

TALLINN UNIVERSITY OF TECHNOLOGY
School of Business and Governance
Department of Law

Anastassiya Platonova

**AMBIGUITY OF HABITUAL RESIDENCE IN CROSS-BORDER
SUCCESSION IN EUROPEAN UNION.**

Bachelor thesis

Supervisor: Lehte Roots, LL.B, LL.M, PhD

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I hereby declare that I am the sole author
of this Bachelor Thesis and it has
not been presented to any other
university of examination.

Anastassiya Platonova
“ “ 2017

The Bachelor Thesis meets the established requirements

Supervisor Lehte Roots
“ “ 2017

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Introduction

Law of succession is one of the most challenging parts of private international law to harmonise and unify due to its deep connection with culture of the state as to a large extent rules of family and succession law are influenced by the features of the society it is meant to regulate, as sceptical cultural constraints argument, which has prevented harmonisation of succession law from coming to the spotlights of the harmonisation of private law discussion, claims.¹ Even in Europe there are undeniable differences in substantive national rules on succession law dictated by different legal cultures² which have a potential to obstruct just outcomes for EU citizens and undermine legal expectations, but irregardless of differences between the European Union Member States and within them, the shared medieval legal past and modern common pan-European ideology which is currently on the rise provide a solid foundation for harmonisation of private international law aspects of succession³.

One of the most important steps towards harmonisation of this sphere of law is the latest Regulation No 650/2012 of The European Parliament and of the Council on Succession and Wills, also known as Brussels IV.⁴ It introduced a connecting factor of habitual residence as a main connecting factor to be used in establishing jurisdiction and applicable law in cases of cross-border succession. Habitual residence as a connecting factor was introduced for that first time on the Hague Conference in 1902, but no strict definition was given in order to avoid rigidity. The new Succession Regulation also does not define what habitual residence is leaving this question open for interpretation and determination by national courts of Member States in accordance with appropriate national law, but at the same time uniform and autonomous European interpretation is proclaimed necessary. It does provide, however, something similar to the guidelines for assessing habitual residence in the recitals 23 and 24 of preamble to the text of the regulation⁵. The test guidelines itself are also open to the interpretation of the national courts of Member States, as the text of the recitals doesn't provide an exhaustive test.

¹ Antokolskaya M. Family law and national culture. Arguing against cultural constraints argument. *Utrecht Law Review*, 2008, 4(2), p 25.

² *Ibid*, p 33.

³ *Ibid*, p 27.

⁴ Regulation No 650/2012 of The European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, OJ L 201, 27.7.2012, p. 107–134.

⁵ Regulation No 650/2012 of The European Parliament and of the Council on Succession and Wills, Preamble.

The aim of this research is to establish whether lack of specific definition of habitual residence and lack of specificity in the test guidelines for assessing it pose unnecessary obstacles in determining jurisdiction and applicable law.

The main hypothesis for this research paper states that **lack of unified definition and autonomous interpretation of the last habitual residence of the deceased in context of Regulation No 650/2012 of The European Parliament and of the Council leads to conflicts of applicable law and jurisdiction on the European law level.**

This research work consist of two main parts. In the first part advantages and disadvantages of habitual residence as a connecting factor will be discussed, comparison of habitual residence to nationality and domicile will be carried out and why habitual residence was chosen as a connecting factor for jurisdiction and applicable law in the course of harmonisation of succession law by European legislator will be established. The second part is set out to analyse scholarly articles about Regulation No 650/2012 of The European Parliament and of the Council and general principles of European Union Law in its foundation in order to establish main goals in adopting this regulation. Analysis of relevant case law in cross border succession in Europe is also to be carried out in the second part of the research work in order to conclude if the aims set out before Regulation No 650/2012 of The European Parliament and of the Council are being staggered by choice of habitual residence as a connecting factor for jurisdiction and applicable law and support the argumentation. Due to scarcity of case law concerning application of Regulation No 650/2012 of The European Parliament and of the Council, case law on matrimonial property was also used in order to analyse European approach to habitual residence as a connecting factor in area of law concerning rights to an estate arising from family relationships such as matrimonial property.

Methodology which was used in writing of this research manifested itself in a deliberate analysis of literary academic sources on Regulation 650/2012 application, international succession and European Union law as well as identification of the European Union and Member state domestic caselaw on international succession with problematic issues in habitual residence, this methodology can be classified as qualitative research method and specific legal methodology used was a combination of explanatory, hermeneutic and evaluate approaches with an evaluative component, as the work attempts to explain the legislative piece it revolves around, interpret the

concepts involved in that legislative piece and evaluate them. Sources to be used were carefully selected in accordance with thesis requirements and by substantiality of their contents. They include scholarly articles on the Regulation No 650/2012 of The European Parliament and of the Council and European family law, books on Private International law and relevant case law.

The Regulation No 650/2012 of The European Parliament and of the Council have entered into force on 17 of August in 2015. The subject of regulation is one of the most cumbersome and troublesome for EU citizens especially when it involves cross-border element. The harmonisation of the private international law area of succession law is quite important due to the consequences of free movement principle for EU citizens, as it became much easier to work and live abroad within the borders of European Union and it led to increase of cross-border element's presence in everyday life. Harmonisation in inheritance law is much needed in order to provide sufficient legal certainty for EU citizens and residents living outside of country of their nationality, to remove obstacles for facilitation of free movement of persons, to create and support a truly European identity⁶ and to simplify proceedings in order to guarantee better achievement of justice. But it should also be noted that such harmonisation should provide more benefits than obstacles, therefore necessary research on the matter is to be conducted.

⁶ Boele-Woelki, K. The principles of European family law: its aims and prospects. *Utrecht Law Review*, December 2015, 1(2), p 161.

1. Habitual residence as connecting factor

1.1. Competence of European Union in unification of private law

Only universally applicable rules on the conflict-of-laws can be a sufficient and satisfactory replacement for the corresponding national rules and as European legislative competence exists by virtue of attribution by Member States and European legal instruments can only be adopted within the frames drawn by the Treaty on the Functioning of the European Union,⁷ it has to be established that Union has acquired necessary competence for such unification. In order to start a conversation about regulation of private international law aspects in succession, whether European Union has necessary competence in private law in particular in order to harmonise and unify the latter has to be discussed first.

In accordance with Article 3(h) of Treaty on European Union, The Union only possesses competences in harmonising national laws to the extent necessary for the functioning of common market and no specific mention was made of inheritance law as it is hard to imagine that property relationship between testator and his or her successors would have significant and direct effect on the functioning of common market.⁸ The further restraint in the matter is that regulation of succession as such is historically a very local matter and principle of subsidiarity would normally dictate that Member States themselves are better equipped to deal with the matter.⁹ On the other hand, growing mobility of persons within the Union and rise in international unions which are often connected with property acquisition lead to a rise in cross-border successions and quickly exposed lack of proper instruments suitable for resolving this issue.¹⁰ Indeed, one cross-border succession case would not be capable to influence market sufficiently, but the multitude of such cases had demonstrated a sufficient economic need to provide unified tools to the Member States in order to deal with those cases.

However, the development of the European Community could not be stopped, European Union acquired more and more competences in private and civil law that the Founding Treaties could

⁷ Fallon, M., Kruger, T. The Spatial Scope of the EU's Rules on Jurisdiction and Enforcement of Judgements: From Bilateral Modus to Unilateral Universality? *Yearbook of Private International Law*, Vol. 14. Germany, SELP 2013, p 25.

⁸ Martiny D. Is unification of Family law Possible or even Desirable? Hartkamp, A.S. et al *Towards a European Civil Code*. Hague, Kluwer Law International 1998, pp 151-171, p 158.

⁹ *Ibid*, p 160.

¹⁰ Green Paper - Succession and wills, Commission, 01.03.2005, eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52005DC0065&from=EN (01.05.2017), p 3.

not initially predict would be needed and gradually it lead to the point where the discussion on European Civil Code in 90s have criticised the lack of private international law rules in private law, especially in recognition ad enforcement of foreign judgements, as national rules have failed to adequately address challenges posed by Common Market with respect to families in cross-border issues related to property.¹¹ In 2005 a Green Paper on wills and succession was published by Commission, which expressed a need for adopting harmonised European measures by the Union for the conflict rules of law on succession which would deal with judicial and extra-judicial instruments alike, it further discussed the legal issues to be addressed and posed the questions to be answered by the upcoming regulation.¹² Hence, a number of instruments was adopted since then to address challenges in various aspects of private law referred to in this paragraph.

European Union has no specific competence in harmonising substantive issues of succession, but it has competence regarding unification of private international law aspects of several areas of law including law of inheritance such as matters of applicable law, jurisdiction, recognition and enforcement of foreign decisions in cases with cross-border elements, although a broad interpretation of Article 65 of EC Treaty theoretically includes taking appropriate steps against loss of a legal position which can arise where connecting factor for determination of applicable law is not immutable and in that case broad interpretation of Article 65 of EC Treaty would allow for unification of substantive laws¹³ and a number of scholars has argued that to assume that it is possible to regulate the conflict of law rules in a particular area without in any way touching upon the substantive law is an illusion as not only will the integration of the private international law rules indirectly affect substantive law, but the EU's negative integration in the context of the four freedoms also has such an effect on substantive national rules, as negative freedoms prevent Member States from applying national rules of succession law in this particular case.¹⁴ The example of mutable connecting factor for determination of applicable law would be habitual residence in question, as it can change in accordance with actions, interests and bonds of a person concerned. The opposite of that would be a domicile of origin which

¹¹ Green Paper - Succession and wills, Commission, 01.03.2005, eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52005DC0065&from=EN(01.05.2017), p 163.

¹² Ibid, p 3.

¹³ Boele-Woelki, K. *supra* nota, 1(2), p 162.

¹⁴ Ramaekers, E. Cross-border Successions. The New Commission Proposal: Contents and Way Forward. A Report on the Academy of European Law Conference of 18 and 19 February 2010, Trier. Electronic Journal of Comparative Law, 2011, 15(1), p 4.

points out the country where the individual was born and which is highly unlikely to change during a lifetime of one individual. Nationality can be considered a stable connecting factor to a certain extent too, as for prevalent majority it is either extremely difficult or not desirable to change it. Location of the assets is also a common jurisdiction, but it works against the unification purposes of the succession regulation leading to a number of different succession warrants instead of one, to which the regulation strives. However, the regulation still allows for the Member State to have subsidiary jurisdiction if the assets of the deceased are situated in a Member states, if the Member state is the state of the nationality of the deceased or it was the state of previous habitual residence of the deceased, provided that when the court seized the case, no more than five years passed since that moment as the escape clause of the Article 10 of the Regulation provides.¹⁵ This Article is to be revoked only when such a need arises as a forum necessatis, as the spirit of regulation calls for the highest possible level of unification of the estate in inheritance case and such split of jurisdiction would work against it.

It shall be also noted that law of inheritance is substantially influenced by human rights instruments, the most prominent and relevant example being an establishment of equal rights to inherit of children born in and outside of wedlock granting of which was a result of an adoption of European Convention on Human Rights.¹⁶ Publications in the field indicate that two mutually non-exclusive conditions for necessity of unification in succession law are a clearly defined economic need and requirements of European Convention on Human rights or any other relevant human rights instruments,¹⁷ as it was elaborated on in this subchapter.

1.2. Description and comparison of connecting factors

After establishing that European Union has competence in sphere of unification of private international aspects of inheritance and succession, it is now appropriate to conduct the comparative analysis of relevant connecting factors used in private international law in order to prepare a foundation for a discussion on the suitability of habitual residence as a connecting factor for Regulation No 650/2012 of The European Parliament and of the Council. Connecting factors which are mainly used in European Union Member States and European Economic Area

¹⁵ Regulation No 650/2012 of The European Parliament and of the Council on Succession and Wills, Article 10.

¹⁶ Urve, L. Laws of succession in Europe and Estonia : how we got to where we are and where we should be heading. *Juridica International*, 2001, 6, p 118.

¹⁷ *Ibid*, p 118.

are habitual residence, domicile and nationality, comparison of which is the main focus of the subchapter. The comparison is needed to demonstrate differences of connecting factors and preemptively and in detail answer the question why habitual residence was chosen by the European legislator out of all connecting factors widely used in the Union despite its ambiguity which the legislator could not have been unaware of, it will provide a foundation for discussing habitual residence in context of Succession Regulation and possible tests and interpretations of the concept.

1.2.1. Habitual residence

Habitual residence is a connecting factor which is more commonly used for establishing jurisdiction in the *in personam* cases or jurisdiction of the lawsuit which lies in person, such as any case in succession law which concerns the personal right of the individual if such a right arose from the succession. It has become a tendency in international and European legislative field to choose habitual succession as a connecting factor lately, especially in the instruments concerning conflict of law rules,¹⁸ such as the Regulation discussed in this research.

Originally notion of habitual residence was developed by the Hague Conference on Private International Law as a compromise between domicile and nationality which belonged to common and civil law systems respectively in order to regulate on the international level.¹⁹

However, there is no clear and unified definition of what exactly is habitual residence in European instruments on conflict rules in private law. CJEU have expressed a clear intention that uniform interpretation of concepts throughout the Community legislation is necessary,²⁰ although necessity of Community interpretation instead of absolutely uniform international one is questioned in the Green Paper on succession and wills.²¹ Does it consequent in habitual residence having the same meaning throughout all areas of law it is introduced to through the European legislation? Not according to international case law and European legislator, as in *Mark v Mark* House of Lords has established that concept of habitual residence would have

¹⁸ Dutta, A. The Europeanisation of International Succession Law. The Future of Family Property in Europe. Cambridge, Intersentia 2011, p 349.

¹⁹ Clarkson C., Hill J. The Conflict of Laws. 4th ed. New York, Oxford University Press 2011, p 329.

²⁰ Lamont, R. Habitual residence and Brussels II bis: developing concepts for European private international family law. Journal of Private International Law, 2007, 3(2), p 269.

²¹ Green Paper - Succession and wills, Commission, 01.03.2005, [eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52005DC0065&from=EN\(01.05.2017\)](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52005DC0065&from=EN(01.05.2017)), p 4.

different meaning in different statutes depending on context and purpose of the statute and at the same time it has been established that for the purposes of EU law a separate and autonomous European position is to be developed and this position is also to vary depending on legal context which results in habitual residence of children definition to differ in context of parental responsibility from habitual residence definition in context of divorce even though both those issues are dealt with in the same Brussels II bis Regulation.²²

One of the most relevant cases on the issue of defining habitual residence in law of social security and Community law is *Robert Swaddling v. Adjudication officer*. This case was referred to the European Court of Justice by the Social Security commission of United Kingdom for preliminary ruling on the interpretation of article 48 of the EC Treaty. In this case Court of Justice of the European Union(CJEU) also provides the appropriate test for habitual residence and describes when a person is habitually resident in a Member state.²³ A person is habitually resident in a member state when his or her habitual centre of interests is found there, in its turn length and continuity of residence, the employment situation, the family status, reasons which had led the person in question to move and person's intentions as it appears from all circumstances are to be analysed in order to establish where habitual residence of a person would be,²⁴ it appears that certain element of routine should be present and proved in such residence. The court expressly states that the length of stay can not be an intrinsic element of such an assessment and preclude receiving a status of habitually resident in a Member State by an individual.²⁵ Intention is further discussed in *Z v. Z* case as the judiciary have concluded that whereas time-limited residence can satisfy the test, the intention to stay temporarily would not.²⁶ The European interpretation strives for a person to be habitually resident in one country as the result of the test, as logically a person can have only one centre of habitual interest.²⁷ In the discussion on the last habitual residence of the deceased, it is possible to imagine that the question of intent is to be excluded from the test in majority of cases, as establishing such can prove to be a tricky ordeal when a person who is no longer there is concerned.

²² Clarkson C., Hill J. (2011), *supra* nota, p 330.

²³ Lamont, R. (2007), *supra* nota, p 265.

²⁴ ECJ 25.02.1999, C - 90/97, Robert Swaddling v. Adjudication officer, para 29.

²⁵ *Ibid*, para 30.

²⁶ Clarkson C., Hill J. (2011), *supra* nota, p 339.

²⁷ *Ibid*, p 339.

The fact that there is no general definition for habitual residence have led to a conflict between proponents of objective, subjective and combined approach and this debate is still ongoing.²⁸ Objective approach refers to the position that only evidence of physical presence of a person in a state for considerable amount of time should be relevant in a test for habitual residence, whereas subjective approach relies on an intention of a person to reside in a state, make this state his or her home. Combined approach believes factual presence and the intention to consider residing in a place to be equally important in habitual residence test.

In accordance with *Swaddling* it is possible to establish that CJEU definition leans heavily towards combined side of the argument, as it doesn't take only intention or only factual presence in consideration, but both factors are to be analysed in order to establish where a person is habitually resident.²⁹ This definition consequently allows individuals to become habitually resident in the state almost immediately based largely on their intention, as the length of the presence is not highlighted, but it can not be completely disregarded also.³⁰ There is suspicion in the publications in the field that such an approach when applied in the sphere of succession law in context of Regulation No 650/2012 of The European Parliament and of the Council would result in providing a possibility for the future testators to vote with their feet in order to choose the law applicable to their succession by moving to a Member State with the legislation deemed most favourable by the testator and establish his or her habitual residence there,³¹ as the Regulation applies habitual residence as a connecting factor for establishing not only the jurisdiction but the law applicable to the succession.³² However, as habitual residence implies a certain degree of stability and routine associated with the country plus habitual centre of interests should be in the country of choice, it is highly unlikely that such a concern would arise,³³ as it is simply too much work, although it can not be disregarded as completely impossible. The reason behind the choice to use the same connecting factor to establish both forum for the proceedings and applicable law is thought to be that in that case the court responsible would apply the law that it knows best as opposed to the law of another Member

²⁸ Lieble, S., Muller, M. The idea of "Rome 0 Regulation". Yearbook of Private International Law, Vol. 14. Germany, SELP 2013, p 146.

²⁹ Lamont, R. (2007), *supra* nota., p 265.

³⁰ *Ibid*, p 265.

³¹ Anderson, M., Arroyo i Amayuelas, E. The Law of Succession: Testamentary Freedom. Groningen, Europa Law Publishing 2011, p 30.

³² Regulation No 650/2012 of The European Parliament and of the Council on Succession and Wills, Article 21.

³³ Rohová, I. et al Habitual residence as a single connecting factor under a succession regulation. International Journal of Law and Politics, 2015, 1(1), p 113, 114.

State or any third country in which case it is highly unlikely that the court would have the same level of expertise,³⁴ harmonising forum and ius would be a possible solution to prevent an undesired effect of the forum shopping.³⁵ However, the fact that habitual residence has no uniform definition and requires an elaborate test to be determined is very likely to put higher expectations on the court.³⁶

The concept of habitual residence is very well suited for the modern world as it became much easier to travel and move around, especially in the context of European Union, as this concept thrives to identify the country with which the person concerned has of have had close and legitimate connection in a relatively recent period of his or her life as opposed to identification of so called real home, even though a manifestly closer bond may connect the person in question with a different country.³⁷ But as it was already mentioned in the first sub-chapter of present chapter, habitual residence is not an immutable connecting factor, as a consequence of its relative flexibility it might generate false link which may render this connecting factor unsuitable to be regarded as a general rule,³⁸ although that doesn't preclude habitual residence to be used as a connecting factor in specific cases where it was deemed to be appropriate and the same risk exists for the concept of domicile.

1.2.2 Domicile

The concept of domicile is generally regarded as having two separate meanings: common law system meaning and continental meaning, but it has been given a specific European meaning for the purposes of Brussels I Regulation, which provides that individual is domiciled in a state if he or she is a resident of that state and the nature and circumstances of that residence indicate substantial connection of the individual with that state, such a connection would be presumed an individual was resident in a state for the last three month or more.³⁹

As the concept of domicile originates from common law features, several characteristics of common law domicile will be and its types will be discussed.

³⁴ Zalucki, M. New revolutionary European Regulation on Succession Matters: key issues and doubts. *The Journal of Civil Law*, 2016,3(4), p 169.

³⁵ Ramaekers, E. (2011), *supra* nota, p 3.

³⁶ Rohová, I. et al (2015), *supra* nota, p 114.

³⁷ Clarkson C., Hill J. (2011), *supra* nota., p 341.

³⁸ *Ibid*, p 341.

³⁹ *Ibid*, p 68.

The origins of most essential characteristics of modern understanding of domicile historically can be traced from Victorian era,⁴⁰ it is generally noted however that even though House of Lords has established that domicile has uniform meaning, it is defined differently in different areas of law,⁴¹ unlike nationality.

Usually three types of domicile are distinguished: domicile of origin, domicile of choice and domicile of dependence, a person can only have one of this domiciles at a given moment of time, although it would be more accurate to say that a person could have only one domicile for one purpose.⁴² A good example of domicile of dependence would be a child's domicile, as a dependence domicile is the one a person has by virtue of depending on another person, whereas domicile of origin is obtained at birth in most cases through the parents' domiciles although in exceptional circumstances place of birth can become the domicile of origin and domicile of choice is a domicile acquired by a person through residing in a country with the intention to settle there permanently or indefinitely.⁴³

In common law domicile is riddled with archaic and unsatisfactory specific rules which overlook a number of certain nuances. For example, the rule that domicile of origin is to be determined through and depends on legitimacy of the child overlooks the fact that in many cases in modern world legitimacy depends on domicile.⁴⁴

The domicile of origin has an interest conflict within itself: it is practically impossible to lose and it has to be proved beyond balance of probabilities and at the same time as domicile by definition it should indicate a so-called permanent home⁴⁵, which becomes a stretch in a modern world due to freedom of movement, even a child can change his or her domicile relatively frequently moving with his or her family and therefore changing his or her domicile of dependence.⁴⁶ This notion together with the doctrine of revival generally leads to the situation that a person will always have a domicile, if domicile of origin or dependency or both would be

⁴⁰ Clarkson C., Hill J. (2011), *supra* nota, p 305.

⁴¹ *Ibid*, p 305.

⁴² *Ibid*, p 306.

⁴³ *Ibid*, p 306.

⁴⁴ *Ibid*, p 307.

⁴⁵ "Habitual residence" as connecting factor in EU civil justice measures, European Parliament, 21.01.2013, [www.europarl.europa.eu/RegData/etudes/ATAG/2013/130427/LDM_BRI\(2013\)130427_REV1_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/ATAG/2013/130427/LDM_BRI(2013)130427_REV1_EN.pdf) (24.04.2017), p 1.

⁴⁶ Clarkson C., Hill J. (2011), *supra* nota, p 310.

lost, domicile of origin will be revived to fill the gap,⁴⁷ however use of the revival doctrine can often result in unrealistic, inappropriate and unpredictable situations when domicile is used as a connecting factor.⁴⁸

Domicile of choice currently also allows to be established through the intention to reside, as opposed to an actual prospects and guarantees such a a job, but it requires both objective and subjective tests to be applied in order to be acquired.⁴⁹ Domicile of choice has quite a few similarities with the subjective doctrine of habitual residence, but it can not be equated as domicile of choice is but a part of domicile doctrine.

Domicile of dependence is also be applied to mentally or otherwise incapable persons and wife in a certain case would have a domicile of dependency on her husband, even though it is generally mentioned in context of domicile of children.

The main issue of the domicile as it had been previously touched upon, is that the notion itself is deeply rooted in its historical Victorian origins despite various case law reforms.⁵⁰ As the purpose of the notion of domicile is to connect individuals with the closest legal system in order to apply the most appropriate rules, and the closest legal system for the person is thought to be that of the so-called home state.⁵¹ So far the contrary is often true as cases such as *Bullock* where a Canadian citizen had lived in United Kingdom for over forty years and would undoubtedly have English domicile of choice be the case ruled today did not acquire English domicile of choice in accordance with the decision and his domicile was found to be in Canada and this precedent had not yet been repealed.⁵² The attempts to reform the law on domicile in United Kingdom had been virtually fruitless and the latest development was the restatement of the definition by the final Report by Law Commission in 1987, which did not bring any long-awaited change.⁵³ For the succession law domicile did not acquire too much popularity in international sphere due to the stress it puts on the intention of the person to make a permanent

⁴⁷ Clarkson C., Hill J. (2011), *supra* nota, p 311

⁴⁸ *Ibid*, p 329.

⁴⁹ *Ibid*, p 317.

⁵⁰ *Ibid*, p 326.

⁵¹ *Ibid*, p 326.

⁵² *Ibid*, p 327.

⁵³ *Ibid*, p 327.

home in the country, establishing which for the deceased can be connected with a certain amount of difficulty and speculation.⁵⁴

1.2.3. Nationality

There is nothing too specific or unusual to be mentioned in accordance with what exactly nationality is. The general rule would be that one would be a national of a country he or she holds a citizenship of and who can be a citizen of the country is dealt with by the domestic laws of that country. This connecting factor is relatively immutable as even though it can be changed with a certain level of effort, very few decide to do so.

The main advantage of nationality over domicile and habitual residence is that it is relatively simple to establish,⁵⁵ it needs no specific definitions and tests, whether it is to be applied in contract law, family law or tort law, the answer to a question what is the nationality of a certain person will stay the same. Nationality itself is also a rather stable concept as not only people generally identify fewer nationalities than residences and it is tougher to change, but also nationality is immune from the random access and persons prefer to identify more with the culture they belong to than with the place they live in.⁵⁶

The obvious downside is that nationality as a connecting factor excludes stateless persons and complicates the situation for the people with multiple nationalities which is troublesome as holding a dual citizenship has become more common due to the rise in multinational family bonds in the European Union,⁵⁷ and whereas the latter can be resolved by applying the nationality of the forum or the nationality which is actively practiced, the latter would not have a readily available solution in absence of a specific rule.⁵⁸ The second obvious disadvantage would be a nationality of a state which has several legal systems, such as United Kingdom or United States.⁵⁹

⁵⁴ Atallah, M. The last habitual residence of the deceased as the principal connecting factor in the context of the succession regulation (650/2012). *Baltic Journal of European Studies*, 2015, 5(2), p 136.

⁵⁵ "Habitual residence" as connecting factor in EU civil justice measures, European Parliament, 21.01.2013, p 1. [www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130427/LDM_BRI\(2013\)130427_REV1_EN.pdf](http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130427/LDM_BRI(2013)130427_REV1_EN.pdf), (24.04.2017), p 1.

⁵⁶ Devaux, A. The European Regulation on Succession of July 2012: A Path Towards the End of Succession Conflict of Law in Europe or Not? *The International Lawyer*, Fall 2013, 47(2), p 233.

⁵⁷ Clarkson C., Hill J. (2011), *supra* nota, p 328.

⁵⁸ Lieble, S., Muller, M. (2013), *supra* nota, p 146.

⁵⁹ *Ibid*, p 328.

1.3. Conclusion

In order to sum up the analysis, the main disadvantages and advantages will be noted in the section of a second subchapter.

Connecting factors are meant to point out the state which has the closest bond with the person in question in order to simplify the proceedings for all the parties involved and choose the authority and the law which is better suited to deal with the situation. Three connecting factors discussed previously in the chapter aim to do so in different ways: domicile is aimed to find a permanent home of the person, although it fails to do so in certain case as illustrated by the *Bullocks* case, habitual residence test's goal is to find the current or last habitual centre of interests of the person in question, which can prove to be difficult sometimes in globalised world, and nationality should supposedly point out the country which has most legal ties with the person in question, which used to be true for a prevalent majority but the situation have changed significantly due to the freedoms granted to European Union citizens and residents.

The main features of habitual residence are the lack of certainty due to the absent uniform and autonomous European definition and insufficiently detailed or ambiguous tests for the habitual residence which leads to the difficulty of application and evidence collection especially when the variable meaning doctrine is applied which means that in practice one unified European definition for habitual residence can not exist. At the same time habitual residence is a most flexible connecting factor which makes it best suitable for the modern globalised world and European Union in particular, due to ease of free movement between the Member States. Consequently, habitual residence allows to identify the place where the deceased has established his most durable family, social and property relations, which favours distribution of estate and access to the competent authorities.⁶⁰ Habitual residence can be lost too, which can lead to the situation where a person has no habitual residence, but that disadvantage is easily fixed by referring to the last voluntarily acquired habitual residence, or in the case of divorce or marital property, to the last common habitual residence. The most important feature however in terms of succession is that habitual residence due to its flexibility and adaptability is not always the most suitable connecting factor in terms of estate planning.

⁶⁰ Alvarez-Thorne, M. Key points on the determination of international jurisdiction in the new EU regulation on succession and wills. Yearbook of Private International Law, Vol. 14. Germany, SELP 2013, p 414.

Domicile however can never be completely lost due to the revival doctrine, different domiciles for different purposes doctrine can rule out the cases where the actual connection with a certain country is low and it has defined tests and definitions, but the archaic nature of the doctrine renders it disadvantaged and inflexible. The fact that this doctrine is applied mainly by the countries which do not participate in Regulation does not make it a suitable connecting factor to be used.

Although nationality is simple to identify, it has obvious downsides in non-standard situations such as multiple nationalities, nationality of the state with several legal systems or statelessness and practiced nationality can only be of help in one situation.

To conclude the chapter and comparison of the connecting factors, it shall be stated that there is no single legal rule which would be the rule, as there are multiple solutions for the same problem and whatever rule is adopted will be just one of many possible solutions. There is no single connecting factor which would fit for each and every situation, but after the analysis carried out in this chapter it can be stated that habitual residence in its described form is a suitable solution to be applied in Regulation No 650/2012 of The European Parliament and of the Council on Succession and Wills, but issues of the ambiguity of the notion itself and the test for it are still present and can not be completely avoided if the Regulation and the notion stay in their current forms. Whether such an ambiguity poses unnecessary obstacles which can not be avoided or fixed in application of Regulation No 650/2012 of The European Parliament and of the Council on Succession and Wills will be analysed in the next chapter.

2. Regulation No 650/2012 of The European Parliament and of the Council on Succession and Wills

2.1. Underlying values and general principles of European Union in the context of the Regulation

In order to give a comprehensive answer to a question whether the ambiguity of the connecting factor of the Regulation creates any problems in application of the Regulation the aims which the Regulation is set out to achieve have to be analysed and the necessary background on the issues concerned has to be provided.

As the Green Paper on Succession puts it, succession of the estates became even more complicated in the recent years due to growth of the mobility of people within the European Union which has no internal frontiers and the increase in family unions between nationals of different Member States, which in its turn often consequents in acquisition of property in the territory of several Union countries, creating an economic need to regulate succession on the Union level.⁶¹

However, in order to better understand that need which led to the adoption of Regulation No 650/2012 of The European Parliament and of the Council on Succession and Wills it should be made known that approximately 11 million European Union citizens have exercised their right of free movement under the Founding Treaties of the Union, and as a result there are about 450,000 cross-border succession cases in Europe every year, with an average value of 274,000 euros per estate, which results in the total estimated value of all international successions in Europe in a year to be over 124 billion euros,⁶² as these statistics put the situation in a better perspective than even a very elaborate explanation of the results of an amplified exercise of freedom of movement given by the European Union to its citizens and residents.

In the preparatory work for the Regulation two key general principles of European Union law were specifically mentioned: legitimate expectations⁶³ and legal certainty.⁶⁴ Legitimate expectations of those whom the succession concerns are specifically mentioned in the context of connecting factor in law applicable to the succession in a preparatory work of the Commission

⁶¹ Green Paper - Succession and wills, Commission, 01.03.2005, eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52005DC0065&from=EN (01.05.2017), p 3.

⁶² Atallah, M. (2015), *supra* nota, p 131

⁶³ Green Paper - Succession and wills, Commission, 01.03.2005, eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52005DC0065&from=EN (01.05.2017), p 4.

⁶⁴ Ramaekers, E. (2011), *supra* nota, p 2.

for the Regulation, as the resulting choice of law should satisfy legitimate expectations of the individuals involved in the succession.⁶⁵

As to the values of the Regulation itself, Atallah comes to the conclusion that the principle of free movement have manifested itself as a value in the foundation of the Succession Regulation and the choices within the Regulation have been made with this value in mind.⁶⁶ He also states that choice of the habitual residence as a connecting factor upholds this value as it does not lock individuals in a certain legal system unlike *lex patriae* which was a second suggestion made by Green Paper on Succession and Wills, as such a choice upheld European integration policy contrary to the connecting factor of nationality, which would amplify sovereignty of the states if it was chosen.⁶⁷

2.2 Legal certainty

Legal certainty in the European law context has very close ties with the protection of legitimate expectations. It is important to understand that in context of the European rules on succession legal certainty and legitimate expectations are expressed through making it certain for the testator what law would be applicable to the succession, what authority will have power over succession and what powers would that be. In order to satisfy the principle of legal certainty, the rules which guard the aforementioned conditions should be accessible, should provide a clear mechanism for specifying the listed components in a concrete case and lack the ambiguity in interpretation.

Therefore in order to provide a sufficient level of legal certainty for European citizens and satisfy their expectations, the Succession Regulation 650/2012 should have a clear mechanism for identifying applicable law and forum. In both of those cases habitual residence is a connecting factor, e.g. the mechanism. It leads to the conclusion that habitual residence should be clearly identifiable for the purposes of Succession Regulation 650/2012.

The importance of the preemptive identifiability should be stressed, as it is a given fact that a person, whose primary interest is to be guarded in a succession will not be present at the proceedings therefore in order to guard the interests of the testator, he or she has to be provided with sufficient ability to plan the succession relying on the clear rules laid out in the Regulation

⁶⁵ Ramaekers, E. (2011), *supra* nota, p 4.

⁶⁶ Atallah, M. (2015), *supra* nota, p 138.

⁶⁷ *Ibid*, p 138

which is a legitimate expectation in the sphere of inheritance law. For these purposes, rules have to be sufficiently clear. It shall also be noted that however the choice of law clause is a necessary instrument, not every testator would use it or find it suitable, or even draft a will, therefore it is necessary for the ordinary mechanisms of the Regulation to provide sufficient insight in order to plan the succession.

2.3. Main goals and aims of the Succession Regulation 650/2012

Three main purposes for creating harmonised rules on the conflict-of-law aspects of the law on succession which are reflected in the recital 37 of the Succession Regulation are: achieving a level of legal certainty which would satisfy legitimate expectations of the citizens to an extent that citizens would know in advance which law would be applicable to the succession and such a choice would be also foreseeable where the testator is connected with more than one Member State⁶⁸, enable the laws which has the closest connection to the estate to govern the succession of that estate and avoidance of the contradictory results with the help of those harmonised rules,⁶⁹ ensure that identity and power of the responsible authorities would be known and their decisions will be recognised and enforceable in all Member States without a special procedure.⁷⁰

Aims which are of the most concern to this research are connected with legal certainty, legal expectations and various issues on foreseeability. Legal certainty in the cross border succession became a much more relevant issue for the European legislator as it was previously discussed due to the consequences of the amplified exercise of the free movement right by the EU citizens and broadening of the competences of the European Union has allowed to find a unified solution on the Union level for this issue. The rise in the cross-border successions without unified conflict-of-law rules in the area lead to a number of cumbersome cases where the heirs and the testator were subjected to the national legal systems of the states which could have different approaches to the estate, let alone the fact that national rules of that state would be applicable in both private international law aspects and succession law itself, where former would often result in either several states claiming the jurisdiction or no state willing to claim it.

⁶⁸ Judicial cooperation in civil matters in European Union, European Commission, 2014, ec.europa.eu/justice/civil/files/civil_justice_guide_en.pdf. (24.04.2017), p 71.

⁶⁹ Crawford, E.B. et al Speculation on the Operation of Succession Regulation 650/2012: Tales of the Unexpected. *European Review of Private Law*, 2014, 22(6), p 851.

⁷⁰ Judicial cooperation in civil matters in European Union, European Commission, 2014, ec.europa.eu/justice/civil/files/civil_justice_guide_en.pdf. (24.04.2017), p 71.

One of the steps towards those goals was adoption of monist approach to the estate where an estate is considered a whole even though its parts can be situated in different countries, which is followed by the majority of the Member States and Hague Succession Convention,⁷¹ that is a necessary step as the scission approach would not bring change and simplification in the cross-border succession proceedings.

As to the legal certainty, one of the traditional ways to achieve it is the simplicity of the instrument, which Brussels IV arguably lacks with 7 Chapters divided in more than eighty articles and many excluded issues, although it can not be denied that the area to be unified is vast and comprehensive.

A set of characteristic features of the regulation corresponding with its goals can also be highlighted: coherence in treatment of every succession case, each succession can be treated under a single applicable law and single competent authority, respect to party autonomy where it is exercised, avoidance of parallel proceedings and contradictory decisions, assurance in mutual recognition and enforcement of the decisions.⁷² The goal which is of most interest for this work is avoidance of parallel proceedings and contradictory decisions as it is largely dependent on successful determination of jurisdiction which depends on determination of last habitual residence of the deceased.

European rules on jurisdiction have evolved to the point where a court that accepts the validity of a certain decision does not only decline jurisdiction but binds other courts of European Union to recognise that decision too which is called a *lis pendens* principle⁷³ and is a serious development as compared to the situation where a national court of a Member State would prevent any other court from examining the validity of jurisdiction claim if it has affirmed its own jurisdiction over the case, as it was under the Brussels I Regulation.⁷⁴ This development puts a strain on jurisdiction rules, which should be more precise in serving its purpose and more efficient in exclusion of forum shopping due to a greater risk it would pose as a French court and a German

⁷¹ Dutta, A. (2011), *supra* nota, p 346.

⁷² Rohová, I. et al (2015), *supra* nota, p 110.

⁷³ Practice Guide for the application of Brussels IIa Regulation, European Commission, 2014. ec.europa.eu/justice/civil/files/brussels_ii_practice_guide_en.pdf, (24.04.2017), p 15.

⁷⁴ Torralba-Mendiola, E. et al Two's a company, Three's a crowd: Jurisdiction, Recognition and Res Judicata in European Union. *Journal of Private International Law*, 2014, 10(3), p 408.

court would not necessarily interpret the same applicable law in a same way⁷⁵ but the resulting decision would be binding and final for all the courts of all Member States. Although if court finds that it has no jurisdiction in the case it must declare so and drop the case in question, there is still hardly a solution in case of incorrect or inappropriate determination of jurisdiction and applicable law especially if there is a certain level of ambiguity involved in the main criteria for such determination, therefore it is the best interest of the legislator to devise which connecting factor would allow for the most precise and accurate determination of the responsible court which would be the most suitable and best situated in order to apply the law chosen. It has to be duly noted that incorrect determination of jurisdiction in case of Brussels IV would often go hand in hand with incorrect determination of applicable law due to both issues being dependent on the same connecting factor. Incorrect determination of applicable law carries a potential to undermine will and expectations of the deceased due to the mandatory provisions of the law which would be applicable such as obligatory shares provisions which are present in substantial inheritance law rules of most Member States and which differ with regards to who is entitled to that share and how much would that be.⁷⁶

Succession Regulation does allow for the court to apply the law it knows best which minimises the mistakes and shortcomings as the connecting factor for the determination of the jurisdiction and applicable law is the same - habitual residence, as long as habitual residence is determined correctly and correct determination of this concept is to be ensured by the appropriate test and uniform and autonomous European interpretation which will be discussed in a relevant sub-chapter. The only difficulty may arise where it would be determined that deceased had more than one habitual residence at the moment of death, although it is highly unlikely that different habitual residences would be used as a connecting factors as it goes against the aims and principles of the regulation and the escape clause on the manifestly closer connection will provide a way out, especially as it underlines the fact that the court best situated is to deal with the case and it would be possible to conclude that such a court would be a court of the country of habitual residence of the deceased with which the deceased had a closer connection where the deceased has acquired several habitual residences by the moment of his or her death. The issue

⁷⁵ "Habitual residence" as connecting factor in EU civil justice measures, European Parliament, 21.01.2013, [www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130427/LDM_BRI\(2013\)130427_REV1_EN.pdf](http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130427/LDM_BRI(2013)130427_REV1_EN.pdf) (24.04.2017)p 15.

⁷⁶ The EU Succession Regulation No. 650/2012, STEP, www.step.org/sites/default/files/Policy/Succession_Regulation_FAQs.pdf (23.04.2017), p 4.

of the less standard cases where one or more of the escape clauses need to be evoked are already difficult in a first place and they can also lead to the situation where court is not familiar with the law it is to apply, but as escape clauses are only to be evoked in rare difficult cases such outcomes would be tolerable.

2.4. Habitual residence in context of succession and wills

This chapter is to analyse suitability of habitual residence as a connecting factor in context of inheritance, problems in determination of last habitual residence connected with ambiguity of the concept and whether any goals, aims or principles and values of the Succession Regulation are undermined when habitual residence acts as a connecting factor.

Habitual residence in context of succession should be evaluated very carefully. Last habitual residence of the deceased would have a significantly harder time in the establishing process due to the nature of the test, not only the lawyers would have to figure out somehow all the relevant details of the private life of the deceased which can include but are not restricted to work place and a permanent home, intention, private memberships in clubs, hobbies, place where the deceased was registered to vote and whatever else would be deemed necessary by the court in the specific circumstances of every case in order to eliminate doubt on what was the last habitual residence of the deceased.⁷⁷ This process is open to a certain speculation and manipulation, as some pieces of evidence would be entrusted by the prospective heirs themselves which would have immediate interest in the outcome of the succession.⁷⁸ The issue of the intent is in the need of re-evaluation as well in context of the test for last habitual residence of the deceased as although intent in European Union caselaw is considered significant for establishing habitual residence of an individual where the person is deceased establishing intent of this person becomes a rather problematic ordeal.

Unfortunately, even the escape clauses for the jurisdiction and applicable law suffer from ambiguity. The Regulation provides that in exceptional case where it was clear from the circumstances of the case that the deceased was manifestly closer connected with a state different from the state of his or her habitual residence, the former state should either have

⁷⁷ Atallah, M. (2015), *supra* nota, p 135.

⁷⁸ Devaux, A. (2013), *supra* nota, p 233.

jurisdiction or law of that state should apply, or both, which is more likely.⁷⁹ However, what is a manifestly closer connection was not defined and there is no test provided in the Regulation for it, although recital 25 mentions that where a person had moved in a state fairly recently before his death, he would generally be presumed to have a manifestly closer connection with a different state which is not necessarily true in each and every case.⁸⁰ Recital 25 of the Regulation also warns against resorting to this escape clause every time when defining last habitual residence of the deceased proves complex.

When the connecting factor for the choice of law is being chosen for the conflict-of-laws instrument, two main issues are taken in consideration: security and proximity, where security means how easy it is to determine the law applicable to the succession and proximity is defined by how close would applicable law be to the presumed centre of main interests of the deceased.⁸¹ The discussion on the subject in context of the Succession Regulation in the relevant publications in the field have arrived to the conclusion that the last habitual residence of the deceased is the most suitable connecting factor as it normally indicates the centre of economic interests of the deceased, it is likely that family of the deceased would also live in a place of last habitual residence of the deceased, it would be most natural and appropriate connecting factor in the circumstances of the Regulation and it had not been problematic to establish habitual residence or domicile in experience of some practitioners, but Devaux warns that theoretical discussion and practice are divided by a gap, especially in the situation of habitual residence acting as a connecting factor in Succession Regulation and predicts that practitioners will be riddled with questions when they would need to apply the Regulation.⁸² There is no practice guide prepared for the Succession Regulation as well which can complicate the situation further,⁸³ but there are transitional provisions laid down in Article 83 of the Regulation,⁸⁴ which effectively mean that any testament made before August 15 in 2015 and enforced after that date is to be reviewed on the subject of the choice of law made in a will to be in accordance with

⁷⁹ Crawford, E.B. (2014), *supra* nota, p 859.

⁸⁰ Regulation No 650/2012 of The European Parliament and of the Council 650/2012 on Succession and Wills, recital 25.

⁸¹ Devaux, A. (2013), *supra* nota, p 232.

⁸² *Ibid*, p 232.

⁸³ Ramaekers, E. (2011), *supra* nota, p 4.

⁸⁴ Regulation No 650/2012 of The European Parliament and of the Council 650/2012 on succession and wills, Article 83

those transitional provisions.⁸⁵ There is a Commission Implementing Regulation No 1329/2014 too which is devoted to the European Certificate of Succession, as it is an absolutely new mechanism in succession law.⁸⁶

What is especially cumbersome in this situation is that a factual criterion of habitual residence requires to be determined on the case by case basis⁸⁷ as expressly stated in the Succession Regulation and the lack of uniform definition, test or caselaw on the Regulation can complicate application of the concept in practice until this problem is resolved by the Court of Justice of the European Union.

Some guidance on the issue was provided in the recital 23 of the Regulation, which states that habitual residence of the deceased shall reveal close and stable connection with a state just as every other connecting factor and this connection is to be uncovered by the overall assessment of the circumstances of the life of the deceased person preceding his or her death and at the time of death and all the relevant factual elements are to be included in such an assessment.⁸⁸ This guidance is not sufficiently specific and does not allow to differentiate habitual residence from the domicile of choice, defining factual assessment in a certain way would be more sufficient, but the recital only provides a short non-exhaustive list of examples. It is only left to conclude that further guidance and necessary precision will be provided once the CJEU will be required to make a preliminary ruling on the subject which had not happened yet.

If it can be assumed that habitual residence in European Union Law is an independent autonomous concept, then there is some guidance in the CJEU case law. It is, however, still unclear, whether the habitual residence as a concept is to have a separate meaning in a context of different branches of law. As currently there is very little case law on Succession Regulation 650/2012, it is necessary to look a bit further than area of succession in Europe in the terms of case law. The most suitable adjacent topic would be case law on matrimonial property as it also deals with property ownership and how the interpersonal relationship influence that, but a great

⁸⁵ Davidoff, P. Will the Brussels IV be the panacea for Europe's cross-border woes? *Solicitors Journal*, April 2015, p 13.

⁸⁶ Commission Implementing Regulation No 1329/2014 of 9 December 2014 establishing the Forms referred to in Regulation (EU) No 650/2012 of the European Parliament and of the Council 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, OJ L 359, 16.12.2014, p. 30–84.

⁸⁷ Rohová, I. et al (2015), *supra nota*, p 111.

⁸⁸ *Ibid*, p 112.

deal of habitual residence proceedings in matrimonial property concern habitual residence of children which is defined in a different way albeit connected with habitual residence of a parent or parents as it was previously established. One of the most useful case law pieces in defining habitual residence is *Romeu v. Commission*. In that case Court again establishes the concept of habitual residence as a centre of habitual residence and states that all factual circumstances must be taken into account when establishing it,⁸⁹ in context of establishing habitual residence of former employee of Spanish nationality of the Patrimonat in Belgium in order to establish if she is to be paid an expatriation allowance. While doing so, Court also references two more pieces of case law which established habitual residence: *Benzler v. Commission* which specified that intention is important for European interpretation of habitual residence⁹⁰ and *Magdalena Fernández v. Commission* which basically sets out a test for habitual residence, by stating that the place of habitual residence is that in which the official concerned has established, with the intention that it should be of a lasting character, the permanent or habitual centre of his interest.⁹¹ The lack of case law which relates to defining habitual residence in the context of succession can be due to either interpretation that uniformity of European definition means that the definition is the same for all areas of law and there is no need to question it due to the guidance from European case-law, or the national courts use national definitions of habitual residence in the context of succession.

With regard to the determination process for habitual residence, a case study on *Chebotareva v. King's Executrix* is a rather good example. The case originated in United Kingdom and was heard in March of 2008 in Stirling, the main subject of this case being habitual residence of the deceased. Irregardless of the temporal scope of this case, it is a useful example of the length lawyers of the both parties had to go in order to establish the last habitual residence of the deceased. Just to give an example, questioning of neighbours of the properties which belonged to deceased was conducted and evidence of how often the trash was taken out of those properties, how often the deceased was seen and whether there were any noise coming from the property was collected and used in the determination of where the deceased had actually lived which as it was already mentioned a number of times is but a mere part of the non-exhaustive list of the

⁸⁹ CJEU 08.08.2004, T-289/02, *Romeu v. Commission*, paragraph 51.

⁹⁰ CJEU 28.09.1993, T-90/92, *Benzler v. Commission*, paragraph 17.

⁹¹ CJEU 15.09.1994, C-452/93, *Magdalena Fernández v. Commission*, paragraph 22.

factual test for establishing the habitual residence of the deceased.⁹² This case took place in one country and concerns different cities, specifically London and Stirling, the complications which will be encountered if the deceased had been more mobile are easily imaginable, with the communication troubles being the first one on the list. To illustrate the matter further, the same paragraph eight goes into the speculation on the character of the deceased, describes the location of the property and where, for how long and how often the car which belonged to the deceased was parked. However, it should be mentioned that more reliable evidence such as electricity bills was examined and taken into consideration too. The procedure used in the case however is quite similar to the national procedures used in Member States, but the case discussed took place within one country although the legal system to be applied depended on whether last habitual residence of the deceased would be found to be in England or Scotland and the cross-border element has to be considered very carefully and standard domestic procedure is unlikely to demonstrate good results in international context.

As to the legal definition of the habitual residence and simplification of the proceedings such as the one described above, Hague Conventions seem to keep the view that habitual residence should not be defined at all, as definition will make habitual residence subject to strict and rigid rules which will deny freedom to decide whether a person is habitually resident in a state to the courts which will make the concept stiff and eventually inappropriate.⁹³ This approach might not be the best suitable and appropriate for the European Union as Member States should be able to apply the instrument on succession and wills in a unified way, although legal definition of last habitual residence of the deceased can be the most suitable for the purposes of the Regulation solution in that case, one of the aims of the legal definition being an assurance that every individual would have at least one habitual residence at the moment of death.⁹⁴

The definitions provided by the scholars, Swiss and Belgian national law share a number of common features, such as: mobility of the concept of the habitual resident, intent of the deceased, stress on 'personal life' instead of 'family life', factual presence in the state concerned of the individual and the necessity of some form of durability of stay.⁹⁵ The simple mention list

⁹² Sheriff Court of Tayside, Central and Fife at Stirling, Fam. L.R. 66, 28.03.2008, United Kingdom, *Chebotaryova v. Khandro(King's Executrix)*, paragraph 8.

⁹³ Atallah, M. (2015), *supra* nota, p 133.

⁹⁴ *Ibid*, p 140.

⁹⁵ *Ibid*, p 141.

of those features in the test for habitual residence of the deceased would allow for a greater clarity, especially the personal life stress and factual presence in the connection with durability of stay.

The interpretation of the last habitual residence of the deceased is also further complicated by the fact that for the many Member States the concept of habitual residence itself in context of succession law is virtually unknown and in the absence of clear and coherent uniform guidance, several problems might arise in interpretation of the notion by national courts, especially where the intent of the legislator was to have a uniform and autonomous interpretation as the result.⁹⁶ For those Member States where the concept of habitual residence is known and applied the situation is not much easier as a specific and established through practice interpretation is likely to differ in different Member States. Even though European legislator has used habitual residence as a connecting factors in a number regulations on private international law aspects of family law before, it is still unclear whether concept of habitual residence would have a separate meaning for each regulation or would it have common meaning for all instruments it encompasses.⁹⁷ One might start to wonder whether the specific interpretation is of that much importance as long as the result is the same irregardless of the interpretation which can be countered with the fact that such coincidences are not guaranteed and it does not contribute to legal certainty.

However, habitual residence is currently a very popular connecting factor in instruments on unification of conflict of law rules in various areas of private law⁹⁸ and it was one of the initially proposed by the Green Paper on succession and wills connecting factors.⁹⁹ The reasons for deciding in favour of habitual residence might have been flexibility which affects the economic reality of the Union, requirement for the presence of the deceased on the territory of a state to be a matter of routine which is thought to eliminate purposeful change of residence aimed to change the law applicable to the succession,¹⁰⁰ which was also discussed in the first chapter of that research. Moreover, habitual residence is thought to raise less litigation than *lex patriae* and *lex*

⁹⁶ Fuchs, A. The new EU Succession Regulation in a nutshell. ERA Forum, 4.08.2015, p 120.

⁹⁷ Fuchs, A. (2015), *supra* nota, p 124.

⁹⁸ Practical Handbook on Private International Law, Civil Justice Programme, 2010, ec.europa.eu/justice/civil/files/practical_handbook_eu_international_law_en.pdf (15.04.2017), p 14.

⁹⁹ Rohová, I. et al (2015), *supra* nota, p 110.

¹⁰⁰ *Ibid*, p 114.

domicili and connect movable and immovable property in a better way.¹⁰¹ Adoption of this connecting factor is thought to correspond with the trends in private international law on all levels including the EU level,¹⁰² the choice of habitual residence as a connecting factor is a libertarian trend in legal field of private international law and specially European private international law.¹⁰³

It shall be duly noted that the main advantages of the regulation can also be considered as disadvantages - greater flexibility of the connecting factor can be viewed as instability and restricted capacity to act in certain way for a testator in order to ensure a certain choice of the law applicable to succession undermine successful estate planning,¹⁰⁴ whereas some may call it a toolbox for the testator with tensions in the family especially as protection provided for the family is minimal.¹⁰⁵ The issue of too great flexibility is thought to be counterbalanced by the more restricted freedom of party autonomy in choice of law, as the testator can only choose the law of his nationality to apply to his succession which is not too much of a choice even if the testator holds several citizenships,¹⁰⁶ the mere introduction of this choice, however, is thought to be dictated rather by a political compromise and need for integration than by a self-determination of a person.¹⁰⁷ Irregardless, this still allows to choose, even though in restricted frames and the mere possibility of this choice allows to plan succession of an estate for the persons who consider this to be necessary.

However, party autonomy in the area is still considered a novel concept and the convention that choice of law includes only the countries which have actual connection with the testator, such as country of habitual residence or nationality, as there is a fear that unrestricted choice would lead to the application of exotic laws.

It also has to be touched upon that last habitual residence of the deceased is particularly hard to establish. As it was discussed above, in the European interpretation of habitual residence intent to settle permanently or temporarily plays a significant role in establishing habitual residence.

¹⁰¹ Atallah, M. (2015), *supra* nota, p 132.

¹⁰² Rohová, I. et al (2015), *supra* nota, p 115.

¹⁰³ Dutta, A. (2011), *supra* nota, p 352.

¹⁰⁴ Ramaekers, E. (2011), *supra* nota, p 3.

¹⁰⁵ Wautelet P. Property rights, freedom of testation and protection of family members under the EU Succession Regulation, 25.09.2015, <https://orbi.ulg.ac.be/bitstream/2268/186230/1/ERA%20Succession%20Protection%20of%20Family%20Property.pdf>, (22.04.2017), p 30.

¹⁰⁶ Pfeiffer, M. Choice of law in International Family and Succession law. *The Lawyer Quarterly*, 2012, 4, p 300.

¹⁰⁷ *Ibid*, p 296.

When habitual residence of a deceased had to be established, it is quite hard to specify what was the intent of a person who is no longer there, unless it was clearly communicated to someone or set in writing, for example, in a diary. At the same time where potential heirs provide evidence about the intent of deceased, it can potentially be hindered with. Unless there is a specific criteria for establishing intent which would replace a vague test of factual circumstances, the possibility of hindrance can not be excluded.

However, habitual residence of the deceased allows to choose the forum and ius best suited to guide the inheritance proceedings.¹⁰⁸ Convenience of that choice for heirs can be questionable, but in the succession will of the testator prevails, although interest of heirs can not be disregarded as well. The only possible solution for the issue where heirs have to get over significant obstacle in order to participate in the proceedings, for example due to residing in a country different from country of last habitual residence of the deceased, would be to separate connecting factors for applicable law and forum, which would both satisfy will of the deceased by applying laws better suited for succession and heirs.¹⁰⁹ However, it creates a bigger problem as the court would not be suited for applying the law if countries of last habitual residence of the deceased and residence of the heirs differ, especially as Regulation allows for third countries law to be applied if the rule points out to it. Also, the plurality of heirs may also pose an issue in that case. The Working Paper also argues that possibility of abuse of system in terms of voting with their feet in order to change their country of habitual residence is unlikely as there is only one Member State which does not have a reserved portion.¹¹⁰ It was also argued previously that this would be rather irrational and unnecessarily cumbersome for the future testator.

It also have to be duly noted that although ambiguity of habitual residence in European context is rather hard to deny, it can pose sufficient problems only in cases limited number to certain circumstances.¹¹¹ In order to prevent problematic cases, choice of law can be exercised under Succession Regulation 650/2012, as it will spare the difficulties of establishing habitual

¹⁰⁸ Crivellaro J., Herzog S., Michaels M. The EU Succession Regulation and its impact for non-Member States and non-Member states nationals, *Trusts & Trustees*, 22(2), 2016, p 227.

¹⁰⁹ Commission staff working document accompanying the Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of successions and on the introduction of a European Certificate of Inheritance Impact Assessment, Commission, 14.10.2009, [eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52009SC0410&from=EN\(01.05.2017\)](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52009SC0410&from=EN(01.05.2017)), p 29.

¹¹⁰ *Ibid*, p 29.

¹¹¹ Wautelet P. International Successions: Overview of Regulation 650/2012, 2014, <http://www.notaries-of-europe.eu/files/training-new/2014-03-24/EN%20Wautelet%20general%20presentation.pdf> (22.04.2017), p 19.

residence of the deceased and choice-of-court clause allows the courts of the Member State whose law is to govern the succession to have the jurisdiction over the case.¹¹² Thankfully, EU judiciary has also excluded the possibility of dual habitual residence for any purposes on the grounds that it is likely to make application of some instruments cumbersome or impossible and it was not intended so to be possible.¹¹³

Taking into account all arguments described above, it is still possible to state, that clear definition of habitual residence would be highly beneficial. As in most cases the problem with ambiguity does not arise, the flexibility of what the concept means, is not necessary, as the concept itself is flexible enough to accommodate the changes in the centre of habitual interests of the testator. However, clear definition will firstly help establish a clear and definitive test for habitual residence, secondly, this definition and test would be highly beneficial for officials working with the case and for the persons involved, as the procedure would not involve collecting mountains of minuscule potentially unimportant details, as was demonstrated in the case of *Chebotareva v. King's Executrix* and it would be easier to devise it before-hand. Both choice-of-the-law in conjunction with choice-of-the-court and manifestly closer connection clauses provide enough protection from hindrance of the test if it is defined. It will also establish a single uniform interpretation through out the European Union without leaving it up to the Member State judiciary to devise a new concept or apply the one in use in that Member State.¹¹⁴

2.5. Conclusion

In order to conclude the chapter, the answer to the question whether habitual residence of the deceased is suitable to fulfil the goals and aims of the Succession Regulation will be given.

It is safe to say that the Succession Regulation 650/2012 has fulfilled most of the goals which were put forward when the need for such instruments arose: it is a legislative piece which provides harmonisation of private international law rules in order to avoid contradictory rules, the provisions of the Regulations allow for the forum and ius to be the same, by that also making the authority responsible for the succession easily deducible and known as well as providing for

¹¹² Wautelet P. (2014), *supra* nota, <http://www.notaries-of-europe.eu/files/training-new/2014-03-24/EN%20Wautelet%20general%20presentation.pdf> (22.04.2017), p 19.

¹¹³ CJEU 16.05.2013, Case C-589/10, *Janina Wencel v Zakład Ubezpieczeń Społecznych w Białymstoku*, paragraph 48.

¹¹⁴ The New EU Regulation (Brussels IV): Understanding the Impact on Cross-Border Estate Planning and Administration, The American Bar Association Section of International Law, 2016, <https://shop.americanbar.org/PersonifyImages/ProductFiles/237345198/Session%205.pdf> (01.05.2017), p 11.

the recognition of the decisions and authentic instruments. The Regulation also accommodates the need of the European population for the certain level of unification in succession. As to legal certainty, however, the situation is slightly more complicated. The lack of uniform definition is still an issue, although it only surfaces in a number of cases as in the most succession processes it can be established fairly easily, but thus number of cases can not be disregarded. Flexibility of the concept is incredibly useful for European context, but providing a uniform definition would still allow for the better application and more certainty even in the cases where the habitual residence is easily deduces for the estate planning purposes. The procedure of establishing habitual residence is a horror in itself, as most of the authors in the field provide, as all sides has to collect all pieces of evidence which can prove absolutely useless in the end, which also requires precious time.

It shall also be duly noted that none of the problems with last habitual residence of the deceased can be solved by simply replacing it with another connecting factor, as it was also demonstrated in the previous chapter, last habitual residence of the deceased is currently the best, most rational choice for the connecting factor in the context of succession, although it has it's problems and can be improved without a doubt.

To sum up, the Succession Regulation and its connecting factor are effective enough, as it is also demonstrated to a certain extent by the scarcity of the case-law submitted to the CJEU, the requests of preliminary ruling also do not concern interpretation of habitual residence, but jurisdiction to grant national certificated of succession which were replaces with European Certificate of Succession¹¹⁵ and permitting refusal to recognise the material effects of a legacy by vindication.¹¹⁶ It leaves, however, the question open whether the tests and definitions applied in the cases are uniform and autonomous European tests and definitions which had been touched upon in previous case law regarding instruments which also use habitual residence as a connecting factor

¹¹⁵ CJEU 18.01.2017, Request for a preliminary ruling from the Kammergericht Berlin (Germany), C-20/17, *Vincent Pierre Oberle*.

¹¹⁶ CJEU 17.05.2016, Request for a preliminary ruling from the Sąd Najwyższy (Poland), C-277/16, *Polkomtel Sp. z o.o. v Prezes Urzędu Komunikacji Elektronicznej*.

Conclusion

In closing, the conclusions made in the present research and the initial hypothesis and research questions will be re-visited and rounded up.

Firstly, it had been established in the course of analysis laid out in the first chapter that habitual residence is indeed currently most suitable connecting factor for international private law in European context. The connecting factor should identify the State which has the closest connection with the person in question, and traditional connecting factors such as domicile and nationality have been proven to be slightly rigid in modern context, especially in European Union where establishing new bonds with States other than the State of nationality or origin is manifestly easier than it has ever been before, which has initially triggered the need for unification in sphere of succession law. Flexibility of habitual residence allows it to adapt to the changing needs and interests of persons.

However, establishing what is the State of habitual residence of an individual can prove to be a difficult feat, which can especially troublesome for the countries with several legal systems such as United Kingdom or Spain where it would have more specific meaning. It shall also be added that European jurisprudence almost does not address ambiguity and vagueness of the concept, although the test for habitual residence is wide-known as it has been established in the number of cases to be that habitual residence of a person is in a State where his or her habitual centre of interests is which is established in accordance with factual circumstances in the particular case. One might ask, what would be such factual circumstances? As it was seen in *Chebotareva v. King's Executrix*, it can be practically anything starting with invoices for utilities to testaments of the neighbours regarding how often the trash is taken out and how often did the neighbours of the person in question met that person on the staircase.¹¹⁷ The practicality of this approach is questionable and although Hague Conference maintains that defining the concept will make habitual residence too rigid,¹¹⁸ there is no reasonable obstacles for defining the test for it in a sufficient way by elaborating on and restricting factual circumstances to certain issues, which will make the process of establishing habitual residence easier for everyone involved, starting

¹¹⁷ Sheriff Court of Tayside, Central and Fife at Stirling, Fam. L.R. 66, 28.03.2008, United Kingdom, *Chebotaryova v. Khandro(King's Executrix)*, paragraphs 6-8.

¹¹⁸ Clarkson C., Hill J. (2011), *supra* nota, p 329.

from the estate planners to their lawyers and heirs. Defining the test for habitual residence would also contribute to its uniform application, which is one of the goals of European legislator.

It should be noted, however, that only a limited number of cases has trouble establishing last habitual residence of the deceased due to the circumstances of life of the deceased,¹¹⁹ which is illustrated by the lack of CJEU case-law on the issue. It also shows that Regulation No 650/2012 of The European Parliament and of the Council is an effective instrument which has achieved the goals set out before it, but that should not lead to disregarding the potential cases which might have problems in defining habitual residence. Issues can arise where a deceased was an airplane crew member or worked on a ship, be it passenger, cargo or cruise ship, and in other similar cases where employment is connected with spending sufficient amount of time in several states.

One shall not also come to think that problems which may or may not arise in application of last habitual residence can be solved by replacing it with another connecting factor, as it is simply not so as it was demonstrated in the first chapter which analysed three connecting factors contemplated on by the Green Paper as possible for the Regulation on Succession and touched upon in the third subchapter of the second chapter.¹²⁰

To shortly sum up, domicile is an archaic Victorian concept with cumbersome application which is impossible to change, nationality can lead application of the laws of the state which has no real connection with the deceased and is helpless if the testator had several nationalities or statelessness of the deceased, whereas habitual residence of the heirs either is far from fulfilling the will of the deceased which is one of the most important aims of inheritance law when it is applied for both forum and ius, or it separates forum from ius when habitual residence of heirs is applied as connecting factor which complicates the inheritance procedure. The issues with habitual residence of heirs might also arise when there is more than one heir which is fairly common. It is currently a scientific consensus that habitual residence is the best suitable connecting factor for European context.

There is no single flawless legal rule which would perfectly fit every possible situation in any given problem and one problem can be solved in many ways, whereas a solution chosen can be

¹¹⁹ Wautelet P. (2014), *supra* nota, <http://www.notaries-of-europe.eu/files/training-new/2014-03-24/EN%20Wautelet%20general%20presentation.pdf> (22.04.2017), p 19.

¹²⁰ Green Paper - Succession and wills, Commission, 01.03.2005, eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52005DC0065&from=EN (01.05.2017), pp 3-4.

perfected by thought through legislation. Such a solution in the case of Regulation on Succession and Wills was last habitual residence of the deceased safeguarded by the escape clauses on choice and manifestly closer connection with another state. Although this solution has its culprits, it is widely considered to be the most suitable for the given context.

The fact that this solution is really best suited for fulfilling the goals of the regulation and specificity of the concept in the context of the inheritance law was discussed in the second chapter.

The Succession Regulation is a successful and quite effective piece of legislation as it was stated above and demonstrated in the conclusion of the second chapter by naming how the Regulation solves the issues set out before it. However, the goal which is most relevant to the choice of connecting factor for the Regulation is provision of sufficient level of legal certainty.

Legal certainty in the case of cross-border inheritance proceedings in Europe is achieved by making sure that future testators know or can reasonable suppose what law will govern disposition of their property, what authority would be responsible for the disposition and what powers would that authority have and that the disposition will be recognised in Member States other than the Member State which governed the disposition. The last aspect is an issue of recognition and of no concern for the connecting factor, whereas rest of them are relevant to the determination of ius and the forum which is directly tied with the connecting factor chosen for the regulation, therefore it is crucial that this connecting factor functions in a proper manner in order to provide the legal certainty to the citizens of the European Union.

Habitual residence also is supposed to allow the choice of the courts and the law of the State which is more closely connected with the deceased, in terms of location of the estate or the significant parts of the estate and most durable family. This is crucial for fulfilling the will of the deceased.

As it was already elaborated on, the clearer and more defined habitual residence will be the easier would it be to satisfy the legal certainty in terms of ius and forum for the prevalent majority of the cases. As the concept of the last habitual residence of the deceased also has to retain a fair share of flexibility, there is no need to provide a rigid definition for it, however, a more defined and specific test with a limited list of factual circumstances which are relevant for

the establishing last habitual residence of the deceased can significantly help in estate planning and allow the more difficult cases of the last habitual residence of the deceased to be solved a bit easier. Especially as the current procedure leaves wishing for the best as it is demonstrated by the case-law and illustrated by Devaux.¹²¹

The hypothesis for this research paper, which was stated in the introduction states that lack of unified definition and autonomous interpretation of the last habitual residence of the deceased in context of Regulation No 650/2012 of The European Parliament and of the Council leads to conflicts of applicable law and jurisdictions on the European law level.

However, in the course of the research it was established that ambiguity which follows the absence of unified definition and autonomous interpretation poses a significant issue only in a limited number of cases, whereas in a significant majority of the proceedings it is fairly easy to establish last habitual residence of the deceased. Assessment was also done as to what can be provided as a solution for the cases which will be hindered by the ambiguity of the concept. Such a solution would be sufficiently defining factual circumstances in the context of the test for habitual residence and the escape clause on manifestly closer connection with another state would serve as a safeguard for that mechanism in the same way as it does now. Choice of law under Succession Regulation 650/2012 is restricted to the country of nationality of the testator and can lead to the application of law and jurisdiction of the court which are in a disadvantaged position as to the governing the succession of the prospective testator..

Therefore, although issues can undoubtedly arise in a certain amount of cases from the absence of unified definition and uniform interpretation, as was in detail discussed above, but the amount of cases which would be undermined by such ambiguity and hindrance to the legal certainty would be insignificant on the larger scale of the European Union, as applicable law, authority guarding succession and powers of that authority will be easily deduced where the habitual residence is easily established. To round it up, the possibility of conflicts in jurisdiction and applicable law which will arise due to inability or difficulty in establishing the last habitual residence of the deceased is rather low and should not be considered as effectively hindering legal certainty of the European Union level.

¹²¹ Devaux, A. (2013), *supra* nota, p 232.

As to the legal certainty in the context of estate planning, again, there would only be a difficulty if the case itself is sufficiently complicated where the circumstances of life of the testator to be connect him or her to several states. It can be an issue, however, as the only way out in that situation would be a choice of law which is not always suitable or desirable for the future testator.

A possible solution for this would be already described suggestion of limited factual circumstances which can preferably be proven by documentation without requiring parties and their representatives to turn into sleuths or private detectives.

Overall, Regulation No 650/2012 of The European Parliament and of the Council on the Succession and Wills is an effective piece of legislation in terms of determining applicable law and jurisdiction which is perfectly capable of achieving the aims set out by the Commission in the Commission staff working document accompanying the proposal for a Regulation of the Parliament and the Council on jurisdiction, applicable law, recognition, enforcement of decisions and authentic instruments in the matters of succession and introduction of European Certificate on Succession and Green Paper on Succession and Wills while upholding fundamental values and principles of the European Union. However, only year and a half has passed since the Regulation has entered into force and only a handful of the preliminary ruling requests have been brought before the Court of Justice of the European Union. Not all the issues which can possibly arise can be reasonably predicted before they arise and therefore however thorough and meticulous this assessment has been in analysing relevant case-law, practices and publications in the relevant field in order to identify possible issues and pose a solution, there is still a possibility of a novel development.

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