediation agreements enforceable'

and thus to the creation of an execution order apart from the contested proceedings.

This legal instrument was created as a supplement to the German Code of Civil Procedure (inserted by Art II EU Mediation Directive, BGBl I 21/2011). This is the introduction of § 433a leg cit, subtitled 'Mediation Comparison', according to which, in mediation proceedings on a civil matter, a court settlement can be obtained before the District Court. This settlement is related to the content of the written agreement, more precisely on the private-law claims contained therein. Thus, after a mediation agreement has been concluded, the parties are granted an enforceable title within the meaning of Section 1 (5) of the Execution Regulations.

Thus, the existence of a written agreement resulting from a mediation procedure is regarded as a substantive prerequisite. An out-of-court agreement reached by any other means is not sufficient ('On the content of the written agreement reached in a mediation procedure'). Incidentally, the legislator makes no distinction between mediations carried out by registered and non-registered mediators and between cross-border and national mediations. It is therefore open to the parties in the course of any mediation proceedings to generate an enforceable title in accordance with § 433a Code of Civil Procedure.

As a result of their systematic classification, it can also be assumed that only those agreements can be considered such that the civil courts would be called upon to rule in the event of a dispute. Agreements in tax and customs matters or in administrative matters are therefore not covered. In addition, the parties must be permitted to reach a settlement on the matter of the dispute under the applicable law. This is not permitted in general if the content of the agreement contradicts the basic values of the Austrian legal system and, in particular, if claims arising from illicit or prohibited transactions or the validity of a marriage are disposed of. Enforceability shall also not be required if the content of the agreement is by its very nature unenforceable (e. g. through friendly contact with one another). Consequently, despite the lack of an explicit normative basis, the legal consequence must ultimately result from this, that an agreement of which the content is contrary to substantive law or morality requires a protocol prohi-

bition. However, the logging capability of such comparisons is again crucial for their enforcement.

It can also be concluded from § 27 (3) of the Code of Civil Procedure that the parties do not have to make use of mandatory legal assistance for this purpose. This assumption is based on the fact that there is no absolute legal obligation for settlements before a district court, even if the amount or the monetary value exceeds EUR 5,000.

The legislator orients its implementation of the Directive on the pretoric comparison pursuant to § 433 Code of Civil Procedure. Accordingly, anyone who intends to bring an action is entitled to apply to the district court of the opponent's place of residence for the purpose of the settlement attempt before bringing the action. The purpose of the pretoric settlement is therefore to settle a dispute that would otherwise have to be resolved by means of legal action. § 547 (3) Geo. puts this even more directly. Accordingly, 'the courts are neither obliged nor entitled to notarize and make enforceable agreements reached between the parties out of court. Rather, the establishment of the enforceable notarial deed (§ 3 NO) must serve this purpose'. Thus, to make a mediation settlement enforceable – which is virtually an expression of a settled dispute – there is no need to go through the legal instrument of the pretoric settlement.

For the sake of completeness, reference should now be made to the above-mentioned inclusion of a public deed in the form of an enforceable notarial deed in accordance with § 3 NO, which is permissible under Austrian law even before the relevant requirements under European law have been implemented. Especially in the context of the mediation agreement, the solemnization pursuant to § 54 NO represents an adequate means of implementation for out-of-court settlements. On the one hand, the certification of the notarially confirmed obligation resulting from the private deed (= mediation agreement) must take place, and, on the other hand, the notarial deed and the certificate must be combined.

However, in this type of creation of an execution order, it is important that the obligor has agreed to the immediate enforceability of the notarial deed (submission to enforcement). The beneficiary does not have to accept this declaration for it to be legally effective. However, such an approach does not fully comply with the requirements of § 6 (1) EU Mediation Directive, according to which the

parties 'apply for enforcement' jointly or by one party with the express consent of the other.

Role of the mediator

The role of mediators can be deduced from the definitions of mediation and from the description of tasks and duties of mediators in the Civil Law Mediation Act and EU Mediation Act as follows.

According to § 1 Civil Law Mediation Act, mediators are professionally trained, neutral intermediaries or third parties who are requested to systematically promote communication between parties using recognized methods with the aim of facilitating a solution to their conflict for which the parties themselves are responsible. According to § 16 (1) Civil Law Mediation Act, mediators are not allowed to decide about the cases they mediate. A hybrid approach is therefore not permitted. However, after completion of mediation, mediators may work within the scope of their other professional powers (i. e. the professions of lawyer, notary or commercial trusteeship) and may, with the consent of all parties, get involved in implementing the result of mediation.

On the basis of § 2 (1) points 1 and 2 of the EU Mediation Act, mediators have the task of conducting mediation in an effective, impartial and competent manner. Once again, the role of mediators is designed to assist the parties in reaching a self-responsible agreement on the settlement of their cross-border dispute. Likewise, in this case, neither conciliation proposals nor decision making by mediators are permitted.

Duty of information on legal framework by the mediator

Mediators must inform the parties about the nature and legal consequences of mediation in civil law matters in accordance with § 16 (2) Civil Law Mediation Act and carry out their duties to the best of their knowledge and belief, personally, directly and neutrally towards the parties. Beyond that, § 16 (3) leg cit states that mediators must inform the parties if there is a need for advice, particularly in terms of legal questions in connection with mediation, as well as in terms of the form in which they must formulate the outcome of mediation in order to ensure its implementation.

With regard to the special situation in Austria concerning the existence of two types of mediators, the registered (§ 13 ZivMediatG) and non-registered, the Austrian legislator has introduced a special information obligation in § 5 EU Mediation Act in the context of cross-border mediations. The rules of the Civil Law Mediation Act also apply to registered mediators in these cases. In contrast, non-registered mediators must inform the parties of this circumstance.

List of abbreviations

AußStrG	Außerstreitgesetz (<i>Non-Contentious Proceedings Act</i>)
BEinstG	Behinderteneinstellungsgesetz (<i>Employment of People with Disabilities Act</i>)
BMVRDJ	Bundesministerium für Vefassung, Reformen, Deregulierung und Justiz (<i>Federal Ministry of Justice</i>)
EheG	Ehegesetz (<i>Matrimonial Law</i>)
FLAG	Familienlastenausgleichsgesetz (<i>Family Burden Compensation Act</i>)
Föder-RI	Förder-Richtlinie (<i>Guidelines for the provision of funding</i>)
Geo.	Geschäftsordnung für die Gerichte (<i>Rules of procedure for the courts</i>)
GewO	Gewerbeordnung (<i>Industrial Code</i>)
MediatG	Mediationsgesetz (<i>Mediation Act</i>)
NO	Notariatsordnung (<i>Professional Code of Conduct for Notaries</i>)
RAO	Rechtsanwaltsordnung (<i>Professional Code of Conduct for Lawyers</i>)
StPO	Strafprozessordnung (<i>Code of Criminal Procedure</i>)

STR2000	Richtlinien der Österreichischen Notariatskammer vom 21.10.1999 über das Verhalten und die Berufsausübung der Standesmitglieder (Standesrichtlinien) (<i>Guidelines of the Austrian notarial chamber from 21.10.1999 on the code of conduct and on the professional practice of notaries</i>)
WTBG	Wirtschaftstreuhandberufsgesetz (<i>Federal Law on Professions in the Field of Public Accountancy</i>)
ZivMediatG	Zivilrechts-Mediations-Gesetz (<i>Civil Law Mediation Act</i>)
ZPO	Zivilprozessordnung (<i>Code of Civil Procedure</i>)

Bibliography

- Allmayer-Beck, M. (2004):** Das österreichische Zivilrechts-Mediations-Gesetz, IDR, 2004.
- Barth, P. / Deixler-Hübner, A. / Jelinek, G. (Eds.) (2013):** Handbuch des neuen Kindschafts- und Namensrechts. Wien: Linde Verlag.
- Beclin, B. (2013):** Zusammenspiel von Obsorge, Betreuung und Informationspflicht nach dem KindNamRÄG 2013. In: Gitschthaler (Ed.), Kindschafts- und Namensrechtsänderungsgesetz 2013. Wien: MANZ'sche Verlags- und Universitätsbuchhandlung.
- Beirer, J. (2002):** Mediation in Zivilrechtssachen. Reflexionen über eine Regierungsvorlage. Wien: LexisNexis ARD Orac.
- Bydlinksi, Peter (2004):** Neuerungen im Nachbarrecht, JBl, 2/2004.
- Deixler-Hübner, A. (2012):** Die neuen verfahrensrechtlichen Bestimmungen des KindNamRÄG. In: Wagner, E. / Bergthaler, W. (Eds.), Interdisziplinäre Rechtswissenschaft – Schutzansprüche und Schutzaufgaben im Recht, Festschrift Kerschner, Wien: Verl. Österreich.
- Deixler-Hübner, A. / Fucik, R. / Huber, M. (2013):** Das neue Kindschaftsrecht. Wien: LexisNexis-Verl. ARD ORac.
- Durl, R. (1999):** Die Pflicht zur Verhinderung von mit Strafe bedrohten Handlungen gemäß § 286 StGB. Graz: dbv-Verlag.
- Falk, G. & Koren, G. (2005):** Zivilrechts-Mediations-Gesetz. Kommentar zum ZivMediatG. Wien: Verl. Österreich.

- Falk, G./Pruckner, M. (2005):** Rechtsgrundlagen der Mediation. In: Falk, G./Heintel, P./Krainz, E. (Eds.), *Handbuch Mediation und Konfliktmanagement*, Wiesbaden: VS Verlag für Sozialwissenschaften.
- Feil, E. (2003):** Zivilrechts-Mediationsgesetz, GesRZ, 06/2003, XXI.
- Ferz, S. (2017):** Das Österreichische Mediationsrecht. In: Trenczek, T./Berning, D./Lenz, C./Will, H.-D. (Eds.), *Mediation und Konfliktmanagement*, 2. Edition. Baden Baden: Nomos.
- Ferz, S. (2007):** Die Rolle des Rechts in der Mediation. In: Kleindienst-Passweg, S./Wiedermann, E./Proksch, S. (Eds.), *Handbuch Mediation (loose-leaf)*, Wien: WEKA.
- Ferz, S. (2005):** Kenne deine Rechte und Pflichten – Das österreichische Zivilrechts-Mediations-Gesetz in der Praxis. *perspektive mediation*, 1/2005.
- Ferz, S. (2013):** *Mediation im öffentlichen Bereich*. Wien: Verlag Österreich.
- Ferz, S./Adler, P. (2006):** Mediation im Behindertengleichstellungsgesetz und im Behinderteneinstellungsgesetz. In: Pretenthaler-Ziegerhofer, A. (Ed.), *Menschen mit Behinderung. Leben wie andere auch?*, Graz: Grazer Universitätsverlag.
- Ferz, S./Filler, E. (2003):** *Mediation. Gesetzestexte und Kommentar*. Wien: WUV Universitätsverlag.
- Ferz, S./Lison, A./Wolfart, E. (Eds.) (2004):** *Zivilgerichte und Mediation. Widerspruch, Ergänzung, Symbiose*. Wien: WUV Universitätsverlag.
- Ferz, S./Salicites, H. (Eds.) (2014):** *Mediation Aktiv 2014, Vielfalt – wer hilft Familien?*. Wien: Verlag Österreich.
- Ferz, S./Salicites, H. (Eds.) (2016):** *Mediation in Betrieben. Konfliktmanagement und Organisationsentwicklung*. Wien: Verlag Österreich.
- Ferz, S./Salicites, H./Storr, S. (Eds.) (2015):** *Mediation und BürgerInnenbeteiligung*. Wien: Verlag Österreich.
- Fitsch, C. (2000 / 2001):** Rechtsfragen des Mediationsvertrages, JAP, 2/2000/2001.
- Fuchshuber, C. (2004):** *Mediation im Zivilrecht. Neue Wege der Konfliktlösung*. Wien: LexisNexis ARD Orac.
- Fucik, R. (2012):** BMJ gibt das neue Familienrechtspaket in Begutachtung, ÖJZ, 06/2012.
- Frauenberger (2017):** §§ 320 und 321 ZPO. In: Fasching, H.-W./Bydlinski, M./Konecny, A. (Eds.), *Kommentar zu den Zivilprozessgesetzen III/1*, 3. Edition. Wien: MANZ'sche Verlags- und Universitätsbuchhandlung.
- Frauenberger-Pfeiler, U. (2010):** Zur ‚Vollstreckbarmachung‘ von Mediationsvereinbarungen. In: Fucik, R./Konecny, A./Lovrek, E./Oberhammer, P. (Eds.), *Jahrbuch Zivilverfahrensrecht 10*, Wien: Neuer Wissenschaftlicher.

- Ganner, M. (2003):** Vertragsgerechtigkeit durch Mediation. *ÖJZ*, 19/2003.
- Gitschthaler, E. (2013):** Kindschafts- und Namenrechtsänderungsgesetz. Wien: Manz.
- Grünberger, S. (1999):** Die Regelung der Mediation im EheRÄG. *ÖJZ* 2000, 2/2000.
- Hölbl, A. (2008):** Neue Bestimmungen im Berufsausbildungsgesetz. Ausbildungsgarantie und Ausbildungsübertritt, ASoK.
- Holzer, C. (2008):** Der Mediator. Vor- und Nachteile des Listeneintrages beim Bundesministerium für Justiz. Wien, Graz: Neuer Wissenschaftlicher Verlag.
- Hopf, G. (2002):** Auf dem Weg zu einer gesetzlichen Regelung der Mediation in Österreich. In: Simotta, D-A. (Ed.), *Der Zivilprozess zu Beginn des 21. Jahrhunderts: Vergangenheit, Gegenwart und Perspektiven*. Festschrift Wolfgang Jelinek. Wien: LexisNexis ARD Orac.
- Hopf, G. (2004):** Das Zivilrechts-Mediations-Gesetz, *ÖJZ*, 2/2004.
- Hutterer, R. (2003):** Die Domestizierung der Psychotherapie. Kritische Bilanz der Legalisierung und Professionalisierung eines unmöglichen Berufes. In: Firlei, M. / Kierein, M. / Kletecka-Pulker, M. (Eds.), *Jahrbuch für Psychotherapie und Recht III*. Wien: WUV Facultas.
- Kathrein, G. (2013):** Kindschafts- und Namensrechts-Änderungsgesetz 2013, *ÖJZ*, 5/2013.
- Kerschner, F. (2004):** Neues Nachbarrecht: Abwehr negativer Immissionen/Selbsthilferecht, *RZ* 2004.
- Kierein, M. (2001):** Anmerkung zur Entscheidung des OLG Wien 15 R 135/01k. In: Firlei, K. / Kierein, M. / Kletecka-Pulker, M. (Eds.), *Jahrbuch für Psychotherapie und Recht II*. Wien: WUV Facultas.
- Kloiber, B. (2011):** Die Mediations-Richtlinie und ihre Umsetzung in Österreich, *ZfRV*, 3/2011.
- Koch, E. (2008):** NEU: Lehrvertragsauflösung nach Mediation gesetzlich verankert. *taxlex*, p. 392 et seq.
- Köper, R. (2004):** Eine Qualitätsstudie des österreichischen Zivilrechts-Mediations-Gesetzes, *ZKM*, 4/2004.
- Kollros, E. (2003):** Die Rechtsstellung des Mediators nach dem Zivilrechts-Mediations-Gesetz, *ecolex*, 10/2003. Lachmair, S. (2004): „Neue“ Pflichten und Haftung für Mediatoren?, *RdW*, 2004.
- Lewis, P. (2017):** § 121 StGB, in Höpfel, F. / Ratz, E. (Eds.), *Wiener Kommentar zum Strafgesetzbuch*, 2. Edition, Stand 17.10.2017, rdb.at. Wien: Manz.
- Likar, A. / Krommer, K. (2005):** Mediation und Recht – Das Recht in der Mediation, *AnwBl*, 2/2005.

- Manhart, S. (2002):** Verschwiegenheitspflicht – ein Rechtsvergleich, *AnwBl*, 12/2002.
- Mattl, C. / Prokop-Zischka, A. / Ferz, S. (2006):** Mediation in Austria. In: Alexander, N. (Ed.), *Global Trends in Mediation*, 2. Edition, Alphen aan den Rijn, The Netherlands: Kluwer Law International.
- Maurer, E. (2007):** Mediation-Plus zur Gerichtsentlastung, *RZ*, 2007.
- Mayr, P. (2008):** Die Mediationsgesetze von Österreich und Liechtenstein, *LJZ*, 2008.
- Mayr, P. (2011):** Europäisches Zivilprozessrecht. Wien: WUV Facultas.
- Mayr, P. / Weber, M. (2007):** Europäische Initiativen zur Förderung der alternativen Streitbeilegung. *ZfRV*, 5/2007.
- Oberhammer, P. / Domej, T. (2003):** Ein rechtlicher Rahmen für die Mediation in Österreich – Zum neuen Zivilrechts-Mediations-Gesetz. *ZKM*, 4/2003.
- Plöchl, F. (2013):** § 286 StGB. In: Höpfel, F. / Ratz, E. (Eds.). *Wiener Kommentar zum Strafbuch*, 2. Edition, Stand 01.03.2013, rdb.at. Wien: Manz.
- Posch, W. / Schleifer, W. / Ferz, S. (Eds.) (2010):** Konfliktlösung im Konsens. Schiedsgerichtsbarkeit. *Diversion. Mediation*, 7. Fakultätstag der Rechtswissenschaftlichen Fakultät der Karl-Franzens-Universität Graz am 07.05.2010. Graz: Leycam.
- Pruckner, M. (2003):** Recht der Mediation. Wien: Linde.
- Rauch, T. (2008):** Die außerordentliche Auflösung von Lehrverhältnissen, *ASoK*, 9/2008.
- Rechberger, W. / Simotta, D.-A. (2017):** Grundriss des österreichischen Zivilprozessrechts. 9. Edition. Wien: MANZ'sche Verlags- und Universitätsbuchhandlung.
- Roth, M. / Egger, P. (2009):** Die EU-Mediationsrichtlinie. *ecolex*, 6/2009.
- Roth, M. / Markowetz, K. (2004):** Bundesgesetz über Mediation in Zivilrechtssachen – Ein Überblick über die neuen Bestimmungen, *JBl*, 126, 5, 2004.
- Scheuer, U. (2011):** Regelungen zur Mediation in Österreich nach Umsetzung der Mediations-Richtlinie. In: Fucik, R. / Konecny, A. / Oberhammer, P. (Eds.), *Jahrbuch Zivilverfahrensrecht* 11, Wien: Neuer Wissenschaftlicher.
- Schmölzer, G. (2004):** Strafrechtliche Probleme der Online-Beratung durch Psychologen und Psychotherapeuten. In: Grafl, C. / Burgstaller, M. (Eds.), *Festschrift Manfred Burgstaller*. Wien, Graz: Neuer Wissenschaftlicher Verlag.
- Schmoller, K. (1996):** Zur Reichweite der Verschwiegenheitspflicht von Ärzten, Psychologen und Psychotherapeuten. *RdM* 5/1996.
- Schmoller, K. (2000):** Grenzen der ‚absoluten‘ Verschwiegenheitspflicht des Psychotherapeuten. In: Firlei, K. / Kierein, M. / Kletecka-Pulker, M. (Eds.), *Jahrbuch für Psychotherapie und Recht I*. Wien: WUV Facultas.

- Schwaighofer, C. (2005):** Mediation im öffentlichen Baurecht. Teil I Bauverfahren, bbl, 3/2005.
- Schwaighofer, C. (2005):** Mediation im öffentlichen Baurecht. Teil II Raumplanung, bbl, 4/2005.
- Sonnleitner, K. (2004):** Wege aus dem Konflikt. In: Ferz, S. (Ed.), Soziale Kompetenz im Zentrum, Volume 3/2015. Graz: Grazer Universitätsverlag.
- Stabentheiner, J. (2004):** Überlegungen zum Einsatz von Mediation im Wohnrecht, wobl 2004, p. 291 et. seq.
- Stadlmaier, J. (2011):** Familienmediation: Einladung zum konstruktiven Miteinander / Geförderte Familienmediation – Erfolgskriterien – Methodik – Stellenwert in der Praxis, iFamZ, 1/2011.
- Steinacher, W. (2003):** Anwaltliches Berufsbild und Mediation, AnwBl, 3/2003.
- Steinacher, W. (2005):** Mediation im Prozess der Kodifizierung, perspektive mediation, 1/2005.
- Steinacher, W. (2000):** Die Mediationsrichtlinie, AnwBl, 3/2000.
- Thunhart, R. (2011):** Können Eltern gegen ihren Willen zur Zusammenarbeit mit außergerichtlichen Institutionen gezwungen werden? / Mediation, Erziehungsberatung, Familientherapie und Besuchsbegleitung im pflegschaftsgerichtlichen Verfahren, iFamZ, 3/2011.
- Trenczek, T. / Berning, D. / Lenz, C. / Will, H.-D. (Eds.) (2017):** Mediation und Konfliktmanagement, 2. Edition. Baden-Baden: Nomos.
- Unger, U. (2004):** Mediation als Konfliktlösungsmodell in Gemeinden, RFG, 2/2004.
- Wiedermann, E. / Fucik, R. / Ferz, S. (2008):** Das Recht der Mediation – gesetzliche Verankerung der Mediation. In: Kleindienst-Passweg, S. / Wiedermann, E. / Prosch (Eds.). Handbuch Mediation (loose-leaf), 1. Volume, Wien: WEKA. Winkler, G. (2008): Eine neue Möglichkeit der vorzeitigen Auflösung von Lehrverhältnissen, ZAS, 6/2008.
- Zenz, D. (2005):** Staatlich anerkannte Pflicht zur Verschwiegenheit bestimmter Berufsgruppen im Verhältnis zur Zeugnisablegung im Verwaltungs-, Zivil- und Strafverfahren, JRP, 2005.

2.1.2 Mediation system in France (by Alessia Cerchia)

Mediation and Conciliation: the peculiarity of the French legal system

The deepening of the current French legislative framework on civil and commercial mediation requires, first of all, to underline a specific feature of this system: the French legislator, while acknowledging the contents of Directive 52/2008 and the concept of mediation therein contained, has chosen to add this new regulation to that already existing one in the field of ‘Conciliation’, an institute already expressly regulated in the Code de Procédure Civile (CPC), without replacing it. The two institutes have raised many problems of coordination and partial overlap, also relating to the different regimes applied to mediators and conciliators not only in the matters of remuneration and professional training, but also with regard to their appointment and operating limits.

The European Directive 2008/52 proposes a definition of civil mediation understood as: ‘a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. This process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member State.’ (Article 3 point A, Dir. 2008/52/CE).

We are in presence of a very broad definition which, inserted in the French legislation, can well be used to include both mediation and French conciliation institute.

The European Directive³ (Tymowski, 2016) has been implemented by the French legislator with the Ordonnance No 2011-1540 du 16 novembre 2011⁴.

In application of this Ordinance and of the previous Loi No 2010-1609 du 22 décembre 2010 ayant créé la convention de procédure participative, it was

3 For a recent analysis of the implementation of Directive 2008/52 in the member Countries, see Tymowski J. (2016), *The Mediation Directive – European Implementation Assessment*. For the implementation of the Directive in French Legal System, see MAGENDIE J.-C. (2008), *Célérité Et Qualité De La Justice Devant La Cour D'appel*. Rapport au garde des sceaux, Ministre de la justice, available at: www.justice.gouv.fr/art.../1_rapport_magendie_20080625.pdf, [2018-09-25].

4 Full title: Ordonnance No 2011-1540 du 16 novembre 2011 portant transposition de la directive 2008/52/CE du Parlement européen et du Conseil du 21 mai 2008 sur certains aspects de la médiation en matière civile et commerciale.

subsequently adopted the Décret No 2012-66 du 20 janvier 2012 relatif à la résolution amiable des différends. The decree modifies, in particular, the Code of Civil Procedure, introducing into it a Book V, dedicated to 'Friendly ways of resolving disputes' (LA RÉOLUTION AMIABLE DES DIFFÉRENDS). Book V contains two different titles: the first is dedicated to the discipline of 'conventional conciliation and mediation' (LA MÉDIATION ET LA CONCILIATION CONVENTIONNELLES); the second title is dedicated to the 'participatory procedure' (LA PROCÉDURE PARTICIPATIVE). In continuity with the Directive, the new Articles 1530 and 1531 of the Civil Procedure Code provide a unified definition of conventional conciliation and mediation, to be understood as 'any structured process by which two or more parties attempt to reach an agreement, outside any judicial proceedings, in view of the amicable resolution of their disputes, with the help of a third party chosen by them, who carries out his mission with impartiality, competence and diligence' (Article 1530).

As evident from the definition proposed above, it is very difficult to identify the elements of differentiation between the two institutes of conciliation and mediation.

An express and exclusive definition of the concept of mediation can, however, be found in the Article 21 of the loi du 8 février 1995, modifiée Ordonnance No 2011-1540 du 16 novembre 2011, according to which 'Mediation governed by this chapter means any structured process, by whatever denomination, by which two or more parties attempt to reach an agreement for the amicable resolution of their disputes, with the assistance of a third party, the mediator, chosen by them or designated, with their agreement, by the judge hearing the case'.

Integration of mediation in legal proceedings / Judicial system

According to a recent doctrinal elaboration (not without criticism) (Inspection Générale des Services Judiciaires, 2018), the instruments of conciliation and mediation, as currently formulated, would have an identical field of application: according to Article 1529 of the Code of Civil Procedure, the same can be exercised in civil, commercial, social or rural matters, unless otherwise expressly stated by legal provisions in each jurisdiction. These legal instruments are, moreover, both aimed at achieving similar objectives: encourage the parties to

meet, in the presence of a neutral third party, in order to seek an amicable solution of their differences.

Voluntary mediation and mediation delegated by the judge

(Conciliation inside Court / Mediation near to Court / External Mediation)

Having dealt with the preliminary issue of the distinction between mediation and conciliation, we must now deal with the analysis of the applicable rules and the different forms of mediation provided for in the French legal system.

The Code of Civil Procedure distinguishes between judicial mediation (Title I, book VI) and conventional mediation (Book V).

In judicial mediation, the judge may, in cases provided for by the law, 'with the agreement of the parties, appoint a mediator to mediate in any state of the proceedings, including summary proceedings' (Article 22 of the Law of 8 February 1995). In the field of conventional mediation, the mediator acts 'outside of any judicial procedure' (Article 1530 of the CPC).

It's necessary to underline that, recently, the *Décret No 2016-1876 du 27 décembre 2016 relatif à la prise en charge de la médiation au titre de l'aide juridique et portant diverses dispositions relatives à l'aide juridique* has expressly regulated the determination of the fees for lawyers and mediators taking part in a procedure of judicial mediation or conventional mediation – where this has led to an agreement – in the event that such professionals assist one or more beneficiaries of free legal aid.

Institutional incentive system

The aforementioned decree was adopted to implement the Article 42 of the law No 2015-1785 du 29 décembre 2015 de finances pour 2016, which expressly introduced the discipline of fees for lawyers and mediators, in judicial and voluntary procedures.

In case of delegated mediation, the mediator can be chosen by the parties constituted in the judgment, at the invitation of the judge, or by this one directly.

The rules introduced in the *Code de Procedure Civile* to regulate judicial mediation stated that ‘The judge hearing a dispute may, after obtaining the agreement of the parties, appoint a third person to hear the parties and to confront their points of view to enable them to find a solution to their conflict’ (Article 131-1). The initial term of this mediation procedure, initiated with the consent of the parties, may not exceed three months, even if it can be renewed once, for the same duration, at the request of the mediator (Article 131-3 and Article 131-6). Nevertheless, the judge retains the power to end mediation at any time, upon the request of a party or on the initiative of the mediator. The judge can also terminate it automatically when the smooth running of the mediation appears compromised (Article 131-10).

The new rules introduced in the code of civil procedure also provide for a fairly detailed discipline of the mediator figure, his role and the obligations ensuing therefrom.

Mediation can be entrusted to a natural person or a legal person (Article 131-4). The natural person who ensures the execution of the mediation procedure must satisfy the following conditions (Article 131-5):

1. Not to have been the subject of a conviction, incapacity or forfeiture mentioned on the bulletin No 2 of the criminal record;
2. Not to have been the author of facts contrary to honor, probity and good morals, having given rise to a disciplinary or administrative sanction of removal, cancellation, revocation, withdrawal of authorization;
3. To Possess, by the present or past exercise of an activity, the qualification required in relation to the nature of the dispute;
4. To justify, as appropriate, training or experience adapted to the practice of mediation;
5. To guarantee the independence necessary for the exercise of mediation.

Article 131-14, then, acknowledging what had already been regulated by Directive 52/2008, introduced the principle of confidentiality, that must apply to any mediation. According to this principle, the findings of mediator and the state-

ments he collects may not be produced or invoked in the course of the proceeding without the agreement of the parties or in any other instance.

Finally, Article 131-12, disciplines the procedure for the homologation of the agreement eventually reached in mediation, providing that ‘at any time, the parties, or the most diligent of them, may submit to the judge the agreement reached by the mediator of justice for its approval. The judge rules on the motion that is presented to him without debate, unless he considers it necessary to hear the parties at the hearing’.

The aforementioned Report ‘Sur le développement des modes amiables de règlement des différends’, 2015, shows a rather negative evaluation of the results obtained in the application of mediation delegated by the judge, stating that ‘depuis 20 ans, les dispositions de la loi de 1995 n’ont pas rencontré le succès escompté dans les juridictions, et la médiation judiciaire s’est très peu développée’. Although referring to dated and incomplete statistical data, the Report states that, referring to the ‘Tribunaux de Grande Instance (TGI)’, only 277 cases were sent in mediation by judge in 2013, 203 in 2012 and 200 in 2011. Also in the Courts of Appeals, the devolution of disputes in mediation by the judge did not have the expected results: only 593 cases were sent in mediation in 2013, 514 in 2012 and 277 in 2011. No data can be found with regard to the duration and the results of these procedures (Inspection Générale des Services Judiciaires, 2018).

The new mandatory mediation experiments

Mandatory family mediation

Article 7 of the LOI No 2016-1547 du 18 November 2016 Modernization de la justice du XXI^e siècle introduced, on an experimental basis, a family ‘mandatory’ mediation attempt, under penalty of the rejection of the claim.

The attempt at mandatory mediation has been implemented in 11 jurisdictions (High Courts of Bayonne, Bordeaux, Cherbourg-en-Cotentin, Evry, Montpellier, Nantes, Nimes, Pontoise, Rennes, Saint-Denis de la Reunion and Tours) and will be implemented until December 31, 2019.

The obligation of the mediation attempt applies to the court proceedings on exercise of parental authority, contribution to the education and maintenance of

minor children, covenants contained in approved agreements. The obligation is excluded in cases where the court proceeding is proposed by both parents jointly, for the approval of separation agreements according to the discipline contained in Article 373-2-7 code civil; if there is a legitimate reason for non-use of mediation; or if acts of violence have been committed against one of the parents or against children.

It should be noted that family mediation has received particular attention from the French legislator, who has regulated the activity of professionals in this field since 2003, with the introduction of a State Diploma for the exercise of the profession of familiar mediator⁵ (Miranda, Antonello et al., 2014).

The mediators thus formed can work as independents or by joining together in national or local Family Mediation Associations. The two main national associations operating in this sector are the Association Pour la Médiation Familiale (APMF) and the Fédération Nationale de la Médiation Familiale (Fenamef).

Mandatory mediation in administrative law

The LOI No 2016-1547 du 18 November 2016 de modernization de la justice du XXI^e siècle introduced important innovations also in the field of administrative law and related judicial procedures (n. a., 2016).

Article 5 of the aforementioned law, in fact, expressly introduces the power of the Council of State, with the consent of the parties, to order a mediation procedure in order to allow parties to seek an agreement for the resolution of their conflicts.

The mediation procedure may also be started on the initiative of the parties, who may request the President of the Administrative Court or of the Administrative Court of Appeal to appoint a person responsible for the mediation procedure, who may be chosen within the judicial organization or on the outside.

On an experimental basis and for a period of four years from the promulgation of the law, all appeals presented by applicants subject to the provisions of LOI No 83-634 of 13 July 1983 on the rights and obligations of civil servants, with reference to the deeds concerning their personal situation and requests relating to

5 For a comparative analysis on family mediation, see Miranda, A. (ed.) (2014), *Mediation in Europe at the cross-road of different legal cultures*, Roma: Aracne.

benefits, allowances or rights granted with regard to social assistance or housing or unemployed workers (Article IV–VI LOI No 83-634), will be subject to compulsory preventive mediation, under the conditions established by the decree approved by the Council of State.

The new decree, to which reference is made, was recently approved by the Council of State: Décret No 2018-101 du 16 février 2018 portant expérimentation d'une procédure de médiation préalable obligatoire en matière de litiges de la fonction publique et de litiges sociaux (Les ministres français, 2018).

The role of mediator

The qualifications required of conciliators and mediators are similar although the regime governing their training is different.

Mediators must have 'the qualification required in view of the nature of the dispute or demonstrate, depending on the case, training or experience appropriate to the practice of mediation'. In particular, according to the Article 1533 of the Code de Procédure Civile (Décret No 2012-66 du 20 janvier 2012) 'The mediator should not have been convicted and should possess the qualifications required relating to the nature of conflict or a training in mediation'.

Article 131–5 of the Code de Procédure Civile governs, as previously analyzed in more detail, the mediator figure, his role and the obligations connected, with particular reference to conditions that he must satisfy for the execution of the mediation procedure.

The conciliators, on the other hand, are required to provide proof of having at least three years of experience in the legal field and to demonstrate 'that their competence and activities are particularly relevant for the exercise of these functions'. Therefore, specific training for ADR methods is not foreseen.

As stated in the report 'Sur le développement des modes amiables de règlement des différends' – created by the Inspection Générale des Services Judiciaires, in collaboration with the Secrétariat général à la modernization de l'action publique – therefore, the only difference between mediation and conciliation currently existing in the French system seems to be the legal status recognized to conciliators and mediators (Inspection Générale des Services Judiciaires, 2018).

Conciliators, envisaged by the French system since 1978, are called on to provide a form of mediation that integrates the public service of justice, ensuring the execution of such an activity without receiving any compensation from the parties in favor of which it is provided. Mediators are, on the contrary, 'private' professionals, paid with fees that can be freely determined by the parties or set by the Court in its decision ordering the start of the mediation procedure, when it is a judicial mediation.

Because of these considerations, the report concludes by specifying that 'It seems important to put an end to the semantic and doctrinal discussions that are clouding the French offer on MARD. Mediators and conciliators perform identical tasks. Their main difference lies in their status, the ones are volunteers, the others are paid. Thus, conciliation and mediation should be grouped under the single terminology 'mediation', given the identity of the process. To complete this clarification, the conciliators of justice could exercise under the name of 'mediators of justice', being submitted in this framework, as will be proposed in the recommendations of the report, to a training obligation equivalent to that of mediators.' (Inspection Générale des Services Judiciaires, 2018, p. 16).

The discipline of confidentiality

The protection of confidentiality guaranteed in mediation procedures, as already provided for in Directive 2008/52, is expressly contained in the articles 131-4 and 1531 CPC, as well as in Article 21-3 of the Loi du 8 février 1995 modifiée Ordonnance No 2011-1540 du 16 novembre 2011.

The French legislator has therefore provided for strong protection of the confidentiality principle in the context of mediation procedures, prohibiting the disclosure of information and statements shared between parties and mediator within the mediation procedure.

The only exceptions foreseen are represented by 2 cases, expressly regulated: 1) In presence of imperative reasons of public order or reasons connected to the protection of the best interests of the child or the physical or psychological integrity of the person; 2) When the disclosure of the existence or the content of the agreement resulting from the mediation is necessary for its implementation or execution.

The legislator makes no reference to any documents produced during the mediation procedure.

Approval and effects on prescription and forfeiture.

The French legal system, like that of other European countries, including Italy, has explicitly regulated the effects produced by the start of a mediation procedure on the limitation period.

In particular, ‘The limitation period is suspended from the day on which, after the occurrence of a dispute, the parties agree to have recourse to mediation or conciliation or, in the absence of a written agreement, from the date of the first mediation or conciliation meeting. (...) The limitation period shall be resumed, for a period which may not be less than six months, from the date on which one or both parties or the mediator or conciliator declare that the mediation or conciliation has ended.’ (Article 2238 code civil).

Enforceability of mediation agreement

Finally, it is foreseen by Article 131-12 and 1534-1535 CPC the possibility of seeking the homologation of mediation agreement, which must be requested at the competent Court by all parties to the mediation or by one of them, with the express agreement of the other.

List of abbreviations

ADR	Alternative Dispute Resolution
APMF	Association Pour la Médiation Familiale (<i>Association For Family Mediation</i>)
CPC	Code de Procédure Civile (<i>Code of Civil Procedure</i>)
Fenamef	Fédération Nationale de la Médiation Familiale (<i>National Federation of Family Mediation</i>)
MARD	modes amiables de résolution des différend (<i>amicable dispute resolution methods</i>)
TGI	Tribunaux de Grande Instance (<i>High Court of First Instance</i>)

Bibliography

- (n.a.)(2016):** Présentation synthétique des principales mesures de la loi de modernisation de la justice du XXI^e siècle., available at: <http://www.tendancedroit.fr/d-o-actualite-presentation-synthetique-des-principales-mesures-de-la-loi-de-modernisation-de-la-justice-du-xxie-siecle/> [2018-04-03].
- Inspection Générale des Services Judiciaires (2015):** Rapport sur le développement des modes amiables de règlement des différends, available at: http://www.justice.gouv.fr/publication/2015_THEM_Rapport_definitif_reglement_conflits.pdf [2018-04-03].
- Les ministres français (2018):** Legifrance, available at: www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000036608557&dateTexte=&categorieLien=id [2018-04-03].
- Magendie, J.-C. (2008):** Célérité Et Qualité De La Justice Devant La Cour D'appel, available at: www.justice.gouv.fr/art_pix/1_rapport_magendie_20080625.pdf [2018-04-03].
- Miranda, A. (Ed.)(2014):** Mediation in Europe At The Cross-Road of Different Legal Cultures. Roma: Aracne.
- Tymowski, J. (2016):** The Mediation Directive – European Implementation Assessment, available at: [http://www.europarl.europa.eu/RegData/etudes/STUD/2016/536346/EPRS_STU\(2016\)536346_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/536346/EPRS_STU(2016)536346_EN.pdf) [2018-04-03].

2.1.3 Mediation system in Germany (by Jonathan Barth & Bernhard Böhm)

Introduction

Mediation in Germany has been decisively characterized by Anglo-American influences. In the 1980s the first mediation training took place in the former FRG. The interest was particularly driven by reports on the successful application of the methodology in the USA. In the 1990s, this interest grew into a partial euphoria, which saw mediation as a kind of all-purpose instrument for conflict resolution procedures for all types of disputes (Hopt & Steffek, 2013, p. 7). However, the level of awareness and, in particular, the frequency of use was still underdeveloped in the first decade of the 21st century. In 1999, the German legislature introduced mediation into court proceedings for the first time in § 15a EGZPO, in which it incorporated mediation related to courts into German procedural law. In addition, the reform of civil procedure⁶ in 2001, by means of § 278 (1) of the Code of Civil Procedure, gave the courts the possibility of proposing out-of-court settlement of disputes, insofar as they consider the case suitable for this purpose.

The Mediation Act (Mediationsgesetz) was passed by the Bundestag on 21 July 2012 and came into force on 26 July 2012. In doing so, the legislator had already exceeded the originally planned transposition period granted by the European Commission. The fact that the implementation deadline was exceeded was largely due to the considerable opposition in the Legal Affairs Committee to the Federal Government's draft law. The main points of contention were, on the one hand, the mediation of judges and, on the other hand, professional law (Wagner & Eidenmüller, 2015, p. 1).

Due to the fact that the Mediation Act was already in the parliamentary discussion phase in the German Bundestag, the initiation of infringement proceedings by the European Commission could be averted. It was, however, initiated against nine Member States, namely the Czech Republic, Spain, France, Finland, Luxembourg and the Netherlands.

6 Gesetz zur Reform des Zivilprozesses (Zivilprozessreformgesetz – ZPO-RG) vom 27.7.2001, BGBI.I vom 2.8.2001, p. 1887.

The German Mediation Act (MedG) is divided into the following nine sections:

§ 1 Definitions

§ 2 Procedure; tasks of the mediator

§ 3 Disclosure obligations; restrictions on activities

§ 4 Obligation to secrecy

§ 5 Training and further education of the mediator; certified mediator

§ 6 Authorization to issue ordinances

§ 7 Scientific research projects; financial support for mediation

§ 8 Evaluation

§ 9 Transitional provision

It becomes clear that only sections 1–4 have a direct regulatory character and practical implications for the mediation procedures. Sections 5–6 regulate the necessary training and further education standards and the introduction of the ‘certified mediator’, who should provide the users of mediation with a minimum quality standard. Sections 7–9 are forward-looking and show that the legislature has already anticipated a possible need for improvement in the legislative procedure by already providing for an evaluation of the measures taken in the law.

From a territorial point of view, the Mediation Act applies to both cross-border and internal disputes. Moreover, in implementing the Directive, the German legislature also went beyond the provisions of the Directive with regard to the scope of application, since it included not only private law disputes but also family, labour, social and administrative law disputes (Wagner & Eidenmüller, 2015, p. 3).

The regulation of training, which was again separately laid down in a legal ordinance, was made in the year 2016. It provides for a minimum of 120 hours of training and introduces the protected term ‘certified mediator’. This regulation, therefore, does not create a fixed job description for a mediator, but places special demands on individuals who want to call themselves ‘certified mediators’. However, this conflicts with the existing certifications of the mediation associations. They had already developed their own training and certification standards,

which generally place higher demands on mediators than the training standards laid down in the statutory ordinance. In addition, a liberal self-certification procedure was chosen for the introduction of the ‘certified mediator’ seal of quality. This means that market operators themselves are responsible for monitoring compliance with the minimum standards set by the RVO. This certification system has been controversially discussed in technical literature.

In the *Mediation Act*, an evaluation of the effects of the introduction of the law had already been promised; it was published in 2017 as an evaluation report of the Federal Government, which was prepared by the University of Speyer. The most important findings are discussed in the section on extrajudicial mediation.

Integration of mediation in legal processes

Mediation within courts

Court-internal mediations are conducted by judges (Hopt & Steffek, 2013, p. 9). However, these are outsourced to a special procedure and generally follow the principles of mediation. Under applicable law, internal court mediations by judges are not permissible (Wagner & Eidenmüller, 2015, p. 15), since the mediation procedure provides for mandatory out-of-court mediations within the meaning of the Mediation Act (Wagner & Eidenmüller, 2015, p. 11). At first glance, then, we are dealing with conflicting regulations. Their origin and design will be briefly outlined below.

In the first decade of the 21st century, before the draft Mediation Act had even been drafted, German courts carried out pilot projects in which the so-called quality judge model was developed. This provides for the use of judge mediators who have generally undergone special training as mediators. Quality judges always act when the competent trial judge or one of the parties has initiated a quality judge hearing and both parties have agreed to the commencement of such a hearing. In accordance with § 278 (5) ZPO, the judge of property may ‘use all methods of conflict resolution, including mediation’. There are no additional court costs or attorneys’ fees in comparison to normal court proceedings (Brandenburgisches Oberlandesgericht, 2018).

Consequently, due to the compromise solution to continue the successes already achieved in the field of mediation within courts and, on the other hand, to place

mediation as an institution outside the court, a provisional dividing line has emerged which seems rather unclear from the point of view of mediation clients. It is not a coincidence that the term mediation is now used in German for any out-of-court attempts at conflict resolution, even in the case of mediation or arbitration (Roland, 2018).

However, the provisions of the Mediation Act do not apply to these procedures. The Mediation Act also stipulates in § 9, in the form of a transitional provision, that judges with no power of decision may act as so-called court mediators until 1 August 2013. Consequently, when the transitional provision expires, the property judge model, which was used as a vehicle for introducing mediation into the German judicial landscape, no longer falls under the provisions of the Mediation Act. Nevertheless, adjudication proceedings may be practiced.

There is no obligation to mediate in the sense of a compulsory attempt at mediation which must have been undertaken before an action is brought. Only one addition in § 253 (3) point 1 ZPO has been retained by these intentions: the statement of claim must contain information relating to whether the attempt at mediation preceded the filing of the claim and whether these grounds arose (Wagner & Eidenmüller, 2015, p. 8).

Out-of-court mediation

Mediation outside the court prevents legal proceedings from the outset (Hopt & Steffek, 2013, p. 9). This kind of extrajudicial mediation is the form of mediation that the Mediation Act regulates in essence. As already explained, it is regulated by the legislator in a relatively liberal manner. Nevertheless, the central principles of mediation and the basic attitude of a mediator were laid down and regulated by law. The extrajudicial German mediation sector is a diverse market and is characterized as a provider market. This means that the supply of mediation services exceeds demand. This has led to the development of a wide variety of products and services with a diverse price structure.

Legal expenses insurance companies operate as the largest mediation providers or mediators. These have developed mediation as a profitable business field by recognising and remunerating mediation as a method of conflict resolution and providing mediation either through in-house mediators, such as ARAG SE, or through mediating the procedures to mediation service providers. This results in cost savings for the legal expenses insurers, as court costs can thus be avoided. Out-of-court mediation has established itself in many different areas as an opportunity for conflict resolution. For example, it is no longer completely unknown within organizations in order to resolve disputes in a non-legal context. These include, in particular, team conflicts or conflicts between hierarchy levels. Due to the ongoing commitment of the mediation associations and the ongoing training of mediators, the areas of application in the extrajudicial field are becoming even broader, so that there is almost no area of conflict for which no mediation offer would exist. There are mediators for schools, inheritance law, construction and real estate, intercultural conflicts, credit mediators, mediation in public administration, neighbourhood mediation and many more. However, the challenge the mediation is facing in Germany is that of the development of demand.

Anyone may work in Germany as an extrajudicial mediator. This is not a protected term. The only protected name is the ‘certified mediator’, who must comply with the minimum standards of the training regulations. Payment for mediation services is freely negotiable. The hourly rates range between 30 – 300 EUR, depending on the willingness of the conflict parties and the complexity of the conflict situation.

Institutional incentives

The only relevant provision is §36a Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction (FamFG), which does not apply in inheritance law. Accordingly, the court may propose mediation or other out-of-court dispute resolution procedures to any or all parties. In matters of protection against violence, the interests of the person affected by violence must be protected. If the parties decide to conduct mediation or other out-of-court dispute resolution proceedings, the court suspends the proceeding.

Financial incentives/support

The legislator has so far refrained from recognising mediation cost aid in the same way as legal cost aid. Nor is such a regulation to be expected. The Article 7 (1) and (2) Mediation Act provides for the investigation of the effects of financial measures within the framework of research projects which are comparable with legal aid. So far, however, there have been no real and meaningful research projects. The Article 7 MediationsuaFöG⁷ introduced § 69b GKG, § 61a FamGKG that gives the states the possibility of reducing or waiving court costs as a result of successful mediation efforts; to date, however, it has obviously not been exercised in any federal state. Thus, the evaluation report also advises against a general regulation of mediation cost assistance as well as special regulations (Masser, Engewald, Schapf, Ziekow, 2017, p. 37).

Enforceability of mediation agreements

The facilitated enforceability of mediation agreements, which was initially provided for in the legislative procedure, was deleted without replacement for good reasons.⁸ Accordingly, the declaration of enforceability of the mediation agreement would have been regulated in a newly inserted § 794 d Code of Civil Procedure (ZPO). An agreement concluded in mediation could thus have been taken into custody and declared enforceable at the written request of all parties or at the request of one party with the express consent of the other parties.

The associated problem of when an agreement is enforceable seemed to the legislator to run counter to a rather informal procedure such as mediation. This question is not always easy to answer, even for experts, without a comprehensive legal examination.

Thus, a mediation agreement is a contract between the conflict parties. In the event of non-compliance with this contract, the affected party would therefore have to assert his claims under this contract, possibly also through legal actions. It is obvious that this path is complex and not always in the interest of the conflict parties.

⁷ Law on the Promotion of Mediation and Other Procedures for Extrajudicial Conflict Settlement.

⁸ See § 796 d as amended by RegE, BT-Drucks 17/5335, p. 7 and BT-Drucks 17/8058, p. 21.

In order to avoid a later ruling, the conflict parties have various possibilities at their disposal. In particular, the declaration of enforceability of a settlement by a lawyer, §§ 794 I point 4 b, 796 a-796 c, and an enforceable deed, §§ 794 I point 5, 797 (BT-Drucks 17/8058 S 21 refers to both possibilities) shall be considered. In addition, it is possible (Saenger, Ullrich, Siebert, 2018, §278a, marginal 5–8) to set up a court hearing for the conclusion of an enforceable settlement (§§ 794 I point 1, 160 III point 1). Another possibility is to conduct the mediation procedure before a recognized conciliator and thus make the result enforceable (§ 794 ZPO).

*Enforceability declaration of an attorney settlement,
§§ 794 I point 4 b Code of Civil Procedure (ZPO)*

One way of declaring the mediation agreement enforceable is to conclude a settlement agreement with the formal participation of lawyers pursuant to § 796a (1) Code of Civil Procedure. This also makes it possible to obtain an enforceable title in the course of mediation proceedings. According to § 796a (1) Code of Civil Procedure, the written form is mandatory (Habersack, 2017, §779 BGB, marginal 12).

a. Notarial deed, § 794 I point 5

If the parties agree, the enforceability declaration by the notary offers a cheaper alternative to the enforceability declaration by the court (Musielak & Voit, 2018, § 796c ZPO, marginal 1). In accordance with § 794 I point 5 compulsory execution can be carried out from the deed concluded before a German notary. A precondition is, among other things, that the deed has been drawn up for a claim which is accessible to a settlement, is not aimed at making a declaration of intent and does not concern the existence of a tenancy agreement for housing and the debtor has submitted to immediate enforcement of the deed because of the claim to be designated.

b. Court settlement (§§ 794 (1) point 1 ZPO)

If court proceedings are pending between the conflict parties, an out-of-court mediation agreement can also be concluded by way of a court settlement. The prerequisite for this is that pending proceedings can be terminated by the settlement (Wolfsteiner, 2016, § 794 ZPO, marginal 24–26).

If proceedings are not pending, there are already practical and cost reasons against bringing an extra action and therefore in favour of an immediate conclusion of the proceeding with a settlement. This would be possible because all that is needed are actions that set proceedings in motion, i. e. the filing of an action in the ordinary course of law (*ibid.*).

c. Recognized quality centre

According to § 794 of the Code of Civil Procedure, compulsory execution also takes place: from settlements concluded between the parties or between a party and a third party for the purpose of settling the whole dispute or part of it, before a conciliation office established or recognized by the State Administration of Justice. Among them, firstly, there are the so-called ‘voluntary quality bodies’.

The basis for the recognition of a conciliation office is § 794 (1) point 1 ZPO in connection with 22 Implementation Act to the Court Constitution Act (AGGVG). In most cases, there are still special regulations under state law, such as the Saxon Arbitration and the Quality Agency Act.

A mediation procedure before a ‘voluntary’ conciliation office is permissible in all cases in which the parties can settle a dispute themselves according to the law – irrespective of the amount in dispute. This applies to most civil law matters such as inheritance disputes. The conciliation office should therefore not be confused with the conciliation office for compulsory settlement of disputes, which has only a limited field of activity. The State-recognized quality bodies adopt rules of procedure which are often examined and recognized by the regional or higher regional courts. This is also reflected in the methods and costs of the procedure.

The form of the mediation agreement

Mediation agreements, like all contracts (with some exceptions), are valid informally, unless a special form, e.g. written or notarial, is required by law. Especially in the area of ‘yielding’, the control options are manifold. So is mediation. Preventive mediation between testator and heirs is just as conceivable as medi-

ation after the death of the heir and disputes over the inheritance. Often, land plots are also affected by inheritance.

Some of the regulations relevant to the project include:

a. Contracts for land plots, § 311b (1) BGB (Civil Code)

If a contract is concluded within the scope of a mediation by which one party undertakes to transfer or acquire ownership of a property, notarization is required. The purpose of the regulation is to protect the contracting parties from hasty and ill-considered obligations (warning function), to guarantee proof of the achievement of the agreement (proof function), to give appropriate advice to the parties (instruction function) and for the validity of the legal transaction (guarantee function) (Schulze, 2018, § 311b BGB, Marginal 1–40).

*b. Contracts on the estate of a living third party, § 311b (4) BGB
or on the legal part of the inheritance, § 311b (5) BGB*

A contract for the estate of a living third party is null and void. The same applies to a contract for the compulsory portion or a legacy from the estate of a living third party. This does not apply to a contract concluded between future legal heirs concerning the legal inheritance share or the compulsory portion of one of them. Such a contract requires notarization.

c. Inheritance contracts

A contract of inheritance (§ 1941 BGB) can also be the result of, for example, ‘preventive’ mediation. As a result of this mediation, the testator can, for example, appoint an heir by contract, order bequests and conditions and choose the applicable inheritance law. Both the other contracting party and a third party may be considered heirs (contractual heirs) or legatees. The form of the public will is prescribed for the contract of inheritance, i. e. notarial certification, § 2276 (1) sentence 1 BGB (Grandel/Stockmann, 2014, 94 et seq., Erbvertrag). If the formal requirement is not observed, the contract is incurably void, § 125 BGB (von Proff zu Irnich, 2017, p. 100).

Suspension of the statute of limitations

Current deadlines must also be observed in inheritance law. For example, the claim to a compulsory portion (§ 2303 BGB) lapses after 3 years (§ 195 BGB), other claims, such as the claim to a legacy (§ 2174 BGB) in the case of real estate, after 10 years, others, such as the claim of subsequent heir to the surrender of the inheritance (§ 2130 BGB), even after 30 years.

Deadlines may be suspended during mediation ('in negotiations' § 203 BGB). If such negotiations on the claim between the debtor and the creditor or the circumstances giving rise to the claim are pending, the limitation period shall be suspended until one or the other party refuses to continue the negotiations. The statute of limitations shall expire at the earliest three months after the end of the suspension.

In practice, the question of when mediation began and – especially in the case of 'long-term mediation' – when it ended is often relevant.

The concept of negotiation is broadly defined, so that mediation is also undisputedly included. There is no start if any replacement or other compensation is immediately rejected in the exchange of opinions (e. g. in the preliminary mediation meeting). The consent of the parties is required.

Mediation shall end if any party refuses to continue the mediation. The refusal must be clear and unequivocal (BGH NJW 98, 2820). If the mediator leaves the negotiations inactive, the suspension ends at the time at which an answer from him would have been expected (OLG Düsseldorf, 1997, 04037). In the case of mediations before recognized quality offices, § 204 BGB shall apply differently.

Role of the mediator

The role of the mediator is regulated, among other things, by §§ 1 and 2 Mediation Act. Accordingly, the mediator is an independent and neutral person without decision-making authority who guides the parties through the mediation (§ 1 (2) Mediation Act). The mediator therefore actively accompanies the proceedings (Greger/Unberath, § 1, marginal 38). His tasks are only vaguely defined. First and foremost, it promotes communication between the parties and ensures that the parties are involved in mediation in an appropriate and fair manner. Which

communication methods and techniques he uses are not defined in more detail. § 5 (1) Mediation Act does not provide any real indication for this. Thus, the mediator must have negotiation and communication techniques at his disposal. The annex to the Ordinance on the Training and Further Training of Certified Mediators (Certified Mediator Training Ordinance – ZMediatAusbV) becomes somewhat more concrete. The contents of the Certified Mediator training course are listed here. In number 4 conversation, communication techniques are mentioned among others:

- Communication techniques (e. g. active listening, paraphrasing, questioning techniques, verbalization, reframing, verbal and non-verbal communication)
- Techniques for developing and evaluating solutions (e. g. brainstorming, mind mapping, other creativity techniques, risk analysis)
- Visualization and moderation techniques
- Dealing with difficult situations (e. g. blockades, resistance, escalations, power imbalances)

The Regulation does not provide any further detail. In any case, it is clear that the mediator has no decision-making authority. His role is therefore to support the parties to the conflict in their search for an amicable agreement. His duties, therefore, include the execution of the mediation *lege artis*, i. e. to act as a neutral third party (Greger / Unberath, § 2, marginal 44). However, the mediator does not owe the success of his support efforts and, in particular, does not owe the conclusion of a mediation with an agreement. The purpose of mediatory action is not to bring about an agreement in every case and at any price, but rather to promote a self-determined, self-responsible and interest-oriented decision of the parties on the desired handling of the conflict situation (Klowait / Gläßer, 2014, MediationsG § 2 marginals 22–25).

Therefore, in order not to violate his neutrality, the mediator may not act as a consultant to a party, even if he would be authorized to do so under the Legal Services Act (as would be the case with lawyers, for example). This, in fact, would be contrary to the duty of neutrality and, beyond that, to the prohibition to represent the conflicting interests (§43a (4) BRAO).

The fact that mediation is not a legal service has meanwhile been clarified in § 2 (3) point 4 RDG. Accordingly, ‘mediation and any comparable form of alternative dispute resolution’ are not a legal service, ‘provided that the activity does not interfere in the discussions of the participants through legal regulation proposals’.

Informativeness

As an independent procedure, it should be clear that the parties are the ‘masters’ of the content of the agreement and thus the mediator leads the mediation and concludes the agreement in their full awareness. According to § 2 (6) sentence 2 of the Mediation Act, in the event of an agreement, the mediator shall ensure that the parties reach the agreement with knowledge of the facts and understand their content. He shall draw the attention of the parties participating in the mediation to the possibility of having the agreement reviewed by external consultants if necessary. With the consent of the parties, the agreement reached can be documented in a final agreement (European Commission, 2011). The mediator must also give a notice if the agreement is evidently impracticable or incomplete (Greger/Unberath, § 2, marginal 284). This obligation also applies if one party is threatened with an obvious and concrete loss of rights.

Possibility of an arrangement of a mediation procedure in the will

If the testator wishes mediation between the heirs in the event of a dispute, he could regulate this in an order.

The edition is regulated in § 1940 Civil Code. Accordingly, the testator may, by will, oblige the heir or a legatee to a benefit without granting another person a right to the benefit (condition). Further regulations regarding the content of the edition can be found in §§ 2192 et seq. Civil Code (BGB).

The subject of that obligation may be any action or omission which may be the subject of an obligation, including, therefore, non-pecuniary orders. Conceivable possibilities of content design are almost unlimited (Grädler, 2018, §2192 BGB, marginals 10–11).

The possible content of an edition is limited only by the prohibition of immoral, impossible and illegal services (§§ 134, 138, 2171, 2192 BGB). The testator may also not oblige the burden of complaint to make, not to make, to cancel or not to repeal a certain decree on death (*ibid.*).

In this respect, the testator could impose on the heirs that, in the event of a dispute over the inheritance, they try to settle the conflict amicably within the framework of mediation.

Hurdles for online mediation

The Mediation Act does not explicitly exclude online mediation. On the contrary, the law defines mediation methods very broadly. A personal, direct conversation is not necessary. The fact that the legislator expressly provides for online mediation can also be concluded on the basis of various regulations at European level.

For example, the so-called ADR Directive (Directive 2013/11/EU) and the so-called ODR Regulation (EU) No 524/2013 of the European Parliament and Council of 21 May 2013 on 'Online Settlement of Consumer Disputes' (ODR Regulation, ODR Regulation) explicitly provide for online mediation.

EU consumers should thus have easier access to cheap, fast and fair mediation in disputes with goods or services traders, especially when shopping online and across borders.

Thus, by no means the Mediation Act stands in the way of online mediation. Online mediation faces psychological, technical and legal hurdles. Practice will show whether this format will prevail or not.

From a legal point of view, data protection must be guaranteed above all. As a rule, the mediator provides the parties with a suitable, password-coded platform for online mediation. The mediator informs them about the technical specifications of the system used. After consultation with the mediator, a system provided by the parties can of course also be used. In addition to the mediator, the conflicting parties also undertake to ensure adequate data security and not to make any recording of the video or telephone sessions. Furthermore, they undertake to treat the access data for the online platform confidentially and not to grant access to third parties.

That the mediator falls within the scope of the basic data protection regulation should regularly be the case, since personal data is stored – especially in online mediation. The individual data protection requirements are waived at this point.

In addition to data protection, the inclusion of consumers could also raise the question of whether the mediation contract falls within the scope of protection of § 312c BGB ('Distance Selling Contract').

Distance contracts are contracts in which the trader or a person acting in his name or on his behalf and the consumer use exclusively means of distance communication for the negotiation and conclusion of the contract, unless the conclusion of the contract does not take place within the framework of a distribution or service system organized for distance selling. Telecommunication means within the meaning of this Act are all means of communication that can be used to initiate or conclude a contract without the contracting parties being physically present at the same time, such as letters, catalogues, telephone calls, teletypes, e-mails, messages sent via the mobile telephone service (SMS) as well as radio and teledia. This would also include 'online mediation'.

The purpose of the requirement of a distance selling organized distribution and service system is to exclude from the field of application of the rules distance contracts concluded accidentally or only occasionally. The occasional conclusion of contracts by means of telecommunication does not take place within the framework of such a system (Schulte-Nölke, §312c BGB, marginals 1–6).

According to the current status of online mediation and the mediators active on the market, it can be assumed that the mediation contract does not fit into the scope of objectives pursued with the protective purpose of distance selling law. However, if the mediator and the sales structure change in the near future and an organized 'distance selling system' is established, the protected area could very well be opened up here.

Conclusion

Germany, as shown by the delay in its transposition, struggled from the beginning in implementing the Mediation Directive into national law. Some special interest groups such as the German Bar Association may have regarded the implementa-

tion of mediation into the German law system as a threat to their market position and, ultimately, to their business model, which has been established centuries ago. So, the status quo is, according to the 'Report of the Federal Government on the effects of the Mediation Act on the development of mediation in Germany and on the situation of basic and advanced training of mediators', that the number of mediations conducted has remained at a low level. However, this report did not take into account the mediations carried out by legal expenses insurers, which are regarded as the largest mediation providers in Germany. Some experts even argue whether these mediation procedures should be called 'mediation' or not. However, applying the definition of the MedG in § 1 (1) neither shuttle mediation is excluded nor does the MedG regulate the communication medium that must be used.

Lawyers, however, should not be blamed for the comparable weak development of mediation in Germany. In a democratic structure each group must work for its own representation. Regarding the service of mediation, mediation associations do not seem to have accomplished a broad understanding and use of mediation yet. This assumption may be supported by using the 'Report of the Federal Government on the effects of the Mediation Act on the development of mediation in Germany and on the situation of basic and advanced training of mediators'. As a scientific base, the number of mediations remains on a low but stable level. Mediations that are carried out, are concentrated amongst a considerable low number of mediators. Thus, the private market for mediation appears to be considerably small. Taking into consideration that mediations carried out by legal expenses insurers were not taken into account in the named report, this indication must at least be considered questionable.

However, in terms of mediation training, interest groups such as mediation associations, the bar association as well as individual market players have apparently taken the right steps in order to foster the idea of mediation and indeed created a demand. In Germany there is a vivid mediation training market, featuring more than 100 different training institutes offering mediation trainings partially specializing in certain fields of mediation like family mediation, business mediation, mediation in the public sector or mediation trainings focussing on certain communication techniques like non-violent communication or certain ways of thinking like systemic mediation.

Regarding mandatory mediation, the German legislator will unlikely follow the path Italy has already taken by introducing mandatory mediation for certain legal areas. This is due to the fact that German MedG underlines the importance of voluntariness of participation in mediation. This principle is also constantly underlined by German mediation associations.

However, in terms of legal aid for mediation procedures, there are some pilot projects carried out at the moment such as 'BIGFAM' which provides financial aid for the use of family mediation in Berlin.⁹ Other organizations like Deutsche Stiftung Mediation (German Foundation Mediation) also provide a unit that aims to implement financial aid for the use of mediation.¹⁰ However, the evaluation report of the Federal Government discourages legislative steps towards providing financial aid. Reasons for this discouragement are not precisely named.

In Germany, mediation as a conflict resolution method can still be regarded as a 'project under construction'. In some fields it is gaining ground and its familiarity is increasing from year to year. However, the popularity in terms of use is still highly viable.

List of abbreviations

AGGVG	Gesetz zur Ausführung des Gerichtsverfassungsgesetzes und von Verfahrensgesetzen der ordentlichen Gerichtsbarkeit (<i>Act to the Court Constitution Act</i>)
BGB	Bürgerliches Gesetzbuch (<i>Civil Code</i>)
BRAO	Bundesrechtsanwaltsordnung (<i>Federal Lawyers' Act</i>)
EGBGB	Einführungsgesetz zum Bürgerlichen Gesetzbuch (<i>Introductory Act to the Civil Code</i>)

⁹ For further information see: <https://www.big-familienmediation.de/> [2018-07-31].

¹⁰ For further information see: <http://deutsche-stiftung-mediation.de/fachreferate/fachreferat-kostenhilfe> [2018-07-31].

FamFG	Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit (<i>Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction</i>)
FamGKG	Familiengerichtskostengesetz (<i>Family Court Fees Act</i>)
GKG	Gerichtskostengesetz (<i>Court Fees Act</i>)
LPartG	Lebenspartnerschaftsgesetz (<i>Registered Civil Partnership Act</i>)
MedG	Mediationsgesetz (<i>Mediation Act</i>)
MediationsuaFöG	Gesetz zur Förderung der Mediation und anderer Verfahren der außergerichtlichen Konfliktbeilegung (<i>Law on the Promotion of Mediation and Other Procedures for Extrajudicial Conflict Settlement</i>)
OLG	Oberlandesgericht (<i>Higher Regional Court</i>)
RDG	Gesetz über außergerichtliche Rechtsdienstleistungen (<i>Act on Out-of-Court Legal Services</i>)
ZMediatAusbV	Zertifizierte Mediations Ausbildungsverordnung (<i>Certified Mediator Training Ordinance</i>)
ZPO	Zivilprozessordnung (<i>Code of Civil Procedure</i>)

Bibliography

- Brandenburgisches Oberlandesgericht (2018):** Mediation beim Güterichter, available at: <http://www.olg.brandenburg.de/cms/detail.php/bb1.c.344132.de#kosten> [2018-07-31].
- European Commission (2011):** Memo/11/840, available at: http://europa.eu/rapid/press-release_MEMO-11-840_en.htm [2018-09-25].
- Grädler, T. (2018):** § 2192 BGB Rn. 10–11. In: Gsell, B.; Krüger, W.; Lorenz, S.; Reymann, C. (Eds.): beck-online.GROSSKOMMENTAR. München: C.H. Beck.
- Grandel, M. / Stockmann, R. (Eds.) (2014):** StickwortKommentar Familienrecht. Baden-Baden: Nomos.

- Greger, R. / Unberath, H. (2012):** Mediationsgesetz Recht der alternativen Konfliktlösung; Kommentar vor Reinhard Greger und Hannes Unberath. München: Beck.
- Habersack, M. (2017):** § 779 BGB Rn. 99–100. In: Säcker, F.; Rixecker, R.; Oetker, H.; Limperg, B. (Eds.): Münchener Kommentar zum Bürgerlichen Gesetzbuch, Volume 6, München: C. H. Beck.
- Hopt, S. / Steffek, F. (2013):** Mediation: Principles and Regulation in Comparative Perspective. Oxford: Oxford University Press.
- Klowait, J. / Gläßer, U. (Eds.) (2014):** Mediationsgesetz Handkommentar. Baden-Baden: Nomos.
- Masser, K. / Engewald, B. / Scharpf, L. / Ziekow (Eds.) (2017):** Evaluierung des Mediationsgesetzes, available at: https://www.bmjv.de/SharedDocs/Downloads/DE/Service/StudienUntersuchungenFachbuecher/Evaluationsbericht_Mediationsgesetz.pdf;jsessionid=5E5DD9281F50A11210BF2DDDE8748B2B.1_cid297?__blob=publication-File&v=1 [2018-07-31].
- Musielak, H.-J. / Voit, W. (Eds.) (2018):** Zivilprozessordnung mit Gerichtsverfassungstext. München: Verlag Franz Vahlen.
- Roland (2017):** Roland Rechtsreport 2017, available at: https://www.roland-rechtsschutz.de/media/rechtsschutz/pdf/unternehmen_1/ROLAND_Rechtsreport_2017_Final.pdf [2018-07-31].
- Saenger, I. / Ullrich, C. / Oliver, S. (Eds.) (2018):** Zivilprozessordnung, Kommentiertes Prozessformularbuch. Baden-Baden: Nomos.
- Schulte-Nölke, H. (2018):** § 312c BGB Rn. 1–6. In: Schulze, R.: Bürgerliches Gesetzbuch Handkommentar, Baden-Baden: Nomos.
- Schulze, R. (2018):** Bürgerliches Gesetzbuch Handkommentar, Baden-Baden: Nomos.
- von Proff zu Irnich, M. (2017):** Das schuldrechtliche Grundgeschäft zum Erbverzicht. In: DNotZ, 2/2017.
- Wagner, G. / Eidenmüller, H. (2015):** Mediationsrecht. Köln: Dr. Otto Schmidt.
- Wolfsteiner, H. (2016) In:** Krüger, W.; Rauscher, T. (Eds.): Münchener Kommentar zur Zivilprozessordnung, Volume 2, München: C.H. Beck.

2.1.4 Mediation system in Italy (by Cristiana Marucci)

Background – The development of Mediation in Italy

The European Union promoted the importance of ADR practice through Directive 2008/52/EC, which imposed on Member States the introduction of mediation procedures for cross-border disputes. The Directive sets a milestone in promoting the harmonization process for all civil and commercial disputes concerning available rights. The main goal of the EU Directive is providing certainty to parties regarding enforcement issues; it invites the Member States to provide disputants with a guarantee of service, including a conciliator's ethics code, training requirements, and the possibility for court-ordered conciliation. The Directive covers cross-border disputes – those disputes in which at least one of the parties is domiciled or resident in a Member State different from that of any other party. However, the Directive leaves to each national State the decision to implement the Directive's rules also in internal disputes. In order to implement the Directive, the Italian legislator enacted Legislative Decree No 28/2010, making full mediation a precondition to the trial in certain subject matters. So the Italian legislator has chosen to extend the rules and principles laid down by the Directive to internal mediation law and has foreseen mandatory mediation for disputes in a large number of categories.

'In October 2012 the Italian Constitutional Court quashed the compulsory attempt of mediation inserted in Legislative Decree No 28/2010, finding that by enacting the law, the government had exceeded the scope of both the Mediation Directive and Law 69/2009, which empowered the Italian government to adopt a legislative decree introducing civil and commercial mediation procedures.' (Bruni, 2018)

In other words, the Constitutional Court did not answer to sensitive issues raised during the process, namely whether mandatory mediation violates the fundamental right of individuals to judicial protection. This last issue was also submitted to the Court of Justice of the European Union, that nevertheless dismissed the case without a decision about its merit, arguing that the same issue had been overcome by the fact that the Italian legislation had lost effectiveness, as a result of the Constitutional Court judgment.

In the meanwhile, with regards to European Council organization, the Commissioner for Human Rights had even approved the introduction of mandatory mediation as a remedy to the troubling length of Italian court proceedings.

‘On 20 September 2013, the so-called ‘mandatory mediation’ (re)entered into force in the Italian legal system. In fact, the Italian government, following the above-mentioned declaration of unconstitutionality of Legislative Decree No 28/2010 in the section which introduced the mandatory attempt of mediation (Constitutional Court decision No 272/2012), reintroduced such procedure, even though partially amended, through the Law Decree No 69/2013 (‘Decree 69/13’) on ‘Urgent dispositions to relaunch the economy’ (Bruni, 2018). The Law Decree No 69/2013 reintroduced the mediation procedure for a limited period of four years. Finally, the Law Decree 24 April 2017, No 50, providing ‘urgent provisions on financial matters, initiatives in favor of local authorities, further measures for areas affected by earthquakes and measures for development’, introduced stable mediation without any limitation of time. The European Union strongly urged Italy to develop the use of ADR and the mediation in particular.

The solution was a compromise: now in Italy it is no longer obligatory to conduct a mediation before to filing a case in court, but only to have an informative meeting with a mediator, who is required to provide such activity free of charge. During the required initial mediation session, ‘the mediator informs parties about mediation purpose and functioning. On the same occasion, the mediator invites parties and their lawyers to evaluate and decide about the possibility to start the mediation’ (Article 8, 1 Legislative Decree n 28/2010).

If litigants fail to agree to begin it, the procedure ends and there are no more obstacles to file the case in the competent court. This rule is actually the result of pressures coming from the legal profession lobbies, who tried in every way to boycott the re-introduction of mandatory mediation.

The main purpose of the promulgated law was to deflect judicial litigation and prevent additional delays in carrying out the proceedings in front of the Courts.

This time there was another notable change: Italy removed the obligation to go through and pay for a full mediation process, requiring, instead, only participation in an initial mediation session in certain categories of case. After almost

four years, both the statistics and the acceptance by all the major stakeholders (judges, lawyers, mediators, representatives of Ministry of Justice) has proven, that the Required Initial Mediation Session model combines the advantages of both the mandatory and voluntary models while minimizing the burdens by ensuring the following three key elements¹¹:

1. the effective beginning of a mediation procedure – by requiring an initial mediation session with a mediator, at a very low cost, with possible sanctions in the subsequent court proceedings if a party does not attend this initial session in good faith;
2. the quality of the procedure – by having the initial mediation session administered by a professional mediation service provider and mediator;
3. the possibility of easily declining to proceed with the mediation process at the end of the initial session without any subsequent sanctions or other negative consequences on the trial.

Some commentators predict that Italy is now set to witness a ‘mediation explosion’ even bigger than before – and this time a more stable one.

As a related consequence, some predict that the Italian mediation model might inspire similar steps in other EU countries struggling with court budget cuts, increasing litigation costs, and delays – where, after many years of attempts to promote mediation, the process remains virtually unused.

Types of mediation

Therefore, in the Italian legal system are established three different types of mediation:

- **Voluntary mediation (external mediation):** when mediation is freely chosen by the parties. It is possible in every civil and commercial matter, upon rights that are considered available (Article 1 Legislative Decree No 28/2010);

¹¹ See also: <https://gpcseries.files.wordpress.com/2017/06/italian-mediation-diagram.pdf> [2018-06-07].

- **Judicial mediation (mediation near court):** when the judge may order the parties of a judicial proceeding (even for cases of non-mandatory attempt of mediation), at any stage of the proceeding, but before the last hearing, to first try mediation, giving them (usually) 15 days to choose the mediation provider (Article 5 (2) Legislative Decree No 28/2010);
- **Mandatory mediation (mediation near to court):** when a preliminary and mandatory attempt of mediation is imposed by law and becomes a precondition for suing in court (Article 5 (1-bis) Legislative Decree No 28/2010).
- **Mediation inside court:** if parties jointly request the judge to try to reach an agreement, the judge sets the hearing to try to mediate (Article 185 Code of Civil Procedure).

Therefore, the first informative meeting with a mediator is a **mandatory step** before starting a lawsuit in civil and commercial disputes regarding the **following subjects**:

- Joint ownership (Condominium)
- Rights in rem
- Division
- Inheritance
- Family agreements
- Tenancy
- Commodatum
- Business leasing
- Medical malpractice damages
- Libel
- Insurance, banking and financial contracts

‘Compared to the previous legislation, declared unconstitutional, the cases related to the compensation for damage caused by the traffic of vehicles and boats, as well as the procedures of prior technical advice for the settlement of the dispute provided by Article 696-bis of the Italian Code of Civil Procedure are now excluded.’ (Bruni, 2018).

Main features

Mediation centers

Mediation providers, both public and private, which can offer their services under the Italian mediation law conditions, have to be enrolled at a specific registry at the Ministry of Justice. Besides, BAR Associations may establish chambers of mediation.

Accredited Mediators

In order to perform mediations, a mediator has to be enrolled at a mediation centre and has to be trained by approved mediation training centres, also registered at the Ministry of Justice.

Territorial Jurisdiction

Territorial competence criteria must be respected. The mediation procedure shall take place before an accredited mediation centre, established within the territory of the competent court. Nevertheless, any dispute may always be mediated outside the rules and limits established by Decree 28/2010, obviously waiving the advantages granted by the Decree.

Duration

The duration of mediation attempt is three months; term disposable by parties.

Legal Assistance and duty to inform

Legal assistance is mandatory if the dispute falls within one of the subject matters listed above. Lawyers are required to inform their clients, in writing, about the mediation option and the financial incentives.

Confidentiality

The EU Mediation Directive underlines that the confidentiality has to be guaranteed during mediation proceedings (Recital 23); moreover, the Article 7 of the Mediation Directive provides that the Member States must guarantee that mediators and whoever has information related to the procedure (i.e. mediation centers employees) may not be called as witnesses unless the parties agree otherwise.

Insofar, the Legislative Decree No 28 of 2010 which implemented the EU Directive in Italy has devoted a lot of attention to the mediator obligations, also reserving a special article to the duty of confidentiality, so much to make it cornerstone element of the mediation procedure.

A further important aspect is that the duty of confidentiality is not imposed only and exclusively to the mediator, but also to ‘whoever works for the mediation centers or however within the procedure of mediation’ (i.e. lawyers, trainees, experts, verbalizing secretaries – Article 9 Legislative Decree No 28/2010).

The Mediator obligation is very meaningful and it is carried out under a double profile: it must be observed both towards the extraneous bystanders to the mediation and the parts themselves, with respect to the information acquired by the mediator during the caucuses.

The external duty of confidentiality binds both the mediator and anyone who collaborates and it is imposed by the first paragraph of the Article 9 Legislative Decree No 28/2010, that prescribes that whoever has taken part in the activity of mediation cannot reveal the content of the declarations and the information acquired during the procedure.

The most innovative legal provision is the second paragraph of the Article 9 Legislative Decree No 28/2010, which consists in the internal duty of confidentiality about declarations and the information acquired during the separate sessions which, the mediator if necessary, holds opportune to apply his/her initiative or on request of the parts.

Through the tool of the private sessions, typical only of the mediation, already widespread in the routine even before such last normative intervention, the mediator succeeds in acquiring information that, in presence of the ‘counter-

part', probably the participants to the mediation would never have revealed, for the fear to subsequently jeopardize his/her own position.

The inherent advantages are manifold and undeniable in such tool, because they can prevent adversarial behaviours of the common meeting, or decontrol situations of impasse in which the parts are purely closed in a defensive attitude. So, the one-on-one sessions can lead to a constructive confrontation that, if managed in the opportune way by the mediator, can conduct to the mediation agreement.

Since the fundamental function of the private sessions is the preservation of the confidentiality, all the information that the parties decide to reveal to the mediator are covered by the most absolute reserve. Such guarantee will make them feel in condition to freely talk to the mediator and will increase the trust regarding the mediator impartiality; in fact, the mediator can report to the other part the content (even partial) of the separate meeting, if specifically authorized by the parties themselves.

There is no precise disposition that imposes a particular form to give the consent so also the oral form is valid.

Force of the agreement

If the parties settle the dispute and the agreement is signed also by their lawyers, it becomes immediately enforceable, like a court decision. The agreement is enforceable if the lawyers declare that the content of the agreement is non-contrary to mandatory rules and public order. Otherwise, it shall obtain the approval of the court to take such effect. In fact, settlement agreements reached by mediation outside the system provided for by legislative decree 28/2010 have the same effect as a contractual agreement and are, therefore, not directly enforceable.

Costs

For mediations mandated by law, there is an identical fee for both public and private providers. With regard to voluntary mediations, each provider may set its own fees, which must be approved by the Ministry of Justice too.

Parties are jointly and severally obliged to pay the fees and the fees-increase in proportion to the value of the dispute. The mediator is paid by the provider, with a percentage of the fee that the parties pay to the same provider. Public rates range from a minimum of € 43 to a maximum of € 4.600.00 (VAT excluded). If parties reach an agreement the provider can charge a success fee (25% of the fees paid by each party). In certain cases, the provider can charge an additional fee for the complexity and for the issuance of a proposal.

Filing fee and initial session

for disputes with value up to € 250.000,00	€ 40,00
for disputes with a value over € 250.000,00	€ 80,00

Mediation fees for each party

value of the dispute	Maximum fee if parties decide to proceed after the initial session (regardless of the number of meetings)
up to 1.000,00 Euro	€ 43,00
from 1.000,01 up to 5.000,00 Euro	€ 86,00
from 5.000,01 up to 10.000,00 Euro	€ 160,00
from 10.000,01 up to 25.000,00 Euro	€ 240,00
from 25.000,01 up to 50.000,00 Euro	€ 400,00
from 50.000,01 up to 250.000,00 Euro	€ 666,00
from 250.000,01 up to 500.000,00 Euro	€ 1.000,00
from 500.000,01 up to 2.500.000,00 Euro	€ 1.900,00
from 2.500.000,01 up to 5.000.000,00 Euro	€ 2.600,00
over 5.000.000,01 Euro	€ 4.600,00
Undetermined value	Up to € 666,00

Benefits

The minutes of mediations with a value under € 50.000,00 shall be exempt from payment of registration fees. All records and documents relating to the mediation process shall be exempt from stamp duty, and any expenses and taxes.

The poor can benefit from legal aid, participating to the mediation procedure without any cost. In case of successful mediation, parties will receive a tax credit of up to € 500; in case of failure, the tax credit is reduced to € 250. Moreover, any mediation agreement with a value below € 50.000 is exempt from transfer taxes, and all mediation documents are exempt from a stamp tax.

ODR

On-Line dispute Resolution has been known from many years in the Italian ADR system. The major ADR providers have electronic ADR programmes that allow disputes to be solved in a virtual environment. Decree No 180/2010, regarding the possibility of the use of electronic tools in mediation, states that the mediation rules of every ADR provider accredited by the Ministry of Justice cannot provide for access to mediation to take place exclusively through electronic means. In any case, to manage online mediations, the mediation provider must have an ODR that guarantees the application of the protocols and the security measures established by the competent department of the Ministry of Justice. Therefore, the use of platforms such as Skype or similar is prohibited. Currently, the most used platform is Teleskill, implemented by an Italian company. Resolutia was the first private ADR provider (2008) to manage via web mediation procedures.

Judicial mediation

The judge may invite the parties to attempt to solve the dispute through mediation at any stage but before the last hearing. Moreover, and in any case, pursuant to Article 116 (2) of the civil procedure code, the unjustified absence of a party at the mediation procedure can be taken into account by the judge of the possible subsequent judicial proceeding to infer evidence. Furthermore, a new legislation (law No. 148 of 14 September 2011) provides now that, in the above-mentioned case, the party who has not appeared will be obliged to pay a sum of money (equal to the one that a party has to pay to the State when he/she participates to a judicial proceeding) to the State as a sort of sanction.

The Procedure

- a) The parties (or one of the litigants) submit a written mediation request at an 'independent qualified professional ADR provider accredited by the Ministry of Justice';
- b) The ADR Provider appoints a mediator (chosen among the mediators accredited by the ADR Provider) and arranges for an initial meeting between parties;
- c) The date, the location and the name of the mediator are communicated to the other parties by the ADR Provider and – if he/she wants – by the claimant, with every means capable to ensure that the other parties have received the communication;
- d) The required initial mediation session takes place and, at its end, parties shall decide whether or not there are conditions to proceed further; if they decide to start the proper mediation procedure, they have to pay the fee and there is no limit to the number of meetings they can arrange to discuss their issues. Instead, if they do not reach an agreement about entering into mediation, the minutes of the meeting are signed by the parties and the mediator, and the procedure is considered closed. Another scenario can arise: if no agreement is reached, the parties can ask for a non-binding proposal for the resolution of the dispute, which the parties may choose to accept or refuse. If the parties (or one among them) refuse the mediator's proposal, the mediation attempt is considered failed and each party may start a lawsuit. However, if the subsequent judicial decision entirely reproduces the contents of the previous mediator's proposal, such a ruling may affect the allocation of judicial expenses. In fact, the court would refuse to award all costs and expenses in favour of the winning party if that party had previously rejected the mediator's proposal. Furthermore, in these circumstances, the court will order the winning party to pay costs and court fees of the losing party.

Italian legislation prescribes that when a mediation clause is inserted in a contract, in a company's statutes or in a company's constitution, and one party has commenced a judicial proceeding directly, without first attempting mediation, the judge or the arbitrator – not automatically but only at the request of the interested party proposed in the first defense – must postpone the proceeding pend-

ing before him/her and fix a time, maximum up to 15 days, so the parties can submit the request for mediation to an accredited provider.

Bibliography

- Ampollini, D. (2010):** Obligatory mediation in Italian parent disputes? Retrieved from Kluwer Patent Blog: <http://patentblog.kluweriplaw.com/2010/08/11/obligatory-mediation-in-italian-patent-disputes/> [2018-06-07].
- Bruni, A. (2011):** Mediation in Italy, available at: <https://www.mediate.com/articles/BruniA1.cfm> [2018-06-07].
- Bruni, A. (2018):** The New Law on Mandatory Attempt of Mediation in Italy, available at: <https://conflictresolution.weebly.com/mediation-in-italy-updated.html> [2018-06-07].
- Conte, G. (2014):** The Italian Way of Mediation, *Artration Law Review*. Vol. 6, Yearbook on Arbitration and Mediation, 180/2014.
- D'Urso, L. / Canessa, R. (2017):** The Italian Mediation Law on Civil and Commercial Disputes, available at: <https://www.adrcenterfordevelopment.com/wp-content/uploads/2018/07/The-Italian-Mediation-Law-3.pdf> [2018-06-07].
- Gabellini, R. (2010):** The Italian Mediation Law Reform. *ADR Bulletin*, Volume 12 Number 3 /2010.
- Moreschini, P. / Saltzberg, G. (2012):** Mediation Goes Mainstream in Italy. *The International Disputes Resolution News*, Spring/2012.

2.1.5 Mediation system in Poland (by Agnieszka Olszewska)

Introduction

In Poland mediation is a voluntary and confidential dispute resolution method in which, with the help of an impartial and neutral mediator, the parties to the dispute reach an agreement by themselves. Using mediation is possible in all cases in which the law allows to reach an agreement. Initiating a mediation interrupts the limitation of applicability. Mediation may concern matters such as payment, cancellation of joint ownership, employment causes, termination of or failure to enforce a contract, division of gained property, the partition of an estate, and matters concerning disputes involving neighbors¹².

According to lawyers and mediators, Polish legal regulations are conducive to and sufficient for the application of mediation in various types of dispute. The option of engaging in mediation is broadly prescribed in all branches of law (criminal, civil, employment). The problem is represented by the promotion of mediation and by the definition of the standards of mediation services, the latter being connected with mediation training (standards of mediation training courses, creation of the certification system).

The amendment of the code of civil procedure and certain other acts (Morek, 2012) in 2005 were crucial for the development of the ‘culture of mediation’ in Poland. However, the creation of a proper normative framework was not enough to push the parties of a conflict or the lawyers to use mediation on a larger scale.

Polish mediators point to the lack of a systemic encouragement for people to use mediation and the lack of an initiative from judges and lawyers in referring people to engage in mediation. Currently, there is a debate in Poland concerning amendments in law, e.g. introducing obligatory mediation or obligatory meetings with the mediator for the parties.

12 Information on Mediation Proceedings in Civil Cases (including Business Law, Family Law, Labour Law, and Law of Obligations) (Ministerstwo Sprawiedliwości, 2016a)

Mediation regulations in Poland

Non-legal regulations (informal) concerning mediation

Non-legal (informal) regulations are created by social organizations of mediators and by the Social Council for Alternative Dispute Solving at the Ministry of Justice.

In 2005 the Council was convened for the first time as an assisting body of the Ministry of Justice. The Council's responsibilities include proposing and conducting activities aimed at developing alternative methods of dispute solving¹³.

So far, the Council has adopted three documents regulating the following: the standards of conducting a mediation, the standards of mediators' training, and the principles of mediators' professional ethics.

The Council adopted the standards of conducting a mediation and the standards of mediators' conduct on 26 June 2006. These standards are intended to provide mediators with guidelines and advice. They are not sources of law and cannot be the basis for legal claims. They describe the key principles of mediators' work, such as voluntariness, neutrality, impartiality, confidentiality, diligence in providing adequate information on mediation, commitment to one's own professional development, and permanent cooperation with other professionals.¹⁴

The Polish Mediators' Ethical Code was adopted by the Council on 19 May 2008. The Code aims at promoting the supreme ethical standards among Polish mediators, building the credibility of the profession of mediator between the parties to a mediation and among the general public, as well as providing mediators assistance in resolving dilemmas of their professional practice. The Code sets down general standards while recognising the specific nature of some types of mediation. The Council encourages the organizations of mediators of particular specializations to reflect on their members' practice of mediation and, if need

13 The Ministry of Justice's decision of 2 March 2015 on the establishment of the Social Council for Alternative Methods of Conflict and Dispute Resolution under the Ministry of Justice.

14 For more information see: The Social Council for Alternative Methods of Conflict and Dispute Resolution under the Ministry of Justice, *Standardy prowadzenia mediacji i postępowania mediatora* (The Mediation and Mediator's Conduct Standards), 2006.

be, to create regulations that take into consideration the specific nature of the particular type of mediation.¹⁵

The Code defines the standards of mediators' training in a very generic way. A candidate attains the qualifications of a mediator by completing theoretical and practical training of at least 40 hours, verified by a certificate of completion of the training.¹⁶

Legal regulations concerning mediation in Poland (sovereign / official)

Depending on the branch of law, in Poland, legal regulations concerning mediation were enacted during the years between 1991 and 2005. In 1998 and 2001 (in relation to juvenile guilty of a punishable act) the first provisions concerning mediation in criminal law were brought into effect. Since 2005, the Code of Civil Procedure has regulated mediation regarding civil law in general, including commercial, family, and labour law (Journal of Laws 2005, No 172, Item 1438, as amended).

The legislative changes of 2008, effective since 13 June 2009 – which brought into Article 58 of the Family and Guardianship Code the spouses' agreement regarding the manner of exercising parental custody and maintaining relations with the child after the divorce if it benefits the wellbeing of the child, and which brought into Article 107 of the Family and Guardianship Code the parental agreement when both of the parents living separate lives have the right to parental responsibility – introduced multiple changes in mediation in family affairs.

Further important changes in Polish law were enacted in 2010 for the purpose of the implementation of the Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters. However, they substantially exceeded its scope (Pieckowski, 2012, p. 10–14).

The latest substantial amendment, which will be described in greater detail in the subsequent part of this report, came into effect in 2016. Its primary objective was to encourage the parties to a dispute to engage in a mediation.

15 The Social Council for Alternative Methods of Conflict and Dispute Resolution under the Ministry of Justice), Kodeks etyczny mediatorów polskich (The Polish Mediators' Ethical Code), 2008.

16 The Social Council for Alternative Methods of Conflict and Dispute Resolution under the Ministry of Justice), Standardy szkolenia mediatorów (The Standards of Mediator Training), 2007.

The Polish Acts on Mediation Regulation

Mediation proceedings, as stipulated in Polish law, reflect the European-wide tendency of applying alternative methods of dispute resolution (ADR). An example of this tendency is represented by the implementation of Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters (Morek, 2012). The main legal acts in civil matter concerning mediation in Poland are¹⁷:

- the 17 November 1964 Act, Code of Civil Procedure (Journal of Laws 2016, Item 1822, as amended – excerpt from the statute), the regulation, effective since 10 December 2005, brought into the Code of Civil Procedure by the 28 July 2005 Act Amending the Code of Civil Procedure and Certain Other Acts (Journal of Laws 2005, Number 172, Item 1438), as amended, including the 10 September 2015 Act Amending Certain Acts Concerning Support for Arbitrational Methods of Disputes Resolution (Journal of Laws 2015, Item 1595)
- the 23 April 1964 Act, Civil Code (Journal of Laws 1964, No 16, Item 93, as amended)
- the 28 July 2005 Act on Court Fees in Civil Cases (Journal of Laws 2016, Item 623, as amended)
- the 20 June 2016 Ministry of Justice Regulation on the Mediator's Fee Rate and Refundable Expenditures in Civil Proceedings (Journal of Laws 2016, Item 921)
- the 20 January 2016 Ministry of Justice Regulation on the Permanent Mediators' List (Journal of Laws 2016, Item 122)
- the 27 July 2001 Act on the Law on the System of Common Courts (Journal of Laws 2016, Item 2062)
- the 23 September 2016 Act on Out-Of-Court Resolution of Consumer Disputes (Journal of Laws 2016, Item 1823)

17 Ministerstwo Sprawiedliwości Polskie akty prawne regulujące mediację (The Polish Acts on Mediation Regulation), Materiały informacyjne (Informational Materials), 2018.

Identifying mediation in judicial and out-of-court proceedings

In Poland, mediation can be conducted before the case is taken to court or after the proceedings have been initiated, on the basis of the court's decision, or out of the court on the basis of parties' decision.

In each case, the prerequisite for a mediation is the consent of the parties.

Provisions of the Code of Civil Procedure allow therefore to identify two distinct sources of mediation: the agreement to mediate and the court's decision to subject the case to a mediation. This distinction results in that between 'contractual mediations' (private, contract-related, prior to court proceedings or out-of-court), and 'judicial mediations' (conducted on the basis of the court's decision). The Polish lawmakers adopted an essentially homogenous model of regulation of both of these types of mediation in Article 1831 (2) of the Code of Civil Procedure with few detailed provisions (Morek, 2012).

No mediations prescribed by Polish law are mandatory. Mediations in civil matters, both contractual and judicial, are **voluntary** in nature (Article 1831 (1) of the Code of Civil Procedure) (Morek, 2012).

Contractual mediations

A contractual mediation is a fully autonomous method of settling disputes, independent and, in many respects, 'alternative' to judicial proceedings.

The key elements of a mediation agreement have been set out in Article 1831 (3) of the Code of Civil Procedure. This provision stipulates that 'in their consent to mediate, the parties define, in particular, the object of the mediation, the person of the mediator or the method of choosing the mediator' (Morek, 2012).

In practice, the consent to conduct an out-of-court mediation, is usually expressed between the mediator and the parties in the oral form.

If an agreement is reached between the parties as a result of a contractual mediation, it can be confirmed in front of the court at the request of at least one of the parties.¹⁸ The mediator is obligated to draw up the protocol of the completed mediation, which is submitted along with the motion for approval by Court.

18 On the procedure for certifying the agreement, see the part of the report on the enforceability of the agreement.

If the mediation does not end with an agreement or if the parties do not request the court to approve it, the procedures concerning the submission of the protocol of the completed out-of-court contractual mediation are not unequivocal. In practice, it is not submitted to the court but only achieved by the mediator or the mediation center.

Mediation ordered by court

The court may refer a case to mediation starting from the beginning of the proceeding until the last hearing. It is not necessary for the court, before taking this decision, to receive the parties' declarations regarding their consent to mediation, as it is the mediator that receives that consent.

During the judicial process, each of the parties may file a motion requesting a mediation at any phase of the court proceeding.

The court may refer the parties to a mediation at any phase of the proceeding and it can do so more than once.

In its decision to refer the case to a mediation, the court appoints a mediator. However, the parties may choose another person to conduct the mediation (Article 1839 first sentence of the Code of Civil Procedure).

Institutional incentive system (The New Mediation Act (The Ministry of Justice, 2016b))

On 1 January 2016, the latest amendment of the Act came into effect, bringing procedural and organizational improvements meant to encourage the parties to voluntarily settle a dispute before the case goes to court or during judicial proceedings. Its aim was also to provide the adequate quality of mediation services.

The new changes were intended to reduce the duration and improve the efficiency of judicial processes, as well as reduce their costs, both on the part of citizens and the state. A broader application of mediation enables the parties to end a conflict in a cheaper, quicker and less formalized way than it is the case in front of the court, and it allows entrepreneurs to retain relations with their business partners without harm. These new changes also aimed at promulgating the idea of mediation and arbitration in civil cases (including family, business and labor).

The adopted changes concerning mediation include the following:

- The applicant, in his petition, must inform the court whether the parties have made an attempt to settle the dispute by amicable means before taking the case to court. In the event that such an attempt has not been made, the petitioner must provide the reasons for this. In that way, the parties will be made aware that any dispute should be preceded by an assessment of whether the case should be concluded by conciliation means, and this also makes it easier for the judge to decide to refer the parties to mediation during court proceedings.
- A greater obligation is placed on the court to inform the parties of the mediation option, especially in the early phase of the proceeding. The judge's obligation will be emphasized to make the assessment of whether the case can be solved by mediation. The judge may order the parties to take part in an informational meeting where they will obtain information about mediation or may summon the parties to attend a closed hearing. The court may refer the parties to engage in a mediation at any phase of the case and can do so more than once.
- Procedural issues concerning mediation have been put in order. The parties have obtained priority in the choice of the mediator, and the mediator may familiarize himself or herself with the case immediately after the parties have joined the mediation. The court provides the mediator with the parties' contact details as soon as possible and the period of mediation can last up to three months.
- If no mediation is initiated prior to court proceedings for reasons independent of the creditor (e. g. the other party has not consented to mediate), and if the creditor files the claim within three months, he retains the positive effects connected with the interruption of the limitation period.
- Requirements have been introduced for mediators concerning their qualifications to provide high-quality services. Mediators with the adequate knowledge and skills can be entered in the list of permanent mediators (which is available on the Internet) that is maintained by the president of a regional court.

- Including the cost of mediation ordered by the court in the court costs will allow freeing underprivileged persons from the cost of mediation.
- A system of financial incentives has been created regarding court fees, e. g. a request to the court for approval of an out-of-court agreement in front of the mediator will be free of charge. If the agreement has been concluded before the trial begins, the court will return to the parties the entire court fee they have paid.
- In assessing the fee for an attorney or a legal counsel, the court takes into account the lawyer's involvement in solving the dispute by conciliation means before the claim is filed with a court.
- The court has obtained the option of charging the party that has refused, without credible reasons, to engage in a mediation with the costs incurred due to its contemptible and disloyal behavior towards the court or the opposing party.
- The appointment of a mediation coordinator at regional courts has been prescribed by law. The coordinator's work contributes to the ever-increasing application of mediation in disputes, which help to unload the courts. The judge who is the mediation leader in his region is appointed as Mediation Coordinator.
- Upon request of the mediator, the list of permanent mediators maintained by the presidents of regional courts will include information concerning the mediator's entry in the lists maintained by non-governmental organizations and centers of higher education. This additional information expands the amount of data available to the parties and the judge and makes it easier for the parties to choose a mediator.

Cost of conducting a mediation

The cost of mediation, including the mediator's fee and the expenses retrieved from the court for engaging in a mediation, is charged to the parties in equal parts unless the parties agree to a different division of the payment.

A party to a mediation may request the court for an exemption from paying court fees for a mediation ordered by court.

In a mediation ordered by court, in non-property disputes and in disputes concerning property rights in which the value of the object of the dispute cannot be identified, the mediator's fee is PLN 150 for the first mediation session and PLN 100 for each subsequent session (but no more than PLN 450 in total). If the mediation concerns property rights, the mediator's fee is equal to 1 % of the value of the object of the dispute (no less than PLN 150 and no more than PLN 2,000 for the entire mediation proceedings).

The mediator's expenditures for conducting a mediation are refundable (including the rent of session room up to PLN 70 for each session and the correspondence cost up to PLN 30). If the mediator is a VAT payer, the cost of mediation is expanded by VAT.

Irrespective of the outcome of the case, the court may charge a party with the expenses incurred due to the party's unjustified refusal to engage in a mediation.

In the case of an out-of-court mediation, the mediator's fee and the refund of the expenses incurred by him as a result of conducting the mediation are based on the price-list of the mediation center. Alternatively, the parties agree on the fee with the mediator before the mediation begins.

There is a recurrent problem caused by the provision of the Code of Civil Procedure regulating the payment for mediation. The mediator's fee for the mediation ordered by court that is held out of the court is paid to the mediator by the court. This causes serious difficulties to mediators who receive their fees with significant delay.

Financial incentives for engaging in mediation

If an agreement is reached before the trial begins, the parties are refunded 100 % of the court fee that they paid in filing the case with the court. If the agreement is reached in front of the mediator in a later phase of the judicial proceeding (after the trial has started), the parties will be refunded 75 % of the court fee.

The request to the court for the approval of an out-of-court agreement reached in front of the mediator is exempt from a court fee.

Enforceability of a mediation agreement

A mediation may be concluded by a joint agreement between the parties. If the parties have reached the agreement in front of the mediator, the wording of the agreement is included in the protocol of the mediation or in the annex to the protocol. In the absence of an agreement, the parties may assert their rights in judicial proceedings.

The agreement approved by a court has the same legal effect as an agreement made before the court and it concludes the proceeding.

In case either of the parties refused to willfully enforce the agreement, the Polish legislators have provided the mediation agreement approved by court with the same legal effect as a court agreement. An agreement made before a mediator, which the court has accepted by granting it a writ of execution, is an enforcement order within the meaning of the enforcement provisions (Article 18315 (1) of the Code of Civil Procedure). Pursuant to Article 18312 (21) of the Code of Civil Procedure, by entering into the agreement, the parties agree to request the court to approve it.

The mediator should inform the parties of this additional legal effect of entering into the agreement.

The cases in which the court can refuse to approve a mediation agreement are usually narrowly specified by the legislator. Under Article 18314 (3) of the Code of Civil Procedure, the court refuses to approve an agreement if it violates the law or the principles of living in a community, if it seeks to breach the law or if it is unintelligible or contains contradictions (Morek, 2012).

In practice, it happens that, despite reaching an agreement, the parties do not ask the court to approve it. This happens especially when all the provisions contained in the agreement have been enforced without delay. But if they are not enforced, the lack of a court approval of the agreement causes a series of complications both for the parties and the court.

A mediation agreement has therefore the power of an enforcement order. At the same time, mediation agreements are considered to possess a large capacity of voluntary enforcement (much larger than in the case of court rulings).

The role of the mediator

Any natural person with a full capacity to perform acts in law and who enjoys full rights as a citizen can become a mediator. A judge, except a retired judge, cannot be a mediator.

Under law, there are two types of mediators: the so-called permanent mediators (Article 1836 (2) Point 1 of the Code of Civil Procedure) and the so-called non-permanent mediators (Article 1836 (2) of the Code of Civil Procedure).

Non-permanent mediators include persons who are not entered in the list of permanent mediators but who are appointed ad hoc for the purpose of mediation. This usually happens when the mediation has begun before the case is taken to court.

In family and matrimonial cases (Article 436 (4) of the Code of Civil Procedure, as well as Article 4451 and Article 5702 of the Code of Civil Procedure) it is possible to appoint as mediators only those who are entered in the list of permanent mediators. Such persons, who have a degree in psychology, pedagogy, sociology, or law, possess theoretical knowledge and practical skills in conducting mediation in family matters (Cebula, 2012).

The obligations of the mediator

A mediator must be impartial (Article 1833 of the Code of Civil Procedure), selfless and neutral.

A mediator is bound by the principle of confidentiality (Article 1834 (1–3) of the Code of Civil Procedure). That means that nobody apart from the mediator and the parties (including the legal representatives) should attend a mediation unless the parties consent to the presence of third parties, and also that the mediator is obligated to keep confidential all the facts that he or she has found out in connection with the mediation. However, the mediator can be freed of this obligation by the parties by their joint declaration of intent (Cebula, 2012).

The confidentiality of a mediation is guaranteed by the provision stipulating that it is ineffective for any party to refer, during the proceedings before a court or an arbitration court, to proposals of amicable settlements or mutual concessions or any other declarations made during a mediation but which are not included in the agreement.

The choice of the mediator

The mediator is appointed either by the parties or by the court (with the permanent mediators being the priority choice).

In out-of-court cases, the parties appoint a mediator taking advantage of the offers available on the market – from individual mediators, mediation centers or recommendations of mediation associations and institutions.

The Presidents of regional courts keep lists of permanent mediators which can include any mediator who satisfies the following criteria: to be at least 26 years old, not to have criminal records for the deliberate commission of a crime, to speak Polish and to possess knowledge and skills in the field of mediation.

Also, mediation centers (non-governmental organizations and centers of higher education) may keep the lists of mediators. Mediation centers set down their own requirements for the person who is willing to be entered in the center's list.

Knowledgeability/awareness of legal basis (of the conflict partners)

People's legal knowledge about mediation as a conflict-solving tool is still relatively low in Poland. The parties to a mediation obtain information about mediation from their legal representatives or from the mediator him or herself during the first mediation session.

Pursuant to the changes in Polish law of 2016, the court, especially at the preliminary phase of the proceedings, is obligated to inform the parties of the mediation option. The judge must make an assessment of whether the case can be solved by mediation. The judge can order the parties either to attend an informational meeting to obtain the information about mediation or to attend a closed hearing.

As far as public awareness about mediation is concerned, besides the obstacles of an informational/educational nature, there are also those of a psychological and social nature. There is a lack of fixed conciliatory patterns of conflict-solving in Poland (Bobrowicz, 2018). This is reflected in how the education of children and teenagers is organized in this field. It is necessary to organize training courses and workshops on communication and negotiation skills both for lawyers and ordinary citizens.

Order for mediation in testament

Mediation in succession cases is governed by provisions prescribed in civil mediation regulations. In Poland mediation is voluntary and the court cannot order the parties to engage in a mediation.

Meanwhile, mediators emphasize the opportunity offered by amicable settlements of potential disputes connected with the distribution of an estate, for which the testator may opt when he is drafting his will.¹⁹

Online Mediation

The factors that distinguish online mediation from traditional mediation are the mediator's working method and form of communication with the parties. In the case of online mediation, the mediator does not designate a mediation session and instead communicates with the parties using interactive online tools.

The legal ground for this form of mediation is provided by Article 18311 of the Code of Civil Procedure, which stipulates that 'the designation of a mediation session is not required if the parties consent to a mediation without a mediation session'. This provision doesn't explicitly refer to online mediation. However, if it is not specified in what other way a mediator can conduct a mediation without holding a mediation session, it is assumed that, as long as there is the consent of the parties, it is possible to use any means that leads to the purpose of mediation. This is also in line with the principle of voluntariness.

A difficulty, also for mediators themselves, is posed by the issue of the online tool used in mediation (in most cases it is Skype, email, instant messengers). The main doubts concern the threat of violating one of the key principles of mediation, i. e. confidentiality. Other adverse factors are the lack of opportunity for the parties to meet each other in person and the lack of the mediator's direct contact with the parties. There are also fewer chances to improve the relations between the parties in the future. Due to these factors, online mediation is not broadly used by professional mediators in Poland.²⁰

¹⁹ See chapter 3.4.9 When is a mediation useful in succession cases?

²⁰ See also Chapter 3.4

Despite these difficulties, there are situations where the benefits from online mediation can outweigh the potential risks. These circumstances include the distance between the places of permanent or actual residence, that prevent people to meet at one time in one place (e.g. when one of the persons is abroad), the short time for the settlement of the case, the little value of the object of the dispute and the parties' reluctance to meet in person (Górska, 2014).

Important aspects regarding cross-border conflicts in succession matters

In Poland, there are not too many practical experiences connected with cross-border succession cases yet. Apart from the difficulties mentioned above, there are those related to differences in legal systems and tools between EU countries, the length of duration of proceedings, the lack of knowledge of a foreign language, the dynamic of succession cases which often involve emotional issues connected with relations within a family. The positive role of cross-border mediation in succession cases, that had been underlined by Polish experts, will be described in Chapter 3.4 of this study.

List of abbreviations

EC	European Commission
VAT	Value Added Tax

Bibliography

- Bobrowicz, M. (2018):** Rozwój mediacji w Polsce, available at: www.ms.gov.pl/pl/dzialalnosc/mediacje/wydarzenia-mediacyjne-w-polsce/download,1322,0.html+&cd=1&hl=de&ct=clnk&gl=de&client=firefox-b-ab [2018-09-25].
- Cebula, R. (2012):** Mediacja w polskim prawie cywilnym, available at: <https://www.ms.gov.pl/pl/dzialalnosc/mediacje/aktualnosc/download,1322,0.html> [2018-09-25].
- Górska, G. (2014):** Mediacja on-line, available at: <http://www.dauerman.com.pl/b,6,mediacja-on-line.html> [2018-09-25]

- Ministerstwo Sprawiedliwości (2016a):** Informacja o postępowaniu mediacyjnym w sprawach cywilnych, available at: <https://www.mediacja.gov.pl/files/doc/Mediacja%20w%20sprawach%20cywilnych.pdf> [2018-09-25].
- Ministerstwo Sprawiedliwości (2016b):** Nowa ustawa dotycząca mediacji, available at: <https://www.mediacja.gov.pl/Nowa-ustawa-dotycz-ca-mediacji.html> [2018-09-25].
- Ministerstwo Sprawiedliwości (2018):** Polskie akty prawne regulujące mediację (The Polish Acts on Mediation Regulation), available at: <https://www.ms.gov.pl/pl/dzialalnosc/mediacje/publikacje-akty-prawne-statystyki/> [2018-09-25].
- Morek, R. (2012):** Mediacja w sprawach cywilnych, Publikacja informacyjna Ministerstwa Sprawiedliwosci, available at: <https://www.mediacja.gov.pl/files/doc/18%20mediacja-w-sprawach-cywilnych--rafal-morek--broszura--stan-prawny-1.12.2012r.pdf> [2018-09-25].
- Pieckowski, S. (2012):** Mediacje w polskim systemie prawa: Mediacja w sprawach gospodarczych. Stan prawny na 1 grudnia 2012 (Mediations in the Polish legal system: Mediation in commercial matters. Legal status as of 1 December 2012), available at: <https://www.mediacja.gov.pl/files/doc/20%20mediacja-w-sprawach-gospodarczych--sylwester-pieckowski--broszura--stan-prawny-1.12.2012r.pdf> [2018-09-25].
- The Social Council for Alternative Methods of Conflict and Dispute Resolution under the Ministry of Justice (2006):** Standardy prowadzenia mediacji i postępowania mediatora (The Mediation and Mediator's Conduct Standards), available at: https://www.ms.gov.pl/Data/Files/_public/mediacje/adr1/adr_standardy_mediacji.rtf [2018-09-25].
- The Social Council for Alternative Methods of Conflict and Dispute Resolution under the Ministry of Justice (2007):** Standardy szkolenia mediatorów, available at: <https://www.mediacja.gov.pl/files/doc/standardyszkoleniamediatorow.pdf> [2018-09-25].
- The Social Council for Alternative Methods of Conflict and Dispute Resolution under the Ministry of Justice (2008):** Kodeks etyczny mediatorów polskich (The Polish Mediators' Ethical Code), available at: https://www.ms.gov.pl/Data/Files/_public/mediacje/adr1/kodeksetyczny.pdf [2018-09-25].

2.1.6 Mediation system in Sweden (by Robert Boch)

Mediation Law

There are two areas of mediation in Sweden, court-based mediation and out-of-court mediation. It is important to notify the differences in the beginning of this report.

Law regarding court-based mediation

Since 1948, the Swedish Code of Judicial Procedure (*Rättegångsbalken*) has enabled extensive utilization of mediation in the district courts via the opportunity to have a special mediator appointed within the frame of the procedure in a civil case (*court-connected mediation*) (Dahlqvist, 2014).

Mediation within court proceedings is now governed by Chapter 42, section 17 and Chapter 50, section 11 of the Code of Judicial Procedure. The mediation is often led by judges.

Law regarding out-of-court mediation

The Mediation Act was implemented with the intention to promote mediation through an extension of potential statutory limitations, the obligation of confidentiality for the mediator and the possibility of execution of agreements concluded in mediation. It applies to out-of-court mediation as opposed to mediation initiated within the framework of court proceedings.

The Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, was implemented in Sweden by the Mediation Act (SFS 2011:860) which regulates mediation in civil disputes:

- The Act (2011:860) on Mediation in Certain Private Law Disputes – the Mediation Act – entered into force on 1 August 2011.
- In Swedish: Lag (2011:860) om medling i vissa privaträttsliga tvister.

The Mediation Act is applicable to out-of-court mediation in both domestic relations and relations where one of the parties had his or her residence in another

member state of the European Union (Denmark excluded) when the process of mediation started (Dahlqvist, 2014).

Prerequisites for the court to decide on special mediation

According to the preliminary work, the court should decide whether conciliation or special mediation (*särskild medling*) is the most appropriate method in the case; the guidelines are to check what the dispute is about, how extensive it is, the parties' attitude and, moreover, the particular circumstances of the case. Reasons for special mediation may be the nature or extent of the lawsuit as well as the request of the parties. The mediation procedure should therefore not only be reserved for lawsuits that may be expected to require large resources. Another reason for choosing special mediation may be that the parties have requested a particular mediator. An additional reason for choosing mediation may be the wish of the parties to hold the discussion away from the public.²¹

Mediation in parental custody disputes

There are two means of support for parents involved in custody disputes. Both are based on mediation rules, but they are introduced at different stages of the dispute. Those two types of mediation will not be mentioned further in this report because child custody and succession are different areas.

Cooperation discussions (samarbetssamtal)

If parents cannot reach an agreement on how to resolve issues related to custody, living arrangements and child support, they can turn to the municipality to get help through a cooperation discussion. The cooperation discussions are free of charge.²² If parents have had cooperation discussions but still cannot agree on issues relating to the child, they can take the matter to the district court. However, the court may also instruct the Social welfare committee to organize cooperation discussions, according to Chapter 6 Section 18 Children and Parents Code.²³ This can be done if the cooperation discussion initiated by the parents on their own fails or if the parents bring an action directly in the court. This provision

21 prop. 2010/11:128 p. 28.

22 Swedish Social Insurance Agency (Försäkringskassan).

23 6 kap. 18 § 1 st. Föräldrabalken.

indicates that parents do not have to go to court in the first place. They should try to resolve their conflict by mutual agreement through cooperation discussions.

Mediation in custody disputes

On 1 July 2006 a new provision was added to the Children and Parents Code²⁴ which made it possible for the courts to appoint a mediator in custody disputes. The purpose of this court appointed mediation is to try and get the parents to reach an agreement, a consensual solution that is consistent with the best interests of the child.

Other regulations regarding mediation in Sweden (non-sovereign / not official)

Beyond the legal regulations, there are internal rules for mediation and mediators, such as ethical rules, which many mediation organizations in Sweden have created for their members. That means that being part of a particular organization ensures that mediation work is carried out in accordance with these rules.

Integration of mediation in legal proceedings / judicial system

Mediation inside court

In Chapter 42, Section 17 of the Swedish Code of Judicial Procedure, a judge, before the parties have their main hearing, can act as a mediator between the parties to settle the dispute. According to the law, the judge should always try to make the parties come to an agreement before the main hearing. This obligation can be fulfilled either through the use of court-based conciliation (judicial settlement) or court-based mediation.

Swedish courts have the obligation to promote an amicable solution to a dispute only in matters where the parties have the right to reach a settlement. If the parties agree to a court-arranged mediation, the court can order the parties to appear before a mediator appointed by the court. The provisions put some pressure on the courts to strive to have disputes settled (Hope, 2017).

The rule in the Code of Judicial Procedure on judicial settlement activities (held by the judge handling the case) and mediation (held by the judge handling the case or by an independent mediator) has somewhat been sharpened. The Gov-

²⁴ 6 kap. 18 a § Föräldrabalken.

ernment has stated that mediation and judicial settlement activities should be two clear and equally available alternatives for the parties during the preparation of the case and that mediation is suitable not only for large and complicated cases (Dahlqvist, 2014). Many specialists in FOMENTO research project mentioned that special mediation is still rarely used in Swedish courts. The judges still use their own settlement activities in most cases.²⁵

Also, the possibility to resort to judicial settlement activities and to appoint a special mediator in the Court of Appeal is now stated. Before the new legislation, it was an unspoken rule and the methods were seldom used in the appellate courts (Dahlqvist, 2014). The Court of Appeal is a higher court and, because of that, the possibility of deciding on special mediation should be used with greater caution than in the District Court. According to the legislative history, mediation in the Court of Appeal shall be done at the request of the parties or if there is any particular reason why it appears appropriate to use it. If the parties have gone through a mediation process at the district court, a new mediation in the Court of Appeal should be allowed only in exceptional cases²⁶.

Mediation near to court

In cases that are amenable to out-of-court settlements, the district court has the opportunity to refer the parties and their dispute to special mediation. The parties must give the agreement to the court to decide on special mediation.

At the same time as the court orders special mediation, it must also set out a period of time during which the mediation must be concluded. The period allocated must reflect the scale of the dispute and its complexity and may be extended if there are particular reasons for doing so. The aim is, in other words, to avoid mediation to become too long. If mediation is not successful, it should still be possible to determine the case within a reasonable time.

Mediation can also be conducted by a judge from a court different to that one in which the case is pending. This can offer greater guarantees of impartiality for the parties, because the mediation is not led by a judge who, in the case of disagreement, will rule on the case.

²⁵ See chapter 3.4.5 cross-border mediation: advantages and challenges.

²⁶ prop. 2010/11:128 p. 34.

External mediation

Mediation promoted by the parties is an alternative dispute resolution method that can be used in Sweden. In this regard, the Mediation Act establishes that an agreement can be confirmed by the court if all parties request it.

By establishing three legal certainties for mediation outside of court proceedings, the Mediation Act renders the support for the mediation practice to which the Mediation Directive aims. These certainties are: mediators and their assistants are bound by a duty of confidentiality; limitation periods are put on hold; the parties can have the settlement agreement declared immediately enforceable upon application to the court.

In relation to international mediation outside of court proceedings (i. e. mediation with at least one party not being Swedish and mediation taking place outside of Sweden), the Mediation Act applies with one exception. In fact, it is not possible to get a court declaration of enforceability if the mediation agreement has been stipulated outside the EU, or in Denmark, which has negotiated an exception from all international private law issues within the EU.

It is reasonable to think that most of the cases that would be suitable for mediation don't end up in courts in the first place: they are solved in arbitral tribunals or by out-of-court mediations (Dahlqvist, 2014).

Institutional incentive system

Duty to notify about mediation (within a trial)

The court always has the right – and now an obligation – to ask the parties if they have discussed an amicable settlement and if they are interested in addressing this matter under the jurisdiction of the court. The court also has the right and obligation to provide the parties with accurate information about the advantages and disadvantages of the various options, namely the judgment and judicial settlement, taking into account legal costs, time aspects and opportunities for voluntary fulfillment (RB, 1942, 740).

Financial support/incentives

The judge's work for a settlement does not cost the parties anything and it regards both conciliation (judicial settlement) and mediation. If someone is covered by the legal assistance insurance, and if the court has ordered the mediation (in accordance with chapter 42, 17 § 2 st. Code of Judicial Procedure), the insurance covers its cost. If such legal assistance is not granted, the parties make the payment themselves. It means that the cost of a mediator responds to the mutual agreement of the parties unless either of the parties has access to legal aid. In that case, the State is responsible for the cost.

Costs of mediation

There are no rules in Sweden regarding how much mediation should cost. The cost of the special mediator, even if the court is referring the parties to special mediation, is shared by the parties and paid directly, because the mediation, in general, is not financed by the court. The costs consist of the mediator's time for studying the material and conducting the actual mediation. It is often mentioned that when assessing how much mediation may cost, it should be considered that the mediation usually does not take more than one day. Discussions may arise about its duration and quality.

If mediation is held inside the court by the judge in the current case or by a judge from another court, the mediation is free of charge for the parties. Even when the mediation has not produced an agreement and the court proceeding continues, if the parties' attempt to reach an agreement has led to the clarification and simplification of the dispute, the cost of mediation could be replaced as a litigation cost.²⁷

There is a problem with the cost of the mediator. In fact, it is not likely that the parties will choose a mediator if they can have the same or potentially the same service in the judicial settlement activities for free. The specialists in the FOMENTO study emphasized that in mediation conducted in the court there are two types of interests and needs: those of the parties and those of the courts. They are not always convergent. It was underlined that external professional mediators can devote much more time to the mediation than judges do, which

27 18 § rättsjälpslagen [1996:1619] och prop. 2010/11:128 p. 31.

leads to more thorough and sustainable agreements. This may cost and many parties choose it.

Enforceability of mediation agreement

Swedish Procedural Code, Chapter 17, Section 6 says that: 'If the parties agree on a settlement of the dispute, the court, upon request of both parties, shall deliver a judgment confirming the settlement'.

If there is an agreement between the parties to the mediation, there are some rules regarding the result of mediation²⁸ that have to be followed:

- What the parties agree on in mediation is written down. Both parties are often involved when this happens and they also have to sign the agreement. The writ of summons can then be withdrawn and the case is resolved.
- The parties may also request that the court confirms (settles) the agreement by judgment.
- If the parties cannot reach an agreement, the proceeding will continue in the court.

Role of mediator

The mediator following the European Commission's code of conduct shall act impartially and carry out the mediation taking into account, inter alia, the need to resolve the dispute quickly. The mediator's main task is to lead the conversation, listen to the parties' standpoints and then get them to agree on a deal with which they both feel comfortable. The mediation process is driven by the mediator entirely outside of the court, but an agreement between the parties can be confirmed by the court if the parties agree on this (Sveriges Domstolar 2018a).

Except for the duty of confidentiality in Section 5 of the Mediation Act and for the fact that the proceedings shall be structured and are voluntary at all stages, there is no special regulation regarding criteria, duties and rights of mediators. However, because of the above-mentioned duty of confidentiality, the obligation to testify in court does not apply to mediators and his or her assistants and there is also a duty of absolute secrecy in the general courts. The mediator is also bound

28 Swedish National Courts Administration (Sveriges Domstolar).

by the duty of confidentiality regarding the data which a party has left in connection with the mediation, if the party has made a reservation on it.²⁹ In addition,³⁰ the mediator may be heard as a witness on the issues raised in connection with the mediation only if the person in favor of whom is placed the duty of confidentiality agrees to that.³¹

Selection of mediators

When choosing a mediator, consideration should be given to whether his knowledge in a particular area of affairs or jurisdiction may be of value. If the case is such that specialistic knowledge in various fields is required, more mediators may be appointed. To provide the best possible conditions for the mediation, the wishes of the parties must also be taken into account.

The Swedish courts have compiled, at the behest of the government, a list of persons who are willing to undertake mediation assignments in disputes susceptible to an amicable composition. The list can easily be found on the website: www.domstol.se.³² Work experience as a lawyer or judge is often named as valuable in mediation assignments, which can lead to some problems. It turns out that the statute does not require any training or experience for someone to be appointed as a mediator.³³ If a person wants to be added to the list, the Swedish courts do not set any other requirement than that the person has expressed willingness to mediate in court. The list is based on information from the mediators themselves. The Swedish courts neither make any verification of this information nor do they evaluate mediators' competence.³⁴

The forms of mediation

Generally, a mediator has the task of solving the dispute in its entirety, but the mediator may also be commissioned to get the parties to find an agreement on one or more parts of the case in order to simplify the dispute. The court shall state in the order in which parts the mediator wishes to help the parties to resolve the dispute.³⁵

29 2 kap. 1 § och 36 kap. 3 § offentlighets- och sekretesslagen [2009:400] och prop. 2010/11:128 p. 72 et seq.

30 36 kap. 5 § RB.

31 Swedish National Courts Administration (Sveriges Domstolar).

32 Ibid.

33 Ibid.

34 Ibid.

35 prop. 1986/87:89 p. 208.

In connection with the decision about mediation, the court shall require the parties to attend a meeting with the mediator and specify the time in which the mediation should be completed. The deadline can be extended if there are special reasons. No additional guidelines about how the assignment should be performed exist.

Knowledgeability/awareness of legal basis (of the conflict parties)

Some people in Sweden know that they can get help to resolve their conflicts in a different way than in the court. This does not necessarily involve the knowledge of mediation as a method, but rather the knowledge of possible aid to resolve the conflict. The parties can get information in different offices, in courts and on the relevant websites. On the other hand, the regulations regarding mediation in Sweden are easy to understand and very uncomplicated. However, many professionals are pointing out that it is obvious that promotion of mediation in Sweden is needed.

Order for mediation in testament

There are no legal obstacles against mediation in the testament. A testator can establish that every dispute between the heirs has to be primarily determined by mediation. On the other hand, mediation is voluntary, which means that, even if there is a mediation clause in the will, the heirs (or one of them) can say no.

Obstacles for Online Mediation

Online communication in Sweden is possible even in the courthouse. Legal representatives can request online participation and use a special room and equipment of the nearest court to contact another court by video call. Using the latest technologies is possible and common in Sweden. On the other hand, many Swedish mediators say that face-to-face meetings are more suitable for mediation.³⁶

Online mediation is available on an ad hoc basis, but not yet on a platform supported by the authorities, except as provided for consumer disputes under the auspices of the EU ODR Project of which Sweden was a pilot participant (Hope, 2017).

³⁶ See chapter 3.4 Qualitative analysis of expert interviews.

Important aspects regarding cross-border conflicts in succession matters

It is worth noting that not everything lends itself to mediation because there exist legal regulations that cannot be circumvented. Mediation can be helpful when:

- everything has been conducted in line with the law and the parties would like to make a different division of the property between themselves,
- people want to understand the situation and each other in this extraordinary situation when someone dies,
- parties want to save money,
- family members want to maintain their relationships.

Succession cases often concern more than just pecuniary issues and this is why mediation can be good for people to explain things to each other, often those from a remote past.

List of abbreviations

FB	Föräldrabalken (<i>Code relating to Parenthood and Guardianship</i>)
RB	Rättegångsbalken (<i>Swedish Code of Judicial Procedure</i>)
SFS	Svensk författningssamling (<i>Swedish Code of Statutes</i>)

Bibliography

- Dahlqvist, A. (2014):** Mediation in the Swedish Courts: Change by EU Directive? In: Ervo, L./Nylund, A.: *The Future of Civil Litigation: Access to Courts and Court-annexed Mediation in the Nordic Countries*. Berlin: Springer.
- Hope, J. (2017):** Mediation Sweden, available at: <https://gettingthedealthrough.com/area/54/jurisdiction/38/mediation-sweden/> [2018-02-25].
- Sveriges Domstolar (2018a):** Särskild medling, available at: <http://www.domstol.se/sarskildmedling> [2018-02-25].

Sveriges Domstolar (2018b): Mer om särskild medling, available at: <http://www.domstol.se/Tvist/Sarskild-medling/Mer-om-sarskild-medling/> [2018-02-25].

Sveriges Domstolar (2018c): Förteckning över särskilda medlare, available at: <http://www.domstol.se/Tvist/Sarskild-medling/Forteckning-over-sarskilda-medlare1/> [2018-02-25].

Sveriges Domstollar (n.d.): Särskild medling. Ett enklare sätt att lösa tvister i domstol, available at: <http://www.domstol.se/Publikationer/Informationsmaterial/Medlings-broschyr.pdf> [2018-02-25].

2.2 Implementation of Regulation No 650/2012 ('Succession Regulation')

2.2.1 Law of Succession in Austria (by Judith Pfützenreuter)

Introduction of the succession law system in Austria

Austrian inheritance law was reformed through the adoption of the Inheritance Law Amendment Act (Erbrechts-Änderungsgesetz) in 2015 and through the implementation of the EU Succession Regulation No 650/2012.

In general, Austrian inheritance law is regulated by the General Civil Code (§§ 531–824 General Civil Code [ABGB]) and is based on the principle of a 'universal succession' (Universalsukzession). This means that all liabilities and rights of the deceased constitute the so-called 'Verlassenschaft' (bequest/succession) (§ 531 General Civil Code). If only one part of the succession is bequeathed in the last will and testament, one speaks of a bequest³⁷ (§ 535 of the General Civil Code). A person that does not figure within the universal succession of a deceased but, however, obtains a part of the heritage is called a legatee (and not a successor). Successors are usually entitled to a certain percentage of the succession.

The succession is initially regarded as a so-called 'dormant succession' and also as a separate legal entity (Süß, 2017, p. 325). The successor must deliver to the court a declaration of inheritance, which may be either unconditional or conditional. An unconditional declaration of inheritance means that the successor is liable with his private assets for all debts of the succession (and thus of the deceased). In the case of a conditional declaration, the successor is only liable up to the amount of the assets of the succession. This is the beginning of the so-called probate procedure. This procedure whereby the notary, who is appointed as court commissioner, is responsible for the probate proceedings, is conducted orally. Therefore, the notary has a decisive role to play in the handling of succession transfers. The probate proceedings are concluded by the so-called 'devolution of property' (§ 819 General Civil Code). Only after that, the succession becomes the property of the successor. Therefore, the Austrian settlement of succession

37 The terms did change from 'Legat' to now 'Vermächtnis', which both means bequest or legacy.

requires the initiation and implementation of ‘judicial proceedings other than disputes’ (Bajons, 2014, p. 94). This ‘exceptionally close interdependence of substantive inheritance and succession procedure law’ (Steiner, 2005, p. 144) is considered to be a special feature of Austrian inheritance regulations.

Overall, Austrian inheritance law has undergone some changes in recent years and decades. The issue of the jurisdiction of the courts in foreign inheritance proceedings is regulated by the Non-Contentious Proceedings Act (AußStrG). This ‘anachronistic’ law (Käferbock, 2008, p. 5), dating from 1854, has been fundamentally reformed and has led to the reorganization of the Federal Act by the creation of the Non-dispute accompanying law (BGB1 I 2003/111) (Käferbock, 2008, p. 6), which came into force on 1 January 2005. The probate procedure is regulated in §§ 143 to 185 of the Dispute Settlement Act (Fucik & Mondel, 2016, p. 23).

The provisions of the EU Succession Regulation, in turn, were included in the following paragraphs of the Non-Contentious Proceedings Act:

§ 143 of the Non Dispute Settlement Act – Opening of proceedings

§ 147 of the Non Dispute Settlement Act – Preserving the assets of the estate

§ 150 of the Non Dispute Settlement Act – Extract Act/prosecution procedure

§ 160a of the Non Dispute Settlement Act – Challenge relating to an authentic instrument

§ 181b of the Non Dispute Settlement Act – European Certificate of Succession

§ 182a of the Non Dispute Settlement Act – Foreign Inheritance Law Titles

§ 191 of the Non Dispute Settlement Act – Challenge relating to the authenticity of an authentic instrument

With the introduction of the EU Succession Regulation, international jurisdiction in probate proceedings was also newly regulated in §§ 105–107 JN (Jurisdiction Standard) (Fucik & Mondel, 2016, p. 9 et seq.). In addition, §§ 28–30 that figured among the private international law were completely superseded by the new legislation (Giesinger, 2014, p. 27). The new regulations relating to the EU Succession Regulation entered into force on 17 August 2015. Many provisions of the Inheritance Law Amendment Act are legally binding beginning from 1 January 2017.

Scope of application in succession matters

Since 1979, the principle of the unit of inheritance applies in Austria: the provisions of the private international law (IPRG) have linked inheritance proceedings to the principle of the law of persons and thus, in most cases, to the deceased's nationality (§ 28 (1) IPRG) (Steiner, 2005, p. 144) (Rudolf, Zöchling-Jud, Kogler, 2015, p. 120). In addition, there were other rules of jurisdiction which were linked to whether the assets were located in Austria or abroad and whether they were movable or immovable property (Rudolf et al., 2015, p.134).

Prior to the introduction of the EU Succession Regulation, Austrian law applied if immovable property was located in Austria. Therefore, when immovable property was located abroad, Austrian courts were not responsible (Rechberger & Frodl, 2015, p. 46). This means that for immovable property (e.g. real estate) located in Austria, Austrian law has always been applied – irrespective of the deceased's nationality. So far, for example, a real estate of a German testator located in Austria has always had to be dealt with in an Austrian probate court (Steiner, 2005, p. 145). If, on the other hand, assets were of movable character, a whole series of factors had to be taken into account, which will not be discussed any further at this point.³⁸

With the adoption of the EU Succession Regulation, the Article 4 now provides that it is the court of the country where the deceased had his habitual residence, that must deal with the entire succession (Fucik & Mondel, 2016, p. 16). The implementation of the European Inheritance Law led Austria to a 'fundamental change' (Solomon, 2017, RN 500) from the nationality principle to the residence principle in probate proceedings.

Another new feature for Austrian courts is that, if they have jurisdiction, they must now decide on the entire succession, regardless of where it is located (Rechberger & Zöchling-Jud, 2015, p. 51). At the same time, this means that foreign inheritance courts, that are situated where the deceased used to have his habitual residence, may also decide on assets located in Austria.

38 For an overview of the legal situation before the introduction of the EU Succession Regulation, see also (Schilchegger & Kieber, 2015, p. 218 et seq.).

Court of jurisdiction

The authority with jurisdiction in the subject matter and geographical area is the district court where the deceased's last place of legal residence was located (last abode, usual place of residence, last litigation) (Section 105 of the Austrian Law on Court Jurisdiction).³⁹

The EU Succession Regulation therefore changed basic principles that governed for a long time the jurisdiction of Austrian courts. Thus, for Austrian citizens who have their habitual residence abroad, foreign courts have now jurisdiction over the entire succession (Article 4 of the EU Succession Regulation & Article 22 sentence 1 of the EU Succession Regulation). This applies as long as the citizen has not made a choice of law (in favour of his law of origin).

In this context, a decision taken by the Supreme Court (OGH) already exists.⁴⁰ In a particular case, an Austrian citizen with habitual residence during the lifetime in Germany, died in Linz the 3 September 2015. The Linz District Court and the Vienna Inner City District Court declared one another to be competent. In the last instance, the Austrian Supreme Court argued in March 2016, that Austrian courts had no international jurisdiction. In this case and according to Article 4 of the EU Succession Regulation, a German probate court should take responsibility. This example demonstrates that even if an Austrian citizen with habitual residence abroad dies in Austria, foreign courts (meaning non-Austrian courts) may have jurisdiction.

In other words: the new legal situation that was established when the EU Succession Regulation was introduced, means that Austrian courts can declare themselves to be not competent if an Austrian citizen with habitual residence in another member state passes away. The initiation of probate proceedings (according to § 142 (1) of the Non Dispute Settlement Act) ex officio is consequently not necessary, since it 'presupposes the existence of domestic jurisdiction', which is not given in such cases (Fucik & Mondel, 2016, p. 19).

Conversely, since the EU Succession Regulation came into force, Austrian courts have been competent for foreign citizens if they had their centre of res-

³⁹ In German: Jurisdiktionsnorm.

⁴⁰ OGH, 17 March 2016 (2 Nc 27/15s).

idence in Austria. In this case, the inheritance must be treated in accordance with Austrian law.

Prerogative to choose the law of a state

Before the introduction of the EU Succession Regulation, Austrians did not have the possibility of choosing the law of succession. They did not have the possibility of a choice of court agreement either. This has now changed with the implementation of the EU Succession Regulation (Article 22).

Principles of testate succession and order of succession

The direct relatives of the deceased, as well as his spouse or registered partner, are cited as legal successors in § 730 of the General Civil Code.

The legal succession applies if the deceased has not written a (valid) will (§ 727 General Civil Code). This also applies to parts of the succession over which nothing has been disposed of.

The succession follows a parental system.⁴¹ This means that the order of the legal successors depends on the line of kinship. The order is as follows: The 1st line applies to direct descendants of the deceased (children and their descendants), the 2nd line applies to the parents of the deceased and their descendants (siblings of the deceased), and the 3rd line applies to grandparents and their descendants (aunts and uncles of the deceased) (§ 731 General Civil Code).

If a relative of a higher order is still alive, it is him who will inherit and not the relatives classified in the next line of descent. If a successor is already gone (e.g. a child of the deceased), his own remaining descendants share equally the inheritance part that the successor of the first order line was entitled to receive.⁴²

Alongside the children, the spouse and registered partner are entitled to an inheritance share of 1/3 (§ 744 General Civil Code). Since 1 January 2017, the spouse receives 2/3 of the succession in addition to the deceased's parents (2nd line) and in addition to the deceased's grandparents (3rd line) the entire succession (§ 744

41 In Austria: one talks about 'lines' ('Linien') (Solomon, 2017, p. 508).

42 Here one talks about the principle of representation and inheritance by tribe (the so-called entry principle) (Solomon, 2017, p. 510 et seq.).

General Civil Code). The rights of the spouse were thus strengthened by the inheritance law reform (Solomon, 2017, p. 512).

- Example: There is no last will. The deceased leaves the spouse and 2 children. According to the statutory shares, the spouse receives 1/3 of the succession, and each child receives 1/3 of the succession, too.
- Example 2: There is no last will. The deceased does not leave children. The deceased husband and his parents are still alive. Then the spouse inherits 2/3 and the parents of the deceased together 1/3 – that is, each 1/6 – of the succession.

Amount of the heritage – statutory share

The legal portion for persons entitled to a part of the inheritance consists of half of what the person would be entitled to according to statutory succession (§ 759 General Civil Code).

Example: The deceased leaves two children. The spouse has already passed away. None of the children were considered in the last will. The statutory share would provide that the children are entitled to 1/2 of the succession. However, since they were not considered in the last will and testament, they are entitled to a statutory share quota of 1/4 of the succession (Österreichischer Rechtsanwaltskammertag, 2018).

The statutory share is generally to be paid in cash and can also be covered as benefits in the event of death or as a gift among the living (§ 761 (1) General Civil Code).

An innovation in Austrian inheritance law is the possibility to lower the amount of the statutory share. This effect can take place when there is proof that the beneficiary of the statutory share did not have a close relationship with the deceased during the lifetime (§ 776 General Civil Code). This means, for example, that the statutory share of children who haven't had contact with their parents for a long time – for at least 20 years (Bundesministerium für Verfassung, Reformen, Deregulierung und Justiz Österreich, 2018) – is reduced by half.

Another innovation is that the parents' right to a statutory share has ceased to exist. They are only entitled to a portion of the inheritance, if it is explicitly retained in the testamentary disposition or regulated by the framework of legal succession (*ibid.*).

In addition, the statutory share may be withdrawn (also known as 'disinheritance'). This has been somewhat extended by the new Inheritance Law Amendment Act: persons who have committed a crime against the deceased's relatives or against the deceased himself and have been sentenced to prison for at least one year may be disinherited (§ 770 (1) and (2) General Civil Code). A further reason for disinheritance can occur when the beneficiary of the statutory share has caused serious psychological damage to the deceased (§ 770 (4) General Civil Code) or has grossly neglected his obligations towards the deceased as defined by family law (§ 770 (5) General Civil Code).

Furthermore, the Inheritance Law Amendment Act provides for the possibility of deferral of the statutory share (§§ 766–76 General Civil Code). Thus, it is possible for the successors to pay out a statutory share in single amounts over a period of five years (in special cases also ten years). The deferment may be specified by the testator in his last will and testament. According to statements made by the Ministry of Justice, a statutory interest rate of 4% applies with the aim to not to put the beneficiary of the statutory share at a disadvantage (*ibid.*). This possibility intends to prevent the destruction of a succession, which is often the result of the immediate payment of the statutory share. Furthermore, the deferral can be determined by the probate court, if the existence of a company is at stake (§ 767 General Civil Code).

The rights of the living spouse and the registered partner

The rights of the spouse and registered partner to claim for statutory shares (§ 744 General Civil Code) have already been explained. In addition, the spouse and registered partner (as long as they have not been legally disinherited) are granted a preferential legacy. The legal nature of the preferential right is that the spouse does not have a real right, but merely a personal claim against the heirs for the delivery of movable objects. Moreover, this arrangement allows the spouse or registered partner to stay in the common flat (§ 745 (1) General Civil

Code). In the case of divorce (and also in the case of pending divorce proceedings), the spouse benefits neither from the preferential legacy nor the statutory share (§ 746 General Civil Code).

Since the 2017 amendment, the (unregistered) partners are also entitled to a preferential legacy, if they have lived with the deceased in the same household for at least three years. However, these rights are limited to one year (§ 745 (2) General Civil Code).

In addition, the partner is granted an extraordinary right of inheritance. § 748 of the General Civil Code states that the entire succession belongs to the partner if the deceased and the partner have lived together in a common household for the last three years before the death. However, this provision only applies if there are no other legal successors.

Moreover, the Austrian law provides for a claim to ensure the maintenance of the deceased's spouse or registered partner. This is valid until the moment the remaining partner enters into a new marriage or civil partnership (§ 747 General Civil Code).

Value of the bequest

Due to the introduction of the EU Succession Regulation in Austria, some provisions regarding the inheritance value were changed. Thus, there was a reform concerning the so-called legal portion supplement due to donations during the testator's lifetime⁴³ (Steiner, 2016, p. 132).

In the case where a beneficiary entitled to a statutory share receives a donation, the value of this donation is generally credited to the recipient's statutory share (§ 78 General Civil Code). An exception to this rule can be made when the deceased has explicitly decreed the remission of this charge in his last will and testament (§ 785 General Civil Code). Contributions to a third party that is not legally entitled to a portion of the succession share are credited if they have been retained within 2 years before the deceased's death (§ 782 General Civil Code). Donations for charitable purposes are excluded if the private capital was not diminished as a result (§ 784 General Civil Code).

43 In German: Pflichtteilsergänzung wegen Schenkungen unter Lebenden.

According to § 288 of the General Civil Code, donations have to be valued with respect to the time when they were offered, so the value must be determined by Statistics Austria (Bundesanstalt Statistik Österreich, 2018) on the basis of the consumer price index. Passing wealth on death, on the other hand, has to be assessed at the time of the deceased's death (§ 780 (2) General Civil Code).

Testament and inheritance contract

The Austrian legal system provides that the disposition of the last will may be drafted in the form of a testament or of a contract of inheritance. The will – also called last will and testament – can be revoked at any time and regulates the fate or whereabouts of inheritances after death (§ 552 General Civil Code). Specific formal requirements must be observed when making a will. The types of will that are recognized under Austrian law include: a public will drawn up by a notary or court; a holographic will, which the testator must write entirely by hand and sign; a personal written will (handwritten or typed by someone other than the testator), which must be drawn up in the presence of three witnesses and signed (§§ 578 and 579 General Civil Code).

A contract of inheritance (§§ 1249 et seq. General Civil Code) cannot be unilaterally revoked. The contract of inheritance must be concluded under notarial supervision. Furthermore, in Austria, a joint will may only be made by spouses or registered partners (§ 602 General Civil Code) (Kerschbaum, 2016). Additionally, 1/4 of the property remains at the surviving spouse's free disposal as long as this quarter is not burdened by statutory shares or other claims (§ 1253, General Civil Code).

Provisions of the EU Succession Regulation that transfer possible jurisdiction to Austrian probate courts over foreign citizens, can give rise to difficulties when it comes to inheritance contracts. For instance, a contract of inheritance of a German citizen with his son – who was appointed sole heir – may be partially invalid (Kerschbaum, 2016). Although the establishment of the contract of inheritance may be considered valid under German law (Article 25 of the EU Succession Regulation), Austrian law merely grants a disposal arrangement that concerns $\frac{3}{4}$ of the succession (Kerschbaum, 2016).

Right in rem

A special feature of Austrian law is the distinction between movable and immovable property. As it has already been described, immovable and movable property located in Austria used to be subject to Austrian law (§ 106 JN). Thus, for immovable property situated in Austria, an inheritance proceeding taking place in front of Austrian courts was always necessary before the EU Succession Legislation came into force (Rechberger & Zöchling-Jud, 2015, p. 46). In theory, this is no longer necessary now, since the Austrian courts are also required to accept a European Certificate of Succession as valid proof of bequests without having to insist on a devolution of property.

Summary

The provisions of the EU Succession Regulation were taken as an opportunity in Austria to reform the inheritance law in some points (Steiner, 2016, p. 131). As shown above, the general amendments concerned national regulations both in terms of the right to a statutory share and in terms of the application of the Succession Regulation.

Probably the biggest change in Austria, when it comes to handling international inheritances, is the new regulation of responsibilities concerning probate proceedings. Article 4 of the EU Succession Regulation changed the objective link between nationality and habitual residence. Last but not least, the responsibilities concerning assets located in Austria have also been reformed and the European Certificate of Succession has been introduced. Another new feature for Austrian last wills is the possibility to choose a law in favour of the entire succession.

The qualitative section of the study will examine to what extent the new regulations are being implemented in practice, particularly with regard to cross-border probate procedures, and how practitioners assess the concrete effects of these regulations.⁴⁴

44 See chapter 3.4.3 Succession Regulation – evaluation of the experts.

List of abbreviations

ABGB	Allgemeines Bürgerliches Gesetzbuch (<i>General Civil Code</i>)
AußStrG	Außerstreitgesetz (<i>Non-Contentious Proceedings Act</i>)
ErbRÄG	Erbrechts-Änderungsgesetz (<i>Inheritance Law Amendment Act</i>)
IPRG	Internationales Privatrechtsgesetz (<i>Private International Law</i>)
JN	Jurisdiktionsnorm (<i>Jurisdiction Standard</i>)
EPG	Eingetragene Partnerschaft-Gesetz (<i>Registered Partnership Act</i>)
OGH	Oberster Gerichtshof (<i>Supreme Court</i>)
RN	Randnummer (<i>Recital</i>)
ZPO	Zivilprozessordnung (<i>Civil Process Order</i>)

Bibliography

Bajons, E.-M. (2014): Erbfälle mit Auslandsberührung unter Geltung der Europäischen Erbrechtsverordnung - Länderbericht Österreich, in: Löhnig, M. / Schwab, D. / Henrich, D. / Gottwald, P. / Grziwotz, H. / Reimann, W. / Dutta, A. (Eds.), Erbfälle unter Geltung der Europäischen Erbrechtsverordnung. Bielefeld: Verlag Ernst und Werner Gieseking.

Bundesanstalt Statistik Österreich (2018): Verbraucherpreisindex, available at: https://www.statistik.at/web_de/statistiken/wirtschaft/preise/verbraucherpreisindex_vpi_hvpi/index.html [2018-06-14]

DAV (2010): Stellungnahme Nr. 3/2010, available at: <https://anwaltverein.de/de/newsroom/id-2010-37?file=files/anwaltverein.de/downloads/newsroom/stellungnahmen/2010/SN-37.pdf> [2018-06-14]

Emmerich, J. (2016): Probleme der Anknüpfung im Rahmen der EuErbVO, Berlin: Duncker & Humblot.

Fucik, R. / Mondel, C. (2016): Das Verlassenschaftsverfahren nach der EuErbVO und dem Erbrechts-Änderungsgesetz 2015, Wien: MANZ'sche Verlags- und Universitätsbuchhandlung.

- Giesinger, L. (2014):** Auswirkungen und Anpassungserfordernisse der EU-Erbrechtsverordnung auf das österreichische Recht, in: DACH, Europäische Anwaltsvereinigung e.V. (Ed.), Die EU-Erbrechtsverordnung Nr. 650/2012 und deren Auswirkungen auf diverse Länder, Zürich: Dach Europäische Anwaltsvereinigung e. V. & Schulthess.
- Käferbock, T. (2008):** Erleichterung und Erschwernisse zur Realisierung des Erblasserwillens im internationalen Erbrecht, Frankfurt am Main: Peter Lang GmbH Internationaler Verlag der Wissenschaften.
- Kerschbaum, S. (2016):** Österreich: Verständnis des Erbvertrags nach der EuErbVO aus österreichischer Sicht, in: Zeitschrift für Erbrecht und Vermögensnachfolge, 3/2016.
- Österreichischer Rechtsanwaltskammertag (2018):** Das neue Erbrecht, available at: [http://www.rechtsanwaelte.at/buergerservice/infocorner/broschuere-erbrecht-neu/\[2018-01-16\]](http://www.rechtsanwaelte.at/buergerservice/infocorner/broschuere-erbrecht-neu/[2018-01-16]).
- Bundesministerium für Verfassung, Reformen, Deregulierung und Justiz Österreich (2018):** Pflichtteilsrecht, available at: https://www.justiz.gv.at/web2013/home/buergerservice/das_neue_erbrecht/pflichtteilsrecht~2c94848a58059036015902cec66b4f7f.de.html [2018-01-16].
- Rechberger, W. / Frodl, S. (2015):** Die Internationale Zuständigkeit, in: Rechberger, W./Zöchling-Jud, B. (Eds.), Die EU-Erbrechtsverordnung in Österreich, Wien: Verlag Österreich.
- Rechberger, W. / Zöchling-Jud, B. (2015):** Die EU-Erbrechtsverordnung in Österreich. Wien: Verlag Österreich.
- Rudolf, C. / Zöchling-Jud, B. / Kogler, G. (2015):** Kollisionsrecht, in: Rechberger, W. / Zöchling-Jud, B. (Eds.), Die EU-Erbrechtsverordnung in Österreich, Wien: Verlag Österreich.
- Schilchegger, J. / Kieber, S. (2015):** Österreichisches Verlassenschaftsverfahren, Wien: LexisNexis Verlag.
- Schlüter, W. (2007):** Erbrecht, 16th edition, München: C. H. Beck.
- Solomon, D. (2017):** Länderübersichten Österreich, in: Schlitt, G./Müller, G. (Eds.), Handbuch Pflichtteilsrecht, München: C.H. Beck.
- Steiner, A. (2005):** Das neue österreichische Nachlassverfahrensrecht und seine Auswirkungen auf deutsch-österreichische Erbfälle, Zeitschrift für Erbrecht und Vermögensnachfolge.
- Steiner, A. (2016):** Reform des österreichischen Erbrechts und ihre Auswirkung auf die kautelarjuristische Praxis. Zeitschrift für Erbrecht und Vermögensnachfolge, 3/2016.
- Süß, R. (2017):** §9 Internationale Testamentsvollstreckung, in: Bengel, M. / Reimann, W. (Eds.), Handbuch der Testamentsvollstreckung, München: C. H. Beck.

2.2.2 Law of Succession in France (by Alessia Cerchia)

Laws with reference to Succession Regulation (Legifrance, 2018)

- Ouverture des successions et saisine des héritiers: code civil, Articles 720 et seq.
- Qualités requises pour succéder: code civil, Articles 725 et seq.
- Etablissement des ordres d'héritiers: code civil, Articles 731 et seq.
- Procédure relative à l'inventaire successoral: code de procédure civile, Articles 1328 et seq.
- Acceptation de la succession (droit d'option entre l'acceptation pure et simple, l'acceptation à concurrence de l'actif net et la renonciation):
 - code civil, Articles 768 et seq.
 - code de procédure civile, Articles 1334 et seq.
- Successions vacantes (mise en oeuvre de la curatelle): code de procédure civile, Articles 1342 et seq.
- Attribution à l'Etat des successions en déshérence:
 - procédure:
 - code monétaire et financier Article L. 518-24
 - code général de la propriété des personnes publiques, Article L. 1122-1
 - code civil, Articles 811 et seq.
 - code de procédure civile, Article 1354
 - textes non codifiés
 - recensement des jugements d'envoi en possession de successions en déshérence
- Administration de la succession par un mandataire (mandat à effet posthume, mandataire désigné par convention et mandataire successoral désigné en justice):
 - code civil, Articles 812 et seq.
 - code de procédure civile, Articles 1355 et seq.

- Régime légal de l'indivision: code civil, Articles 815 et seq.
- Opérations de partage et rapports des libéralités (attributions préférentielles, partage amiable, partage judiciaire, actions en nullité du partage):
 - code civil, Articles 816 et seq.
 - code de procédure civile, Articles 1358 et seq.
- Dispositions relatives aux droits successoraux du conjoint survivant:
 - code civil, Articles 756 et seq.
 - code de procédure civile, Article 1341
- Assiette et modalités de recouvrement des droits de succession (droits de mutation à titre gratuit): code général des impôts Articles 750 ter et seq., Articles 292 A et seq. de l'annexe II, Articles 280 et seq. de l'annexe III

The opening of succession in the French legal system General jurisdiction and the possibility of choice of law

In the French legal system of inheritance, succession can be opened both following the death of the *de cuius* and following the declaration of his absence or his disappearance.

The disappearance is defined by Article 88 Code Civil as a possible cause for the opening of the succession, but only under certain conditions: as in Italy, it is necessary, first of all, to seek and obtain a judicial declaration of death, which is issued by the judge in all cases in which a person has disappeared in circumstances that may have endangered his life, when his body has not been found.

The absence is provided for in Article 128 Code Civil.

In these cases, the declaration of absence can be pronounced at the end of a period of ten years from the judgment which determined the presumption of absence.

In both cases, the judicial pronouncements of disappearance or absence have the same consequences as death, in particular marking the dissolution of the marriage and the opening of the succession. In these last hypotheses, however, the possible devolution of property of the *de cuius* will not be definitive: If it is demonstrated that the person declared absent or disappeared is still alive, the

devolution of his property following the opening of hereditary succession will be canceled retroactively.

The opening of succession

The succession opens from the moment of death, which is formalized in the death certificate, or from the date of the declaratory judgment of absence or disappearance. This date will be relevant for determining the law applicable to the succession, which will be the law in force at the time of its opening. The same date also marks the beginning of the indivisibility of the *de cuius* patrimony, which is attributed in co-ownership to the different heirs, if they exist⁴⁵.

The opening date of the succession allows to know how many and which heirs will be called to succeed the deceased, especially in the case of numerous and almost simultaneous deaths. With specific reference to these hypotheses, Article 725 (1) Code Civil, introduced by the loi of 3 December 2001, establishes that when two persons, one of whom was destined to succeed the other, perish in the same event, the order of death is established by all means. If this order can not be determined, the succession of each of them is devolved without the other being called upon. However, if one of the *codécédés* leaves descendants, these can represent their author in the succession of the other one when the representation is admitted.

Unlike what happened before 2001, the French legislator has provided that, in the event of simultaneous death between several people linked by family and successor relations, the order of death must be established by 'all means'. If, in any case, this order cannot be determined, the succession of each of them is opened without calling the other among the heirs.

An explicit exception, however, is provided for by Article 725-1 point 3 Code Civil, according to which, if one of the deceased has left heirs, these may be called in the succession of the other, after the call for representation is admitted. This solution allows, by means of the representation institute, the heir – who initially would have been excluded from the succession – to represent one of the two simultaneous deaths in order to be able to access the succession of the other one.

⁴⁵ In this context, all the sale decisions, such as the sale of property, must be taken unanimously by the heirs.

The choice of applicable law before and after the Regulation No 650/2012

The adoption of the European Regulation No. 650 of 2012⁴⁶ (Bonomi, 2010) (Davì & Zanobetti, 2013) has involved some important changes in the French discipline of international successions⁴⁷, with particular reference to the choice of applicable law. It is first necessary to point out that the French system of private international law, in matters of succession, is one of the so-called ‘splitting systems’, which apply a different discipline distinguishing between movable and immovable property.

The French legislator chose not to apply the Hague Convention of 1 August 1989, on the law applicable to succession, in which it was expressly stated the principle according to which it is applicable to succession ‘the law of the State in which the deceased had his habitual residence at the time of his death, when the deceased was a citizen of that State’ (The Hague Convention, 1 August 1989, Article 3 (1)) and also that this law ‘governs the entire estate, regardless of the location of hereditary goods’ (The Hague Convention, 1 August 1989, Article 7 (1)).

This principle of indivisibility of the *de cuius*’ heritage is not, therefore, applicable to transnational successions opened on French territory before 2015: also, the French Court of Cassation has always made a distinction between the mobile property (subject to the law of the last residence of the deceased) and the immovable property (regulated by the law of the place where it is located).

The existence of a dual discipline with regard to the law applicable in matters of succession (one for immovable property and the other for movable property) has sometimes been used to obtain the application of a law different from the one normally applied, especially regarding the movable property. In such cases, in fact, the *de cuius* could define the law applicable to his death, establishing his

46 For an examination on the effects of the application of the European Regulation No 650/12 in France: A. BONOMI, *Le choix de la loi applicable à la succession dans la proposition de règlement communautaire*; for a comparative analysis referring to the different member states: A. DAVÌ, A. ZANOBETTI (2013), *Il nuovo diritto internazionale privato delle successioni nell’Unione Europea*, in *Cuadernos de Derecho Transnacional* (Octubre 2013), Vol. 5, No 2, p. 5–139.

47 For an analysis of practical cases in the field of international successions involving French law, see: Ancel-Lioyer et. al., *Successions internationales: révolution! Recueil de cas d’application du Règlement No 650/2012*.

residence in one of the countries that offered the most favorable legislation for the pursuit of his own interests.

The advantage of the splitting system is certainly that of allowing the enhancement of the applicable law in reference to the State in which the inherited property is located. Its disadvantage – and at the same time the advantage of the unitary system – is to make it complicated – when not impossible – for the deceased to foresee and regulate his succession with sufficient certainty.

The classic example, to understand the problem, is represented by a French father, domiciled in France, who owns two buildings of equal value, one in London and the other in Paris and who wishes to send, in succession, the first to his daughter who lives in London and the second to his son who lives in France. This will, however, could be compromised, since the daughter can claim her share of the reserve on the Paris property, in application of the French law on succession, while his son cannot do the same on London property, since English law does not provide a legitimate quota for children (Lagarde, 2010).

The application of the principle of unity in the identification of the law applicable to succession, as introduced by the European Succession Regulation No 650/2012, certainly allows to solve a similar problem.

Legal heirs

The possibility of being qualified as heirs and, consequently, of being called to succession following the death of the *de cuius*, requires the presence of a plurality of assumptions, expressly governed by the law:

1. The heir must exist at the time of the opening of the succession or, if he/she has already been conceived at that moment, he/she must be born vital⁴⁸.
2. The heir must not have been declared unworthy.

The law of 2001 reformed cases of unworthiness strengthening them.

48 Article 725 Modifié par Loi No 2001-1135 du 3 décembre 2001 – Article 19 JORF 4 décembre 2001 en vigueur le 1er juillet 2002.

Article 726 of the civil code identifies two specific cases in which the indignity automatically operates, excluding the right of the unworthy to success, without the need for a judicial declaration. The first is when he is condemned, as an author or accomplice, to a criminal penalty for having voluntarily given or attempted to give death to the deceased (I); the second is when he is sentenced, as an author or accomplice, to a criminal penalty for deliberately beating or committing violence or assaulting the deceased until his death without intention to kill him (II).

Article 727 provides, however, that unworthy to succeed can be declared: anyone who is condemned, as an author or as an accessory, to a correctional punishment for having voluntarily killed or attempted to kill the deceased (i); anyone who is condemned, as an author or accessory, to a criminal conviction for voluntarily committing violence with the consequent death of the deceased without any intention to kill him (II); one who is convicted of giving false testimony against the deceased in criminal proceedings (III); a person who has been convicted of deliberately abstaining from preventing both a crime and a crime against the physical integrity of the deceased, from which death is achieved, when he could have done so without taking risks for himself or for others (IV); anyone convicted of a defamatory complaint against the deceased when a criminal conviction has been imposed for the facts reported (V).

The unworthy is excluded from the succession and retroactively loses his status of heir. However, Article 728 of the Code Civil admits a particular form of 'forgiveness' or rehabilitation of the status of heir by the direct will of the *de cuius*. This is when the *de cuius*, after the events that led to the heir's indignity and while being aware of them, declares by will that he wants to recognize to the unworthy his rights, in any case.

The unworthy is excluded only by the succession of the relative in respect of which the state of unworthiness has been produced, but not by the successions of the other members of his family. On the contrary, the children of the unworthy are not influenced by the indignity of their parent. With the changes introduced by the law of 2001, and the consequent introduction of Articles 729 (1) and 755 of the Code Civil, in fact, the children of the unworthy are no longer excluded

from the succession because of their parent but can contribute to the succession directly or through the legal instrument of the representation⁴⁹.

The ‘hereditary call’ and the right to succeed

Rights of the surviving spouse (and PACS)

The family relation determines the emergence of a successional vocation, albeit within certain limits: the collateral does not occur beyond the sixth degree, even if he is a privileged collateral. People who live together and people linked by a civil solidarity pact (or PACS) have no right to the succession of their partner. They are not excluded, however, from the right to benefit from testamentary bequests or donations, in accordance with the deceased’s will, expressed in the forms required by law.

Furthermore, a difference must first be noted between the kinship and the c.d. ‘Alliance’ (the relationship that arises as a result of marriage). Initially, only the relationship of kinship allowed the vocation to collect the succession. Traditionally, among the allies there was only a maintenance obligation, but no right to inheritance.

However, the hereditary vocation deriving from matrimonial links has been progressively recognized and the law of 23 June 2006 also improved the rights of the surviving partner (PACS) in respect of the couple’s house: now the survivor has the right, at the death of the partner, to ask to use the property belonged to him/her. The surviving spouse has also the right, for economic reasons, to request the preferential allocation of certain assets (for example, a company).

Regarding the cases of divorce or separation, the law of 2006 provides, in Article 732 of the Civil Code, that the non-divorced spouse may succeed as an heir. A spouse separated by law – although pending the divorce procedure – remains heir, since only the divorce decree puts an end to the right to inheritance.

⁴⁹ Articles 751, 752, 755: Representation is a legal fiction that has the effect of calling the succession of representatives to the rights of the represented. The representation takes place at infinity in the direct descending line. She is admitted in all cases, whether the children of the deceased compete with the descendants of a predeceased child, or that all children of the deceased having died before him, the descendants of such children are together in equal or unequal degrees. The representation is admitted in favor of the children and descendants of the unworthy, although this one is alive at the opening of the succession. The provisions of the second paragraph of article 754 are applicable to the children of the unworthy during his lifetime.

Legal portion and rights of the surviving spouse

Devolution is the transfer of the inheritance of the deceased to his heirs. In the absence of a will, the assets are devolved according to the rules established by law. In the presence of a will (defined as ‘voluntary devolution’), it will be necessary to respect the wishes of the deceased, taking into account some legal rules and the limits expressly identified by them.

In the French legal system, in addition to the surviving spouse, all persons linked by a relationship of kinship with the deceased are defined heirs. However, there are some criteria for privileging certain categories of heirs.

The civil code distinguishes, first of all, the cases in which the deceased has left a surviving spouse or not.

The ‘hereditary call’ in the absence of the surviving spouse

Article 734 of the Civil Code provides that, in the absence of a surviving spouse with the status of heir (or who is not divorced or has not renounced the succession), the heirs are called to succeed as follows:

- children and their descendants;
- father and mother, brothers and sisters and their descendants;
- ascendants other than father and mother;
- collaterals other than brothers and sisters and their descendants.

Each of these four categories constitutes an order of heirs which excludes the subsequent ones (Article 734).

The Code, therefore, provides a hierarchy between the different orders listed above. For example, children have ‘priority’ over the deceased’s father or mother.

The first order of heirs is that of the descendants, referring to which is forbidden every distinction on the basis of the relationship of filiation: It will not be possible to make distinctions in the case in which the child was adopted or was born out of wedlock.

The second order is that of the father and the mother of the deceased and of the privileged collaterals. Within this order, the distribution of the succession is determined by Articles 736 to 738 of the Civil Code:

- When the deceased leaves neither children nor brothers, sisters or descendants of the latter, the father and the mother succeed, each for a half.
- When the father and mother died before the deceased, and this one does not leave children, brothers and sisters or their descendants, ascendants or collateral, succeed him with the exclusion of other relatives.
- When the father and mother survive the deceased and he does not have descendants but he has brothers and sisters or their descendants, the succession devolves for a quarter to each parent and for the remaining half to brothers and sisters or to their descendants.
- When only the father or the mother survives, the succession is devolved for a quarter to him or her and for three quarters to brothers and sisters or their descendants.

The third order includes ancestors different from the father and the mother. Article 739 of the Civil Code states: *'In the absence of the heirs of the first two orders, the succession is attributed to ascendants other than the father and mother'*.

The fourth order includes collaterals other than brothers and sisters and their descendants, i. e. uncles, aunts, great-uncles and great-aunts.

The hereditary call in the presence of the surviving spouse

Some specific features of the French succession system must be highlighted with reference to the succession of the deceased's spouse.

In particular, in the event that the deceased leaves his or her spouse and one or more children, it will be necessary to distinguish according to whether the children are all born by spouses or there are children born outside the couple. In the first case, the surviving spouse will have the opportunity to choose between the usufruct of all the property of the succession or the property of a quarter of the same assets. If, on the contrary, some children are not born within the couple (for example, because they were born out of wedlock or from a previous mar-

riage) the spouse will have no choice but only the right, provided by law, to the sole property of a quarter of the estate's assets.

Testament

In the voluntary devolution, the deceased can leave a will, by which he regulates personally the devolution of his legacy. Donations made by the deceased can, however, be reduced through the reduction action; this is the case in which the heirs are deprived of all or part of their reserve due to excessive donations made by the deceased.

Marriage benefits can be subjected to the 'action en retranchement' in the presence of first-born children.

Furthermore, it is always possible to challenge a will, particularly when it does not respect the substantive and formal conditions imposed by law.

The hereditary reserve

The Civil Code provides for a 'reserve' for the benefit of certain persons, called 'heirs of reserve' ('héritiers réservataires'); these are the descendants and (but only in the absence of children) the spouse of the deceased. The reserve represents the share of the estate of the deceased of which the heirs cannot be deprived by law.

The reserve share depends on the number of descendants. In the absence of a descendant, a quarter of the inheritance belongs to the spouse.

Réparation réserve/quotité disponible		
Si le défunt laisse:	La quotité disponible s'élève à:	La réserve s'élève à:
Des descendants directs		
1 enfant	1/2 en pleine propriété	1/2 en pleine propriété
2 enfants	1/3 en pleine propriété	2/3 en pleine propriété
3 enfants ou plus	1/4 en pleine propriété	3/4 en pleine propriété
À défaut des descendants Le conjoint survivant en concours, par exemple, avec des frères et/ou sœurs de l'époux décédé et/ou des neveux et nièces	3/4 en pleine propriété	1/4 en pleine propriété

Table 1: Répartition Réserve / Quotité Disponible (Distribution Reserve / Available Share) (Source: Own representation after Planète Patrimoine, 2018a).

Droits successoraux du conjoint	
Héritiers laissés par le défunt	Droits du conjoint
Enfants issus de l'union (descendants)	Le conjoint pourra choisir entre: - la totalité de l'usufruit des biens existants au décès (mais pas des biens rapportés) ou - 1/4 en pleine propriété des biens existants et des biens donnés sans dispense de rapport (avancement d'hoirie)
Un ou plusieurs enfants qui ne sont pas communs aux deux époux (ex.: un enfant issu du précédent mariage de l'époux décédé)	1/4 en pleine propriété
Les deux parents du défunt (ascendants privilégiés) et pas de descendant	1/2 en propriété pour le conjoint 1/2 en propriété pour les pères et mères
Le père ou la mère du défunt, pas d'enfant ni de frère et sœur	3/4 en propriété pour le conjoint 1/4 en propriété pour l'ascendant privilégié
Frère et sœur du défunt (pas d'enfant ni de parents du défunt)	Totalité en pleine propriété pour le conjoint Toutefois, en présence de biens de famille reçus par donation ou succession: 1/2 des biens de famille en pleine propriété pour le conjoint, 1/2 pour les frères et sœurs

Table 2: Droits Successoraux Du Conjoint (Spouse's Succession Rights) (Source: Own representation after Planète Patrimoine, 2018b).

Between the death and the effective division of the property belonging to the deceased, hereditary goods fall into the co-ownership of the heirs: any heir (and only the heirs) may require division.

However, there are some exceptions. In particular:

- The judge can order a suspension of the division on the basis of Article 820 of the Civil Code when the immediate division can lead to a risk of reduction of the value of the undivided property.
- The judge can also decide to maintain the undivided ownership of particularly important assets. For example, Article 821 of the Civil Code provides that for the agricultural, commercial, craft or professional enterprise, the judicial provision of indivisibility may be arranged in favor of the spouse and minor children.

Finally, the Articles 1873 and following of the Civil Code allow the co-owners to establish, by consensus, a defined or indefinite period of indivisibility of the aforementioned assets.

The law of 23 June 2006 favored the friendly division. The principle is the freedom of the division act. Thus, in presence of a succession made up only of movable property, the heirs can carry out an absolutely consensual and private division act. On the other hand, in presence of immovable properties, a transcription of the change of ownership is necessary, which presupposes the intervention of a notary.

A judicial division can intervene as soon as there are disagreements between the heirs. Each heir receives a property for a value equal to that of his rights in the indivision.

From the division of the inheritance every heir becomes the sole owner of certain properties. The civil code states that the division has a declarative effect. This means that once the partition has been created, it is considered that every heir is, from the moment of death, the owner of the property attributed to him in the partition.

International Successions and European Regulation No 650/2012

The choice of adopting the principle of unity in the application of the law governing the entire estate of succession can give rise, in the French legal system and not only, to a plurality of critical situations.

First of all it should be highlighted the contrast that may arise in cases where the applicable law with reference to the place where the immovable property of the deceased is located is represented by the law of a non-member state of the European Union, which could therefore claim to regulate directly the properties located on its territory, thus satisfying the principle of *lex rei sitae*. It is true, in fact, that Regulation 650/12 introduces a principle of universal application of its discipline, but perplexities may arise with reference to the enforceability of such a principle to non-EU States which, as such, may be considered not bound to the respect of a similar principle.

This is an application problem of general scope, which can be referred not only to the successions opened after 2015 on French territory.

Further problems, with particular reference to the French rules of succession, have been determined by the European legislator's choice to use the criterion of 'habitual residence' of the *de cuius* (considered most suitable to ensure greater connection with the center of his life and interests) as the criterion for determining both the law applicable to the whole succession and also the Court having jurisdiction on disputes in succession matters.

Not only, in fact, the choice of such a criterion reflected in a discontinuity with the one established by Article 720 of Code Civil – according to which the successions are opened with reference to the last domicile of the deceased – but also gave rise to many problems about the determination of the last habitual residence of the deceased, that is not always easy to identify.

Some experts underline that the Working Group in charge of the preparation of the European Regulation referred to the rulings of the EU Court of Justice, which defines the habitual residence as *'the place where the person concerned has fixed, with the intention of giving it a stable character, the permanent or habitual center of his interests, it being understood that for the purpose of determining the residence it is important to take into account all the constituent elements*

of it' (CJCE 17 fév. 1977, aff. C-76/76, Di Paolo; 23 avr. 1991, aff. 297/89, Ryborg) (Lagarde, 2010).

Some French authors point out that the notion of habitual residence would not even need an abstract definition, having to be identified from time to time on the basis of a set of factual circumstances specific to each particular case, including: the duration of residence, the intention of the deceased, the place where he paid the taxes, received his income and so on.

The same Regulation (EU) no. 650/2012, moreover, in the second part of the preamble No 23, states that

'In order to determine habitual residence, the authority responsible for the succession should make a global assessment of the circumstances of the life of the deceased in the years preceding death and at the time of death, which takes into account all relevant factual elements, in particular the duration and regularity of the deceased's residence in the State concerned and his conditions and reasons. The habitual residence thus determined should reveal a close and stable connection with the State concerned taking into account the specific objectives of this Regulation.'

Article 22 of Regulation (EU) No 650/2012 provides an important exception to the application of the principle of habitual residence, where it recognizes the freedom of the deceased to choose as law applicable to his succession the law of his nationality (so-called *professio juris*), providing that the choice 'is expressed in a declaration made in the form of a provision due to death or resulting from the provisions of that provision'. Article 22 recognizes, in the case of multi-nationality, the freedom to choose between one of them without distinction.

The application of the new European law makes the compliance of the law applicable to transnational successions with the principles of the French Public Order very important. In cases of conflict, Article 35 of the European Regulation states that the law abstractly applicable, but in contrast with the principles of public order, must be disappplied, in favor of the law applicable referring to the competent Court.

The French public order in international matters allows the refusal of the application of the foreign law normally applied to regulate succession if its application would lead to a result in contrast to the essential principles of the French legal

system (i. e. are contrary to public order: discriminatory rules based on the order of birth, sex or religion of the heirs, or on differences between legitimate and non-legitimate children).

Finally, a mention must be made about the relationship between the European Certificate of Succession and the French Notoriety Act.

The European Certificate of Succession is the instrument, issued by a notary, that can be used by the heirs, the legatees who have direct rights over the succession and the testamentary executors or administrators of the inheritance who, in another Member State, need to assert their quality or to exercise, respectively, their rights as heirs or legatees and/or their powers as executors of wills or administrators of the estate.

The Certificate is not mandatory and does not replace internal documents used for similar purposes in the Member States. However, once issued for use in another Member State, the Certificate also produces its effects in the Member State whose authorities have issued it.

This Certificate represents the equivalent of the well-known Act of Acknowledgment already used in the French legal system in order to establish the status of heir of the persons called to succeed. On this point, in the Report of the French Ministry of Justice it is stated:

‘The European Certificate of Succession is not a substitute for internal documents with similar purposes, such as the act of notoriety in France. However, the certificate issued by a French notary also produces in France the effects connected to this new European instrument. As recourse to a European Certificate of Succession is not obligatory in the settlement of international successions (Article 62 of the Regulation), the French notary may therefore choose to issue either an act of notoriety or a European Certificate of Succession. Those entitled to apply for a certificate are therefore free either to use the certificate or to use the other available instruments as court decisions, authentication tools or court transactions. However, no authority or person before whom a European Certificate of Succession is issued in another State is entitled to request the production of a decision, authentication tools or judicial settlement in place of the certificate (recital 69)’.

The Organization of French Notaries has created a national register for monitoring the European Certificates of Succession required in French territory and reports that, by 2 August 2016, 52 European successor certificates have been registered. During the same period, French notaries carried out 165 searches for certificates relating to France.

List of abbreviations

CJCE	Cour de justice des Communautés européennes (<i>Court of Justice of the European Union</i>)
PACS	Pacte Civil de Solidarité (<i>Civil Solidarity Pact</i>)

Bibliography

- Bonomi, A. (2010):** Le choix de la loi applicable à la succession dans la proposition de règlement communautaire. Lausanne: L'Université de Lausanne.
- Cheysson-Kaplan, N. (2017):** Héritage: les erreurs à éviter. available at: www.macsf.fr/Patrimoine-Finance/Actualites-Conseils/Les-Echos/Heritage-les-erreurs-a-eviter [2018-04-03].
- Davi, A. Zanobetti, A. (2013):** Il nuovo diritto internazionale privato delle successioni nell'Unione Europea, in: Cuadernos de Derecho Transnacional. Varese: Università degli Studi dell'Insubria, 5/2013.
- Ancel-Lioger, Z. / Boulanger, D. / Chalas-Kudelko, S. / Dalgé, S. / Gourcy (de), R. / Herail, M. / Khairallah, G. / Nadaud, M. (2018):** Successions internationales: révolution! Recueil de cas d'application du Règlement. available at: <https://www.cridon-lyon.fr/wp-content/uploads/2016/04/Dip-Ouvrage.pdf> [2018-04-03].
- Lagarde, P. (2010):** La loi applicable et la dernière résidence habituelle du défunt, available at: www.notaries-of-europe.eu/files/cnue-events/2010-10-15/Lagarde.pdf [2018-04-03].
- Legifrance (2018):** Code Civil, available at: www.legifrance.gouv.fr/affichSarde.do;jsessionid=B84AB593D01D51B30486F466D68998DA.tplgfr41s_3?reprise=true&page=1&id-Sarde=SARDOBJT000007114384&ordre=null&nature=null&g=ls [2018-04-03].

- Ministère de la justice (2018):** Bulletin officiel du ministère de la justice – Circulaire du 25 janvier 2016 de présentation des dispositions du règlement (UE) No 650/2012, available at: www.textes.justice.gouv.fr/art_pix/JUSC1601018C.pdf [2018-04-03].
- Planète Patrimoine (2018a):** Succession avec dispositions préalables, available at: www.planete-patrimoine.com/Gestion-de-Patrimoine/Transmission-Patrimoine/succession-avec-dispositions.html [2018-04-03].
- Planète Patrimoine (2018b):** Succession sans dispositions préalables, available at: <https://www.planete-patrimoine.com/Gestion-de-Patrimoine/Transmission-Patrimoine/succession-sans-dispositions.html> [2018-04-03].
- Warnery, N. (2017):** Rapport du gouvernement sur la situation des français établis hors de france available at: www.assemblee-afe.fr/rapport-du-gouvernement-sur-la-situation-des-francais-etablis-hors-de-france-2017.html [2018-04-03].

2.2.3 Law of Succession in Germany (by Judith Pfützenreuter)

Introduction

The EU Succession Regulation No 650/12 has been implemented in German law through the adoption of the International Inheritance Law Procedure Act (IntErbRVG). The law was passed by the Bundestag with the approval of the Bundesrat on 6 June 2015 and came into force on 17 August 2015 – in accordance with Article 22 (1) of the EU Succession Regulation. The International Inheritance Law Procedure Act regulates the implementation of the EU Succession Regulation (§ 1 (1) IntErbRVG).

The provisions of the EU Succession Regulation No 650/12 have also been incorporated into the Introductory Act to the Civil Code (EGBGB). This Act regulates general provisions and responsibilities of international civil law. Section 4 (Articles 25 and 26 Introductory Act to the Civil Code) regulates the law of succession in international contexts. This section has undergone major changes as a result of the implementation of the EU Succession Regulation.

The main legal change for cases of inheritance with cross-border relations is possibly the new connecting factor of the applicable law.

Before 16 August 2015, Article 25 of the Introductory Act to the Civil Code stipulated that the testator's right of citizenship should always apply. Therefore, the starting point was the testator's nationality. Hence, this applied in principle to the entire succession. By way of derogation, a foreign law came into effect 'when a different inheritance law applied to objects situated abroad, Article 3a (2) Introductory Act to the Civil Code' (Wieland, 2014, p. 42). This was the case, for example, for properties located in France or Austria.

Furthermore, Article 25 provided the possibility for German citizens to make a conditional partial legal choice when it comes to inheritance matters. The consequence of this choice of law concerning fortune located in Germany was the fragmentation of the succession. The provisions of the EU Succession Regulation that do apply now grant German citizens an overall choice of law in favour of one's own national law (Article 22 EU Succession Regulation).

Article 26 of the Introductory Act to the Civil Code regulates the formal requirements for dispositions by will. In this matter, too, the provisions of the EU Succession Regulation No 650/12 do apply since 16 August 2015.

In addition, the new ‘omnibus bill’ (Müller-Lukoschek, 2016, p. 441) includes the legal rule of the European Certificate of Succession in the German regulations.

In the following, an overview over the German inheritance law and the regulations for international inheritance proceedings will be given, as well as the content readjustments since the introduction of the European inheritance regulation that brought about several changes.

Scope of application in succession matters

Before the European Commission and European Parliament issued the Succession Regulation No 650/12, it was the principle of nationality that applied to German inheritance cases. This was regulated by Article 25(1) of the Introductory Act to the Civil Code. More exactly, this article stated that it was the national law in relation to the deceased’s nationality at the time of death, that applied in succession matters.

For persons with multiple citizenships of several states, the so-called ‘effective citizenship’ had to be determined (Emmerich, 2016, p. 31). This was done by identifying the habitual residence of the deceased and the close personal relationships of the deceased during the lifetime. If the person was German, German law applied in principle (Article 5 (1) EGBGB). It should therefore be noted that German inheritance law has so far been linked to the testator’s nationality.

This has now changed fundamentally with the introduction of the EU Succession Regulation No 650/12. According to Article 4 of the EU Succession Regulation, national jurisdiction and applicable law are linked to the habitual residence. Before the adoption of the EU Succession Regulation, this starting point was often criticized by German associations. Members of the Inheritance Law Committee of the German Lawyers’ Association (DAV) stated in 2010:

‘The legal link to nationality still deserves priority. [...] The concept of nationality is clearly defined. It contains no subjective constituent element.’ (DAV, 2010)

In the scientific discussion one could also find numerous concerns with regard to possible difficulties that could occur in the process of interpretation of the habitual residence (Maltry, 2012, p. 157) (Wachter, 2014, p. 4).

Court of jurisdiction

In German law, the Code of Civil Procedure regulates which court is responsible for the settlement of a succession. The place of jurisdiction where probate proceedings take place is the deceased's general place of jurisdiction, i. e. his last place of residence (§ 27 Code of Civil Procedure). If a German citizen had his habitual residence abroad and died there, the German district in which the testator had his last habitual residence is declared responsible (§ 2 (4) International Inheritance Law Procedure Act).

If no choice of law has been made in favour of German law, the court in whose jurisdiction the testator had his last habitual residence (Article 4 of the EU Succession Regulation) is competent according to the EU Succession Regulation. The jurisdiction of foreign courts for the settlement of German citizens bequests, who deceased abroad, is therefore a fundamental innovation for German jurisdiction.

Another consequence of the EU Succession Regulation No 650/12 is that bequests of foreign citizens who die in Germany must be assessed according to German inheritance law.

Furthermore, according to Article 10 of the EU Succession Regulation, a German Court is also competent to settle a bequest which is situated on its territory, if the testator had the nationality of a third country. This is the case, for instance, for English citizens who have property in Germany. In that case, the German court must dispose of those bequests by applying English law (Pintens, 2014, p. 26 et seq.).

Choice of law in inheritance matters

Until today, German citizens have not had the possibility of a full choice of law in inheritance matters. However, there was the possibility to make a ‘limited choice of law in accordance with Article 25 (2) written in the Introductory Act to the Civil Code’ (Kunz, 2012, p. 208) for immovable property located in the German Federal Republic. Following the introduction of the EU Succession Regulation No 650/12, the full choice of law in favour of German law is now possible as long as German citizenship can be proved (Article 22 of the EU Succession Regulation).

Principles of testate succession and order of succession

Provisions of the German law determine the order of succession. The category of intestate successors includes persons connected with the deceased by ‘family bonds’ (descendants, parents, siblings and descendants of siblings, grandparents and their descendants).

Inheritance law in Germany is regulated in the 5th book of the German Civil Code (BGB) (§§ 1922–2385, German Civil Code). German law provides for legal intestate successors and legal succession. If there is no last will and testament, the legal succession applies to the entire bequest.

The legal succession is regulated in §§ 1924–1936 of the German Civil Code. Who belongs to the legal heirs is determined by a so-called ‘parental or regulatory system’ (Schlüter, 2007, p. 22). The descendants – the children – of the testator are the first-order successors. Second-order successors are the parents of the testator and their descendants (i. e. siblings of the testator). Third-order successors are the grandparents and their descendants (i. e. aunts and uncles of the testator). Fourth-order successors are the great-grandparents and their descendants. Heirs of the fifth and every higher order are the forefathers of the testator.

As long as a relative of a higher order is alive, the relatives of the lower order are not called to the succession (§ 1930 C.C.). This means, for example, that the testator’s parents will inherit nothing as long as the testator leaves behind his own children.

If the legal successors have already passed away, their descendants will take their place. This is regulated by a so-called ‘tribal or line system’ (Schlüter, 2007, p. 22).

Example:

- The testator had 3 children. One of the children has already passed away. The two remaining children take the place of their deceased sibling and share the remaining 1/3 of the succession claim.

The deceased's spouse or registered partner is also a legal successor.

If there is a last will and testament which excludes legal successors or bequeaths the entire fortune to third successors, German inheritance law provides for reserved shares that go to descendants, the parents and the deceased's spouse (§ 2303 C.C.).

Amount of heritage – statutory share

The statutory share is regulated in Section 5 (§§ 2303–2338 C.C.). If there exists no will or other last will and testament in the event of an inheritance, the legal heirs are granted a reserved share in accordance with the rules of statutory succession.

The amount of the statutory share refers to the value of the entire estate at the time of the deceased's death (§ 2311 C.C.). According to § 2303 of the German Civil Code, the beneficiaries of the reserved share are entitled to half of the value of the statutory inheritance as a compulsory portion.

Example:

- Version A (no last will is available): If the testator leaves 2 children and no other legal successors behind, each child will receive 1/2 of the bequest.
- Version B (a last will in favour of third parties is available): If the testator has bequeathed all his assets to a third party, his two children are each entitled to 1/4 of the assets' value defined as a reserved share.

If an existing will or contract of inheritance does not take into account the direct descendants, parents or spouse of the testator, they are nevertheless entitled to a reserved share of the inheritance whether the succession is testate. This means that in the case of disinheritance, the beneficiaries of the compulsory portion are entitled to the reserved share (§ 2303 C.C.). If the beneficiaries of the compulsory portion receive less than half of the reserved share, they are entitled to compen-

sations of the missing value which have to be acquitted by their co-successors (what is meant is the so-called additional portion of the obligation, § 2305 C.C.).

The statutory share can be withdrawn if and only if very specific conditions are fulfilled. For example, if the descendant has sought the testator's death or has violated the legal maintenance obligation towards him (§ 2333 C.C.).

A special feature of German inheritance law is the possibility to make a declaration concerning the waiver of the succession. The possibility to renounce an inheritance is written in §§ 2346–2352 of the Civil Code. The contract of renunciation of inheritance requires notarization and, unless otherwise specified, the renunciation also extends to the descendants of the renouncing heir.

It is also possible to enjoy the right of not claiming a reserved share. This is often done in order 'to maintain family ownership in one hand' (Schlüter, 2007, p. 132), as otherwise the disbursement of compulsory portion claims could lead to the destruction of a business entity. In practice, children do not claim their reserved shares in the event of the death of one parent, as they will inherit the assets after the death of both parents anyway.

The claim to a compulsory portion (§ 2303 C.C.) lapses after 3 years (§ 195 C.C.), other claims, such as the claim to a legacy (§ 2174 C.C.) in the case of real estate, after 10 years, others, such as the claim of subsequent heir to the surrender of the inheritance (§ 2130 C.C.), even after 30 years.

Rights of the living spouse and the registered partner

The spouse or registered partner of the testator takes also a special position in inheritance law. In Germany, spouses enjoy, next to the deceased's relatives, a statutory right of inheritance and thus they benefit from a right of reserved shares (§ 1931 C.C.). The same applies to registered civil partners (§ 10 Registered Civil Partnership Act – LPartG). The amount of the inheritance depends on the status of the other heirs and in which matrimonial property regime the married couple lived.

Towards successors of the first order, the spouse inherits a quarter of the bequest, towards relatives of the second order or the grandparents of the testator, the spouse inherits half of the bequest (§ 1931 (1) C.C.). If there are no relatives of

the first and second order and no grandparents, the surviving spouse inherits the entire bequest (§ 1931 (2) C.C.).

In principle, married couples in Germany live under the statutory property regime of community of surplus (§ 1363 C.C.), unless they have agreed otherwise. This means that all assets generated in the marriage are divided equally between the spouses. In the event of a spouse's death, the surviving spouse's intestate share is increased by 1/4 (§ 1371 C.C.) as a lump sum for the regular equalization of the surplus (even if the surviving spouse did not contribute as much as the deceased to the profit accumulation).

- Example: One surviving spouse and 2 children. The married couple used to live under the statutory property regime of community of surplus. The spouse inherits 1/4 of the estate. In addition, the surviving spouse's intestate share is increased by 1/4 as a lump sum for the regular equalization of the surplus. The spouse thus receives 1/2 and each child 1/4 of the heritage.

However, the spouses can also live under the contractual property regime of separation of property (§ 1414 C.C.). In this case, the surviving spouse does not benefit from an intestate share increase.

Another special feature of German inheritance law is the surviving spouse's claim to the so-called 'advance' (§ 1932 C.C.). The advance consists of the items belonging to the matrimonial household, as well as the wedding gifts. If the spouse has the status of legal successor vis-à-vis the second order relatives or grandparents of the testator, the spouse inherits all the objects mentioned above. However, if the spouse has the status of legal successor vis-à-vis the first order relatives, the spouse will only receive the objects that are sufficient to manage a household (§ 1932 (2) C.C.).

A rather far-reaching problem area, which is approached by the EU regulation, concerns the issue of matrimonial property regime. As already described above, matrimonial property regime refers to the possibility of separation or community of property. What is possible here, is a collision between German matrimonial property regime statute and foreign inheritance statute (Maltry, 2012).

Two problems may arise:

- Accumulation of norms (the heir is ‘oversupplied’)
- Lack of norms (the heir is ‘undersupplied’)⁵⁰

In principle, the Regulation allows to conclude that issues in the field of property regimes in view of the spouses’ death, are not being dealt with in the EU Succession Regulation (Recital 12 of the EU Succession Regulation). This means that in this area it is still the law of the testators’ nationality that applies. However, the legislator acknowledges that some cases of conflict may arise here and grants the courts the possibility to strike a balance between the two provisions in individual cases. Especially in Germany, this can lead to different possibilities of application.

A recent case makes this clear: A German man dies and leaves his wife and child behind. He owned a real estate in Sweden. The wife hands in a demand for a European certificate of inheritance in order to claim the inheritance of the property for herself and the child. However, the court rejected the wife’s demand. The reason for this decision is that this inheritance is based on the regulation of § 1371 (1) of the German Civil Code which makes it a regulation of matrimonial property regime. The EU Succession Regulation does not deal with this type of regime. Esskandari sums up: ‘It is disputed whether § 1371 para. 1 of the Civil Code is to be regarded as a provision under **inheritance law** or as a **provision under matrimonial property law** within the meaning of Art. 1 EU Succession Regulation’ (Esskandari & Bick, 2017, p. 40, emphasis in original).

Some German Higher Regional Courts have already submitted decisions and assessment proposals regarding that case. The interpretations differ: sometimes the equalization of the surplus is interpreted as a property right regulation⁵¹, sometimes the property right increase of the inheritance ratio is to be applied (Wieland, 2014, p. 51 et seq.)⁵².

50 In German: ‘Normenhäufung’ and ‘Normenmangel’.

51 OLG Stuttgart, Beschluss vom 8.3.2005 – 8W96/04.

52 OLG Schleswig, Beschluss vom 19.8.2013 – 3 Wx 60/13.

Inheritance value

The inheritance value and, accordingly, the amount of the reserved shares is calculated at the time of death (§ 2311 C.C.). An exception consists of the so-called spouses' 'advance'. The successor (vis-à-vis possible beneficiaries of the reserved shares) is obliged to provide information about the assets (§ 2314 C.C.). This task can also be performed by an authority or a notary on request made by the beneficiary of a reserved share. Allowances made by the testator before his death are included. The value is determined by the time at which the donation was made (§ 2315 (2) C.C.).

Gifts that were made up to 10 years before death are to be credited to a certain percentage to the value of the bequest (§ 2325 (3) C.C.).

Testament and inheritance contract

In Germany there is a large number of different forms of testamentary dispositions and legal inheritance rules, which do not exist in other states or are even explicitly prohibited there (Wieland, 2014, p. 54). These include, for example, inheritance contracts, joint wills of spouses or communities of successors.

The will is a form of unilateral disposition mortis causa, carried out by the testator. Anyone who is 16 years of age or older and has no mental disorder is eligible to make a will (§ 2229 C.C.). The will can either be notarized by a notary or drawn up by hand in accordance with certain formal requirements. The regulations for a holographic will are explained in § 2247 of the Civil Code. The will can be revoked or replaced by a new testament at any time.

In Germany it is possible for spouses and registered civil partners to draw up a joint will (§ 2265 C.C. and § 10 Registered Civil Partnership Act). Often, the partners designate each other as single successors and determine their children as the final successors. The joint will may only be revoked jointly by both partners (§ 2271 C.C.). In other words, it is a matter of the longer-living person being bound by inheritance law. According to Lehmann, the way this ruling will be dealt with in the jurisdiction of non-German inheritance courts still represents a risk of implementation of the EU Succession Regulation (Lehmann, 2015, p. 312).

A contract of inheritance (§§ 2274–2302 C.C.) is also a binding decree by reason of death. Special formal requirements apply to this contract. Thus, the contract may only be drawn up for notarization in presence of all contracting parties (§ 2276 C.C.). Furthermore, an inheritance contract can only be revoked in the presence of all contractual partners. This means that it cannot be dissolved after the death of a testator (§ 2290 C.C.).

The introduction of the EU Succession Regulation does not change the substantive law of inheritance contracts and wills. Article 24 of the EU Succession Regulation merely stipulates the admissibility and validity of an inheritance contract and will (Wieland, 2014, p. 57). These are based on the respective applicable inheritance regime, i. e. that of the last habitual residence or the choice of law that has been made.

However, the possible transfer of jurisdiction to the country of the testator's habitual residence may pose some difficulties. Lehmann (2015, p. 311 et seq.) identifies several problematic cases. On the one hand, it is possible that the applicable national law does not have any legally binding decree upon death (e. g. Spain). Thus, if a German with an inheritance contract has moved his habitual residence to Spain and has not made a choice of law, the inheritance contract cannot be enforced in Spain. Furthermore, it is questionable whether foreign inheritance courts or notaries would even become aware of an existing inheritance contract in Germany. Lehmann criticizes that there is a lack of an 'overall system for the cross-border settlement of bequests' (Lehmann, 2015, p. 311) and that there are significant gaps, especially in the transfer of information on inheritance contracts.

However, Wieland takes a positive view upon the implementation of the EU Succession Regulation: more precisely, he welcomes the opportunity for a foreign citizen living in Germany to conclude a testamentary contract in accordance with German law on the grounds of his habitual residence (Wieland, 2014, p. 57).

Right in rem

Rights in rem – such as the distinction between movable and immovable property – are sometimes defined differently by the European member states. This can lead to problems if, for example, in one country a legal figure (e. g. right of

residence) cannot be transferred one to one to a legal figure of the other country (Lechner, 2015, p. 11). Conflicts can also arise if a country's property law regime applies to estate objects which in another country fall under the inheritance regime (Schmidt, 2016, p. 269). According to Döbereiner, this relationship between inheritance and property law has become a 'big bone of contention' (Döbereiner, 2015, p. 559) in the interpretation of the EU Succession Regulation.

- Example: 'The [German] testator had his habitual residence in Belgium. He leaves behind children and his surviving spouse. Belgian inheritance law provides for the latter to be entitled to 50 % of the bequest, which competes with the legal inheritance law of the descendants which provides for 75 % of the bequest. This legal right of use cannot relate to assets located in Germany, as the German *lex situs* does not have such a legal right of use.' (Bergquist, 2015, p. 180).

The EU Succession Regulation explicitly excludes the definition of rights in rem from its scope (Article 1 (2) (k)). However, Article 31 of the EU Succession Regulation takes into account the problem areas described above. This stipulates that the rights in rem should be adapted as closely as possible to the applicable national law. Thus, Bergquist concludes in his example:

'This right of use must therefore be interpreted by adjustment in such a way that the successor is obliged to extend the usufruct in favour of the surviving spouse to the assets located in Germany. (Bergquist, 2015, p. 180).

Another problem area concerns the distinction between movable and immovable property, even in the case of jurisdiction rejection or jurisdiction transfer (Article 34 of the EU Succession Regulation). For example, a competent court in New York may only accept jurisdiction for movable property (domicile law) but does transfer jurisdiction to a foreign court (e.g. France), if the immovable property is located there (property law) (Bergquist, 2015, p. 187). In this case, it comes to a fragmentation of the succession.

The last point to be addressed here is the transfer of the bequest of immovable property, i. e. often the inheritance of estates and land. The registration of rights to movable and immovable property in a register is also excluded from the scope

of the Regulation in accordance with Article 1 (2) point I of the EU Succession Regulation. The consequences can be explained in the following case:

- Example: Deceased E with German citizenship and habitual residence in Germany leaves a house in France. He bequeathed the house to his partner L in his last will. How can L be registered as the new owner in the French property register after his death that occurred the 30 October 2015? (Döbereiner, 2015, p. 360)

According to the new EU Succession Legislation, German inheritance law applies here. However, since the transfer of rights and the entry of assets in subject registers are excluded from the ordinance, the transfer of the land plot cannot take place according to German, but must take place according to French specifications. In this example, L must register the property according to French rules. The EU Succession Regulation therefore does not simplify the transfer of the bequest. However, the practical implications of the European certificate of inheritance remain to be seen.⁵³

Summary

In order to ensure the implementation of the European Succession Legislation, the German legislature has enacted the ‘Law on Inheritance Law and on Amendments to Inheritance Certificate Regulations and on Amendments to Other Provisions’, which came into force on 17 August 2015. This includes the International Inheritance Procedure Act (Article 1), which specifically regulates the implementation of the Succession Legislation. In addition, existing German laws will be adapted in accordance with the EU Succession Regulation (Müller-Lukoschek, 2016, p. 441).

The aim of this paper was to give an introductory overview of the principles of German inheritance law and to describe the changes that have resulted from the European Succession Regulation.

⁵³ In Döbereiners opinion, the European Certificate of Succession can enable a ‚considerable relief‘ for the notary, for example, since it may spare the examination of foreign testamentary dispositions – even if further ‚acts of execution‘ may be required for the entry in a register. (Döbereiner, 2015, p. 562).

The biggest change in this area of international private law is the change concerning the general jurisdiction and the introduction of legal rules that go along with the European Certificate of Succession.

List of Abbreviations

BGB	Bürgerliches Gesetzbuch (<i>Civil Code/C.C.</i>)
EGBGB	Einführungsgesetz zum Bürgerlichen Gesetzbuch (<i>Introductory Act to the Civil Code</i>)
IntErbRVG	Internationales Erbrechtsverfahrensgesetz (<i>International Inheritance Law Procedure Act</i>)
LPartG	Lebenspartnerschaftsgesetz (<i>Registered Civil Partnership Act</i>)
OLG	Oberlandesgericht (<i>Higher Regional Court</i>)
ZPO	Zivilprozessordnung (<i>Code of Civil Procedure</i>)

Bibliography

- Bergquist, U. (2015):** EU-Erbrechtsverordnung: Kommentar. Köln: Verlag Dr. Otto Schmidt.
- DAV (2010):** Stellungnahme Nr. 3/2010. Deutscher Anwaltverein.
- Döbereiner, C. (2015):** Damnationslegate unter Geltung der EuErbVO am Beispiel des deutsch-französischen Rechtsverkehrs. ZEV Zeitschrift für Erbrecht und Vermögensnachfolge, 10/2015.
- Emmerich, J. (2016):** Probleme der Anknüpfung im Rahmen der EuErbVO. Berlin: Duncker & Humblot.
- Esskandari, M./Bick, D. (2017):** Ausweis der Erhöhung des Ehegattenerbteils im europäischen Nachlasszeugnis?, Erbschaft-Steuerberater, 2/2017. Kunz, L. (2012): Die neue Europäische Erbrechtsverordnung – ein Überblick. GPR Zeitschrift für Privatrecht der Europäischen Union 2012.

- Lechner, K. (2015):** Verordnung (EU) Nr. 650/2012: Eingehende Analyse. Brüssel: Europäisches Parlament.
- Lehmann, D. (2015):** Erhöhter Druck auf Erbvertrag, gemeinschaftliches Testament und Nacherbfolge durch die EuErbVO. ZEV Zeitschrift für Erbrecht und Vermögensnachfolge, 6/2015.
- Maltry, R. (2012):** EU-Erbrechtsverordnung – Chance und Risiken. Zeitschrift des Deutschen Juristinnenbundes, 4/2012.
- Müller-Lukoschek, J. (2016):** Das Gesetz zum Internationalen Erbrecht und zur Änderung von Vorschriften zum. Zeitschrift für die notarielle Beratungs- und Beurteilungspraxis, 12/2016.
- Paffhausen, P. (2014):** EuErbVO und GüterrechtsVO in Konflikt. Brucerius Law Journal, 8/2014.
- Pintens, W. (2014):** Einführung in die Erbrechtsverordnung, in: Dutta, A./Löhnig, M./Schwab, D./Heinrich, D./Gottwald, P./Grziwotz, H./Reimann, W. (Eds.), Erbfälle unter Geltung der Europäischen Erbrechtsverordnung. Bielefeld: Verlag Ernst und Werner Gieseking.
- Schlüter, W. (2007):** Erbrecht, 16th edition. München: C. H. Beck.
- Schmidt, J. P. (2016):** Artikel 31: Anpassung dinglicher Rechte. In: Dutta, A./Weber, J.: Internationales Erbrecht. München: C. H. Beck.
- Wachter, T. (2014):** Europäische Erbrechtsverordnung in der Gestaltungspraxis. ZNotP, 1/2014.
- Wieland, M. (2014):** Ausgewählte Rechtsfragen zur Anwendung der Europäischen Erbrechtsverordnung im deutschen Erbrecht. In: DACH (ed.), Die EU-Erbrechtsverordnung Nr. 650/2012 und deren Auswirkungen auf diverse Länder. Zürich: Dach Europäische Anwaltsvereinigung e. V. & Schulthess.

2.2.4 Law of Succession in Italy (by Silvia Pinto)

General jurisdiction (before Succession Regulation) – Legal portion

By succession is meant the set of acts and obligations required by law to provide for the fate of the property of a deceased person, that is his or her heredity. The succession opens at the time of death, in the place of the last domicile of the deceased (Article 456 of the C.C.).

The rules governing the devolution of the inheritance (Article 457 C.C.) can be established by will (testamentary succession) or, in the event of a lack or non-applicability, even partial, of the will, by law (legitimate succession). A portion of the inheritance is reserved by law to the closest relatives of the deceased (*legittimari*), and the will may not derogate from this prescription.

All those who are born or conceived at the time of the opening of the succession, have the legal capacity to succeed. When there is a will providing in that way, the same capacity belongs to the unborn children of a specific person who is already living at the time of death, except for legal entities and the unworthy (Articles 462–466 and 471–473 C.C.).

The inheritance can be accepted purely and simply or with the benefit of inventory (*accettazione con beneficio di inventario* – Article 470 C.C.).

When a survivor, who is called to the inheritance, cannot or does not want to accept it, his descendants take his place, and so on with descendants of the descendants (mechanism of representation, Articles 467–469 C.C.).

The inheritance is a communion of goods and rights (Articles 1100 et seq. C.C.), to which the co-heirs participate on a universal basis and per quota; each co-heir may at any time request the division (Article 713 C.C., Article 1111 C.C.), except in the cases contemplated by Article 715 C.C.

The heir may request the recognition of his hereditary *status* against anyone who even partially possesses hereditary goods, with or without the title of heir, in order to obtain the restitution of them (petition of the inheritance, Articles 533–535 C.C.).

Contract of inheritance

The agreements through which a person, still alive, disposes of his own succession, are null and void, as well as those through which the heir renounces the rights that may arise from a still unopened succession or those aimed at the waiver of them (prohibition of succession agreements, Article 458 C.C.). Furthermore, as an exception of the above mentioned general principle, since 2006 the Civil code provides for the ‘family pacts’ (*patti di famiglia*), which allow to regulate the transmission to the closest family members of economic activities belonging to one of them (Law 55/2006, Articles 768 bis-768 octies C.C.).

Testament (formal validity)

The will is a unilateral revocable act by which the testator, also partially, disposes of his assets for the time he or she will cease to live (Articles 587 and 589 C.C.).

The will is valid only if it respects one of the following forms (Article 606 C.C.): the holographic will that must be entirely written, dated and signed by the testator (Articles 602 and 607–608 C.C.); public testament that must be declared by the testator to a notary, in the presence of two witnesses (Article 603 C.C.), a secret will that can also be typed, but must necessarily be delivered sealed to a notary, in the presence of two witnesses (Articles 604–605, 607–608 C.C.).

The will, in addition to identifying the heirs (i. e. the beneficiaries of shares in the entire estate, Article 588 C.C.) may also include one or more legacies (*legati*). A legacy is the attribution of specific assets to natural or legal persons other than heirs, called legatees (*legatari* – Articles 649–673 C.C.). The heir is also responsible for inherited debts with his own assets, unless he accepted with the benefit of inventory (*accettazione con beneficio di inventario*), while the legatees are only responsible for debts that specifically burden the legatee, but within the limits of the value of the legacy itself.

The content of the will is unbound, but a part of the assets (including donations made in life, but net of debts Article 556 C.C.) is unavailable, as some survivors,

also called *legittimari*, always and in any case have a share of reserve.⁵⁴ If the will reduces the share of reserve due to *legittimari*, they have the right to request the reduction of the testamentary provisions and, if that is not enough, the reduction of the donations made by the deceased when he was still alive, starting from the most recent (Articles 554, 555, 559 and 564 C.C.). The *legittimari* cannot waive this right before the opening of succession (Article 557 C.C.). Every contrary agreement is null (Article 458 C.C.).

Legitimate succession (Successione legittima): Intestacy rules

In the absence of testamentary dispositions, or in the case of totally or partially invalid provisions, the legitimate succession automatically intervenes. This is a set of rules that allows the identification of the heirs and the shares to each of them (Articles 565–586 C.C.).⁵⁵

The Italian legislation looks at natural, legitimate and adoptive children equally, without any kind of difference.

Rights of the surviving spouse

The Article 540 C.C. says: 'A legitimate successor spouse has the right to live on the house used as a family residence and to use it on the furnishings that accompany it, if owned by the deceased or common. If the spouses lived in a regime of legal communion, the surviving spouse has the right to half the remainder of the communion'.

54 The Civil Code rules at Book II, Title I, Chapter X, The legitimates Article 536 C.C.: They are the spouse, the children (or their descendants), the ascendants. Article 537 C.C. If the child is only one, half of the assets are reserved for him. If the children are more than one, the reserve is 2/3 of the assets. Article 540 C.C.: The spouse is entitled 1/2 of the assets. Article 542 C.C.: If the spouse competes with a child, both have reserved 1/3 for each of the assets. If the spouse competes with several children, they are generally reserved 1/2 and the spouse 1/4 of the patrimony. Article 538 C.C. If there are no children, 1/3 of the inheritance is reserved for the ascendants. Article 544 C.C. If the ascendants compete with the spouse, the first is reserved 1/4 and the spouse 1/2 of the patrimony. The patrimony includes the *relictum* plus the *donatum*.

55 The Civil Code rules at Article 566 C.C.: Children achieve the hereditary axis in equal parts. Article 581 C.C.: The spouse has the right to half the axis if there is only one figural and 1/3 in the other cases. Article 582 C.C.: The spouse has the right to 2/3 of the inheritance if it competes with the ascendants or with the brothers and the sisters, except the right of the ascendants to 1/4 of the inheritance (Article 571 C.C.) Article 583 C.C.: In the absence of children, of ascendants, of brothers or sisters, the spouse devotes all the inheritance. Article 570 C.C. The siblings and siblings succeed in equal parts. The unilateral brothers get half of the siblings.

Matrimonial property

The principle enunciated by the Article 548 C.C. is that the legally separated spouse has the right to the reserved share. If he has been charged for the separation by a final sentence he may be entitled to a life allowance, but only if at the time of the opening of the succession he had the right to a maintenance allowance.

The Law No 76/2016 regulates civil unions between persons of the same sex. The part of the civil union is basically equated to the spouse in succession matters.

Legal aspects

The right to accept the inheritance lapses after ten years from when it arose (i. e. from the opening of the succession).

The declaration of waiver of the succession is made by the survivor to a notary or to a chancellor of the competent court on the basis of the last known residence of the deceased. This declaration is revocable within ten years of death, but the rights that in the meantime have been acquired by third parties on inheritance are preserved (Article 525 C.C.).

Tributary aspects

The heirs and legatees are burdened by the inheritance tax and the donations tax (*Testo unico- T.U.*: Legislative Decree 31/10/1990 No 346 and subsequent amendments, on inheritance taxes and donations). Furthermore, the Regulation provides for a personal income tax (*IRPEF*), applicable to inheritance credits collected by the heirs, but limited to the credits of the individual company or self-employment activity of the deceased, a mortgage tax and the cost of land register for real estate and property rights.

The payment of the inheritance tax must be made in relation to the inheritance estate (more specifically on the difference between assets and liabilities), to which three different rates apply, depending on the degree of kinship. Anyway, the tax is due for the inheritance itself, regardless of the transfer of wealth. In fact, the submission of the declaration of succession is an obligation (Articles 27 and 28 T.U.) to be completed within 12 months from the date of the opening of the

succession. Inheritance tax is payable in relation to all assets and rights transferred, even if they exist abroad. If on the date of the opening of the succession the deceased was not resident in Italy, the tax is due only in relation to the goods and rights existing there (Article 2 of the T.U.).

Credits from life insurance

The amount provided by the policy in the event of the insured's death is not part of the hereditary asset (Article 12 of the T.U.), so it is not subject to the inheritance tax. This amount does not fall within the reserve shares of the heirs at law (*legittimari*) in the event of a will (the beneficiary may return only the premiums paid in life by the deceased if one or more heirs at law (*legittimari*) are injured in their share of reserve).

Right in rem

The property is divided into movable and immovable goods (Article 812 C.C.). Rights in *rem* are divided as follows: property rights (Articles 832–951 C.C.) which can be full or burdened with other rights in *rem* (*nuda proprietà*); right of superficies (*diritto di superficie* – Articles 952–956 C.C.); right of emphyteusis (*diritto di enfiteusi* – Articles 957–977 C.C.); rights such as usufruct, use and habitation (*diritti di usufrutto, uso, abitazione* – Articles 978–1026 C.C.); rights of easement entitlements (*diritti di servitù prediali* – Articles 1027–1099 C.C.).

The heirs and legatees submit the declaration of succession for the cadastral transfer, while for the transcription in the public real estate registers, the legatee files a copy of the will and the heir deposits the act of acceptance of inheritance, even tacit, to the competent office for territory.

Documents and bureaucratic requirements

The first step is to prove the actual death of the person.

The Officer of the Civil Status of the Municipality in which the death occurred annotates in the appropriate register the death of a specific person, indicating the personal data, marital status, place, date and, if possible, the time of death.

The first document that the survivors need for the fulfillment of the formalities is a copy of the summary extract of the deed of death.

The Registry Office of the Municipality of the last residence of the deceased issues the death certificate after some days from the annotation. The certificate does not expire.

The second issue concerns the verification of the rules applicable to succession and the identification of those called to inheritance.

The heir makes a declaration that is defined as ‘act of notoriety’. It is a public deed drawn up by the registrar of the Court or by a notary in the presence of two witnesses; therein the heir declares the death, the presence or absence of a valid will and who are the legitimate heirs. A self-declaration of the heirs may be issued but it has to be signed in the presence of a municipal officer authorized to authenticate the signature. Only in that way the aforementioned self-declaration is able to replace the declaration of a notary.

Consequences of death on existing economic relationships

Bank or the Stock Broking Company, as soon as it becomes aware of the death of one of its clients and, in any case, until the presentation of the succession declaration, carries out a range of precautionary measures such as: the freeze of withdrawals from the bank account; the prohibition to access deposit booklets; the ban of the sale of the invested assets (title, shares, mutual funds, bonds, etc.) and the prohibition to access to security deposit boxes, unless a notary is present. Moreover, the co-heading of the banking and financial relationships doesn’t have any value, while the proxies released by the deceased to third persons automatically decay. The co-certification of the reports is not valid, while the proxy issued by the deceased to third parties lapses automatically.

When the deceased was an entrepreneur or exercised, whether in an associate or company form, a commercial, artistic or professional activity, the heirs must decide whether to continue the business or whether to cease and liquidate it, with the consequent activities.

In addition, a preliminary collection of information concerning the inheritance is necessary to allow its complete identification.

Finally, it is necessary to consider and resolve the potential economic and/or character conflict between those called to inheritance.

Probate court

The competent Court is the one of the places where the succession is opened. If the succession has been opened outside Italy, the competent judge is determined by the place where the main part of the assets is located (i. e. if the assets are located in Rome, the competent Court will be in Italy, specifically in Rome) or, in the absence, by the place of residence of the defendant or of the defendants (Article 22 *Codice di procedura Civile*).

Mandatory mediation attempt

Anyone who wants to sue someone else in connection with an inheritance dispute is required to conduct a preliminary mediation procedure (Article 5 (1-bis) Legislative Decree 28/10).

Private international law prior to EU Regulation No 650/12: Possibility of choice of law

The succession due to death was regulated by the national law of the deceased at the time of death. In the will the testator could choose that the whole succession is regulated by the law of the state of his residence. The choice had no effect if, at the time of death, the declarant no longer resided in that State. The choice of an Italian citizen did not affect the rights of the closest relatives of the deceased (*legittimari*) resident in Italy at the time of the death of the deceased (*de cuius*). The hereditary division was also governed by the law applicable to the succession, unless the parties agreed to apply the law of the place of the opening of the succession or of the place where one or more inheritance was found (Article 46 Law 218/1995).

The capability to make the will is regulated by the national law of the testator at the time of the will, or at the time of its modification or revocation (Article 47 Law 218/1995).

The validity of the form of the testament is established by the law of the State in which the testator has disposed, or by the law of the State of which the testator, at the time of the will or death, was a citizen or of which he was domiciled or resident (Article 48 Law 218/1995).

The Italian jurisdiction is applied if the deceased was an Italian citizen at the time of his death; if the succession has opened in Italy; if the part of the inheritance of greater economic consistency is located in Italy; if the defendant is domiciled or resident in Italy or has accepted the Italian jurisdiction, unless the dispute relates to real estate abroad; if the dispute concerns assets located in Italy (Article 50 of Law 218/1995).

The European Regulation on succession: main problems of implementation of Succession Regulation & possible sources for conflicts

The Regulation introduces rules of private international law and procedural law that replace the domestic rules. Therefore, the Regulation prevails over national rules and inconsistent rules.

Accordingly, the Regulation overturned Article 46 of Law 218/1995. Before the Regulation, as already mentioned, the rule applicable to the succession was the national law, with the option to choose the law of the State of residence. Since the entry into force of the Regulation, succession due to death is governed by the law of habitual residence of the deceased at the time of death, while the option to choose is reserved to the law of citizenship at the time of choice or death (Articles 21 and 22 Regulation 650/12). The same criterion is applied to identify the jurisdiction.

The new regulation is based on entirely acceptable principles: the unity of succession, according to which only one authority is competent to decide on the whole succession; the identity between jurisdiction and applicable law, as a result of which the court applies, in most cases, the law of the forum; the favor for succession planning in order to facilitate the organization of the succession in advance; coordination between national laws. The Regulation simplifies the procedure for managing a cross-border inheritance succession and reduces its costs, both in accordance of the automatic recognition in the member states of

the decision of the court of another member state and pursuant to the establishment of the European Certificate of Succession, allowing the heirs to prove their *status* in relation to goods in another member state. The European Certificate of Succession produces the same effects in all member states, regardless of where it is issued, and it is title for the registration of the hereditary goods in the real estate registries. Nevertheless, the use of the certificate seems to have remarkable limits. In fact, the Succession Regulation does not rule the legal requirements needed for the registration in a public register and, in particular, the requirements relating to the form of documents necessary to access to the register. Where national law limits the access to registers only to public documents, the European Certificate of Succession may not be considered as such. It will be the practice to solve these aspects. In Italian law, where the system of transcription (*trascrizione*) is applied, the title is represented by the acceptance of the inheritance contained in a public deed or in a certified private deed and for the transcription of the purchase of the legacy (*legato*) the title is represented by an authentic extract of the will (Article 2648 C.C.), not by the European Certificate of Succession. It would also be desirable for the European successor certificates to be interconnected in the ARERT (Association of the European Testament Network of Testaments) which currently interconnects only those of France, the Netherlands and Luxemburg. Other applicative problems could arise from the coexistence of both a national certificate and a European Succession Certificate, that could be in conflict with one another.⁵⁶

Besides, another problem connected to the application of the Succession Regulation is that there may be difficulties in determining the actual habitual residence of the deceased, whose definition is left to the interpreter.

Other applicative difficulties could arise regarding certain situations that are in a grey area between the matrimonial property system (*regime patrimoniale dei coniugi*), excluded from the application of the Succession Regulation, and the succession. To give just an example, consider the withdrawal (*revoca di diritto*) of the will, in the case of the subsequent marriage of the testator that concerns the property relations between spouses in common law systems, while in American law it is qualified as a succession.

⁵⁶ See also chapter 3.4, European Certificate of Succession (ECS) – evaluation of the experts.

Then, according to the Succession Regulation, the law applicable to the succession could treat the rights of the heirs at law (*legittimari*) in a different way from the Italian law. This could generate conflicts among the heirs and give rise to doubts about whether the rules that are aimed to protect the heirs at law (*legittimari*) fall within the public order concept (with the consequence that they will be considered mandatory) or not.

A potential cause of conflict among heirs could derive from the application of a law that admits the validity of agreements as to future succession, that are forbidden in Italy as well as donations due to death which, however, in other law systems are provided and assimilated to provisions due to death.

Finally, remaining on the same matter, Italy has not ratified the Hague Convention of 5 October 1961 on the conflicts of law concerning the form of the testamentary provisions, nor the Hague Convention of 2 October 1973 on the International Administration of Succession, nor the Aja of 1 August 1989 on the law applicable to succession due to death.

List of abbreviations

ARERT	Association du Réseau Européen des Registres Testamentaires (<i>Association of the European Testament Network of Testaments</i>)
C.C.	Codice Civile (<i>Civil Code</i>)
IRPEF	Imposta sul reddito delle persone fisiche (<i>Personal Income Tax</i>)
L.	legge (<i>law</i>)
Reg.UE	Regolazione unione europea (<i>Regulation of the European Union</i>)
T.U.	Testo unico (<i>Collection of legal rules</i>)

Biibliography

Bonomi, A. / Wautelet, P. (2015): Il Regolamento europeo sulle successioni. Milano: Giuffrè Editore.

Guzzi, D. (2013): Ereditare. Milano: Edizioni Fag.

Mazzon, R. (2015): Manuale pratico per la successione ereditaria. Santarcangelo di Romagna: Maggioli Editore.

2.2.5 Law of Succession in Poland (by Agnieszka Olszewska)

Introduction

Key legal regulations

Formalities concerning succession procedures in Poland vary depending on whether they are governed by a judicial procedure, which is regulated by the provisions of the Polish Code of Civil Procedure, or by a civil-law notary procedure, which is regulated by the provisions of the Polish Notary Law.

Under Polish law until 2008, proceedings to determine acquisition of the inheritance could only be held before the competent court. Since 2 October 2008, it is also possible to obtain a notarial certificate of succession from a civil-law notary. A Polish civil-law notary may draw up a notarial certificate of succession and, in that way, a Polish court can issue a decision confirming or not the acquisition of the inheritance – as long as it has jurisdiction over the particular case.

Book IV of the Polish Civil Code (Articles 922–1088) contains the principal regulations concerning succession law. The provisions contained in Book IV of the Civil Code regulate such issues as e.g. what can be inherited, which persons are called to succession and on what titles they have to be called to succession, in what way the successor acquires the inheritance, and how the successor is liable for inherited debts.

Provisions of a legal and succession-related nature are also contained in other books of the Polish Civil Code (see Articles 62, 301 (2), 445 (3), 645 (1), 691 C.C.) and in secondary legislation (see Article 56 of the Banking Law).

Legal regulations concerning succession law are also contained in the Law on the Notarial Profession Act, passed on 14 February 1991, which provides for regulations regarding such issues as the form of a will, the procedures and prerequisites for a notarial certification of succession, and the procedures and prerequisites for the European Certificate of Succession.

Major amendments of Inheritance Law (except for the cases of the inheritance of agricultural farms):

- Act of 24 August 2007 (Journal of Laws No 181, Item 1287) – introducing the notarial certificate of succession.
- Act of 2 April 2009 (Journal of Laws No 79, Item 662) – amending provisions on intestate succession.
- Act of 18 March 2011 (Journal of Laws No 85, Item 458) – introducing the provision of absolute legacy.
- Act of 20 March 2015 (Journal of Laws, Item 539) – amending the provisions concerning the acceptance of the inheritance and the successors' liability for debts (came into force on 18 October 2015).
- Act of 24 July 2015 (Journal of Laws, Item 1137) – introducing the European Certificate of Succession and adjusting Polish law to the new Regulation No 650/12 (came into force on 17 August 2015).

General Jurisdiction (before the Succession Regulation No 650/12)

Until the moment the Succession Regulation came into force, Polish courts had jurisdiction over the case when, at the time of his or her death, the deceased was a Polish citizen, had his or her permanent domicile or habitual residence in Poland, or his or her estate – even the main part of it – was located in Poland.

Moreover, Polish courts had exclusive jurisdiction in any succession case concerning a real property that was located in Poland.

Jurisdiction in a succession case

For issues that may arise in a succession proceeding within the courts' jurisdiction, the only court with jurisdiction is the court of the deceased's last habitual residence, and if his or her habitual residence in Poland cannot be established, the court with jurisdiction is the one of the place where the succession property – or the main part of it – is located (the succession court). In the absence of the above, the Regional Court of Warsaw is the succession court (Article 628 of the Polish Code of Civil Procedure).

Prerogative to choose the law of a state

Regulation (EU) No 650/12 gives the testator a limited prerogative to choose the law of the State that will be applicable to rule his or her succession case, provided that he or she is a citizen of that state at the time of choosing the law or at the time of death.

This provision changes the previously existing provision in Polish law (Article 64 of Private International Law, PPM):

‘The testator in his or her will or in any other kind of disposition in case of his or her death may subject the succession case to the law of his or her nationality, or his or her place of permanent or habitual residence at the time of performing such an act or at the moment of his or her death.’

Principles of testate succession

Order of succession

Provisions of the Polish Civil Code determine the order of succession. The category of intestate successors includes persons connected with the deceased by ‘family bonds’ (descendants, parents, siblings and descendants of siblings, grandparents and their descendants), persons connected with him or her by ‘legal bonds’ (spouse and adopted children), and persons connected with him or her by ‘bonds of affinity’ (step-children).

Furthermore, either the municipality or *gmina*⁵⁷ where there was the deceased’s last domicile or the Treasury Department of the State may be called to inherit the estate in the absence of the other aforementioned successors.

Following the amendment, the Polish Civil Code identifies six succession classes.

Under Article 931 of the Polish Civil Code, the first succession class includes the deceased’s spouse and descendants. ‘Children and spouse of the deceased shall, by operation of the statute, be called to succeed first; they shall inherit in equal portions. However, the portion taken by the spouse shall not be less than one-fourth of the entire estate. If a child of the deceased has died before the opening of the succession, the hereditary portion which would be taken by him or her

57 Polish *gmina* is a unit of territorial administrative division of Poland corresponding to Level 5 of the European Union’s NUTS – Translator’s comment.

is devolved to his or her children in equal portions. This provision shall apply accordingly to more remote descendants'. The existence of the descendants including the deceased's children excludes the other groups of successors.

Following the 2009 reform, Article 932 C.C. identifies two new succession classes. In the second class, in the absence of descendants of the deceased, his or her spouse and parents shall be called to succeed (Article 932 (1) C.C.) or his or her parents alone will be called to succeed (Article 932 (3) C.C.).

In the third class, in the absence of at least one of the parents, the deceased's siblings and their descendants are called to succeed in concurrence with the spouse or the living parent (Article 932 (4) and (5) C.C.).

In the fourth class, in the absence of the deceased's descendants, spouse, parents, siblings and the siblings' descendants, the deceased's grandparents and their descendants are called to succeed (Article 934 (1) C.C.).

In the fifth class, in the absence of the deceased's spouse and relatives by consanguinity, the children of the deceased's spouse are called to succeed (in specialist literature usually referred to as spouse's children (Article 934 C.C.).

In the sixth class, the municipality of the deceased's last domicile or the State Treasury is called to succeed (Article 935 C.C.).

Legitime (legal portion)

The 'Legitime' is a pecuniary claim of the person specified in the statute, who has not inherited any estate or has received a benefit lower than that provided by law. Those persons are entitled to the 'legitime', which allows them, in a particular case, to inherit the estate by operation of the statute if the testator has made substantial donations. It is therefore not a right to a part of the estate.

The persons who are entitled to the 'legitime' include the deceased's descendants, spouse and parents who would, in a given situation, be called to succeed as intestate successors (e. g. the parents if there are no descendants). This right is binding irrespective of whether the eligible persons have been called to succeed by operation of the statute or by the testament. The binding condition to carry out the claim for the 'legitime' is that the eligible persons have not received the

legitime that is due to them in the form of a donation, a call to succeed or a particular legacy from the testator.

Particular legacies and instructions are not taken into consideration in calculating the 'legitime'; however, the donations made by the testator are added to the estate.

In calculating the amount of the legitime, the shares in the estate should be calculated on the basis of the right of intestate successors, in a given situation (on a fractional basis). Next, the fraction has to be determined because it will be the basis for the legitime calculation. In fact, the 'legitime' is not an entire share to which a particular person has the right in intestate succession, but only a part of the share (so a proportional fraction). The general principle says it is a half of the share (Article 991 (1) C.C.). However, if the eligible person is totally incapacitated for work or the eligible descendant is a minor, then the legitime is two-thirds of the value of that share (Article 991 (1) C.C.) (Borysiak, Ksiezak, & Osjada, 2013).

Article 991 (1) C.C.: *The deceased's descendants, spouse and parents who would be named to inherit under the law are entitled, if permanently without the capacity to work or if the entitled descendant is a minor, to two-thirds of the value of the share in the estate which would fall to him or her in the case of intestate succession, and in other cases, to one-half of the value of that share (legitime).*

(2) If an entitled person has not received the legitime due to him or her in the form of a donation made by the deceased, or by being named to inherit, or in the form of a legacy, he or she is entitled to a claim against the heir for payment of the sum of money needed to cover or supplement the legitime.

The spouse's particular legacy – the rights of the living spouse

Article 939 of the Polish Civil Code allows the spouse to keep the household objects which he or she used jointly with the deceased at the time of death or which he or she used exclusively by him- or herself when the deceased was alive, but which were potentially aimed to be used by the entire family. The above-mentioned provision gives the spouse the right to demand to the other concurrent successors to have the shares in which they inherited the ownership of these household objects devolved to him or her so that he or she becomes the exclusive owner of these objects. This right may be exercised as a claim against the other successors.

Matrimonial ownership/a type of statutory matrimonial property regime

In addition to the spouse's personal property, the estate includes also the deceased's share of one-half in the community property, even though the court may determine that the spouses will own different shares in the community property (Article 46 of the Family and Guardianship Code in conjunction with Article 1035 of the Polish Civil Code and Article 43 (1) of the Family and Guardianship Code).

Polish law prescribes the existence of statutory community property.

The Family and Guardianship Code enumerates the following community property regimes:

- Statutory
- Contractual
 - Expanded statutory community property
 - Restricted statutory community property
 - Separate property
 - Separate property with compensation for possessions gained
- Compulsory

A contractual community property regime may be contracted before the marriage. The property regime may be revised or dissolved at any time during the marriage. When the parties decide to dissolve the contractual regime, the statutory property regime will automatically come into force, unless the parties have decided otherwise. A contractual property regime may be invoked with regard to other persons only when it is typed and the fact it was contracted was known to them (Smyczynski, 2016).

Testate succession

Forms of Will

A will can be drawn up in the following forms:

- As a 'notarial deed' (Article 950 of the Polish Civil Code and provisions of the Notarial Profession Act – Articles 79–95)
- As a will written 'by hand (holographic)' (the following elements are necessary to make the will valid: written entirely by hand, dated, and signed by hand) (Article 949 (1) C.C.)
- 'Nuncupative will by public act', a will made orally in the presence of a person holding public functions and two witnesses (Article 951 C.C.)

Revocation of the will

A will can be revoked at any time. The only restriction in this respect results from the requirement that the testator should have testamentary capacity at the time of the revocation of the will (Article 944 (1) C.C.). Therefore, a will cannot be revoked by a representative (Article 944 (2) C.C.), and the desire to revoke the will has to be declared clearly. The revocation of the will may concern all or some of the testator's dispositions.

Revocation methods (Article 946 C.C.)

1. The testator makes a new will.
2. With the intention of revoking the will, the testator destroys the will depriving it of the features which make it valid.
3. The testator alters the will in a way indicating that he or she intended to revoke its provisions.

Succession contracts and waiver of succession

Contracts concerning a future estate are prohibited in Poland (Article 1047 C.C.). Estate disposition can be made exclusively by means of a will (Article 941 C.C.).

An intestate heir may decide to disclaim his hereditary share with a contract stipulated with the person to whom he or she should succeed (Articles 1048–1050 of

the Polish Civil Code). The parties to the contract may only be the future testator and his or her intestate heir. The person who waives succession is excluded from succeeding as if he or she is passed away at the time of the opening of the succession, and this effect, by extension, covers also his or her more remote descendants.

The role of the civil-law notary in the Polish succession law

The type of deeds that must be drawn up by a notary, derives from the provisions contained in Book IV of the Polish Civil Code (Kot, 2015). In succession matters, civil-law notaries perform the following acts:

A notarial will

A testament drawn up in the form of a notarial deed has the power of an official instrument. It is deemed to guarantee the compliance of the testator's dispositions with his or her actual will and with the law. The requirements concerning the way in which it is drawn up, how the testament's original copy is stored and how it is registered, which are regulated in the Notarial Profession Act, protect such a testament against undesirable interference from third parties.

A declaration of acceptance or rejection of succession

The successor may carry out a declaration about the decision to accept or reject the inheritance. This choice has to be done in front of a civil-law notary and, mandatorily, within six months since he or she has become aware of the title under which he or she is called to succeed. In the case of succession opened before 18 October 2015, the failure of the successor to make a declaration within the above six-month period is equal to accepting succession without limitation of liability for debts (simple acceptance). In the case of successions opened after 18 October 2015, the lack of the successor's declaration within this period is equal to his or her acceptance under benefit of inventory.

Opening and announcement of the will

A civil-law notary performs the act of opening and announcing the will towards the interested persons, informing them of the existence of the will and of its con-

tents. If the testator has appointed an executor of the will, then, after the opening of the will, the civil-law notary gives the executor a proper certificate.

Waiver of succession contract and a repeal of waiver contract

A waiver of succession contract is executed in the form of a notarial deed. Waiver of succession also covers descendants of the waiving person (i. e. children, grandchildren, greatgrandchildren etc.) unless otherwise agreed. It is also possible to stipulate a contract to repeal a waiver of succession, which is also drawn up in the form of a notarial deed.

Obligation to dispose of the estate and an estate transfer contract

A successor who has accepted succession may, in the form of a notarial deed, dispose of the whole or of any part of the estate. The disposal of an object that is part of the estate is subject to general provisions, whereas the disposal of a share in an object that is part of the estate requires the consent of the other successors (see Article 1036 C.C.).

Partition of the estate contract

If the estate includes real estate or a cooperative member's right to ownership of a property, the partition contract should be drawn up in the form of a notarial deed. Contractual partition of the estate may cover the entire estate or be limited to part of the estate.

Major complimentary amendments of Regulation (EU) No 650/2012

The demands of the Succession Regulation, that came into effect on 17 August 2015, and the necessity for its effective implementation (Srokowka & Ryng, 2015) will be shown in this chapter.

A cross-border succession case is a succession case (e.g. a case to identify acquisition of an estate) that involves a cross-border element, i.e. legal or factual elements that are relevant for this succession case and which are located in more than one country or which are related to more than one country. E.g. the deceased's last habitual residence was located in Poland but his or her estate includes the ownership title to a real estate situated in Spain or the deceased's

last habitual residence was located in Germany but he has chosen the Polish law as the applicable law.

Jurisdiction

Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 establishes the deceased's last habitual residence as the principal criterion to establish which jurisdiction should be applicable for his or her succession case. This means that, in principle, it is the courts of the European Union member country in which the deceased had his or her habitual residence at the time of death that will have jurisdiction over the particular succession case, irrespective of the deceased's citizenship or of the location of his or her estate, including a real estate.

This brings about a relevant difference in relation to the legal situation that has been in place in Poland so far. Polish courts had jurisdiction over succession cases if one of the following criteria was satisfied: the deceased at the time of death was a Polish citizen or had his or her domicile or habitual residence in Poland or his or her estate or a significant part of it was located in Poland. Moreover, Polish courts had exclusive jurisdiction over any succession case that concerned a real estate situated in Poland.

The most important departure from the jurisdiction based on the criterion of the deceased's habitual residence at the time of death involves the option of making a 'choice-of-court' agreement that will establish a different jurisdiction over a particular succession case. In fact, this is a very relevant change in relation to the legal situation in Poland prior to the Regulation because the Polish law prescribed such an option only with regard to certain types of succession cases, such as estate partition.

Choice of applicable law

Like in the case of jurisdiction, the Regulation sets down the deceased's last habitual residence as the key criterion to establish which law is applicable for succession cases. What this means is that in principle it is the law of the country in which the deceased had his or her habitual residence at the time of death

that will be applicable for the particular succession case, irrespective of the deceased's citizenship or of the location of his or her estate.

This is a major difference from the past. In fact, under the previous provisions of Polish law, unless the testator had chosen which law should be applied to his or her succession case, the applicable law was the one of the deceased's nationality at the time of death, so the law of the country of which he or she was a citizen.

The choice of law should be made by the submission of a proper declaration. It can be part of a will or a separate declaration that follows the same formality required for a will. The declaration should state expressly that the testator chooses a particular law as the law that is applicable for his or her succession.

Major difficulties in the implementation of succession provisions and possible sources of conflict

Recognition and enforcement of decisions

Possible difficulties include the recognition and the enforcement of a court decision, i. e. extending the results of a decision issued in one country to another country. For instance, as a general principle, a decision issued by a Polish Court is lawfully binding only in Poland. To come into force in another country (e. g. in Germany) a decision has to be recognized and enforced by that country (e. g. by the German justice system). For this purpose, the decision must satisfy certain conditions specified in appropriate regulations concerning recognition and enforceability of foreign decisions in a particular category of cases.

Having the succession case decision recognized and enforced in a particular country will allow the eligible person, for example, to obtain access to the cash deposited by the deceased in a bank in this country or to recover other estate assets left there.

Major problems concerning the European Certificate of Succession (ECS)

The European Certificate of Succession is a new instrument intended to verify the person's rights to an estate. Above all, it is intended to prove the person's legal standing abroad, i. e. in other European Union member countries than the one in which the Certificate was issued. But it can also be effectively used in the country in which it was issued.

Issued according to a uniform procedure and on an identical template in all the European Union member countries in which the regulation is binding, the Certificate has made it easier for interested persons to prove their right to an estate in other EU countries. For the purpose of effectiveness beyond the territory of the state in which it is issued, it does not require recognition or enforceability.

The European Certificate of Succession does not replace the domestic instruments intended for similar purposes. In Poland it works as an alternative along with the judicial decision on acquisition of an estate and the notarial deed confirming succession.

The European Certificate of Succession is issued only when all the circumstances that are relevant for the issuance of the Certificate are verified without a doubt and are not contested by the interested parties. If this condition is not satisfied, in order to confirm the rights to succession, the interested person should use the proceedings to have the Declaration of Succession confirmed, and only after the court has issued a legally-binding decision confirming the acquisition of an estate, the interested person may potentially apply for a European Declaration of Succession.

The biggest advantage of the European Declaration of Succession is that it does not require recognition or enforceability in order to be enforceable in the other EU countries bound by the Regulation.

In Poland, the European Certificate of Succession can be obtained in the course of proceedings conducted by a Court or by a civil-law notary, according to the interested person's preference. The application for its issuance may be submitted through a special form, that is not mandatory but allows the applicant to include in the application all the required information. The court fee for the submission of the application is PLN 300, and the maximum notarial fee is PLN 400. The applicant will have the right to file a complaint with a regional court concerning the court's decision on the European Certificate of Succession or the civil-law notary's action regarding the European Certificate of Succession.

Regarding foreign documents that are not covered by the Succession Regulation, it may sometimes be required to have an Apostille issued for a particular document (according to the Hague Convention, which with regard to Poland came

into force on 14 August 2005). In cases that are not covered by The Hague Convention, the applicant may expect a requirement to obtain a consular authentication at a Polish consulate.

Potential other difficulties from foreign regulations concerning international succession proceedings

Under Polish law, civil-law notaries are not allowed to issue legal opinions concerning the interpretation of the Polish law to foreign notaries (certificat de coutume).

Polish law does not prescribe the involvement of a genealogist in a succession proceeding (either in court or before a notary). Judicial proceedings provide the possibility of summoning successors by publishing a public announcement. Such an announcement should be published in a newspaper widely read on the entire territory of Poland and made known to the public in the deceased's last residence area and in a manner that is locally visible and acceptable. The decision confirming the acquisition of the estate with regard to such succession may be issued after the lapse of six months from the date of the announcement made at the hearing scheduled by the court (Kot, 2015).

Summary

Major objectives and advantages arising from the Regulation

The Regulation's primary objectives were:

To increase the enforceability of law and the predictability of court decisions in cross-border succession cases, which is particularly important from the point of view of the testators who want to 'plan' their succession;

To simplify and facilitate the conclusion of cross-border succession cases including the confirmation of the right to succession, which is particularly important from the point of view of successors.

These objectives should be achieved in the first place by:

Common principles concerning jurisdiction, applicable law, and acceptance and confirmation of court decisions enforceability, which all the European Union countries should adopt. This will allow to substantially reduce the number of

disputes arising from the differences in laws between individual EU members states in respect to which country and under which law a particular succession case should be resolved; it will also make it easier to use in another EU country a succession case decision issued in a different member state.

Adoption of the principle ‘*one estate – one court*’, as the leading principle for the conclusion of cross-border succession cases. The point is to have all issues concerning a particular succession case, i. e. all the estate assets, irrespective of the country in which they are located, determined by just one member state court, whom decision is based only on the provisions coming from a sole legislative system (preferably the law which is binding in the individual court’s state). This will allow to avoid the necessity to have different proceedings conducted in several EU member countries and based on different provisions, granting, in turn, to save time and to reduce costs.

It is worth noting that more than 450 thousand international succession proceedings are launched every year in the European Union. Such factors as freedom of mobility and residence of natural persons as well as the open borders and the principle of an open job market and capital flow. All of them have an impact on the growth of the number of proceedings of a cross-border nature.

To sum up, the new Regulation responds to the actual needs of European Union citizens in the field of international succession law and provides confidence in the applied law by having all EU member states lay down uniform rules, and its implementation in Polish law achieves the Regulation’s objectives.

Possible difficulties in applying the Succession Regulation’s provisions and directions of potential Regulation amendments

Legal practice takes some time before potential difficulty areas can emerge and the same goes for the establishment of both good practice and further legal changes.

The following is the result of the expert suggestions thanks to whom some possible changes have been enumerated (Makowiec, 2012):

It may be observed that the choice of law pursuant to Article 21 of the Regulation is substantially limited as the person making the choice may only choose the

law of his or her nationality. It seems that the EU legislator might have granted a wider freedom to the person whose succession is involved. It could seem to be a better solution to broaden the extent of this choice, e. g. by the law of the country of the testator's habitual residence at the time of making the choice or the time of death, or the law of the country of the testator's domicile at the time of making the choice or the time of death, or the country to which his or her matrimonial regime is subject. At present, a clear tendency can be observed in EU member countries in giving the testator a significant freedom to testate.

Another dubious issue involves the lack of the option of the so-called scission of the Certificate of Succession. The person making the choice cannot subject the succession of different parts of his or her estate to separate legal systems. This arises from the fact that there is a uniform certificate for all succession rights. On the one hand, such a solution might lead to multiple complications, and, consequently, could increase the time for the conclusion of a succession case proceeding. But on the other hand, a possibility to apply a different law to different parts of the estate might lead to the development of the above-mentioned tendency of giving the testator a wider freedom to testate. Therefore, It deserves a thought about which value should have priority.

Another important issue emphasized by practitioners⁵⁸ is the double taxation of succession. Inheriting an estate abroad often causes the successor to pay the tax twice. The aforementioned double taxation is excluded only in the case of a property located in Czech Republic, Hungary and Austria since these countries are the only ones that have stipulated with Poland different agreements that prevent such double taxation.

Another problem concerning Polish law is caused by the fact that Poland does not participate in another parallel European Council regulation that is coordinated with the succession Regulation, namely the Matrimonial Property Regime Regulation (2016/1103). As a result, Poland will not be obligated to accept other than Polish decisions concerning partition of community property. If a dispute concerning the partition of an estate or community property arises, there will be difficulties in the future.⁵⁹

58 See chapter 3.4 Qualitative analysis of expert interviews.

59 FOMENTO research project report concerning Poland.

There is a great need to develop a coherent practice and case law that could define in a more detailed way the shape of the succession law, trying to homogenize it as much as possible.

It can be argued that there is a lot to do in the field of legal rules regarding the devolution of property to future generations. The Resolution is not capable of solving all problems and should not regulate every detailed issue. But, to a great extent, it will improve the current legal situation (Makowiec, 2012).

Important aspects regarding cross-border conflicts in succession matters

Cross-border succession cases can be conducted based on notarial or court procedures. By definition, civil-law notaries deal exclusively with cases that have been concluded. Therefore, it is only courts that deal with cases in which there is a conflict. In the Polish practice, succession cases belong to those which take the most time, especially the ones concerning the partition of the estate.

As things stand, it seems justified that the parties in a conflict situation should be advised to engage in mediation. In line with Polish provisions concerning mediation proceedings, courts have a freedom to broadly apply the tool of mediation in conflict situations between the parties to a proceeding.⁶⁰

List of abbreviations

C.C.	Civil Code
NUTS	Nomenclature of Units for Territorial Statistics
PLN	Żłoty (<i>Polish zloty</i>)

Bibliography

Borysiak, W. (2013): Dziedziczenie. Konstrukcja prawna i ochrona.

Borysiak, W. / Ksiezak, P. / Osjada, K. (2013): Kodeks cywilny. Komentarz (The Civil Code. A Commentary). Warszawa: Wydawnictwo C.H. Beck Sp. z o.o.

60 FOMENTO research project report concerning Poland.

- Biernat, J. / Cybula, P. (2009):** Prawo spadkowe. Pytania, kazusy, tablice. 2 edition, Warszawa: C.H. Beck.
- Kot, T. (2015):** Prawo spadkowe w Polsce (Inheritance Law in Poland). Card I, II, III, IV, V, available at: https://www.krn.org.pl/4816/Prawo_spadkowe [2018-03-31].
- Makowiec, A. (2012):** W kierunku harmonizacji prawa spadkowego w Unii Europejskiej – rozporządzenie. In: Roczniki Administracji i Prawa, 13/2013.
- Margonski, M. (2015):** Charakter prawny europejskiego poświadczenia spadkowego. Analiza prawno-porównawcza aktu poświadczenia dziedziczenia i europejskiego poświadczenia spadkowego. Warszawa: Instytut Wymiaru Sprawiedliwości.
- Skowronska-Bocian, E. (2016):** Prawo spadkowe. Warszawa: C.H. Beck.
- Smyczynski, T. (2016):** Prawo rodzinne i opiekuńcze (The Polish Family and Guardianship Code). Warszawa: Wydawnictwo C.H. Beck Sp. z o.o.
- Srokowka, A. / Ryng, A. (2015):** Informator Ministerstwa Sprawiedliwosci, available at: <https://www.ms.gov.pl/pl/archiwum-informacji/news,7400,10,jeden-spadek--jeden-sad--jedno-prawo--nowe.html> [2018-03-31].

2.2.6 Law of Succession in Sweden (by Robert Boch)

Laws with reference to Succession Regulation

Succession law (Arvsrätt) – The government's work in the field of succession is to ensure that legislation in that field is kept up to date. It may involve the implementation of EU legislation in Swedish law.

List of laws that regulate succession in Sweden:

- Law on heritage in international relations (2015:417)
 - Lag (2015:417) om arv i internationella situationer (IAL)
- Regulation with supplementary provisions to the EU's Succession Regulation (2015:422)
 - Förordning (2015:422) med kompletterande bestämmelser till EU:s arvsförordning
- Regulation on the Inheritance Fund (2004:484)
 - Förordning (2004:484) om Allmänna arvsfonden
- Regulation on certain issues relating to the Swedish Tax Agency's handling in accordance with Chapter 20 of Inheritance Code (2001:423)
 - Förordning (2001:423) om vissa frågor rörande Skatteverkets handläggning enligt 20 kap. ärvdabalken
- Marriage Code (1987:230)
 - Äktenskapsbalk (1987:230)
- Notification with detailed provisions for publication under Chapter 16 of Inheritance Code (1959:321)
 - Kungörelse (1959:321) med närmare bestämmelser om kungörande enligt 16 kap. ärvdabalken, m.m.
- Inheritance Code (1958:637)
 - Ärvdabalk (1958:637)

General jurisdiction (before Succession Regulation)

Before the EU Succession Regulation, Summary No 650/2012, two laws regarding international succession matters were in use: the law (1937:81) on international legal relationships relating to estate (IDL) and law (1935:44) on the estate after the Danish, Finnish, Icelandic or Norwegian citizen who had residence in the kingdom of Sweden (NDL I). At this time in Sweden the principle of nationality was used, which meant that the legacy of a person was always covered by the law of the deceased's country of citizenship. These laws regulated international successions but were repealed by the EU Succession Regulation, No 650/2012. For the succession of persons who died before 17 August 2015 IDL and NDL I are still in use.

Probate court

The distribution of the inheritance is mostly carried out without the involvement of the authorities. In fact, such step is handled by the parties who are entitled to the inheritance – the joint owners of the deceased's estate – who together distribute the estate after the death. The parties to the estate are the surviving spouse or cohabiting partner, heirs and universal legatees. Three months after the death, an inventory of the estate must be submitted to the Tax Agency (Skatteverket). This estate inventory reports the assets and debts of the deceased's estate. The estate inventory also shows which people are authorized to represent the estate.

When a person dies, a list of the deceased's assets and liabilities – inventory of the estate (*bouppteckning*) – is required. Then the estate distribution document (*arvskifte*) must be drawn up and signed by the heir and/or legatees, as the base for the distribution of property of the deceased between those entitled to inherit. If the survivors are not able to agree about the distribution of property, the **District Court** (tingsrätten) may appoint an official estate administrator (*boutredningsman*) or a special estate distributor (*skiftesman*) who can compel the distribution of an estate.

An estate administrator (*boutredningsman*) allows the investigation of the estate and establishes the estate inventory. Moreover, such a figure may also act as an estate distributor and fulfill the estate distribution, which means distribution of inheritance between heirs and then liquidation of the estate (Sveriges Domstolar, 2018a).

The estate distributor should first try to reach a voluntary agreement among the successors. If the heirs do not agree, the estate distributor performs a forced shift of estate (*tvångsskifte*). If someone is dissatisfied with the forced shift of estate, she or he can bring an action against the other heirs in the District Court.

The District Court (*Tingsrätten*) can decide disputes about how a testament has to be interpreted or inheritance distributed. If someone wants a testament to be declared invalid, he or she must bring an action before the District Court within six months of receiving the testament. There are 48 district courts spread out over the whole of Sweden. The District Courts have a local link - the cases that are considered by the district court come from those municipalities that fall within the district of the court (a geographical area that is included in the district court's catchment area, usually a number of municipalities) (*ibid.*).

Possibility of choice of law

The EU Succession Regulation No 650/2012 is applied as a law in Sweden and is directly applicable in the country. It contains provisions on which state's courts and other authorities may decide (has competence) in matters of succession with international connection and which state's law is applicable to the succession. The regulation entirely applies to the succession and also includes the provisions relating to estate administration in connection with the inheritance (Justitiedepartementet, 2015a).

The regulation governs which country's courts may decide on issues of succession and which country's law is applicable. These rules are applicable whether the international connection is due to an EU country or to any another country (Justitiedepartementet, 2015b). The Succession Regulation in Sweden does not only apply to countries within the EU but also to non-EU countries and the countries outside the regulation such as Iran, Thailand, Great Britain and the United States.

Legal heirs

The main rule is that if the testator was married, the surviving spouse is entitled to receive the whole inheritance. The spouses inherit each other, which means that the heirs instead inherit the survivors. The exception is if the deceased has

children with someone else, who are not the children of the surviving spouse, those children inherit directly upon the deceased's death.

If the inheritor was married, the entire estate of the surviving spouse is due to the surviving spouse, if there are no children with someone else.⁶¹ This applies to all of the deceased's estate, both marital property and separate property. The surviving spouse inherits before the common children. The common children have to wait for their inheritance until the other parent dies, these heirs thus inherit by secondary inheritance (*efterarv*) after the death of the surviving spouse.

Cohabitants (*sambos*) do not inherit each other. The common cohabitation property can be divided if the surviving cohabitant request it.

If someone dies without leaving any spouse or registered partner, the deceased's closest relatives are entitled to inherit under intestate succession in accordance with the law on inheritance (Ärvdabalk (1958:637)). The deceased (inheritor's) relatives are entitled to the inheritance based on three classes of heirs. The inheritance classes stand for succession successively. This means that as long as any heir within a class lives and can inherit, the heirs in the next class are excluded from the legacy.

- First inheritance class – the closest heirs due to relatives are the descendants of the inheritance, the so-called heirs of the body (*bröstarvingar*). Heirs of the body means children and grandchildren of the deceased.⁶²
- Second inheritance class – If a hereditary dies without leaving any children or other descendants, the inheritance goes to the parents and their descendants, which means siblings and their descendants.⁶³
- Third inheritance class – If there are no heirs in the second inheritance class the deceased's grandparents and their children inherit, that means the deceased's parent's siblings, deceased aunts and uncles.⁶⁴

61 Ärvdabalk (1958:637) – 3 kap. 1 § ÄB.

62 Ärvdabalk (1958:637) – 2 kap. 1 § ÄB.

63 Ärvdabalk (1958:637) – 2 kap. 2 § ÄB.

64 Ärvdabalk (1958:637) – 2 kap. 3 § ÄB.

No other relatives may be legal heirs, which means that cousins do not inherit by law.⁶⁵

Right of birth (*Istadarätt*) – If an heir in the first or second inheritance class is not alive, his or her descendants enter the deceased's place.

Unborn heirs – A general condition for inheritance is that the heir is alive at the time of the inheritor's death. A child conceived before the inheritor's death can inherit if he is born alive.⁶⁶

Common children – When a married person dies, the surviving spouse or wife inherit before the common children.⁶⁷ The common children have to wait for their inheritance until the other parent dies.

Heirs who are children of one of the spouses (*särkullbarn*) – Children who are not the children of the surviving spouse. When one spouse dies, his or her children with someone else are always entitled to receive their inheritance immediately. The surviving spouse's right of inheritance does not include the inheritance (*arvslott*) of the children who are not the children of the surviving spouse.⁶⁸ Those children's right to receive their inheritance is limited by the so-called base amount rule (*basbeloppsregeln*).

Adoptive children – they inherit in the same way as biological children. There is no inheritance right between adoptive children and their biological relatives. If one of the spouses adopts the other spouse's child or children, the child is considered to be the spouse's common child and is therefore treated in the same way as biological common children.

Confiscation of succession – If any person intentionally caused the death of another person, the right to take inheritance after the deceased will be forfeited.⁶⁹ That person is excluded from the inheritance (is treated as non-living). The part of the estate which would be inherited by the person who committed a crime is inherited by another heir.

65 Ärvdabalk (1958:637) – 2 kap. 4 § ÄB.

66 Ärvdabalk (1958:637) – 1 kap. 1 § ÄB.

67 Ärvdabalk (1958:637) – 3 kap. 1 § ÄB.

68 Ärvdabalk (1958:637) – 3 kap. 1 § ÄB.

69 Ärvdabalk (1958:637) – 15 kap. 1 § ÄB.

Limitation of heritage – The general rule is that an heir by law is entitled to inheritance within the maximum limitation period that is ten years from the date of death. The same rule applies to a legatee. If the right to inheritance occurs later, the ten years limitation period starts from that date.⁷⁰ If the paternity of a deceased person is not established or if the father is not known, for the co-owners of the estate (the estate is a legal person in its own right), the father or father's relatives who wish to inherit the person's property must claim his right within three months limitation period, which starts from the day of the death, or if the estate inventory is executed later, at the latest at the estate inventory.⁷¹

Intestacy rules

The estate inventory (*Bouppteckning*), a list of the deceased's assets and liabilities must be made as a basis for the division of property and distribution of estate (*arvskifte*), and must be completed within three months since the time of the deceased's death. If a parent dies, leaving spouse and children under 18, the chief guardian (*överförmyndaren*) should appoint a trustee (*god man*) who will represent those who are under age or legally incompetent in the estate inventory (Sveriges Domstolar, 2018a).

If the survivors cannot agree, the district court may appoint an official estate administrator (*boutredningsman*) or a special estate distributor (*skiftesman*) who can compel the distribution of an estate.

An estate administrator (*boutredningsman*) allows the investigation of the estate and establish the estate inventory. An estate administrator may also be an estate distributor and fulfill the estate distribution, which means distribution of inheritance between heirs and then liquidation of the estate. The EU's Succession Regulation treats a forced shift of estate (*tvångsskifte*) made by the estate administrator equal with a court judgment and acknowledges it in other Member States. It is required that the estate administrator has been impartial and that his/her decision could be appealed to a court. Because of that, a new institution, a special estate administrator, was introduced.⁷²

70 Ärvdabalk (1958:637) – 16 kap. 4 § ÄB.

71 Ärvdabalk (1958:637) – 16 kap. 3 a § ÄB.

72 Ärvdabalk (1958:637) – 19 kap. 3 § ÄB.

The district court (*Tingsrätten*) can decide disputes about how a testament is to be interpreted or inheritance distributed.

The estate (*Dödsbo*) – The estate is a legal person in its own right and therefore has its own rights and obligations. It can for example go into bankruptcy and then no distribution of the inheritance is carried out. In general, the surviving spouse, registered partner, cohabitant, heirs and legatees (persons who, according to a testament, receive whole or a part of the estate), are co-owners of the estate. They will jointly manage the deceased's property during the investigation of the estate.

Division of property and distribution of estate – If the deceased was married and the spouses had marital community, any of them had marital property (any property that is not private property), the division of property must take place before the deceased's assets can be divided. Division of property must also be made if a surviving partner (*sambo*) has requested it. When the division of property is completed and the deceased's debts have been paid, then the succession can begin and the inheritance can be divided.

The main rule is that the surviving spouse inherits before the common children of the spouses. It does not happen if there is an ongoing divorce between spouses.

Common children are entitled to inheritance if they survive the surviving parent. The surviving parent receives the free determination right of the estate. This means that the spouse may do what he or she wants with the property during her or his lifetime – even consume it entirely – but not decide about it by testament.

If there are no heirs, under the legal inheritance or by testament, the estate goes to the Inheritance Fund (*Allmänna Arvsfonden*). Swedish Inheritance Fund is a state fund, established in 1928, that distributes money to various socially useful projects.

Legal portion is the part of heritage which cannot be taken away from a child by testament. Testament that restricts the legal portion is invalid (see below).

Cohabitants (*sambo*) do not inherit each other. To inherit each other, cohabitants must write a will in favor of each other. According to The Cohabitees Act (*Sveriges Domstollar*, 2018b), the surviving cohabitant is entitled to request the divi-

sion of property of the couple's home and mortgage, if the property 'was acquired for joint use'. Whether the cohabitantes are of the same sex is of no importance.

Legal portion

The statutory/legal portion (*laglott*) – a reserved portion of estate – the portion is half of what an heir would inherit under the law, that is, half of the inheritance share.⁷³ The heirs of the body (*bröstarvingar*), which means children and grandchildren, always have the right to get their legal portion. This right cannot be limited by a testament.

If a testament limits the statutory portion, the heirs (children and grandchildren) must request an adjustment of the testament to get the statutory portion.⁷⁴ This must be done no later than six months after the heir of the body received the testament, otherwise, the right to the statutory portion will be lost.⁷⁵ The heir can bring an action against the testamentary in the district court.

Common children cannot get their statutory portion in case of the first parent's death, even if the child requests adjustment due to a testament for the benefit of the surviving spouse encroach on the statutory portion protection (*laglottsskyddet*).⁷⁶ Such a request means instead that the surviving spouse inherits statutory portion with free right of disposal (*fri förfoganderätt*) and that the child is entitled to a right of a secondary succession (*efterarvsrätt*) to a value corresponding to statutory portion.

If a testament is for the benefit of another person than the surviving spouse, a common child has the right to get the statutory portion at the first parent's death.⁷⁷ If a testament is in favor of only one or more of the deceased's children, the rest of the common children also have the right to get their statutory portion.⁷⁸

Heirs who are children to one of the spouses (*särkullbarn*), in principle, always have the right to get out their statutory portion immediately after the parent's

73 Ärvdabalk (1958:637) – 7 kap. 1 § ÄB.

74 Ärvdabalk (1958:637) – 7 kap. 3 § ÄB.

75 Ärvdabalk (1958:637) – 7 kap. 3 § ÄB.

76 Ärvdabalk (1958:637) – 7 kap. 3 § ÄB.

77 Ärvdabalk (1958:637) – 7 kap. 3 § ÄB.

78 Ärvdabalk (1958:637) – 7 kap. 3 § ÄB.

death. However, the base amount rule (*basbeloppsregeln*) may in certain cases limit the right of the heirs who are children to one of the spouses to immediately receive their statutory portion.

Rights of the surviving spouse

There is a clear rule. If the deceased was married, the entire estate goes to the surviving spouse, if there are no children with someone else.⁷⁹ This applies to all of the deceased's estate, both marital property and separate property. If the death occurred while a divorce proceeding between spouses was going on, the surviving spouse has no right to inheritance.⁸⁰

Testament (formal validity)

The testament is a legal act. The person who prepares a testament can decide who will inherit and what that person will inherit. There is one exception: an heir of the body (*bröstarvingar*) – children and grandchildren – always has the right to demand its legal portion.

As a rule, a testament must be written and witnessed by two persons. There are special requirements for witnesses. It is important that the testament fulfills the formal requirements and that the purpose of it is clearly stated.

The heirs shall be given the will. They have six months to bring an action in the District Court. If the testament is not blamed within this time then the heirs cannot claim that the testament is invalid. After a nullity action has been brought before the court, a testament can be annulled if it has not been drawn up correctly or if it has been prepared under the influence of mental illness (Regeringskansliet, 2018a).

Contract of inheritance

When the heirs have agreed on how the inheritance should be distributed, they need to set up an estate distribution document (*arvskifteshandling*) that explains who gets what. The document must be in writing and signed by the heirs⁸¹. For

79 Ärvdabalk (1958:637) – 3 kap. 1 § ÄB.

80 Ärvdabalk (1958:637) – 3 kap. 10 § ÄB.

81 Ärvdabalk (1958:637) – 23 kap. 4 § ÄB.

example, the estate distribution document is used together with the estate inventory (*bouppteckning*) to change the title of a property.

If there is only one heir, there is no need to establish any estate distribution document. In such case, the ending of the inheritance is deemed to have taken place as soon as the estate inventory has been registered at the Tax Agency.

Finally, the assets can be shifted to the heirs. The person who has access to the accounts is responsible for the payment of the inheritance. The estate will cease when the inheritance is completed, but if there is no inheritance, the estate remains as a legal person.

Right in rem (movable / immovable property)

There are no differences in treating movable and immovable property in succession cases. Anyone who has acquired the ownership rights of immovable property must apply for the registration of the acquisition (registration of title) at the National Land Survey⁸², within three months since the acquisition. A person who applies for the registration of the title must submit the document of acquisition and the other documents that are necessary for the registration of the acquisition (European e-Justice Portal, 2018).

Main problems of implementation of Succession Regulation & possible sources for conflicts

The choice of law introduced by Article 22 in Succession Regulation should lead to legal certainty.

Professional lawyers point out that a uniform regulatory framework in the field of inheritance provides an opportunity to avoid collisions between countries in cross-border successions (Kanehorn, 2016).

Through the Succession Regulation and Chapter 4 in Law on heritage in international relations (IAL)⁸³ there is a substantial change in recognition and enforcement, which means that not only judgements from a Member State are recognized in Sweden but also foreign decisions regarding succession. There are no

⁸² For more information see: National Land Survey, available at: www.lantmateriet.se.

⁸³ Lag om arv i internationella situationer (2015:417) 4 kap. IAL.

differences from the time when Succession Regulation was not in force in relation to the Nordic countries, because the Nordic Heritage Convention from 1934 still applies.⁸⁴

Countries' material succession rules will remain different and difficult to change, but creating a common regulatory framework creates predictability and security for the people. This security may be threatened because some EU countries, i. e. Ireland and Denmark, are not applying the Succession Regulation.

From a Swedish perspective, the Succession Regulation applies not only to countries in the EU but also to non-EU countries such as Iran, Great Britain and the United States. It means that regulation certainly creates a security for many citizens, but the content is not complete (Kanehorn, 2016).

Differences in various legal systems

The Succession Regulation gives a space for law selection through testament and this can lead to problems. In common law countries it is considered to be of great importance to respect the deceased's will and in civil law countries the legislature has established protection for the surviving heirs (Kanehorn, 2016).

However, a disadvantage of harmonization of inheritance law is that common law and civil law jurisdictions differ significantly. For example, the testamentary freedom is given a huge space in common law countries, and there the legal portion appears incredibly strange. In civil law countries, the protection of the family is a core of inheritance law (ibid.).

The biggest impact can occur when people choose the habitual residence law and make their children disinherited, which is possible in England. The fact that children inherit from their parents is a fundamental principle of Swedish inheritance law. The fact that a Swedish citizen can now make his children disinherited is against the Swedish succession law. Even though the inheritor is resident in a country like England, the inheritors may still live in Sweden. Persons residing in Sweden can thus lose their right to inherit their parents depending on where in the world the parent chooses to reside. It can definitely lead to major disputes (Malm, 2015).

84 Lag om arv i internationella situationer (2015:417) 1 kap. 2 § IAL.

If a related person resides in another country with foreign rules for a Swedish citizen, this may overturn the system he relied on. Some examples that can highlight the problem are that heirs inherit the deceased's debts in Poland and in the UK, you can make your children disinherited (Kanehorn, 2016). In countries such as Germany and Spain, you can also inherit a debt, which can cause a big problem (Malm, 2015). The change from the principle of nationality to the habitual residence principle implies a real upheaval for many countries and will lead to noticeable results.

The concept of habitual residence

The definition of the habitual residence plays a central role in the EU Succession Regulation and is of major importance for its consequences. The widely accepted perception of Swedish citizens is that the law of the country of origin is applicable to the succession after him and this can lead to serious misunderstandings and grievances when a person has been declared as habitual resident in another country with rules of law which are completely different from the Swedish (Kanehorn, 2016).

A practical advantage of the habitual residence principle is that the court can usually apply the law of its own country (*lex fori*). This creates predictability and legal certainty and reduces the risk of misinterpretation of law. However, a disadvantage of habitual residence as an extension factor is that in some cases it may be difficult to determine in which place a person is a resident (*ibid.*). One attempt of clarification is that if a person has just moved, his residence will be deemed to have changed to the new state if the person has changed his habitual residence, usually staying in the new country and the person also intends to stay there for a longer period (Bogdan, 2014, 134)

The meaning and concept of habitual residence is not concretely regulated in the EU Succession Regulation, it is complicated and difficult to interpret it. The term has its own meaning in almost every country and there are different requirements to be met in order for habitual residence to be deemed as arisen (Malm, 2015). The concept of habitual residence has no legal definition either in Nordic law or in EU law. Unfortunately, it is unclear that the concept of habitual residence has the same interpretation in Swedish law, in Nordic law and in EU law (Bergquist & Hedström, 2015).

The concept of habitual residence is not clarified and how the term should be interpreted is not discussed at all in the Succession Regulation, the grounds or in its legislative history. Due to the fact that there is no clear definition of habitual residence, there is still room for each country to make a free interpretation, which already causes conflicts (ibid.).

It does not create a uniform and predictable interpretation, which is a part of the purpose of the Succession Regulation. Not being able to predict which country should be indicated as a habitual residence gives an unclear legal application and neglects the predictability of the law. In addition, problems may arise when two countries consider that a person is resident in each country. Here the usual problems in Private International and Procedural Law (IP rights) arises, where the two countries are indicating different laws as applicable. To avoid conflicts, there is a need to clarify the situation of a person who has a habitual residence in two countries (Malm, 2016).

Information and lack of information

Today, active lawyers do not yet have enough knowledge of the law applicable to the deceased's inheritance when he was habitually resident in another country. On the other hand, it cannot be required that lawyers should be familiar with (all) different legal systems. It means that the choice of country of nationality will be suggested and then one of the regulation's main rules will not be filled up (Kanehorn, 2016).

Through the Succession Regulation, some uncertainties have been resolved and heirs have a chance to get into the law of succession in the two countries that may be relevant. However, the Regulation requires that citizens who move to a country other than their citizenship have knowledge of the law. The European Commission has created a website containing relevant information about EU members' material inheritance rules.⁸⁵ This website contains only information about 22 countries' inheritance law (ibid.).

In some countries, the heirs may be at risk of inheriting their parents' debts unless the property is inherited has a higher value than the debts. Of course, a choice of law can be made and Swedish law would be applicable, but many citizens with less legal knowledge are likely to end up in a difficult situation and

85 Notaries in Europe: Succession in Europe, available at: www.successions-europe.eu [2018-02-25].

a big conflict. A new situation can affect many heirs, both positive and negative, and to avoid unexpected negative consequences, people should be aware that the choice of legal frame is possible (Malm, 2015).

Out of date information and documents

People who live abroad and choose to write a testament today will hopefully become aware of the legal situation when the lawyer or notary who helps them to write the testament probably pay attention and informs about this. The rest of the population, who already have a testament or choose to not write some, probably do not know that it is possible to choose the law or do not know that it is the law of the country of habitual residence that will apply to their succession. The problems with the Succession Regulation have not yet been discovered fully because it is still something new. However, the problems will reach the heirs and they will feel the consequences that their relatives had not been better informed about the current legal situation (Malm, 2015).

List of abbreviations

ÄB	Ärvdabalken
SOU	Statens offentliga utredningar (<i>State public reports</i>)
IAL	Lag om arv i internationella situationer (<i>Law on heritage in intern. relations</i>)
IDL	Law (1937:81) on international legal relationships relating to estate
NDL	Law (1935:44) on Estates left by Danish, Finnish, Icelandic or Norwegian nationals, resident in Sweden

Bibliography

- Bergquist, U. / Hedström, U. L. (2015):** Hemvistbegreppet – svenskt, nordiskt, europeiskt, Advokaten, 8/2015.
- Bogdan, M. (2014):** Svensk internationell privat – och processrätt, attonde upplagan, Lund: Norstedts Juridik.
- European e-Justice Portal (2018):** General information Sweden, available at: https://e-justice.europa.eu/content_succession-166-se-en.do [2018-02-25].
- Justitiedepartementet (2015a):** Internationella rättsförhållanden rörande arv, available at: <https://www.regeringen.se/rattsliga-dokument/statens-offentliga-utredningar/2014/04/sou-201425/> [2018-02-25].
- Justitiedepartementet (2015b):** Arv i internationella situationer FAKTABLAD, available at: <https://www.regeringen.se/contentassets/960bc96df6894670843ed3baebd1766c/faktblad-arv-i-internationella-situationer.pdf> [2018-02-25].
- Kanehorn, O. (2016):** Internationell arvsrätt: arvsförordningen och hemvistprincipen ur ett komparativt perspektiv. Stockholm: Faculty of Law, Department of Law, Stockholm University.
- Malm, M. (2015):** Internationell arvsrätt och utlandssvenskar. Arvsförordningen och dess konsekvenser för svenska medborgare med hemvist utomlands, Umea: Umea universitet.
- Regeringskansliet (2018a):** Arvsrätt, available at: <https://www.regeringen.se/regeringens-politik/familjeratt/arvsratt> [2018-02-25].
- Regeringskansliet (2018b):** Arv – kortfattat om lagstiftningen, available at: <http://www.regeringen.se/informationsmaterial/2015/08/arv---kortfattat-om-lagstiftningen> [2018-02-28].
- Sveriges Domstolar (2018a):** Dödsfall och arv, available at: <http://www.domstol.se/Familj/Dodsfall-och-arv> [2018-02-25].
- Sveriges Domstolar (2018b):** Tingsrätt, available at: <http://www.domstol.se/Om-Sveriges-Domstolar/Domstolarna/Tingsratt> [2018-02-25].

3 Qualitative & quantitative results

3.1 Introduction of collected quantitative and qualitative data

Next to a theoretical view about the implementation of the Succession Regulation and the Mediation Directive, the second part of this research also provides a quantitative and qualitative approach to include practical information and arguments.

First of all, **statistical figures** have been collected in order to approach the following question:

- How many succession cases of cross-border relevance could there be in Europe?

As a second step, an **online survey** has been implemented to ask also about both the frequency of succession cases with an international background and the knowledge of the Succession Regulation. This online survey has taken place over a period of three months and has reached 752 participants.

To gain a specific and detailed insight into the challenges and possible consequences of Succession Regulation and of cross-border mediation in succession matters, 105 **expert interviews** have been conducted and analyzed. The research question behind the guideline-based expert interviews have been:

- How far does the Succession Regulation pose new legal uncertainties and which uncertainties may open up opportunities for the application of mediation as a conflict resolution method?
- What are the main obstacles and opportunities regarding mediation on succession matters in a cross-border context?

So, the particularities of succession cases that have a cross-border context have been examined from two different angles: from the juridical point of view and from the view of interpersonal conflict matters. Of course, depending on their professional background, the interviewees could tell more about their experience either in cross-border succession cases or in cross-border mediation.

The experts have been asked about their **experience with and evaluation of the Succession Regulation and the European Certificate of Succession**. Especially the interviewed lawyers, notaries and judges did tell about their experiences of legal cases in the field of succession and what challenges may arise in handling them.

- Cross-border succession cases – results from interviews
- Succession Regulation – evaluation of the experts
- European Certificate of Succession (ECS) – evaluation of the experts

Regarding the issues of **cross-border mediation**, the interviewers asked not only for the actual challenges and obstacles but also for the possibilities of this method regarding succession cases. Furthermore, interviewers gathered information about the preparation for those proceedings. The qualitative analysis includes the following points:

- Cross-border mediation – results from interviews
- When is a mediation useful in succession cases?
- Preparation for cross-border succession mediation
- Legal knowledge of mediators
- Online mediation in cross-border succession cases

Last but not least, professionals have been asked about their knowledge of the **Mediation Directive and the specific legal framework of mediation** of the specific country where they work. So, at the end of chapter 4.3 there can be found the evaluation of professionals on the European approach to improve mediation as a conflict resolution method and about the different implementations by the estimated countries:

- Mediation Directive – evaluation of the experts
- Legal framework on mediation – evaluation of the experts.

In the following sections, results of the analysis of quantitative and qualitative data will be presented.

3.2 Statistics on the frequency of cross-border succession cases

Key questions and method of approach

In order to assess the relevance of EU-wide legal Regulations concerning cross-border cases of inheritance, it is necessary to take a closer look at certain facts and figures. Therefore, this chapter aims to provide an insight into a collection of considerable statistical data. EU-internal migration numbers, the number of heritages in each country and the number of annual deaths of EU-citizens in other member states can be identified as such key facts. In the following, figures from Austria, France, Germany, Italy, Poland and Sweden have been collected and edited.

However, it is necessary to take into account that, in many cases, no uniform statistical surveys have been conducted on a European level yet.⁸⁶ Consequently, a variety of material has been taken mainly from each country's national records. Given that, they might not be quite comparable to each other in some cases but nonetheless they do stand for themselves. Furthermore, in many cases, making out concrete numbers in terms of the amount of heritage and of the number of annual deaths in foreign countries has proven to be difficult since most countries do not hold such records. This inevitably entails certain gaps in terms of some figures in this report. Yet, as mentioned above, this paper primarily intends to give a general overview of the residential mobility within the EU to draw attention to the frequent occurrence of transnational inheritance cases and thus, to the necessity of improvements to resolve conflicts in such matters.

Mobility amongst EU-citizens

First of all, what can generally be anticipated from the gathered figures is that, from the total number of foreigners living in each country, citizens of other EU-member states are on average more than a third of them. More precisely, they count an average number of 622.000 EU migrants per country, of which Germany, Spain and France host the highest amount and Slovenia, Estonia and Bulgaria host the lowest (European Migration Network, 2016). Beyond, when comparing the records over time, it becomes evident that EU-internal migration is fairly ris-

⁸⁶ Of course data from Eurostat was used where possible.

ing, this reflecting the increasing mobility amongst EU citizens in general (World Bank, 2013).

A closer look at a selection of figures from individual countries can provide a more detailed explanation. In Austria, for instance, a total number of 430.000 citizens have migrated to other European Countries, of which Germany (257.000) and the United Kingdom (25.000) are the most popular destinations (Statistik Austria, 2017). Vice versa, more than 655.000 EU citizens have been living in Austria in 2017 (Eurostat, 2017b) with around 181.000 Germans forming their largest group (Eurostat, 2017a).

With regard to France, the numbers are even higher. According to a report from the French foreign ministry, almost 660.000 French citizens are living in other EU member states (Warnery, 2017) and over 1.580.000 citizens of other EU Member States have chosen France as their permanent residence (Eurostat, 2017b).

Unsurprisingly, since Germany is the most densely populated country in the EU, a similarly high number of Germans are living in other EU countries. In 2017, statistical records counted 871.000 of them, ranking Austria (182.000), the UK (147.000) and Spain (141.000) in the top three of German citizens most popular destinations. Remarkably, comparing between 2012 and 2017, the number of German immigrants in the former two countries has increased by 20 and 19 per cent while the number of German citizens living in Spain has decreased by eight per cent (Statistisches Bundesamt, 2018). Besides, the German Federal Bureau of Statistics has specifically focused upon the number of pensioners moving abroad, gathering that 3,4 per cent of them emigrates once they are retired. The official report suggests that many of those pensioners are foreign citizens, moving back to their home countries but also mentions that in 2014, for instance, 980 pensioners with German citizenship have moved to Spain, 710 to Austria and 570 to Poland (ibid.). Corresponding to these migration flows, Germany is host to the highest number of EU-immigrants, counting almost four million in 2017 (Eurostat, 2017b). Especially for Poles (726.000), Italians (566.000) and Romanians (507.000), Germany appears to be a particularly popular destination (Eurostat, 2017a).

With regard to Italy, figures are even much higher, with the Ministry of Foreign Affairs counting over 2.125.000 Italian citizens living in various EU mem-

ber states in 2016. According to these records, the number of Italians living in Germany ranks with over 760.000, even remarkably higher than what has been referred to in the above, putting France in second place (405.000) and Belgium in third place (276.000) (Ministero degli Affari Esteri e della Cooperazione Internazionale, 2018). Besides, the total number of EU immigrants in Italy ranks almost 1.540.000 (Eurostat, 2017b), of which the 1.168.000 Bulgarian citizens make up almost two-thirds of them alone (Eurostat, 2017a).

As the relatively high number of Polish immigrants in Germany has already shown, a total of 2.360.000 Polish citizens live not only in Germany but also in other EU countries (Eurostat, 2018). In Ireland, the UK, the Netherlands and Norway, for example, they make up the largest group of immigrants in total (Eurostat, 2017a). On the other hand, however, being host to 29.000 EU-citizens, Poland ranks far below the average in terms of the amount of EU immigrants (Eurostat, 2017b).

In the case of Sweden, no data were collected from an official government organization up till today. However, according to the NGO 'Swedes Worldwide', 90.000 Swedish citizens count Spain as their main residence and an equally high number of them live in the United Kingdom, putting those two countries, together with France, in third till fifth position in the ranking of the most popular destinations to migrate to (Aftonbladet, 2018). Furthermore, there are about 310.000 European immigrants living in Sweden (Eurostat, 2017a), of which Finish (55.800) and Polish (52.500) citizens make up the largest groups (Eurostat, 2017b).

Other factors

Self-evidently, these processes cause even more extensive effects. For instance, the French Consular Office reports about 7.000 deaths of abroad-living French citizens per year (Warnery, 2017) and statistics of the Swedish Ministry for Foreign Affairs display a rise in numbers to about 1.000 deaths per year as well (Aftonbladet, 2018). To get an insight about the amount of heritage, some figures from Austria and Germany shall be presented here: the sum of heritage in Austria for 2010 amounts to approximately 8 billion euros. Researchers from Vienna University of Economics and Business predict an increase in the amount of heritage per year to up to 20 billion Euros by 2030 due to demographic change

(Altzinger and Humer, 2013, p. 2). In the case of Germany, depending on methods and data that researchers are using, the annual amount of heritage is estimated to be between 200 and 385 billion euros per year (Tiefensee and Grabka, 2017, p. 569). Even though it is not specified precisely to which extend this includes heritages abroad, regarding the vast numbers of Austrian and German citizens living abroad, it can be figured that cross-border succession cases certainly make up an important part of it. According to estimations of the European Commission thereupon, 9–10 per cent of all cases of inheritance have an ‘international’ dimension, which could make up to a volume of approximately 123.3 billion euros per year (Kommission der Europäischen Gemeinschaften, 2009). Such facts need to be taken into account in order to understand the full dimension and consequences of EU internal migration flows.

Conclusion

In any case, this part has shown that more and more people are and will be affected by heritages with some sort of international links. Either because they themselves move to another (European) country or because they inherit from relatives living abroad, citizens of the European Union are very likely to be confronted with questions about the prevailing inheritance law, especially regarding the consequences of the Succession Regulation. To support mobility processes within the European Union, it is therefore worthy to ask about the challenges of these international succession cases and how to meet them.

Bibliography

- Aftonbladet (2018):** Dagens tre rubriker 30 mars, available at: <https://www.aftonbladet.se/tv/a/248152> [2018-02-27].
- Altzinger, W. / Humer, S. (2013):** Simulation des Aufkommens verschiedener Erbschaftsbesteuerungen, Vienna: Vienna University of Economics and Business (WU).
- European Migration Network (2016):** Migration and Migrant Population Statistics in EU-28, available at: https://ec.europa.eu/eurostat/statistics-explained/index.php/Migration_and_migrant_population_statistics [2018-05-03].

- Eurostat (2017a):** Main countries of citizenship and birth of foreign/ foreign-born population, available at: http://ec.europa.eu/eurostat/statistics-explained/images/6/60/Main_countries_of_citizenship_and_birth_of_the_foreign_foreign-born_population%2C_1_January_2017_%28in_absolute_numbers_and_as_a_percentage_of_the_total_foreign_foreign-born_population%29.png [2018-05-07].
- Eurostat (2017b):** Non-national population by group of citizenship, available at: https://ec.europa.eu/eurostat/statistics-explained/index.php/Migration_and_migrant_population_statistics [2018-05-14].
- Eurostat (2018):** Population on 1 January by age group, sex and citizenship, available at: http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr_pop1ctz&lang=en [2018-05-14].
- Kommission der Europäischen Gemeinschaften (2009):** Arbeitsunterlage der Kommissionsdienststellen: Begleitdokument zu dem Vorschlag für eine Verordnung des Europäischen Parlaments und des Rates über die Zuständigkeit, das anzuwendende Recht, die Anerkennung und die Vollstreckung von Entscheidungen und öffentlichen Urkunden in Erbsachen sowie zur Einführung eines Europäischen Nachlasszeugnisses (KOM (2009) 154 endgültig), available at: http://ec.europa.eu/civiljustice/news/docs/succession_impact_assessment_summary_de.pdf [2018-05-07].
- Österreichischer Integrationsfonds – Fonds zur Integration von Flüchtlingen und MigrantInnen (ÖIF) (2015):** Fact Sheet – Aktuelles zu Migration und Integration: EU Migration nach Österreich, available at: https://www.integrationsfonds.at/fileadmin/content/AT/Downloads/Publikationen/Fact_Sheet_14_EU-Migration_nach_OEsterreich.pdf [2018-04-17].
- Statistik Austria (2017):** Auslandsösterreicherinnen und Auslandsösterreicher, available at: https://www.statistik.at/web_de/statistiken/menschen_und_gesellschaft/bevoelkerung/internationale_uebersich/index.html [2018-04-17].
- Statistisches Bundesamt (2016):** Ältere Menschen in Deutschland und der EU, available at: https://www.destatis.de/DE/Publikationen/Thematisch/Bevoelkerung/Bevoelkerungsstand/BroschuereAeltereMenschen0010020169004.pdf?__blob=publicationFile [2018-05-07].
- Waltery, N. (2017):** Rapport du Gouvernement sur la situation des Français établis hors de France, available at: <http://www.assemblee-afe.fr/rapport-du-gouvernement-sur-la-situation-des-francais-etablis-hors-de-france-2017.html> [2018-05-14].

3.3 Outcome of the online survey

Over a period of three months, from 1 December 2017 until 28 February 2018, a quantitative online survey has been implemented, with the aim to gain an insight over the frequency of cross-border inheritance cases. Simultaneously, data about the awareness of the EU Succession Regulation (Regulation No 650/2012) and the EU Mediation Directive (Directive 2008/52/EC) in general society were collected. The survey has been conducted via the online survey platform LimeSurvey.org where a total number of 752 participants took part in the online poll. Among them, 612 have completed the survey and 140 have not completed it entirely. In the following evaluation, an overview of the most important results will be given along with an initial visual and interpretative analysis of the figures.

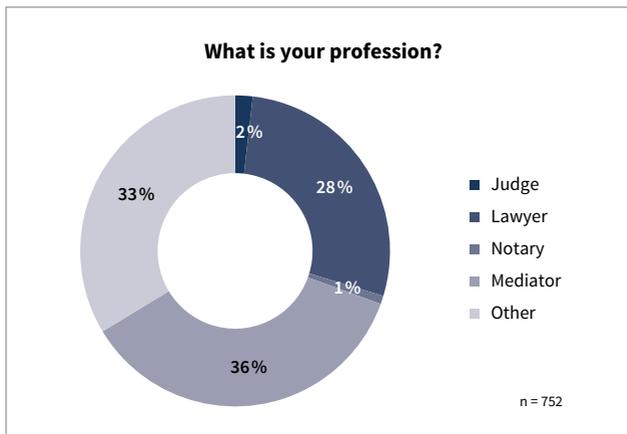


Figure 1: Participants' response to the question of their profession (Source: own illustration).

The first question dealt with the respondent's profession, citizenship and age, at which 36 % claimed to be mediators, 28 % to be lawyers, 2 % to be judges and 1 % to be notaries. Conversely, a third (33 %) of the respondents stated to have various different professional backgrounds. The strikingly high number of participants working in law-related professions can be explained when considering that the survey started off in the five FOMENTO project partners' own professional settings.

With regard to citizenship, the highest number of participants stated to be from Germany (39 %) and from Italy (35 %). Another 13 % were Polish, 5 % French,

4% Swedish, 2% were Austrian and 2% spread over other European countries. Furthermore, most respondents were 35–50 years old (39.89%) and over a third (36.97%) stated to be between 50 and 65 years old.

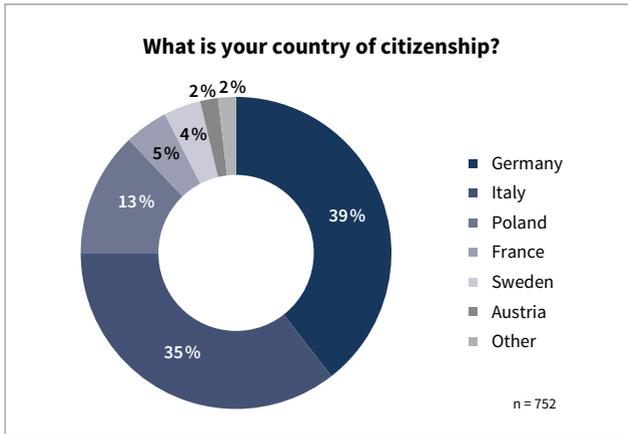


Figure 2: Participants' countries of origin
(Source: own illustration).

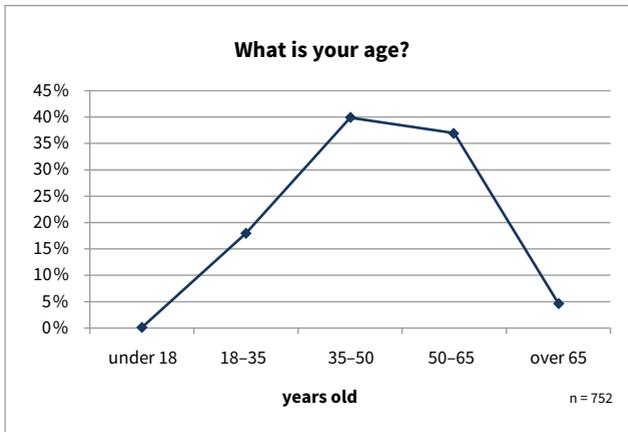


Figure 3: Average age of all respondents
(Source: own illustration).

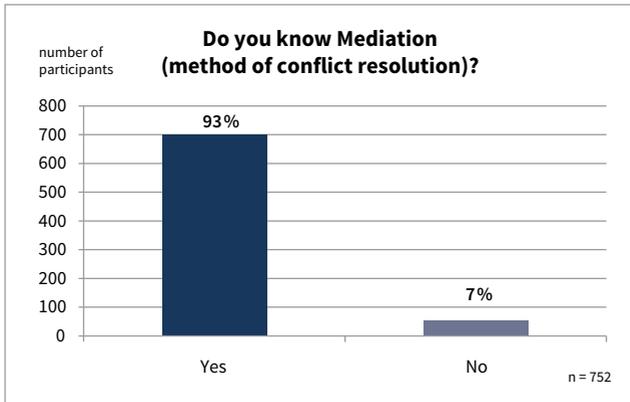


Figure 4: General awareness of Mediation as a method of conflict resolution amongst participants (Source: own illustration).

In the second part of the online survey, participants were asked questions concerning mediation as a method of conflict resolution in general and concerning the legal situation in the European Union in particular. Almost all of the respondents (93 %) declared to already have an awareness of the potential of mediation in conflict matters. Yet, it has to be taken into account that this figure might not be quite representative since a great number of participants came from a legal background and might therefore have been more likely to have heard of mediation than most other participants from general society.

Nevertheless, it is striking that, in contrast, only a third of the respondents (32 %) are aware of the ‘Succession Regulation’ (Regulation No 650/2012) while two-thirds (68 %) are not. In parallel, more than three-quarters of the interviewees (77 %) do not know the European Certificate of Succession either. It is not surprising that lawyers, notaries and judges did know the Succession Regulation more than mediators and citizens. The analysis of the quantitative data shows, that only 27 of the participants who were neither mediator nor jurist did hear of the Regulation. This is a percentage of 10 % of this group. Of the (non-lawyer) mediators 74 of them did know that there is a Succession Regulation, which makes up about 30 % of this group. Next to that, 147 (50 %) of the group of jurists did indicate that they know of the Succession Regulation.

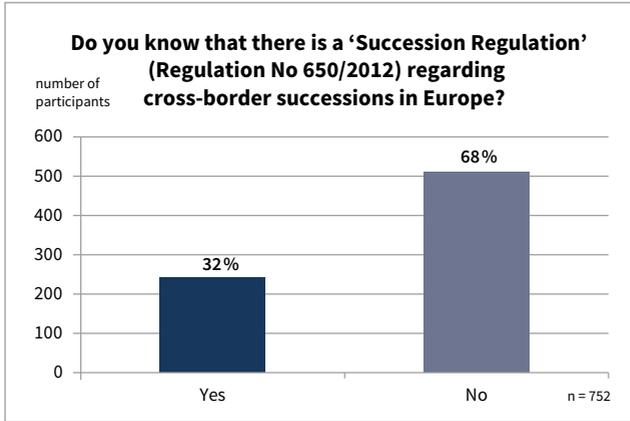


Figure 5: Awareness of Regulation No 650/2012 (Source: own illustration).

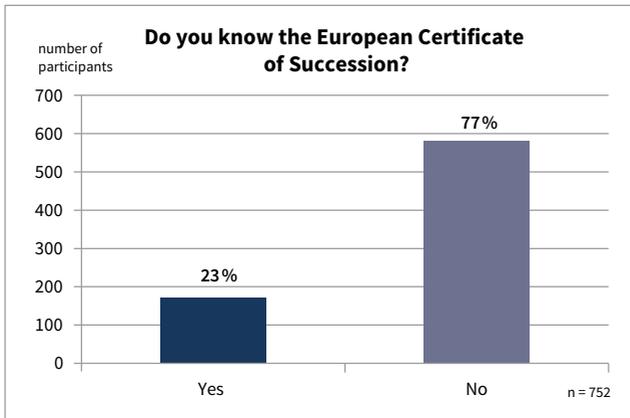


Figure 6: Awareness of the European Certificate of Succession (Source: own illustration).

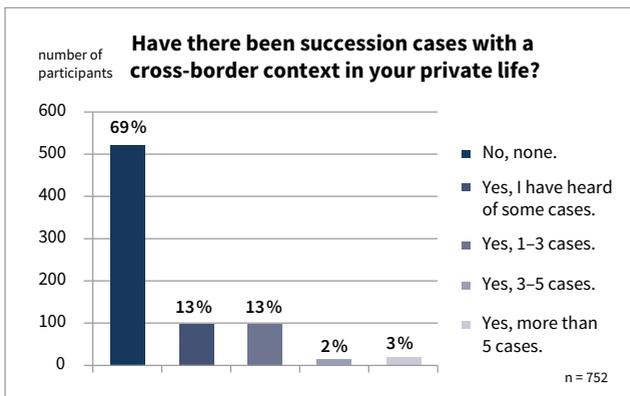


Figure 7: Relative quantity of participants having experienced cross-border succession cases in their private lives (Source: own illustration).

The third block of questions enquires if, and how often, the participants have been confronted with succession cases with a cross-border context in their private lives. Here, the vast majority of the respondents (69%) declared to have never been involved in any case. However, 13% stated at least to have heard of some cases and another 13% of the respondents claimed to have themselves experienced up to three of such cases.

In a final step, those participants who have declared to work in a law-related and/or a mediation-related business in the first part of the survey were then asked more specific questions on their experiences on succession cases with a cross-border context as professionals.

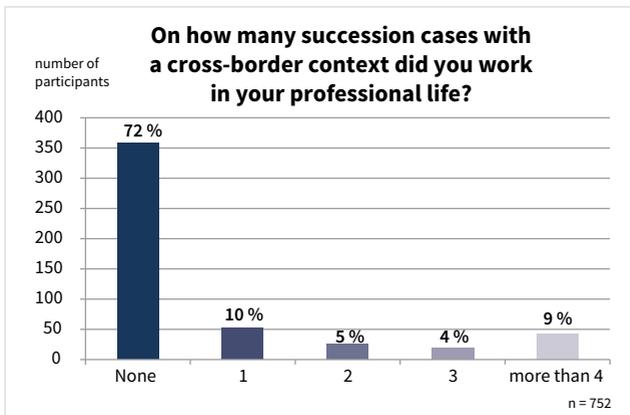


Figure 8: Relative quantity of participants having experienced cross-border succession cases in their professional lives (Source: own illustration).

Matching with the figures in question three, an almost equal number of interviewees, namely 72%, responded to the question concerning 'how many succession cases with a cross-border context they did work on in their professional lives' that they have never done so yet. Conversely, from the other 28% who have worked with such cases before, a total of 9% have even worked with four or more cases.

Furthermore, only a third (36%) of those participants who have had experiences with cases related to cross-border contexts stated, in a following question, that their cases have led to legal proceedings. The clear majority (64%) appears to have managed to settle the disputes extra juridically and, in the final question of the survey, one-third (29%) of those claimed that their cases had been resolved

through the use of mediation procedures or other methods of dispute resolutions. A majority of two-thirds (71%), however, did not consider such mediation tools to be the direct resolving factor in their conflict cases.



Figure 9: Number of cases which have led to legal proceedings (Source: own illustration).

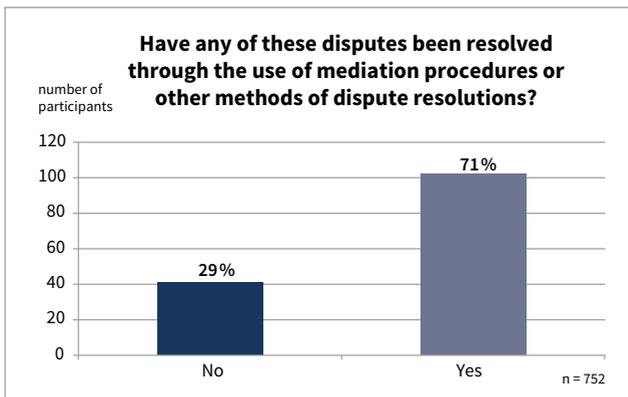


Figure 10: Extent to which mediation and other methods have been involved in dispute resolutions (Source: own illustration).

All in all, the quantitative online survey has shown that there is a considerable interest in mediation as a method of conflict resolution, especially amongst professionals in this field. Although this conflict resolution technique seems to be widely known among the different European respondents in general, people strikingly still lack awareness about the legal situation in cases of inheritance on a wider European level. However, when taking a closer look, one might find that those numbers correspond quite precisely to the numbers of those participants who have not actually been confronted with cross-border succession cases.

Therefore, it can be argued, that those who are indeed affected in their private – or in their work life, do already have a certain knowledge of the legal situation.

Regarding the question if mediation has been applied in conflict solving, the survey's results have shown that this method of conflict resolution is already rather established to a certain degree. However, only another long-term survey will be able to display to what extent its popularity will have increased over time due to the legal renewals at European level.

3.4 Qualitative analysis of expert interviews

3.4.1 Survey and methodological procedures

A particular aim of the qualitative data survey was to identify and to contact professionals who are experienced in the field of cross-border succession cases and/or cross-border mediation.

The guided interviews were conducted by each project partner in the time period from December 2017 until February 2018. A total of 105 interviews had been carried out.

Country	Number of expert interviews
Austria	10
France	11
Germany	26
Italy	23
Poland	18
Sweden	17
Total	105

Table 3: Number of expert interviews (Source: own compilation).

Because of the main focus of the interviews – related on the one hand to the experiences with the implementation of the Succession Regulation and, on the other, to experiences in the field cross-border mediation and the impact of the Mediation Directive – the experts had professional backgrounds as lawyers (36),

mediators (19), notaries (12) and judges (2). Additionally, 28 of the experts were trained and qualified as lawyer *and* mediator, as well as 9 of them were notaries *and* mediators. Most of the experts were specialized in civil and inheritance issues and many of them had experience in cross-border cases.

Most of the interviews were conducted via telephone, just some of them were conducted face-to-face.

The guideline questionnaire of the interviews was divided into two main aspects. One part of the interview worked out experiences of the interviewees with cross-border succession cases and the effects of the Succession Regulation on this area. What had been the differences compared to old procedures, before the Succession Regulation was implemented? What are the main challenges, legal and practical obstacles of conducting succession cases with a cross-border background? How does cooperation work with foreign institutions or colleagues? How does the European Certificate of Succession work?

The other main aspect on which the expert interviews were focused was cross-border mediation. The professionals who were trained as mediators were asked about their experiences with cross-border mediation: What are the challenges in this field? Did they know (or already use) online mediation tools? How do they prepare for these cases and at which point do they get juridical experts involved? Furthermore, the assessment of the experts towards the impact of the Mediation Directive and the country specific law on mediation were enquired.

The method of analysis of these expert interviews was that of qualitative content analysis (Gläser & Laudel, 2010). At a first step, the interviews were put into a written text via transcription. Afterwards these texts were analyzed in order to find typical statements and general argumentation patterns. Some categories (like advantages and disadvantages of the Succession Regulation) had already been developed but were concretized and modified during the analysis. The contents of the expert interviews were therefore always the focus of attention.

To analyze and quote the interview results, acronyms were used, which give an indication of the origin of the expert⁸⁷ and his or her profession⁸⁸.

87 Austria (A), France (F), Germany (G), Italy (I), Poland (P), Sweden (S)

88 mediator (m), lawyer (l), notary (n), judge (j), lawyer & mediator (lm), notary & mediator (nm).

3.4.2 Cross-border succession cases: specifics and challenges

Succession cases with cross-border implications are defined in this research as situations where heirs live in different countries (than the successor) or where heritage is situated abroad.

The interviewees were asked if they could estimate, **how many cross-border succession cases** in their country may arise as a percentage of all succession cases. Only 44 of the experts could force themselves to estimate a figure. Furthermore, their estimations differed from 5% up to 30%. One reason for that difference could be that the interviewees work in different fields and also in different regions. For example, a lawyer from a capital city might have been in contact with more cross-border cases than one from the countryside and therefore estimates a higher percentage. This was also an argument which many interviewed professionals stated themselves: that their estimation is likely influenced by their work field and experience. Nevertheless, almost all of the interviewees pointed out that there seems to be a growing tendency in the number of these cases. The average outcome was that about 15% of all succession cases might have a cross-border implication.

With regard to the **challenges in cross-border succession cases**, the experts mentioned the problem of different languages as the most practical challenge. One notary spoke of 'linguistic barriers' (A10n). Specially in order to obtain the needed documents and information – for example about the amount of heritage that is situated in different countries – there exist communication problems. In some cases, it is necessary to summon a sworn translator which rises the costs of the process (P5l).

This leads to the second most common practical challenge of cross-border cases: the problem of exchanging documents and information with foreign institutions. One case was named particularly often, namely the difficulty to collect information from foreign banks. The reason for this is that there are 'confidential criteria, that are difficult to overcome' (F7n). For instance, the foreign banks command special proofs and certificates of special administrations from their own country (G1lm, G24l, P8lm). Also, according to the experts, it is sometimes just difficult to understand each other, if one is not used to speaking English (G24l).

Another problem that arises is to get access to the Central Register for Wills, which is not possible for foreign lawyers or notaries in all countries. One notary underlined that there should be a European wide and coherent procedure for service / delivery of testaments (A2n). Furthermore, it is complicated to get access and fulfil the requirements for the Registry of Deeds.

Besides, another practical challenge to handle succession cases with a cross-border background is the distance to clients, which increases the duration and costs of these procedures. The interviewees also spoke about cultural differences that may arise. These differences could include issues on how to communicate with clients or other colleagues. For example, German clients want to be informed more often than Spanish clients, explained a German lawyer who is working in Spain (G7l).

Other practical challenges in cross-border succession cases are the high time and cost efforts, the difficulty to get in contact with reliable experts in the foreign country and the participation of every party in the process (especially joint and legal heirs).

Looking at the juridical aspects of cross-border succession cases, there is an obvious result: the main difficulty lies in knowing and applying the foreign inheritance law and the foreign procedural law.

The first issue is to identify the applicable law (I15l, I17n, G25lm)⁸⁹. Then, it may happen that the applicable law of inheritance differs from the national law of the testator. To give advice regarding foreign law is a huge challenge for lawyers and notaries. Some of the interviewees said that they don't give advice about foreign law at all but ask for support from colleagues from the specific country (G3l, G5lm, S17l). In fact, according to the statements of the interviewed professionals, it is very advisable to have a network of other lawyers and notaries, who are specialists in the respective law. The cooperation with professionals of other countries has been described as 'essential' (F2lm, F6l) in cross-border succession cases.

89 This problem arises even after the Succession Regulation has entered into force, e.g. because of the different interpretation of 'habitual residence'.

3.4.3 Succession Regulation: evaluation of the experts

Overall three-quarters of the experts did know the Succession Regulation. The majority of the interviewed persons who had not heard of the Succession Regulation were mediators, some of them were also lawyers. This is remarkable because only experts who had experience in cross-border civil and succession cases were interviewed.

This result already clarifies one of the main **difficulties of the European Succession Regulation**: the level of awareness is still quite low. One Swedish lawyer told the interviewer: ‘Everybody talks about it but few people have read it.’ (S41m). Another stated that the ‘level of knowledge varies even among judges and courts’ (S91m). Many of the respondents indicated that certain population groups should be informed about the Succession Regulation (A 3l, A7nm, G6l, G8l, G10l, S8l, S13mn, S15l). This should be people, who have property in other countries or who have their habitual residence abroad or who plan to do so (for example senior citizens, students, business people, bi-national couples and people who are living in border regions).

Coming to the assessment of the interviewed experts about the Succession Regulation, there is a great satisfaction among the questioned experts about the existence of this Regulation in general. Some of the lawyers spoke about the Regulation as a ‘milestone’ (G11l), ‘a big improvement’ (G18l) and a ‘rational solution’ (P5l). Although some criticism has been levelled against the regulation, it can be said overall that ‘the Regulation solves more problems than it creates.’ (I22n)

Two main **advantages of the Succession Regulation** were singled out by the interviewed jurists. First, there is now a consistent legal basis to decide which law is applicable for a succession matter. Second, the Succession Regulation has facilitated the resolution of disputes because there are now ‘common criteria’ (F6l) to decide which law is applicable. Another lawyer pointed out that the Regulation created a common ‘basis for discussion’ and a ‘consistent action frame’ (G8l). That simplifies the work of courts, lawyers and notaries. All in all, the idea of a harmonious functioning of justice (Recital 34 Succession Regulation) is appreciated by the interviewed experts.

The choice of law (Article 22 Succession Regulation) has often been mentioned as another great advantage. Experts said that this Regulation, with the possibility to choose the applicable law, increases the number of planned heritages (I16n, I51m). The first scenario that occurs often is that citizens make a choice of law in their disposition of property. This is often the case when people are planning to move abroad (for example seniors, bi-national couples, students and so on). The choice of law is also an advantage for people with two nationalities: they can choose among their nationalities (Article 1 (1) Succession Regulation). That gives them the possibility to choose the law they know best, which is a 'big convenience for citizens' (P81m). Some lawyers and notaries recommend the choice of law in general, so the possible successor can be sure about which law is applicable to his or her inheritance.

The other dimension of choice of law is to willingly not to choose a law and move to another country, accepting that the law of one's place of habitual residence will be applicable. Some of the lawyers do advice this procedure – depending on which country the person wants to move to and which succession law will be applicable in this case. Therefore, some of the experts suspected that even the decision about where citizens may move to could be influenced by the Succession Regulation (G3l, G9l). Some of the interviewed would actually prefer a solution that includes a totally free choice of law (A4m) or at least the choice of law according to the habitual residence (G7l).

Moreover, the connecting factor of habitual residence has been praised by some of the interviewed experts. According to the experts (A7nm, G20ml, G23l, I22n, P1n), it will unburden the courts because they can now in many cases apply their own national law. That also facilitates the work of lawyers and notaries.

What is also positively mentioned is the choice-of-court agreement (P91m) as well as the fact that there should now be just one proceeding (A7nm, P3n). Actually, there have not been many statements about this legal instrument. That leads to the assumption that there have not been many cases in which the clients settled a choice-of-court agreement.

However, several **criticism of the Succession Regulation** were made by the experts.

As a general criticism can be mentioned that the Succession Regulation leads to new legal uncertainties. This is in contrast to the positive evaluation about the fact that the Succession Regulation is forming a consistent legal basis in Europe and shows one of the main challenges at this point which was also mentioned by almost every expert: everybody has to get used to the new proceedings of the Regulation. This applies to citizens as well as to the professionals who have to deal with it. Therefore, some of the professionals do not want to make a final conclusion about it yet. Some said that it is too early to ask for a valuation because they have not gained enough experiences with cases that are under the scope of the Succession Regulation so far (F8n, G14Im). Another Swedish lawyer said: ‘... but we must wait yet before we make a judgement and so we can see how it looks in practice’ (S14Im).

Another reason for these uncertainties was named by another Swedish lawyer: ‘There is no clarity here or equal treatment in all countries’ (S71). That means that the Succession Regulation is implemented and interpreted differently in the different European Countries.

The main concerns about different interpretation were named in connection to the term habitual residence. The decision to determine the habitual residence as the connecting factor for the application of law is under criticism by many of the interviewed lawyers, notaries and mediators. An Austrian expert pointed out: ‘The term habitual residence is a term linked to tax law. Actually, they should have used a term linked to civil law.’ (A4m). Another assessment from a German lawyer was that through the openness of the term the European Ordinance put the responsibility on the courts (G71). Many experts said that it is difficult to determine where the habitual residence actually is and this allows different interpretation (A2n, A9nm, G5Im, G71, G111, G231, G26m, I151, I 16n, P51, S91m, S13nm). One Swedish lawyer pointed out: ‘The place of residence is translated differently in the different EU countries. This leads to lots of collisions, misunderstandings and conflicts.’ (S151) For example in Poland there is confusion between the terms habitual residence and ‘registered residence’ (P51). Some of the interviewees reclaimed that of the deceased’s nationality as a connecting factor and argued that this would lead to more certainty. This statement is not surprising if one

knows that, before the Succession Regulation entered into force⁹⁰, in all the countries from which the experts came the connecting factor was the principle of citizenship. The experts then indicated some case-scenarios in which it can be difficult to define the actual habitual residence. For example, when seniors are living half of the year abroad, business people have more enterprises in different countries or in the case of cross-border commuters (G21lm, I8l).

Another critical issue, named above all by German lawyers, was connected with the transitional provisions (Article 83 Succession Regulation). This Article declares that '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 this Regulation, that law shall be deemed to have been chosen as the law applicable to the succession' (Article 83 (4) Succession Regulation). Some of the interviewed lawyers said that this 'fictitious choice of law' (G8l) might be difficult for some people. The following example was given: take the case of a German who had lived in Spain, drawn up a will there and then moved back to Germany. After the transitional provisions, his testament, drawn up in Spain, could be seen as a choice of Spanish succession law. So, even if he is German and his habitual residence is in Germany at the time of his death, the Spanish law could be applicable because of his old testament (G3l). These provisions have been criticized as 'very complicated' (G11l) with 'harsh consequences' (G9l).

Even if the Succession Regulation lays down a uniform provision on applicable law and jurisdiction, there are several remaining questions that were raised in the interviews.

In the view of the experts, some issues concerning matrimonial regimes or marital property systems are still unsolved. For example, Poland wasn't part of the European Regulation (2016/1103), which harmonizes decisions regarding the division of matrimonial property. Therefore, an interviewed Polish notary predicted disputes about this issue in the future (P3n).

Another question that may arise is related to the implementation of juridical figures provided by another country and contained in the last will of the deceased. With respect to the German joint will of spouses, for example, a German lawyer,

90 In France there had been furthermore a 'splitting system', where the difference between movable and immovable property has been made (see chapter 2.2.2 France).

who works in Spain, was sceptical about that, because the joint will doesn't exist in the Spanish law (G6l). Another lawyer added that he is afraid that the validity of a binding will in form of a hereditary contract is not legally protected under the scope of Succession Regulation (G8l). In addition to that, a Swedish lawyer and mediator emphasized (S9lm) that it is important for the citizens to be aware of the different validity criteria of a testament.

According to the experts, other issues that have not been completely solved are those concerning the law applicable to movable and immovable property. The transfer of succession (especially in the case of immovable properties) and the effects of the recording in a register is excluded from the scope of the Succession Regulation⁹¹. The interviewed experts criticized that they still have to find out themselves the procedures related to the transfer of property in foreign countries and the ways to comply with them. One Austrian notary also pointed out that, after the Succession Regulation came into effect, the workload increased because now many cases of European citizens with foreign nationalities and property in other countries will be decided in Austria, under the Austrian law. In these cases, the Austrian notaries have to collect all the information about the property located abroad, which is quite complicated (A8nm). Likewise, a Swedish lawyer complained about the proceedings that have to be done in Spain (particularly the ones related with the transfer of property by succession) and said: 'The European Certificate of Succession does not work as it was initially intended. Everybody does as they please. There is no common framework.' (S7l).

This leads to the next topic: the implementation of the European Certificate of Succession.

91 Recital 18 of Succession Regulation 650/2012.

3.4.4 European Certificate of Succession (ECS): evaluation of the experts

Seventy per cent of the interviewed experts knew the ECS but only 18 of them did have direct practical experiences with it. This is why the arguments of the interviewed are divided into ‘personal experience’ and ‘theoretical estimation’.

Many of them did underline that this document leads to the simplification of the process of transferring and registering succession property. The interviewees explained how complicated a succession process with a cross-border issue generally is. As mentioned above, this is also due to documents and materials to be provided in order to prove the status of the heirs and to fulfil every requirement of the registry office. In fact, it is often necessary to produce apostilles and certified translations and, sometimes, according to the specific procedures in each country (G11m), different types of information are required.

*‘The introduction of the European Certificate of Succession is a very good solution: one instrument that makes it possible to act in other legal systems.’
(P1n)*

This statement by a Polish notary is a good example of many expert declarations. The interviewees emphasized that the idea of having one document to prove the status in a succession case is appreciable because it makes the process simpler and it is a standardization, facilitation and simplification (A8nm, F6l, G5lm, G6l, G19lm, G24l, I1l, I5lm, I17n, S5l).

This is why, if it is accepted in the other country as a sufficient document, the ECS saves a lot of work, time and costs. The main fear of the majority of the experts is that the ECS is not going to be recognized as a sufficient form to transfer property by succession in every European country. Especially in the case of transferring real estate or other registered properties, the experts doubt that the ECS will be sufficient for the responsible authorities (A5l, G3l, G13m, I7l, I13l, S7l, S15l).

One statement from a Swedish lawyer did illustrate the situation:

‘The way it works is wonderful indeed. For example, in Germany, I can see it working very well and I have no problems there. It saves lots of time and, let’s

face it, the money of clients who pay for it. It also works very well in Holland and Belgium but, sadly, not in Spain.’ (S71)

Like already mentioned, 18 of the interviewed experts had personal experiences with this Certificate. Some of these professionals reported about some countries in which they had to submit other national documents in addition to the Certificate. In most of the examples named by the lawyers and notaries, there were problems in bank institutes that did not accept the ECS at all (G12lm, I13l, I15l, S7l, S12l). Besides, some official register offices did not ‘trust the (Swedish) ECS completely and often required some complementary documents’ (S6l). Another Italian notary experienced ‘resistance’ from real estate register in Germany against the European Certificate (I22n).

According to the interviews, it turned out that many authorities, banks and the responsible staff in these institutions are not yet used to the Certificate and still follow the former system of proofing the status of heirs, legatees or executors of wills. This is why many professionals added that the implementation of the ECS still needs time. And yet, that these have to be understood as typical problems of the practical application of a new legal document (G18l).

However, concrete criticism and remarks referring to the form and index of the Certificate have been voiced during the expert interviews. First of all, the complexity of the Certificate as a very extensive paper led a German lawyer to describe it as: ‘totally complex and far too long’ (G7l). On the contrary, one of the advantages lies in the fact that there are forms of the Certificate in all the languages of the countries that have accepted the Succession Regulation. So theoretically it will not matter in which language it was filled in, because every information can be found at the same place (S5l). However, some of the experts reported that they had to provide a (sworn) translation of the Certificate. For example, a Swedish lawyer complained:

‘So e. g. if you do it in Sweden, it is issued in Swedish and we still need to have it all translated into English or into the language of the country in which it will be used. So first, we pay for having this Succession Certificate issued, and then we pay for having this document translated.’ (S71)

Another German lawyer explained that, in his opinion, the cost of this certified translation relativize the usefulness of the ECS (G9l).

In addition to that, the experts referred to the uncertainties about the concrete content of the Certificate. For example, there have been differences between German and Austrian courts about foreign real estate into the ECS.⁹²

Furthermore, some of the professionals (G3l G17n, G18l, G24l, I8l) criticized the short validity period of 6 months. According to the experts, considering the time that is needed to conduct a succession process, the period of validity should be lengthened.

Last but not least, there are some open questions about the possibility to proof the matrimonial property regime within the Certificate (A4m, G5lm, G11l, G17n, I22n). At the moment, the experts are still waiting for a judgement of the European Court of Justice about this question (I16n).

Summarizing, most of the experts appreciate the existence of the European Certificate of Succession. There are still some aspects of the Certificate that could be improved, for example by lengthening the short validity period and by simplifying the index and form of the document.

However, some of the experts said that, considering its recent introduction, it is still too early to evaluate the impact of the ECS. Anyway, they have great hopes that the implementation process of the ECS will make progress within the next years. So far, the motto is: 'Every beginning is difficult'. (A8nm). Nevertheless, there is a great hope for this instrument.

3.4.5 Cross-border mediation: advantages and challenges

From the interviewed persons, 31 of them, had experience with cross-border mediation cases. They were asked about their concrete experience and the challenges and opportunities of mediation in this field. In addition, the other group of experts – lawyers, notaries and judges – were questioned about their personal experiences on mediation in succession cases in general.

⁹² One Austrian notary (A8nm) referred to judgements from Higher Regional Court from Munich (31 Wx 275/17) and Nuremberg (15 W 299/17).

The most mentioned **advantage of mediation in cross-border succession cases** was that this procedure can help to avoid extended lawsuits and therefore saves time and costs. As described before, cross-border succession cases face difficulties like the distance between the heirs, the handling of different languages and the complexity of different legal systems. The experts told the interviewers about legal proceedings in succession cases with a duration of several years (G41m, G241m) and that cost a lot of money (G131m, G211m). One pointed out that sometimes conflict parties get tired of the proceeding and after some years they decide to settle the conflict out of court. The expert claimed ‘then, it would have been better to come to an agreement right at the beginning’ (G201m). Many of the professionals therefore appreciate mediation as a procedure that reduces time (A9nm, G61, G101, I41, I51m, S13nm). Thus, if a mediation process is successful, ‘the costs, time and greater uncertainties, that the cross-border nature of the dispute entails, are limited’ (I11).

Something else that has been outlined by the experts of all the six examined countries was the possibility of a mediation which focus lies in the interests and needs of the parties and not so much in the juridical situation. One German mediator pointed out: ‘During mediation, there is no application of law, but shaping of law.’ (G221m). This opens up new possibilities to find a solution (A6m). Besides, some of the non-mediators said that with the help of mediation, it is possible to avoid complex situations with uncertain outcomes of court proceedings (G21, I151, I17n). ‘Most often, succession cases concern the sense of justice,’ a Polish mediator described, ‘and law rarely gives you the opportunity to answer to this need’ (P12m). In some cases, in order to avoid extended lawsuits, it can be useful to speak more about harmed feelings or internal family conflicts (F21m). And frequently, conflicts in the succession field have been defined through this sort of means by the interviewees (G141m, G221m, G241, P71m, P13m, P14m, S91m). One lawyer and mediator from Germany referred of cases where people have been happy and relieved after a mediation process – even though they got less money than they would have gotten according to their inheritance rights – because they have made their peace with the family (G11m).

Another peculiarity of succession conflicts is that, after a family member or close person passed away, ‘there’s also the emotional mourning element. Mediation is particularly useful in the field of partition.’ (P111m). Like another Polish lawyer

said, 'The event of death is difficult for the parties and they feel mentally weakened. Mediation is therefore more appropriate for such a situation' (P10lm).

An argument that emerged frequently during the interviews was that a juridical process about sharing the heritage may leave the clients unsatisfied. The experience of many professionals taught them that a mediation leads to a greater satisfaction for clients. The experts described the period of a juridical proceeding as a 'stressful time' (G20lm) for the clients and as a moment in which their quality of life may suffer (G21lm). In addition, a Polish mediator underlined that in front of a court the conflict escalates instead of decreasing: 'There is often an exchange of harsh words that are hard to blank out, so the conflict escalates' (P8lm). Another argument was that an out-of-court agreement can lead to a greater satisfaction among the conflict parties because they have an active involvement in the solution of the conflict (G4lm, I19l). This leads to a 'better sustainability' of the agreement (G4lm).

'A look into the past or at least an apology or recognising or appreciating an approach to the economy and solutions that is different from the merely legal one. This may lead to a solution that is broader, more lasting and is based on mutual understanding.' (S9lm)

Referring to the specifics of cross-border succession cases, mediation was recognized as a very useful process to overcome communication problems. One of the cases in which the dispute takes place in a cross-border context is where the legatees and heirs live in different countries. The personal contact between heirs during a mediation is a good way to avoid conflicts. Especially when the parties involved have not been in contact for a long time – or, maybe, have never met before – a personal meeting is the right way to avoid conflicts, explained a notary and mediator from Austria (A9nm). As an example, he mentioned the situation where illegitimate children turn up. Another emblematic situation that has been named is the one in which the second spouse and children from the first marriage are joint heirs (G24l). In these situations, personal and emotional aspects play a big role. Mediation is 'very adequate to enhance dialogue and to maintain relationships' (I15lm), said one lawyer and mediator from Italy. One expert pointed out:

'If there are language and cultural differences involved, it should be even more important for people to use mediation in order to listen to and understand each other' (S3lm).

What has been further highlighted by the interviewed is that knowing and using methods and skills of mediation is quite valuable for juridical professions. A good example is that of the Austrian notaries. The role of a 'court commissioner' in a succession is to work towards a consensual solution between the successors or legatees. That is of course also possible without a mediation training. Nevertheless, among the interviewees, there were notaries trained also as a mediator and they pointed out that using methods and skills of mediation is valuable for the work of a notary (A7nm, A8nm). One of them explained the advantages of mediation skills as follows: 'The quality of the service is higher because one can react also to needs and not only to legal positions.' (A8nm).

Coming to the named **challenges and obstacles of cross-border mediation in succession cases**, it is possible to identify different fields of them: challenges that define nearly every cross-border case (distance, language and cultural differences) and challenges that define especially mediation processes in succession in general and in succession matters (awareness level about mediation, explaining and distinguishing between mediation and arbitration, participation of all the parties, finding (co-)mediators and experts, involving juridical experts and financial aspects).

The situation in which there are different languages used by the conflict parties was identified as one of the main challenges of cross-border mediation. Mediation is based on the idea of understanding each other (G5lm), which is why the linguistic aspect is so important. One expert pointed out that especially 'when it gets emotional, it is good if you can express yourself in your mother tongue' (G15lm). If there is only one heir or conflict party that does not speak the same language, it gets difficult. In the professionals' opinion, there are different ways to face these difficulties. The first possibility is to engage an interpreter. This may work if the interpreter is well prepared (S10m). Some of the mediators declared that they do not want to involve an interpreter at all because the dynamic of the process would be affected by this external person and there is still the risk of missing something within the communication (G5lm). The second possibility

is to include a co-mediator who can speak the needed languages (F21m, G221m, I21m). In any case, according to the interviewed mediators, it is necessary that the mediator fully understands the conflict parties and that he can ‘create reliability also in his linguistic intermediation’ (I19l).

Furthermore, according to the respondents (A1m, G16m, G221m, I2nm, I12nm, I15l, I23j, P16m), cultural differences may lead to difficulties during a succession mediation in a cross-border context. There exist differences in ‘mentality’ (G19lm). The experts reported, for example, that the concept of the family plays a role too, such as: ‘What should the children have to have? What can be preserved? What obligations can I impose?’ (A4m). Also, the valuation of the family estate is different between the different countries. For example, a German mediator had the impression that in France the concept of the whole family (with uncles, aunts, grandparents and so on) is more important than for the Germans. In fact, the latter are more focused on the ‘nuclear family’ (G221m). On the other hand, this interpretation on cultural aspects has also been criticised by the experts:

‘The aspect of stereotypes and prejudices is a troublesome one. [...] People often perceive a behaviour through the prism of the culture from which they originated.’ (P17m).

This also influences the feelings of the clients about the law and their expectations because they can come from different legal systems (A4m). In any case, the mediator should be able to understand the ‘mentality of foreigners and of distinct cultures’ (P16m).

Another issue that has already shown up in relation to the challenges of succession cases in general, is the problem of the great distance between the conflict parties. Mediators told the interviewers about the difficulty to arrange a place for mediation (G15lm, G19lm, I1l, P12m, S4lm). An Italian lawyer stated that, even if the parties are interested in a mediation process, great distances may still cause a risk for mediation (I1l).

All in all, the mediation process in general is an issue that has been named several times during the interviews. One aspect is that the mediation as a conflict resolution method is still unknown among the citizens⁹³. The experts (A3l, G4lm,

93 See below chapter 3.4.10 Mediation Directive – evaluation of the experts.

G6l, G11l) reported that either there is no knowledge about the possibility of mediation in general (F1m, G15lm, G19lm) or, especially in the field of succession, mediation is not very commonly used. Some professionals spoke of a 'procedural fear' (G20lm) because the proceeding is not well enough known. There are also reports about the lack of trust in mediation, 'as people are familiar with judicial procedures and lawyers, and people trust them', like a Polish lawyer and mediator reported (P10lm). There are often misunderstandings regarding the procedures and peculiarities of mediation (F1m, F4lm). Also, some lawyers and judges are still not well informed about the mediation process and cannot give the conflict parties valid information (F1m, G15lm). One German mediator said: 'The perception that this is an orderly and highly structured technical process and not just a coffee chat, has not yet matured.' (G21lm) This increases the barriers to mediation.

Another big challenge that has been reported by over 10 experts during the interviews was the difficulty of bringing all parties to the table (G4lm). Mediation is a procedure that is based on the principle of voluntariness. Even if a mediation is obligatory – for example before the start of legal proceedings in succession matters in Italy – everybody can leave the process at any point. One Austrian notary explained that, in his experience, the parties of highly escalated conflicts in succession matters did not show interest in mediation (A2n). The more people there are in the community of heirs, the harder it is to get everybody at one table (G21lm). If there is just one person who does not want to participate, this might be an influencing factor that could undermine a secured mediation agreement (G4lm).

One peculiarity of cross-border conflicts in succession matters is that it is crucial to involve legal professionals (I5lm, I21m). Even if the whole conflict is settled out of court, the interviewed mediators pointed out that there is a need to involve additional legal professionals. Because the conflict parties have of course the interest that their settlement – which leads to a so-called mediation agreement – is valid after all and can be enforced. This issue is a very important one. Especially in cross-border issues in succession matters, the cases are very difficult and it is important to involve experts in the specific succession law.

Because the mediator is not in the function of a legal counsel, the parties have to get legal advice for their positions from an external legal professional. For lawyers that are trained as mediators, it is a challenge not to switch to the legal adviser role but to stay neutral (G4lm, G14lm).

This is why many of the experts emphasized how important it is to inform the parties at the beginning of the mediation about the necessity to also separately see a lawyer. In the best case, these lawyers are open to the idea of mediation (I21m) and do not feed the escalation of the conflict (S4lm).

Another observation by the experts was that there are some juridical questions that need to be treated according to juridical proceedings and that can't be mediated. As one Swedish lawyer explained:

'Some things simply can't be mediated or negotiated. The record of estate assets has to be written down, the estate inventory must be registered, the group of potential and actual successors must be verified ...' (S15l)

Therefore, it is necessary to involve external experts in succession matters. The timing of when this external advisory should take place depends very much on the particular situation. The mediation is often recommended by lawyers or judges and so the clients are already in contact with legal professionals. They can provide the needed legal information, such as the amount of the legal portion (G4lm, P14m). Like experienced mediators emphasized (A1m, A6m, G11m), the latest point of time when it gets absolutely necessary to involve external legal experts is before the mediation agreement has been set up. Then, his or her task is to give legal form to the agreement. Like an Austrian mediator explained: 'Basically, the lawyer must understand what has been agreed upon and should then put it into a legal form.' (A1m) But sometimes, especially lawyers, recommend towards a juridical proceeding, because, especially when the dispute is of high value, they 'prefer a judgement' (I15l). A judge also brought into consideration that the adequate protection of the 'weaker party' might not be guaranteed during a mediation (I23j).

Last but not least, some of the mediators raised their concerns with respect to the fees for mediators, that are considered to be quite low. For example, German lawyers and mediators told that they earn less with a mediation than when they

are handling the case as lawyers (G15lm, G20lm, G21lm). At the same time, clients might think that the mediator represents an extra cost that they don't want to spend (S1lm, S7l, S11jm).

3.4.6 Preparation of cross-border succession mediation

During the interviews, the mediators were asked how they prepare for their cross-border mediations and what they pay particular attention to.

Next to the organizational tasks, like setting place and time for the mediation – which are sometimes not the easiest part in cross-border cases (G15lm, I21m) – the experts did underline the importance of the preliminary talk with the parties. Like mentioned in the theoretical part about mediation laws, there are countries (Austria, Germany) in which the mediator is forced to inform the conflict parties about the difference between mediation and legal advisory. The mediator has to explain to the parties that they should get legal advice from external professionals. One Austrian mediator explained that, especially when people 'think that they are well informed', he sends them to notaries or lawyers because 'nothing is more dangerous than half-knowledge' (A6m). The challenge for mediators who are also notaries or lawyers is to keep the two roles separate. In fact, according to the experts, sometimes the clients try to 'get both': a mediation and in addition valid legal information because the mediator is also a lawyer or a notary. And it is here that the preliminary talk gets crucial and the mediator has to emphasize the differences between mediation and legal advice (G19lm, G26m).

Another task of preparation that the interviewed mediators mentioned, is the pre-work with a co-mediator. Out of all the interviewed mediators, twelve did have experiences with co-mediation in cross-border cases. They spoke about their experience and the main advantage mentioned by the mediators is the possibility of balancing differences with the help of the co-mediator. The interviewed mediators declared that if the conflict parties are from two different countries, it is quite useful if also the mediators come from these countries. Ten of the experts pointed out that through the co-mediation the differences of culture, age and sex can be handled. Another advantage of the co-mediation, as explained by eight of the interviewed mediators, is when the other mediator speaks the second language that might be needed within the mediation.

Before the mediation takes place, it is important to find an adequate partner. Most of the mediators, who were interviewed and had had experience in co-mediation used to have a close network of co-working partners (A1m, F2m, G15lm). Like a Swedish lawyer and mediator underlined, the prework between the co-mediators is essential:

'If I have to conduct a mediation with a co-mediator from another country, we must get to know each other before we start our cooperation. What kind of techniques and tools do we use, and so forth.' (S4lm)

Another good opportunity of co-mediation regarding succession mediation is the aspect of legal knowledge that can be provided by at least one mediator. Through the method of co-mediation, it is possible that one of the mediators has got a legal background and the other does not. As an Austrian mediator (A1m) explained, the fact that not both of them 'have this juridical focus' on the matter might also be an advantage.

3.4.7 Juridical knowledge of mediators

The question 'how important the juridical knowledge of a mediator is' was controversially discussed among the interviewees. The opinions range from 'juridical knowledge is indispensable' to 'juridical knowledge is not necessary'. This question is a 'general political question of mediation', a German expert considered (G5lm). One group of mediators said that it is necessary to know the legal background of the dispute. Especially in the field of succession, many experts underlined that it is absolutely 'crucial' (A6m) and 'essential' (I18n) to know the applicable succession law. The main argument behind this opinion is that, through this knowledge, the mediator is able 'to understand if the position of the parties is sustainable' (I20m). Other professionals underlined as well that the connection to practical applications is indeed desirable (A1m). Furthermore, the mediator should 'be able to speak with lawyers as equals' (I21m) and none of the parties' should risk being disadvantaged (P17m).

At this point, it comes to speak again about the distinction between mediation and legal advisory. About half of the experts who underlined the importance of knowing the legal situation as a mediator also emphasized that the mediator

should *not give legal* advice within the mediation. Like one Italian notary and mediator pointed out, the mediator should give ‘guidance’ to the conflict parties and should also be able to ask the lawyers relevant questions (I12nm). However, mediators should not provide solutions for the conflict parties in general, a German mediator explained (G26m). But, at the same time, it is possible for the mediator to ‘give direct information’; for example, the hint that something has changed due to the European Succession Regulation, he added (G26m).

The other group of experts defined the mediation process as something where legal knowledge is not needed because during the mediation the focus is on relational issues (G211m).

One polish lawyer and mediator described it as follows:

‘In cross-border cases, the knowledge of the law isn’t so important, as it’s impossible to know the jurisdiction of many countries. General knowledge of succession law will be enough. Lawyers exaggerate this allegation against mediators, according to which the latter don’t know the law. That’s a misunderstanding of the essence of mediation.’ (P101m)

The task of mediators is rather to solve the conflict and to be able to work together with the experts and therefore it is not necessary to know the legal details (S10m, S13nm). Sometimes it is even an advantage if mediators pose very simple and ‘naïve’ questions (A1m) and are ‘not impressed’ by law (G211m).

3.4.8 Online mediation in cross-border succession cases

The possibility to use online tools to communicate with the mediation parties in cross-border succession conflicts was also controversially discussed among the professionals.

All in all, 23 of the experts indicated that they had already used online mediation. The ones that had experienced this way of communication generally evaluated it positively. The use of online tools is ‘forward-looking’ (A9nm) and, especially in international family mediation, ‘widely used’ (F5m). The main advantage is that it highly increases the possibility of meeting each other. This is a great possibility in cross-border cases, where there are great distances between the parties (A1m,

A6m, F9nm, F10nm, G4lm, G13m, G19lm, G24l, I19l, I20m, I21m, P7lm, S14lm). If long travels can be avoided through online meetings, it is possible to save time and money. Another situation in which online mediation might be useful is when people do not want to meet in the same room (S4lm, S10m). The experts also underlined a generational gap. In other words, it is possible that future generations will ask for online tools (S8l).

However, mediators also referred to the speciality that should be taken into account when using online mediation. First of all, not only the technical equipment must be provided, but also the privacy has to be guaranteed (I1l). Most of the mediators that had already used online tools reported that they normally use a mixed form: either they first met with all parties and did the following mediation phases online (A1m, P9lm, P12m, S9lm) or they provided the preliminary session online (F3lm, P13m). Some said, they only use online tools to exchange information (G5lm, P11lm, P13m, P16m) – which in the strict sense is no longer an ‘online mediation’.

The greatest scepticism about mediating via internet was related to the absence of personal contact. One interviewee put it this way:

‘Mediation lives by immediacy in my experience and from what happens in a room. And I am not talking about virtual space.’(G5lm)

Besides, other mediators talked about their intuition, and argued that for them it is necessary to have a direct contact with the people involved: non-verbal communication can be better interpreted (A6m, G14lm, I7l), confidence in the mediator can be better established (I4l) and it is easier to adjust the inequalities between parties (S10m). Especially when emotions are involved in a conflict – like it often is in succession conflicts – some of the experts recommended using online mediation just as a supplementary method (F1m, F2lm, G26m, I5lm, P14m, P17m, S2lm).

3.4.9 When is a mediation useful in succession cases?

During the interviews, all experts have been asked about the situations in which a mediation makes sense regarding cross-border succession conflicts.

Most of the answers named the case of the division of the heritage. In many cases, the professionals experienced that these conflicts result from family conflicts and can also ‘disrupt family relationships’ (G18l). It is therefore useful to find an alternative way of conflict resolution and not to end up in front of a Court because the first option opens up the opportunity to speak more than the latter one. A lawyer said in the interview that most of the time in succession conflicts there are ‘hurt feelings’ involved and with mediation it is possible to bring family quarrels on the table (G9l).

‘The estate assets that have an extraordinary emotional value for a party, especially for their connection with the deceased’ (P1n) was mentioned as a typical matter in dispute. Another Polish mediator pointed out: ‘The relationship factor cannot be solved by legal means, it can only be done on the basis of interests’ (P12m). If it is certain who is going to be the heir, then often the conflict is about the amount of money each heir is going to get. One Swedish expert said:

‘When someone dies, in most cases we have to deal with the money that he has left behind and if money is involved in the game, then the person’s painful and ugly side shows itself.’ (S13nm)

The experts reported that in many cases the conflict parties are quarrelling about the value of the heritage, for example referring to donations made during the lifetime (P16m). It occurs that people start to ask for ‘social justice in the division of material goods’ (P15m).

Another field of application for mediation that was named by the experts during the interviews is that of mediation before succession. This term means a sort of pre-mediation that gathers the testator and the future heirs. Some of the lawyers and notaries did provide this service under another label, like ‘generation talk’ (G6l). This is an ‘optimal’ (G12lm) way to prevent conflicts in succession matters. All in all, 13 of the interviewed professionals emphasized the enormous advantage of this sort of conflict solution – or, rather, conflict prevention (A1m, A5l,

A6m, A9nm, G6l, G12lm, G13m, G14lm, G19lm, G20lm, P9lm, P11lm, S13nm). One Austrian mediator underlined that this sort of mediation is the best because it allows to include the needs and interests of every party – including the testator (A6m). According to his experience, the goodwill of the testator sometimes unfortunately does not correspond to the future plans of the heirs. This is why it is helpful to talk to each other, for example about the future of the real estate or of the company (A1m). According to the interviewees (G12lm), however, talking about the future death of a family member is not so simple and not everybody is willing to do so. This is why such a talk should be guided and moderated through an expert. And also: ‘It’s important to promote the idea of pre-testamentary mediation. It’s an arbitration-based solution, which is flexible, and quickly enforceable after the testator’s death.’ (P9lm).

3.4.10 Mediation Directive: evaluation of the experts

About 70 % of the questioned professionals knew or had heard about the Mediation Directive.

Over half of the interviewed evaluated the Directive as something positive. The general positive effect of the Mediation Directive was identified as the start of legislation in mediation in many European countries (P4nm, P7lm, S4lm). It helped in general to promote the idea of this alternative conflict resolution method in Europe. The interviewees explained that mediation has become more well-known: the awareness among citizens as well as among professionals increased (F2lm). During the interview, one lawyer spoke of a cultural change ‘among legal operators’ (I6l) that was fostered through the Mediation Directive. A French notary and mediator said that it ‘increased the interest of notaries to specialize in this discipline’ and that ‘numerous mediation centres run by notaries are being opened throughout France’ (F9nm). Also, in Poland, there have been organized trainings for judges (P13m, P18m). By increasing the familiarity with mediation, the Mediation Directive helped to ‘facilitate the work of mediators’ (F4lm), as a French lawyer and mediator explained.

One expert also mentioned that, through the Mediation Directive, the ‘issues of settlement enforceability, limitation of applicability, and confidentiality have all been regulated’ (P7lm).

The main criticism in relation to the implementation of the Mediation Directive was that this Directive is too general and it has not brought noticeable effects in the practical work of mediation (F1m, G13m, P7ml, P10ml).

The professionals criticized that there has been a different implementation of this Directive among the European countries. For some of the experts, there have not been made enough efforts to really implement mediation into juridical conflict procedures. Most of all, professionals from Germany (G4lm, G13m) and France (F5m, F9nm, F10nm) complained about the status of mediation in their country⁹⁴. Some of the experts had the impression that mediation is still too unknown (G1lm). One French lawyer and mediator underlined:

‘The intervention of the European legislator has increased the confusion between mediation and conciliation, including in the judiciary context, and has also created confusion between judicial mediation and conventional mediation.’ (F2lm)

Other mediators said that there is no need for more regulations in mediation (G1lm) but there should be larger information campaigns about mediation in general (G4lm, I8l).

3.4.11 Legal framework on mediation: evaluation of the experts

The expert assessment of the specific legal systems of mediation in their country will be briefly presented in this section.

Experts from **Austria** praised the legal framework of Mediation. First of all, the provision of confidentiality was mentioned among the positive aspects (A1m, A7nm). The suspension of the statute of limitations was positively highlighted as well (A1m). On the contrary, among the criticisms there were those related to the necessity of further training of mediators (A8nm), as well as the mediation list – which some of the asked mediators do not consider necessary (A6m, A8nm).

Only a few positive outcomes were named by the French mediators about their legal basis for mediation in **France**. One of them said that the implementation

⁹⁴ In both countries, mediation is not obligatory in civil procedures, like for example in Italy. (See also the country reports about the implementation of Mediation Directive, chapter 2.1.)

of the European Directive contributed to raising awareness in relation to mediation (F21m, F9nm, F10nm). One mediator stated that: ‘the role of the mediator, his obligations, including training, and his objectives are better regulated by the legislator’ (F5m).

The main criticism on French implementation of the Mediation Directive was the ‘confusion between mediation and conciliation’ (F41m, F5m) that came up due to the Mediation Act which has been implemented into the Civil Code⁹⁵. The experts also mentioned the problems related to oppositions towards mediation coming from lawyers. In fact, these oppositions still exist – especially when mediation is mandatory (F9nm, F10nm). The other point of criticism is that mediation is still too unknown: ‘More development of judicial mediation and more information for citizens would be needed.’ (F9nm, F10nm).

In **Germany**, the ‘Mediation Act’ has been predominantly assessed positively. The consistent opinion is that it is quite short but regulates the most important aspects of mediation (G51m, G221m). It is open but also concrete at the same time (G221m) – a ‘step in the right direction’ (G141m). The mediation act was described by one mediator as ‘long overdue’ (G13m). Besides, the interviewees have outlined the increase in awareness of mediation among judges and lawyers (G31, G41m, G201m), but also a rise of awareness in society (G141m). At the same time, a disappointment about the lack of financial support for mediation has been expressed (G51m).

What has been criticized by the interviewees, in contrary, was the *Certified Mediator Training Ordinance*. This framework, that regulates the trainings and the title of ‘certified mediator’, has been described as a ‘backward step in the quality of the market’ (G141m). The main aspect that has been criticized is that the regulation does not provide 120 hours of training for a certified mediator. This was considered a too short training time (G51m, G141m, G151m) – compared to training times in other European countries of over 300 hours. Some of the interviewees also criticized (G151m) that the qualification of trainers and supervisors is not specified within the regulation. Furthermore, the experts disapproved that the certification can be done as a self-certification and the lack of a certification authority (G141m, G201m, G221m).

95 See chapter 2.1.2 Mediation system in France

Coming to the national mediation law in **Italy**, the mediation centers have here been highlighted as an ‘adequate space’ (I2nm) for mediations to happen and also for mediators to ‘meet, to exchange ideas and experiences, to form together’ (I12nm). The territorial competence of mediation centers has been named as a fair instrument ‘to avoid inequalities between strong and weak subjects’ (I16n). The interviewees also praised the fact of the compulsory mediation (I9lm, I14l, I21m) and the tax benefits to support mediation (I14l, I18n, I20m).

What has been mainly criticized is the training and the education of mediators in Italy. The arguments being: traineeships by mediators are not ‘controlled effectively’ (I2nm), the trainings are not homogenous (I5lm), mediators should be trained in tax and enforcement aspects of the mediation agreements (I6l) and the trainings are valued inadequate in general (I15l, I21m).

Some of the interviewed experts mentioned the problem of the confusion between mediation and arbitration (I3l) that is also due to the closeness of the mediation process to the legal proceeding (I9lm). A disadvantage of compulsory mediation is also that ‘sometimes the first meeting is not held seriously’ (I21m). Another mediator added: ‘The so-called phase of the first practical meeting works bad, is useless or exploited by lawyers.’ (I20m). This seems to happen especially if lawyers but also mediators are not ‘properly prepared’ (I14l) or if the consultants of the parties are not ‘in favor of mediation’ (I5lm). One expert recommended:

‘The forms of entry to the mediation could be clearer on the objectives, on the tools and on the usefulness of the mediation; as a kind of instructions for use. You could look for verbalization forms that indicate the object of each session of the meeting.’ (I19l)

One notary asked for a better coordination between mediators and notaries especially before signing the final agreement (I22n).

In **Poland**, the positive evaluation of the national mediation law stayed quite general and modest during the interviews (P6l, P10lm, P12m, P16m, P17m, P18m).

When it comes to problems or possible suggestions, the interviewed mediators gave more detailed answers. As a main remaining problem of mediation – next to the low awareness of mediation as an alternative to juridical proceedings (P12m, P13m, P14m) – the interviewed referred that the incentives for mediation are too

low in Poland. Many of the respondents recommended introducing a mandatory system for mediation (P8lm, P10lm, P11lm, P18m). Even if just the first meeting were mandatory, it would help to promote the concept of mediation and might change 'people's awareness' (P14m). Like a mediator said: 'We have created a system based on the idea of changing the awareness and education, but we can't wait for it for generations.' (P10lm)

Besides, a lack of cooperation between the Polish legislator and Polish mediators has been noticed (P13m, P15m). Mediators want to be more involved in developing and improving the mediation system in Poland. Last but not least, the experts noted that there is no coherent training and certification system of mediators in Poland (P15m). That means that there are 'discrepancies in the level of mediation' trainings and services (P7lm).

The professionals of **Sweden** shared their experience and assessment of the court-based mediation and the out-of-court mediation. The experts that experienced or conducted a court-based mediation emphasized that it is working quite well (S11jm). Either the judges meet the parties themselves during a 'conciliation meeting' where they can also invite a judge from another court or there is an external mediator involved. Legal assistance can be granted by the court and then the mediation is free of charge for the parties (S2lm). Besides, there is the possibility that the legal assistance insurance covers the costs of mediation (S2lm).

At the same time, the court-based mediation has been criticized by some of the questioned lawyers and mediators. The main problem with the involvement of judges in mediation processes is that there is a confusion between conciliation and mediation (S17l). Some of the interviewees said that often judges, in promoting mediation, actually 'intimidate the parties to make them find some solution' (S4lm). The fear is that in this way, even if solutions might be found faster, there is a 'very bad promotion and bad marketing of the concept of mediation' (S4lm). To help to promote mediation also among Swedish citizens, it would be helpful if the people that conduct mediation were also trained as mediators and use methods and languages that are adequate for mediation (S9lm).

The interviewees also reported that in Sweden there is a lack of confirming the quality of mediation competences. They asked for improvements, especially con-

cerning the list of mediators, that is maintained by the Swedish Courts. The fact that everybody can declare him- or herself a mediator and get access to this list is a problem for citizens because they cannot be sure which quality of service they might get (S41m, S171). As a result, this can lead to skepticism towards mediation, which results from bad experiences deriving from the lack of ethical codes, inadequate requirements for mediator training and the fact that amateur enthusiasts undertake mediation (S4 ml, S14 ml). All in all, the experts stated that the situation of mediation in Sweden is quite differentiated. In fact, the situation can vary depending on how much the president of the court or the competent judges are in favor of mediation (S161m).

Bibliography

Gläser, J. / Laudel, G. (2010): Experteninterviews und qualitative Inhaltsanalyse als Instrumente rekonstruierender Untersuchungen. Wiesbaden: VS Verlag für Sozialwissenschaften.

FOMENTO (2018): Quantitative Online Survey Results, available at: <https://www.fomentonet.eu/wp-content/uploads/2018/04/FOMENTO-quantitative-online-survey.pdf>, [2019-02-22].

4 Results

4.1 Summary of results from theoretical and qualitative part

The research study of FOMENTO (Fostering mediation in cross-border civil and succession matters) gathered knowledge and insights from professionals into the quite complicated field of succession conflicts with cross-border implications and on their strategies of approaching them.

In the first chapter, the theoretical basis of the succession systems and mediation law of six European countries (Austria, France, Germany, Italy, Poland and Sweden) was outlined. Thereby, the focus was on the implementation of the Succession Regulation and the Mediation Directive.

Furthermore, there have been conducted qualitative interviews as well as an online survey to get an insight into practical questions of the impacts of both European regulations.

Increasing importance of cross-border succession matters

To begin with, the collection of statistical data showed that the topic of cross-border succession matters is of increasing importance in Europe. In general, mobility amongst European citizens has increased over the last time.⁹⁶

Within the online survey – where over 750 people had been reached – over 30 % of them stated, that there has been a succession case with a cross-border context in their private lives.⁹⁷

However, there are no clear figures about the frequency of cross-border succession cases. Therefore, the amount of heritage that is transferred over borders can only be estimated. In any case, the analysis of statistical data has shown that more and more people are and will be affected by heritages with some sort of international links. Be it because they themselves move to another (European) country or because they inherit from relatives living abroad: citizens of the European

⁹⁶ See chapter 3.2 Statistics on the frequency of cross-border succession cases.

⁹⁷ See chapter 3.3 Outcome online survey.

Union are very likely to be confronted with questions about applicable inheritance law, especially regarding the consequences of the Succession Regulation.

Succession Regulation

It shall not be concealed at this point that some of the experts told the interviewer that an evaluation of the Succession Regulation (which applied 17 August 2015) is still too early. They argued that they had not gained enough experiences with cases that are under the scope of the Succession Regulation so far. Nevertheless, the main effects of this Regulation could be gathered in the theoretical parts as well as a plenty of opinions, propositions and also experiences of the interviewed professionals.

General jurisdiction: habitual residence (Article 4 Succession Regulation)

It became apparent that through the Succession Regulation there have been huge changes, most importantly regarding the general jurisdiction. Article 4 of the European Union Succession Regulation provides for the habitual residence of the deceased as connecting factor for jurisdiction in succession cases. This means the law applicable to the succession is the one of the country in which the deceased had his habitual residence at the time of death. Looking at the previous general jurisdiction in the examined countries, this means a change for all six countries.

The main advantage of the concept of habitual residence as connecting factor for applicable law is that courts can usually apply the law of their own country (*lex fori*). This creates more legal certainty and predictability in court decisions.

The main disadvantage which was named by the experts and which can also be found in the literature is that there is no uniform definition of habitual residence. The Succession Regulation says:

'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 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.' (Recital 23)

This means that there is room for interpretation and that this could in some cases again lead to conflicts in terms of jurisdiction. Some of the experts expressed their worries about possible misunderstandings and interpretation conflicts that could emerge. One German lawyer criticised that the responsibility of identifying the habitual residence was put to the courts by the European Ordinance (G71).⁹⁸

Choice of law (Article 6 Succession Regulation)

Yet, what has explicitly been highlighted as an advantage is the choice of law. Through this possibility the successor can regain legal certainty. The questioned professionals expressed their hope that through this legal instrument – choosing the law of nationality in one’s testament – the number of planned heritages may increase.⁹⁹ At the same time, some of them criticised that the decision to choose the nationality as a criterion for the possible choice of law has been too restrictive. In fact, there have been demands for a choice of law according to the law of the habitual residence under the experts.¹⁰⁰

Awareness of the Succession Regulation

The main challenge at this point is to increase the awareness of the Succession Regulation among European citizens. Even among the interviewed experts – who are all dealing with cross-border conflicts (in succession cases) – only three out of four had a certain knowledge about this Regulation (77 out of 105 experts did know the Succession Regulation).¹⁰¹ Considering the changes which the Regulation brought along, an increasing knowledge about it is crucial. Especially regarding testaments that have been drawn up before 15 August 2015 and to which the transitional regulations apply.¹⁰² Many interviewed professionals have requested more information campaigns about the Succession Regulation – especially for groups of citizens that may be affected like immigration groups, students/workers/seniors that are living abroad. In this situation it is recommendable to seek advice and, if necessary, to draw up a new disposition of property.¹⁰³

98 See chapter 3.4.3 Succession Regulation: evaluation of the experts.

99 Ibid.

100 Ibid.

101 Ibid.

102 Ibid.

103 Ibid.

European Certificate of Succession

In terms of the European Certificate of Succession (ECS), the evaluation from the experts came from a very practical perspective. The interviewed professionals have highly valued the fact that now there is a document to prove the status of heirs and legatees which is accepted among the European countries (except Denmark, Ireland and the United Kingdom). If the document is accepted, it leads to a simplification and standardization of proving the heir's status. Unfortunately, according to the experts with practical experience, that is not always the case however.¹⁰⁴

Recognition of the ECS

Even though the Certificate should be recognized by any EU country, at the same time the Succession Regulation declares that 'the requirements for the recording in a register of a right in immovable or movable property should be excluded from the scope of this Regulation.' (Recital 18 Succession Regulation). This is why many of the experts reported about additional documents they had to provide in order to carry out a registration.

Furthermore, there are open questions about the index of the Certificate, e.g. in terms of the matrimonial property regime. Other critical points have been the short validity period of six months as well as the high costs of issuing and translating the ECS.

Overall one can say, that the European Certificate of Succession has not fully arrived in the practice of succession cases but it will be applied more and more over time. According to the experts, there should be some changes in the form and index of the Certificate and maybe an extension of the validity period. So far, the motto is: 'Every beginning is difficult.' (A8nm)

104 See chapter 3.4.4 European Certificate of Succession (ECS) – evaluation of the experts.

Another suggestion was to enter the European Certificates of Succession automatically into European registers, so that these Certificates can be found more easily.¹⁰⁵ In some countries there already exist registers for ECS, but not in every country and also just for their territory.¹⁰⁶

Mediation Directive

The effects of the Mediation Directive have been presented in the country reports within chapter 2.1 in this study. Due to the implementation of this Directive, in some countries a legislative process was initiated (e.g. Germany), in others the already existing mediation systems have been developed (e.g. Austria, Poland).

The experts who were aware of the Mediation Directive did underline that this edict did help to promote the idea and concept of mediation in general.¹⁰⁷ Nevertheless, some of the interviewed criticized that the Directive is still too general and that the implementation varies very much between the European countries.

Details of the advantages and disadvantages of different mediation systems can be found in the next chapter, which gives the results of a SWOT Analysis regarding mediation in cross-border civil and succession matters.

4.2 SWOT Analysis (mediation in cross-border conflicts in succession matters)

Introduction

In this chapter strengths and weaknesses of mediation in cross-border conflicts in succession matters, as well as opportunities and obstacles which mediation is facing in this field will be presented. Therefore, the outcomes of all theoretical parts¹⁰⁸ and of the qualitative interviews¹⁰⁹ have been summarized, analyzed and interpreted with regard to consequences for cross-border mediation in succes-

105 An example had been ARET (Association of the European Testament Network of Testaments, see chapter 2.2.4 Law of Succession in Italy).

106 For example in France (chapter 2.2.2).

107 See chapter 3.4.10 Mediation Directive: evaluation of the experts.

108 See chapter 2 Theoretical Part.

109 See chapter 3.4 Qualitative analysis of expert interviews.

sion matters. All collected data have been brought together in a so-called SWOT analysis, where each argument identified in the theoretical reports and from the interviews has been assigned to the sections 'strength', 'weakness', 'opportunity' and 'threat'. The former two are of an internal origin which means that they are attributes of mediation itself as a system. Which are the strengths and weaknesses of mediation as a conflict resolution method in cross-border succession conflicts. Opportunities and threats, on the other hand, contain attributes of external origin, like the implications of legislations or the state of mediation in relation to other conflict resolution methods.

The features named in each class can be additionally distinguished between universal and country-specific since the status quo of mediation in succession cases is in certain respects different in each country. The internal features of strength and weaknesses of mediation in this special field, are justifiably quite universal, whereas the external opportunities and threats are often based on the country-specific situation of mediation and of handling successions.

The following analysis will therefore examine the outcomes of the theoretical parts concerning the national and European legislation on mediation and on succession, separating universal from country-specific features.

Strengths of mediation in cross-border inheritance conflicts

Since the theoretical reports in this study deal with the implementation of European regulations, the general and internal strengths of mediation in succession matters, were mostly gathered from the information given by the expert interviews.

Those professionals generally agreed that mediations are not only time- and cost saving but also give more satisfaction to clients. Mediation offers the unique opportunity for quarrelling parties to overcome communication problems and cultural differences, re-establish contact between them and bring them back on one table. Such an intervention on the level of human relationships, with a focus on both parties' interests rather than the juridical situation only, provides out-

comes which are generally more accepted by all sides and are therefore more satisfying and sustainable according to the experts.¹¹⁰

Furthermore, experts consider it as a significant advantage that mediation can be conducted even before somebody dies. This 'pre-mediation' can be seen as a family meeting with the future testator and his or her future heirs to develop a share of heritage that is accepted by everyone. After the interviewed experts, that would be the best way of conflict prevention in succession matters at all. Of course, this is a very delicate matter to talk about. That is why this moderated process should be conducted by a professional, who is experienced in mediation tools and methods to determine the actual interests and feelings of the participants.

Opportunities of mediation in cross-border inheritance conflicts

Not only from an internal, but also from an external perspective, several positive features of mediation in cross-border conflicts in succession matters can be identified.

From all theoretical reports it can be derived that the importance of mediation as a tool of conflict resolution has been promoted by the European Mediation Directive from 2008. As already mentioned, the legal development of mediation systems has been initiated or advanced by this Directive.

The national legislations on mediation contributed to the steady institutionalization of mediation in different ways, which also includes the standardization in terms of enforceability of settlements, the suspension of prescription periods and the duty of confidentiality.

In Austria following developments for mediation can be singled out in this context: the protection of confidentiality for mediators and the possibility to pause a court proceeding.¹¹¹

The French Code of Civil Procedure provides the possibility for judges to attempt conciliation between conflict parties, either directly or by delegating to an impartial third party. Recent legislative interventions are leading to experiments with

¹¹⁰ See chapter 3.4.5 Cross-border mediation: advantages and challenges.

¹¹¹ See chapter 2.1.1 Mediation system in Austria.

forms of compulsory mediation, especially in the field of family conflicts. If any of these mediations are mandatory, the forms of conciliation delegated by the judge are always free of charge.

From the Italian theoretical parts on mediation legislation, equally positive features can be deduced. According to the Italian law, mediation is compulsory in the matter of inheritance cases. That means that a first informative meeting with a mediator is a mandatory step before starting a lawsuit in inheritance matters. In addition, the Italian law also provides that mediators have to be registered at the Ministry of Justice.

In Sweden there is the possibility of court-connected mediation, mostly through judges, but also the possibility to decide for an out-of-court mediation.

It's similar in Poland, where mediation can be conducted before the case is taken to court or after the proceedings have been initiated on the basis of the court's decision or out of court on the basis on the parties' decision. Unquestionably, this flexibility can be considered as a particular strength for the process of mediation.

Other opportunities for mediation in cross-border conflicts in succession matters arise from the respective financial incentive systems of the European countries.

For Austria it can be said, that there is the possibility to get support for family and child conflicts.¹¹²

In the case of Germany, the fact that mediation is offered in a widespread way by legal expense insurance contributes to the increase in the acceptance of mediation in general. These insurances also offer insurance policies that cover mediation, which fosters the demand for mediation. Apart from that, the legal basis in Germany increases the prestige of mediation by allowing the initiation of mediation to suspend the statute of limitation. That means that if parties enter into mediation, the matters discussed may not be prescribed. In succession matters, this is connected with the claim of the compulsory part (three years claim of property (§2174 BGB); 10 years, surrender of inheritance (§2130 BGB)).¹¹³

112 See chapter 2.1.1 Mediation system in Austria.

113 See chapter 2.1.3 Mediation system in Germany.

Apart from the legislation on mediation, national and European legislation on succession also indirectly feature opportunities for mediation in cross-border succession matters. The choice of law, for instance, improves the inheritance and estate planning (if citizens are informed about this possibility) and enables testators to wilfully manage their own estate. This circumstance, yet again, can be seen as an incentive to get mediators involved earlier in the process.

Especially in Austria, it occurs that notaries are more and more trained as mediators and can implement mediations and mediation methods into a succession process that way.

In Germany, an evaluation report of the mediation law has been published in 2017. This report provides facts for the development of mediation and might foster the widespread of mediation due to the increasing level of awareness and indications for further development for the Federal Government. Furthermore, mediations can be performed within private, state-recognized arbitration committees ('Gütestellen') that ensure enforceability of mediation agreements as well as suspension of time limits. This may also be ensured by the inclusion of lawyers into the case when closing legal settlements (§§ 794 (1) point 4b ZPO). Yet, this is not the only feature that shows the opportunities provided by the flexibility that mediation models are offering. Such mediation techniques are also executed in court through so-called 'Güterichtermodell' where judges are appointed as mediators if both parties agree on it. Concerning mediation training in Germany mediation associations are currently elaborating a foundation of a joint organization, aiming for an introduction of higher quality standards than the minimum education and training standards established by German mediation law.

Furthermore, the Polish theoretical part has highlighted that the disadvantage of the slow juridical system in Poland can be turned into an advantage or, to be more precise, into an opportunity for mediation since that method of conflict resolution can be further promoted as a faster alternative method to use in all kinds of conflicts.

When taking a look at the results of the interviews, it becomes evident that experts see a big importance of the cooperation between professional groups. Many of the experienced lawyers, notaries or mediators who work with cross-border cases explained that they already established a network of cooperation part-

ners.¹¹⁴ That is why it is recommended to establish more networks, especially on an international level. Furthermore, since there are many difficulties for foreign lawyers to identify the necessary formalities in matters of successions in another country, this could lead to a favoured use of mediation.

Other than that, many experts have identified, among the opportunities to be considered, the use of online tools as a supportive device in order to communicate faster and save costs, which can be useful especially for cross-border cases. Besides, online mediation is enabled by law in Italy, which can have several advantages especially concerning cross-border cases. Regarding the possibility of online mediation, it should be pointed out that Sweden is very advanced in this respect. Online mediation is possible and commonly used in courthouses in Sweden.¹¹⁵ This provides opportunities for faster and more effective conduction especially of cross-border conflicts.

One consequence of the Mediation Directive is the trend towards professionalization in mediation. There is an increasing number of regulations on definition of mediation and the role of a mediator as well as set up processes of minimum standards for mediation trainings. The formal requirements for mediators range from ‘any natural person with a full capacity to perform acts in law and who enjoys full civil rights can become a mediator’ in Sweden¹¹⁶ to ‘the qualification required in view of the nature of the dispute or demonstrate, depending on the case, training or experience appropriate to the practice of mediation’ in France.¹¹⁷

The standardised minimum education level for mediators in some countries generally reinforces confidence in mediation as a tool for conflict resolution from a public perspective.

Weaknesses of mediation in cross-border inheritance conflicts

However, there are also several weaknesses of mediation in cross-border conflicts in succession matters which can be identified mainly from the statements of the interviewed experts.

114 See chapter 3.4.2 Cross-border succession cases: specifics and challenges and chapter 3.4.6 Preparation of cross-border succession mediation.

115 See chapter 2.1.6 Mediation system in Sweden.

116 See chapter 2.1.6 Mediation system in Sweden: The role of the mediator.

117 See chapter 2.1.2 Mediation system in France: The role of mediator.

First of all, it has to be recorded that, since mediation is institutionalised as a court-external conflict resolution procedure, conflict parties that do not know of its capabilities and existence, in case of doubt, continue to follow the path of juridical dispute. One of the main difficulties, named by mediators, is that there still is a lack of EU-citizens' knowledge of this alternative conflict resolution method.

Apart from the weaknesses which can be identified in the theoretical parts the experts from the qualitative analysis pointed out numerous issues as well. Many of them complained that mediation in the field of succession is not particularly established and well-known yet. Especially in this sector, there are still some misconceptions about the role and function of a mediator. They explained, for instance, that clients expect to get legal advice from the mediator or refuse to meet a lawyer for that purpose at all.¹¹⁸

Another issue mentioned in the interviews is the difficulty to identify experts, especially in cross-border cases. This, yet again, draws attention to the above-mentioned importance of networks at European level.

Furthermore, many experts remarked that there is nothing that can be done when extremely quarrelling parties are not willing to take part in mediation. Mediation is a voluntary procedure and can be stopped by every conflict party at any time. Furthermore, there are some juridical questions that need to be treated according to juridical proceedings which cannot be mediated.¹¹⁹

Threats of mediation in cross-border inheritance conflicts

Apart from the internal issues which mediation in cross-cross border conflicts is facing, there are also external obstacles that can be identified in all theoretical parts and in the qualitative survey.

The first question to be raised is the professionalization of mediators. In terms of the European legislation on mediation, it can be deduced from the theoretical analysis that, by law, mediation can still be performed by any professional in

¹¹⁸ See chapter 3.4.6 Preparation of cross-border succession mediation.

¹¹⁹ For example setting up the estate inventory, see chapter 3.4.5 Cross-border mediation: advantages and challenges.

many countries. Often it is not a legally protected term. The risk is that poorly performed mediations might damage the reputation of mediation in general.

Nonetheless, as already mentioned, a trend towards professionalization can be seen in the field of mediation. According to the interviewed experts there are nevertheless critics about standards of mediation trainings.

Especially in Italy, the interviewed experts criticised that the Italian legislation is lacking in terms of training and selection procedures of mediators.¹²⁰ In addition, the Italian criterion of territorial jurisdiction and of specific mediation centers¹²¹ could be an obstacle to the spread of cross-border mediation, especially regarding co-mediation.

In a similar way, French experts criticise the lack of legislation in terms of training and selection processes and point out that only a few French mediators have experiences in transnational mediation or in matters of succession. Furthermore, especially in France, there are no institutional initiatives for the dissemination of mediation and for the gathering of statistical data on mediation. Apart from that, experts have pointed out that there are still major problems in terms of relations between mediators and conciliators but also between family mediators and other mediators. Consequently, such factors weaken the position of mediation, also in cross-border conflicts in succession matters.

In the case of Germany, certified mediators need to take part in a 120-hour training course in order to be able to call themselves certified. This relatively low minimal requirement can turn out to be a threat to quality standards, like some of the interviewed mediators noted.¹²²

Also, interviewed Polish mediators asked for a coherent training and certification system.¹²³ Conversely, Swedish mediators consider the listing of mediators by Swedish courts as problematic. Accordingly, there are no quality standards about their trainings and information provided by them are not evaluated or verified.¹²⁴

120 See chapter 3.4.11 Legal framework on mediation: evaluation of the experts: Italy.

121 See chapter 2.1.4 Mediation system in Italy.

122 See chapter 3.4.11 Legal framework on mediation: evaluation of the experts: Germany.

123 See chapter 3.4.11 Legal framework on mediation: evaluation of the experts: Poland.

124 See chapter 3.4.11 Legal framework on mediation: evaluation of the experts: Sweden.

The general state of institutionalization of mediation is another topic, where threats for mediation can be derived from.

In Sweden, where the system of free of charge court-based mediation has already been established and judges perform mediations themselves, this turns out as a disadvantage for independent mediators since it poses an obstacle for out-of-court mediations. Consequently, people might be less willing to make use of external conflict solution even though they might be the more sustainable. In addition, the parties must give their agreement to the court to decide on these mediations. Another special feature applying to Sweden is that mediation is commonly considered not to take more than one day, which raises questions about time and quality of such a resolution.¹²⁵ Considering the situation in Sweden, the theoretical reports state that out-of-court mediation is not financed by the court.

From a French legal perspective on mediation, it can be seen as problematic that its costs are poorly regulated and can be freely defined by the individual mediators. Consequently, this non-transparency and disparity hampers procedures and makes it more difficult to conform with other systems such as the Italian one for instance.

Unlike in other countries, in Germany there is no obligation to consider or to perform mediation before introducing a judgment. German mediation law states the procedure as absolutely voluntary which means that mediators need to act on a free market and are not allowed to compete with judicial conflict resolution. This situation can be seen as fairly harmful to the reputation and recognition of mediation in general public. Consequently, it is not surprising that mediation is commonly not regarded as a legal service in Germany and is therefore also not supported through a legal aid program. Some pilot projects were recently launched in order to evaluate the effects of assumption of cost for mediation in family matters.¹²⁶

In the case of France, the legal situation is similarly ambiguous. Apparently, there is still a lot of confusion regarding the relationship between mediation and conciliation which might turn out to be a threat to the development of media-

125 See chapter 2.1.6 Mediation system in Sweden.

126 See chapter 2.1.3 Mediation system in Germany.

tion.¹²⁷ Also some Italian experts explained that, in their opinion, mediation in Italy takes place too close to the proceedings and that there is confusion between mediation and arbitration.

Furthermore, Italian as well as Polish experts complained about slow juridical proceedings in their countries which decelerates their negotiations.

It had been already named the fact of compulsory mediation for inheritance conflicts in Italy. At this point it should be noted that the question if mediation actually *can* be compulsory, there has already been put to the Italian Constitutional Court.¹²⁸ Besides, the law provides that in matters relating to inheritance, parties must collaborate with a lawyer in their cases. The fact that the involvement of external legal experts is necessary from the beginning, could also be a difficulty for the mediation process. This was made clear above all by the analysis of the expert interviews.¹²⁹

In terms of threats to mediation in succession matters, interviewees stated that sometimes Italian lawyers are not trained on the mediation subject and are not always in favour of mediation.¹³⁰ It might be that mediation proceedings are still not supported by lawyers and notaries as desired. These issues can become a threat in that sense, that rivalries between all sides can have negative effects on the public reputation of mediation.

In the case of Austria, the peculiarity of the inheritance proceeding ('Verlassenschaftsverfahren') is that notaries in the function of court commissioners ('Gerichtskommissär') conduct the whole proceeding.¹³¹ This poses another threat to mediation in cross-border succession cases, since there are high obstacles for (non-notary) mediators to mediate.

Furthermore, the ***effects of the European Succession Regulation*** can also be interpreted in relation to the situation of mediation in cross-border inheritance conflicts. The experts stated that many citizens are unaware of the impact of the Succession Regulation, such as the new criterion of habitual residence. Many of

127 See chapter 2.1.2 Mediation system in France.

128 See chapter 2.1.4 Mediation system in Italy.

129 See chapter 3.4.5 Cross-border mediation: advantages and challenges.

130 See chapter 3.4.11 Legal framework on mediation: evaluation of the experts: Italy.

131 See chapter 2.2.1 Law of Succession in Austria.

them complain that also experts do not know where they can get valid information about changes introduced through the Succession Regulation. Moreover, in some cases citizens and experts are not aware of the Succession Regulation at all.

Yet again, such unawareness also exists toward mediation in general, according to the experts. Especially in the field of succession, there still exist procedural fears, a lack of trust and misunderstandings towards mediation.¹³² Hereditary matters are a highly regulated part of society that are treated by specialised jurists and notaries, which allows the rise in misperceptions and missing recognition of mediation procedures by heirs.

Apart from that, the experts considered several more technical issues as a threat to their work. In terms of Online Mediation, technical and security issues make face to face contact still irreplaceable for many experts.¹³³

Especially in terms of mediation cases with cross-border links, several other obstacles become evident. Self-explicitly, larger geographical distances make it more difficult to bring quarrelling parties to one table or summon witnesses, and language barriers and cultural differences make cross-border mediation even more difficult. Likewise, foreign correspondence, translations and travel distances significantly increase the mediators' workload for such mediations.

Conclusion

All in all, it can be said that new legislation on mediation has strengthened the position of mediation in the field of extra-judicial conflict resolution and gives citizens the chance to use this method of conflict resolution more and more. The systems of mediation nevertheless do still vary between the member countries a lot, as well as the quality of mediation trainings.

To summarize it can be said that the Succession Regulation brought many changes (general jurisdiction after the habitual residence, choice of law, European Certificate of Succession) for succession cases with a cross-border connection. But at the same time the Regulation and its effects are still quite unknown among citizens.

¹³² See chapter 3.4.5 Cross-border mediation: advantages and challenges.

¹³³ See chapter 3.4.8 Online mediation in cross-border succession cases.

Mediation is not yet very common in the field of inheritance disputes as well. Yet, there are many advantages to conduct or even prevent a conflict especially in this complicated field. The concrete advantages of mediation especially in cross-border inheritance cases are:

- avoid long-duration legal proceedings and save time and cost
- bring conflict parties together and maintain personal relationships
- overcome communication problems and cultural differences
- find consensual solutions on the basis of the personal needs of each conflict party

Last but not least, the interviewed experts within this study emphasized the significant advantages of a mediation in the forefront of a succession case. This 'pre-mediation' can be seen as best way of conflict prevention in succession matters at all.

Nevertheless, there is a great need of a better cooperation between lawyers, notaries, judges and mediators to foster networks among the professional groups across borders.

5 Recommendations

The study *Mediation in cross-border succession conflicts and the effects of the Succession Regulation* is a result of the EU-project FOMENTO in the framework of the Justice Programme 2014–2020.

In order to reach a deeper understanding and to find out the right methods for a correct implementation of Directive 2008/52/EC ('Mediation Directive') and of Regulation (EU) No 650/2012 ('Succession Regulation') the effects of both regulations have been examined in this research study. Therefore, country reports regarding the implementation of the Succession Regulation and the Mediation Directive in six European countries (Austria, France, Germany, Italy, Poland and Sweden) have been assembled.

In the second part of the study quantitative and qualitative data had been gathered to show real-life implications of the juridical changes in these fields. The quantitative part – based on collected statistical data and on an online survey including 752 participants – underlines the increasing importance of cross-border succession cases. For the qualitative part, 105 expert interviews with lawyer, notaries, judges and mediators have been conducted and analyzed.

The following recommendations for policymakers on improvements for mediation in cross-border succession matters can be derived from the results of the research:

Raise awareness of the Succession Regulation among European citizens (including the applicable law of the habitual residence and the choice of law)

The Succession Regulation had been set up in 2012 and entered into force in August 2015 in the European Union (except Great Britain, Ireland and Denmark). The main problem for European citizens and juridical experts is the unfamiliarity and lack of knowledge of the Succession Regulation. The online survey including 750 participants showed that only one third of the participants did hear about the Succession Regulation. At the same time, the interviewed experts did complain about the low level of awareness of this Regulation. According to lawyers and notaries more information activities need to be implemented. Especially the

concerned population groups (people who live or plan to live abroad and people who have property abroad) have to be informed about the consequences of the Succession Regulation.

Raise awareness on mediation in general and in succession conflicts in particular

Although the Mediation Directive did support the legislative process for mediation in European countries this method of conflict resolution is not very common in the field of succession conflicts. This can be derived from the expert interviews. The interviewed mediators often expressed the lack of knowledge about mediation and mediation methods in general. Furthermore, there are misunderstandings about mediation. To promote the effective use of mediation, it would be helpful if also jurists and legal experts are further introduced with the advantages and possibilities of mediation. Also, basic information campaigns on mediation – especially in the field of succession conflicts – were proposed by some of the interviewed experts.

Promote the possibility of mediation in the forefront of a succession case

One specific field of action for mediation was identified as the possible open field for mediation procedures: the forefront of a succession case. This would be the most effective way to prevent conflicts in succession matters. Of course, juridical experts must be involved in this process. Especially if the cases have a cross-border contexts with complex legal situations. The other way around it is imaginable that lawyers or notaries who arrange the succession arrangements can involve mediators, if it gets obvious that relationship conflicts are the drivers of the conflicting parties.

Foster a better collaboration work between lawyers, notaries, judges and mediators

Essential for the development of mediation in cross-border civil and succession conflicts is a collaborative work between jurists and mediators. Succession conflicts are defined on the one hand on a great level of juridical extremely regulated field. At the same time, emotions as mourning and depression are most often involved when acting in a field where topics as death and demise are involved. A mediation process opens up space and time for direct communication between

all involved parties (heirs). Conflicts that arise can be countered with a planned and structured approach. So, the different professional fields of mediators and jurists are asked to work together closely, so that citizens can resolve possible conflicts in succession matters in the best possible way.

Development and Improvement of training standards for mediators

It became apparent through the theoretical reports on mediation within this study that in each examined European country there are different quality requirements for mediators. The possibilities range from registered to non-registered mediators or from certified to non-certified mediators. The analysis of the expert interviews revealed that many mediators themselves were not satisfied with the different standards of mediation trainings. There had been criticised the discrepancies in mediation trainings as well as the lack of conforming the quality of mediation competences. So, there should be improvements on training standards for mediators on a European level.

Enhance the index and validity period of the European Certificate of Succession

The idea of one certificate that proofs the status of the heirs and is valid in every European country (again except Great Britain, Ireland and Denmark) had been praised by the interviewed succession experts. Most of them had to speak theoretically, because only a few of the interviewed experts personally had experience with the ECS. Moreover, they indicated several practical obstacles that decrease the effectiveness of the European Certificate of Succession. First of all, the short validity period of six months had been criticised by the experts. Another point for criticism was identified, specifically, as the long and complex index of the document. Last but not least some of the interviewed experts reported about problems of acceptance of the ECS and that they still had to provide other national documents in addition to the Certificate.

Summarized it can be said that there should be follow-up studies regarding the further development of the implementation of the Succession Regulation when there will be more cases conducted under its scope of application. Also, the development of mediation, especially regarding the frequency of application and the quality and quantity of trainings, should be further investigated.

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The world is getting closer. More and more people are living abroad, enter into binational marriages and own real estate in different countries. This has a big impact on inheritance matters. The European Union has taken this into account and adopted the Regulation (EU) No 650/2012, so called Succession Regulation. This regulation unifies jurisdiction over inheritance matters across Europe and introduces the European Certificate of Succession.

The study at hand shows that the Regulation itself is not very known yet – not even among experts. The same can be said about the Directive 2008/52/EC ('Mediation Directive'). The effects of both regulations have been analyzed in this research. Therefore, the legal differences are presented in country reports – for Austria, Germany, France, Italy, Poland and Sweden.

Furthermore, the research report gathers information about the possibilities and challenges of mediation in the field of cross-border succession conflicts. More than 100 expert interviews with mediators, lawyers, notaries and judges were conducted and evaluated in order to get an insight in this difficult and increasingly important field.

This publication is part of the project FOMENTO (Fostering mediation in cross-border conflicts on civil and succession matters), cofounded by the Civil Justice Programme of the European Union, which was carried out from 2017 to 2019.

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