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

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I. What is the problem?

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

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

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

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I. What is the problem?

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

- Art. 31: 'adaptation' as answer:

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

• Two questions:
  – When is Art. 31 relevant?
  – How does it work?

• How to resolve these questions?
II. The Regulation's answer

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

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

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

1) Art. 31 not relevant if difference as to 'mode of transfer' to heirs-legatees ('saisine' – 'administration' – 'Einantwortung', etc.)

2) Art. 31 not applicable if right in rem is known by law of State, but not granted ex lege (or even ex successionis) to heir/legatee (e.g. usufruct granted to surviving spouse in FR/BE and not in DE)
III. When is Art. 31 relevant?

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

4) Analysis should focus not on 'technicalities' of rights *in rem* (rights *in rem* are creation of the law → always differences → general application of Art. 31) but remain on level of principles and focus on 'outcome' (actual position of holder of right *in rem*)

• See Recital 16: “... account should be taken of the aims and the interests pursued by the specific right *in rem* and the effects attached to it”

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III. When is Art. 31 relevant?

5) Art. 31 only relevant if significant differences between rights *in rem* - *e.g.*

- If succession law and Art. 31 law grants usufructee different prerogatives (may usufructee assign his right: FR yes, DE no): not 'unknown'

- If differences between prerogatives is *significant*, art. 31 may be applied (art. 3-215 NBW – *'vruchtgebruik met interingsbevoegdheid'*)

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III. When is Art. 31 relevant?

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

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IV. How does Art. 31 work?

- Heart of the mechanism: 'adaptation' to the closest equivalent right *in rem*
- Not a novelty: see recognition of foreign security interests
IV. How does Art. 31 work?

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

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

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

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

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