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Jürgen Basedow[a)]
https://orcid.org/0000-0002-8379-7160

"Member States" and "Third States" in the Succession Regulation

Abstract: The author advocates a flexible approach with respect to the interpretation of the term "Member State" as employed in the Succession Regulation, allowing the differentiation between "participating" and "non-participating" States. It does not mean that the term "Member State" should always be interpreted in a wide sense including the three non-participating States: Denmark, the Republic of Ireland, and the United Kingdom. Whether a wide or a narrow interpretation is appropriate depends on the context and the purpose of the single provision. Most provisions contained in the chapter on jurisdiction refer to participating Member States only. But some articles such as the Article 13 of the Regulation, provide a counter-example. A uniform interpretation of the concept of Member State in all provisions of the Succession Regulation seems far too sweeping. It reminds of *Begriffsjurisprudenz* and does not take account of the purpose of the single provisions. In particular, it disregards the need for the cross-border protection of individual rights in a Union with open frontiers.

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[a)] Prof., Max Planck Institute for Comparative and International Private Law.

I. Member States, participating Member States, third States

According to Article 39 of the Succession Regulation[1], "a decision given in a Member State shall be recognised in the other Member States without any special procedure being required". This is only one of the numerous provisions of the Regulation that uses the term "Member State". In the secondary law of the European Union, this term usually designates those States which have concluded and ratified the founding Treaties on European Union and on the Functioning of the European Union. The other States are "third States". From the perspective of the Union, the world appears to be divided into Member States and third States, *tertium non datur*. This is similar to the terminology employed in the field of international treaties, for example, the Hague conventions, where "contracting states" are distinguished from "non-contracting states".

However, the EU Regulations on the judicial cooperation in civil matters have established a more complicated situation. Under Protocols No. 21 and 22 annexed to the Treaty of Lisbon[2], Denmark, the Republic of Ireland, and the United Kingdom do not participate in the measures adopted in this policy area unless they explicitly opt in. Under its own constitutional law such options are foreclosed to Denmark[3]. Moreover, Article 81(3) TFEU requires a unanimous approval by the Council of measures concerning family law which is difficult to attain. Where it cannot be achieved, measures can be adopted by at least nine Member States in the legislative procedure of enhanced cooperation, Article 326 TFEU. Thus, there are two ways leading to what is called *Europe à la carte*. As a consequence, several EU regulations in the field of private international law are not in force for all Member States. The Succession Regulation is one of them: Denmark, the Republic of Ireland, and the United Kingdom do not participate. Here, the world is divided into three groups of countries: participating Member States, non-participating Member States, and third States.

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[1] Regulation (EU) No. 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, OJ 2012 L 201/107.

[2] Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security, and justice, OJ 2016 C 202/295; Protocol (No 22) on the position of Denmark, OJ 2016 C 202/298.

[3] See P.A. Nielsen: *Denmark and EU Civil Cooperation*. "Zeitschrift für Europäisches Privatrecht" 2016, pp. 300—309.

What does this mean for the interpretation of Article 39 and numerous other provisions of the Succession Regulation which do not distinguish participating and non-participating Member States? Some commentators have subjected this question to a careful analysis and have come to the conclusion that the term "Member State" as employed in the Succession Regulation has to be understood in the sense of participating Member State[4]. This view is based on the implicit assumption that the term "Member State" must be interpreted in a uniform way throughout the Succession Regulation; as a consequence judicial decisions in matters of succession originating in Denmark, the Republic of Ireland, or the United Kingdom are not covered by Article 39. My following remarks are intended to question the underlying assumption of a uniform interpretation of the term "Member State". I shall suggest that this term should be interpreted in the context and with a view to the purpose of the single provision where it is used. This will allow for a more open interpretation of Article 39 and some other provisions of the Regulation.

II. Text of the Regulation

The text of the Succession Regulation is incomplete and unclear in this respect. With regards to the United Kingdom and Ireland, Recital 82 referring to Protocol No. 21, points out that "those Member States are not taking part in the adoption of this Regulation and are not bound by it or subject to its application". The same words can be found in Recital 83 with regards to Denmark. But these recitals only repeat what is said about the position of the three States set forth in Protocols No. 21 and 22. Their courts are of course not bound to apply the provisions of the Regulation. The British, Danish, and Irish courts will continue to apply their national rules of law relating to jurisdiction, applicable law and the recognition and enforcement of judicial decisions originating in other EU Member States in matters of succession.

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[4] See A. Bonomi, in: *Le droit européen des successions — Commentaire du Règlement No. 650/2012 du 4 juillet 2012*. Eds. A. Bonomi, P. Wautelet. Bruxelles 2013, pp. 30—31; A. Dutta, in: *Münchener Kommentar zum BGB*. Vol. 11, 7th edn. München 2018, Article 1 EuErbVO, Rn. 29; J. Weber, in: *Internationales Erbrecht*. Eds. A. Dutta, J. Weber. München 2016, Einl., para. 29; J. Carrascosa González: *El Reglamento Sucesorio Europeo 650/2012 de 4 de julio 2012 — Análisis crítico*. Granada 2014, pp. 47 *et seq*.

But neither the recitals nor any other provision of the Regulation address the question whether the three countries are to be considered as Member States in proceedings conducted *in the courts of the Participating Member States*. A pertinent provision contained in the initial Commission proposal was deleted in the course of the legislative proceedings[5]. The cancellation of this provision has been explained as an unintentional mistake[6]. This explanation is in line with the existence of clear definitions of the term "Member State" in most EU acts on private international law adopted prior to 2010. But why are the more recent instruments on private international law equally silent on this issue? The situation is the same everywhere: Some Member States and at least Denmark are not among the participating States. But neither the Brussels I Recast[7] nor the Insolvency Regulation[8] define the concept of Member State; and the Regulation on marital property does not clarify this issue either[9] although the initial Commission Proposal contained a general provision defining the term[10]. The same applies to the Regulation on property issues of registered partnerships[11]. In the light of

[5] See Article 1(2) of 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 succession and the creation of a European Certificate of Succession of 14 October 2009, COM(2009) 154 final: "In this Regulation, 'Member State' means all the Member States with the exception of Denmark [the United Kingdom and Ireland]". The square brackets are due to the fact that it was unclear at the time of the proposal whether the United Kingdom and Ireland would opt in.

[6] See A. Bonomi, in: *Le droit européen*..., p. 30: "Il s'agit probablement d'un oubli".

[7] Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJ 2012 L 351/1; Article 1(3) of the predecessor Regulation 44/2001 excluding the application of the regulation in and to Denmark was not taken over perhaps because of the bilateral Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ 2005 L 299/62.

[8] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast), OJ 2015 L 141/19.

[9] Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, OJ 2016 L 183/1; under Article 70(2) the Regulation applies in the Member States which participate in the enhanced cooperation allowed by Decision 2016/954; the Regulation is silent on its application in the participating Member States, to the recognition of judicial decisions originating in other Member States.

[10] See Article 1(2) of the Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes of 16 March 2011, COM(2011) 126 final.

[11] Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement

these instruments the silence of the Succession Regulation rather appears to be deliberate and may be part of a new general approach based on the insight that the non-application of the Regulation in some Member States does not necessarily imply that they are to be considered as third States in judicial proceedings conducted in the participating Member States.

III. Reciprocity and mutual recognition

A closer look at the arguments submitted in this dispute gives support to a more open-minded approach. The first point is reciprocity. Commentators argue that the participating Member States should not recognise, in accordance with Article 39 of the Succession Regulation, judgments originating in Denmark, Ireland, or the United Kingdom since the courts of those States do not apply the Succession Regulation to the recognition of judgments from participating Member States in analogous situations[12]. That is an argument of reciprocity. The principle of reciprocity governs the relations between States under public international law. States commit themselves since the counterparty accepts corresponding duties. This results from the basic principle of *do ut des* that governs the law of agreements. Thus, States balance their mutual interests which are State interests.

The situation in the EU is different. The Court of Justice has pointed out as early as 1963 in *van Gend en Loos* that "this Treaty [establishing the European Economic Community] is more than an agreement which merely creates mutual obligations between the contracting states. … The Community constitutes a new legal order of international law … the subjects of which comprise not only Member States but also their nationals"[13]. The principle of reciprocity is inappropriate where three or more parties are involved. It is particularly problematic where the consequences of a lack of reciprocity between States have to be borne by individuals[14].

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of decisions in matters of the property consequences of registered partnerships, OJ 2016 L 183/30; Article 70(2) is identical to the provision of the Marital Property Regulation, the preceding footnote.

[12] See A. Bonomi, in: *Le droit européen*, and A. Dutta, in: *Münchener Kommentar, both cited above at fn. 4.*

[13] CJEU, 5.2.1963, Case 26/62 (*van Gend en Loos*), ECLI:EU:C:1963:1 at p. 12.

[14] See J. Basedow: *Gegenseitigkeit im Kollisionsrecht.* In: *Zwischenbilanz — Festschrift für Dagmar Coester-Waltjen zum 70. Geburtstag.* Bielefeld 2015, pp. 335—348;

In the context of the fundamental freedoms which confer rights upon private persons, the constant practice of the Court of Justice has rejected the principle of reciprocity. Member States are not permitted to exclude the application of the basic freedoms to citizens of other Member States which are in breach of their obligations under the Treaty[15]. This case law precludes an argument based upon the same principle in the context of EU private international law which is meant to protect individual rights.

It might however be argued that the Treaty itself is meant to promote recognition only to the extent that recognition is "mutual", see Article 81(1) TFEU, and that, contrary to the basic freedoms, the principle of reciprocity is therefore acknowledged in this field of EU policy. But Article 81 has to be read in conjunction with Article 67 TFEU which lays down the general guidelines for the establishment of the area of freedom, security, and justice. It follows from Article 67(4) TFEU that the recognition and enforcement of judgments is considered as an aspect of the access to justice and, moreover, that the principle of mutual recognition is only intended to *facilitate* access to justice, not to *obstruct* it.

It also emerges from Article 67(1) TFEU that the whole construction of Title V of the Treaty is aimed at the respect of fundamental rights. The traditional approach considered the recognition and enforcement of foreign judgments as an exercise of giving effect to the acts of a foreign sovereign; this approach is still reflected in Article 67(1) TFEU by the "respect [required] for the different legal systems and traditions of the Member States". But within the European Union this traditional approach has been supplemented by the "respect for fundamental rights", that is, an objective putting the individual and their private rights first. The protection of property by Article 17 ChFR is directly affected by the non-recognition of judgments in matters of succession. Where the courts of the Member States implement provisions of EU law such as the Succession Regulation they are required by Article 51 ChFR to respect the fundamental rights and should interpret its provisions to the widest extent possible in a way that ensures the respect for property rights.

J. Basedow: *The Law of Open Societies — Private Ordering and Public Regulation in the Conflict of Laws*. The Hague 2015, paras. 538—540.

[15] See for example CJEU, 16.5.2002, Case-142/01 (*Commission v. Italy*), ECLI:EU:C:2002:302, para. 7 (Italian requirement of reciprocity for the admission of foreign skiing instructors); CJEU, 13.2.2003, Case C-131/01 (*Commission v. Italy*), ECLI:EU:C:2003:96, paras. 39—46 (hidden requirement of reciprocity for the registration of foreign patent attorneys).

IV. The mirror principle

A second point relates to the alleged link of recognition under Article 39 with the application of provisions on jurisdiction and applicable law by the courts of the country of origin of the foreign judgment. It has been argued that the recognition of a foreign judgment is based upon the fact that the foreign court has applied the same rules on jurisdiction and choice of law that would apply in the country of recognition[16]. It is true that this link gave rise to the conclusion of the Brussels Convention of 1968 in the form of a *convention double*. And it is also true that the national legal provisions of many countries that govern the recognition of foreign judgments provide that the jurisdiction of the foreign court has to be checked under the rules of jurisdiction of the country of recognition. In accordance with the so-called mirror principle the court of the country of recognition has to examine whether it would have been competent had the same facts been submitted to it *mutatis mutandis*.

On the other hand, conventions which exclusively deal with the recognition of foreign judgments without covering rules on jurisdiction demonstrate that there is no such inherent link. Moreover, it is very well conceivable that a country gives effect to the judgment of a foreign court that has based its jurisdiction upon a provision that would not apply in the country of recognition. The mirror principle provides for a *minimum of respect* for foreign judgments, but the country of recognition is not precluded from going beyond that minimum. And the wording of Article 39 allows going beyond with regards to judgments originating in Denmark, the Republic of Ireland, and the United Kingdom.

A more open interpretation of Article 39 allowing for the recognition of decisions from the three countries might be an incentive for the courts of those States to respect judgments from participating Member States in a generous manner under their national provisions. At the same time it would avoid the private parties involved to be taken as hostages for the conduct of States.

[16] See A. Dutta, in: *Münchener Kommentar*, fn. 4.

V. Alternative solutions

The interpretation of Article 39 should also take into account the alternative solution that applies if the three non-participating countries are not considered as Member States. In this case the recognition of judgments originating in the three Member States would be left to the national provisions which deviate as between the participating Member States. In some countries such as Italy and Poland recognition and enforcement require that the foreign proceedings are in line with certain procedural principles, relating *inter alia* to jurisdiction, and do not violate the public policy of the forum[17]. In others such as Germany there is an additional requirement of reciprocity[18], and there are also Member States such as Sweden which exclude, in the absence of an international agreement with the country of origin, the recognition and enforcement of foreign judgments completely[19]. A strict interpretation of Article 39 would revitalise the differences between the national laws with regards to the recognition of judgments in matters of succession originating in Denmark, the Republic of Ireland, and the United Kingdom.

Let me illustrate with a final example what this means. Assuming that a Polish national living in Denmark passes away and that his estate consists of assets located in Denmark which was the country of his last habitual residence, and of real property located in Poland. Let us further assume that two children, both pretenders of the inheritance, one living in Denmark, the other in Sweden, start to litigate in Copenhagen. The resulting Danish judgment may be effective in Sweden under a Nordic convention[20]. But will it be recognised in Poland? Since it relates to real property located in Poland, the exclusive jurisdiction of Polish courts in matters relating to real property in Poland will likely be an impediment[21].

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[17] See Article 64 of the Italian law of 31 May 1995 No. 218 on the Reform of the Italian system of private international law and Article 1146 of the Polish Code of Civil Procedure.

[18] See § 328(1) No. 5 of the German Code of Civil Procedure.

[19] See M. Bogdan: *Sweden*, in: *International Encyclopedia of Laws — Private International Law*. Ed. B. Verschraegen. Alphen aan den Rijn 2012, para. 312.

[20] See M. Hellner: *Sweden*, in: J. Basedow, G. Rühl, F. Ferrari, P. de Miguel Asensio: *Encyclopedia of Private International Law*. Vol. 3, Cheltenham 2017, pp. 2535—2548 (2545 f.), referring to the Convention of the Nordic Countries of 11 October 1977 on the recognition and enforcement of judgments in the field of private law, published in Sveriges överenskommelser med främmande makter, SÖ 1978:11.

[21] A. Mączyński: *Poland*, in: J. Basedow, G. Rühl, F. Ferrari, P. de Miguel Asensio: *Encyclopedia*…, pp. 2421—2433 (2426) referring to the exclusive jurisdiction of Polish courts in matters relating to immovable property located in Poland.

As a consequence, the Danish judgment may become effective in Sweden, but not in Poland. This will perpetuate the dispute between the heirs. The exclusive competence does not matter if Article 39 applies as the basis of recognition. Similar examples could easily be added. They demonstrate that the alternative to an open interpretation of Article 39 is the chaos that prevailed in the area of recognition and enforcement of foreign judgments over so many years. This chaos is even aggravated by the migration of millions of Europeans that has occurred meanwhile on the basis of the fundamental freedom of movement.

It is unlikely that this unsatisfactory situation will be resolved by the conclusion of conventions on the recognition and enforcement of foreign judgments with the three non-participating States. The participating *Member States* are not allowed to negotiate such agreements, since the exclusive competence for their conclusion is vested in the European Union[22]. The *Union* has concluded a separate agreement with Denmark concerning jurisdiction and the recognition and enforcement in general civil and commercial matters; this was meant to ensure the continuous application of a uniform Brussels I regime in all Member States[23]. But the Union will not conclude similar agreements in other fields such as succession, since there are already provisions in the two Protocols mentioned above[24] that enable the three Member States to ensure the mutual recognition of judgments in matters of succession and other areas. Thus, the solution for the recognition and enforcement of judgments originating in Denmark, the Republic of Ireland, and the United Kingdom in matters of succession can only be conceived in the framework of the existing Regulation.

VI. Conclusion

These considerations do not suggest that the term "Member State" as employed in the Succession Regulation should always be interpreted in a wide sense including the three non-participating States. Whether a wide or a narrow interpretation is appropriate depends on the context

[22] See CJEU, 7.2.2006, opinion 1/03 (*Lugano Convention*), ECLI:EU:C:2006:81.

[23] Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, done at Brussels on 19 October 2005, OJ 2005 L 299/62.

[24] See fn. 2.

and the purpose of the single provision. Thus, most provisions contained in the chapter on jurisdiction refer to participating Member States only. But Article 13 provides a counter-example. Where proceedings are conducted in a court of a participating Member State and a person designated as heir and resident in a non-participating Member State wants to waive the succession, the court of his or her habitual residence in Denmark, the Republic of Ireland, or the United Kingdom may be considered as having jurisdiction for that purpose under Article 13 provided that the law of the forum of habitual residence allows such a declaration.

In a similar vein, Article 57 on the requirement of an enforcement security can easily be applied where the enforcement of a judgment from a non-participating Member State in a participating Member State is at issue. The same is true for the acceptance of an authentic act established in Denmark, Ireland, or the UK, in other parts of the Union, Article 60. In Article 39 the term Member State is used twice, for the country of origin of the judgment and for the country of recognition. It is only for the designation of the country of origin of the decision that a wide interpretation of the term is appropriate. Where the recognition is requested in a non-participating Member State, this will of course be decided on the basis of national law, not the Regulation.

In summary, a uniform interpretation of the concept of Member State in all provisions of the Succession Regulation is far too sweeping. It reminds of *Begriffsjurisprudenz* and does not take account of the purpose of the single provisions. In particular, it disregards the need for the cross-border protection of individual rights in a Union with open frontiers.

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