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Article 22 of Regulation (EU) 2016/1103 Matrimonial Regimes; Articles 21, 34 and 75 of Regulation (EU) 650/2012 Successions; Article 16 of the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children; Art. 8 EGBGB *(Einführungsgesetz zum Bürgerlichen Gesetzbuch);* EGBGB old version Art. 14, 15 — Ukraine: Frequent legal issues related to Ukrainian actors in notarial practice

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**Ukraine: Frequent legal issues in relation to Ukrainian nationals in notarial practice**

In the context of the war in Ukraine, legal issues related to Ukrainian nationals are increasingly arising in notarial practice. The summary below is intended to provide an overview of the main legal questions in this area.

1. **What is the legal matrimonial regime in Ukraine?**

The legal matrimonial regime in Ukraine is a form of joint ownership of subsequently acquired property. The property acquired against payment in the course of marriage belongs to the spouses as collective co-ownership (art. 60 of the Ukrainian Family Code of 10 January 2002). Common property includes, inter alia, property acquired by virtue of the family during marriage and the income of the wife and spouse (see Article 61 of the Ukrainian Family Code; see, on this subject, Himmelreich, in: Eherecht in Europa, 4thedition 2021, Länderbericht Ukraine, No 25). This is the case, regardless of the name with which the contract was concluded. Property brought into marriage or acquired in the course of marriage by donation or succession is excluded from the joint property. The relevant provisions of Articles

57 and 58 of the Ukrainian Family Code provide as follows (Daschenko, in: Bergmann/Ferid, Internationales Ehe- und Kindschaftsrecht, Länderbericht Ukraine, 31.1.2018, page 71:

***Art. 57 Personal private property of a spouse***

*(1)Part of the spouses’ personal private property:*

1. *property acquired by her or by him before the marriage;*
2. *property acquired by her or by him in the marriage by virtue of a donation or succession;*
3. *property acquired by herself or by himself in the marriage, but by her or his personal means.*
4. *The personal private property of the spouses is property of individual use, including valuable property, even if it has been acquired with joint funds of the spouses.*
5. *Belong to the personal private property of the spouses: bonus and rewards they have received for personal merits. The court may recognise the right of the other spouse to obtain part of the bonus or reward if it is established that the other spouse has contributed to their continuation through his/her actions* (household, children, etc.).
6. *The personal private property of the spouses includes the means they have received in their capacity as compensation for lost (damaged) property and moral damage caused to them.*
7. *Part of the personal private property of the spouses is an amount of insurance which she or he has received by way of private insurance or voluntary personal insurance, provided that the insurance fees have been paid through resources belonging to the personal property of the spouse concerned.*
8. *The court may recognise as personal private property of the wife or spouse what has been acquired by her or herself during the period of separation in connection with the actual termination of the marriage.*
9. *If the property has been acquired, not only by joint funds but also by funds belonging to one of the spouses, the share of the property is her/his private personal property,* *depending on the amount of the financial contribution.*

***Article 58 Right to fruit/ benefits and income of property belonging to the private property of a spouse***

*Where an object belonging to one of the spouses produces a benefit or a return (dividend), the spouse owns those benefits or returns (dividends).*

Objects not covered by Articles 57, 58 of the Ukrainian Family Code and acquired during marriage are part of the **community/common property**. The possession and use of the common property and the arrangements made in relation to those assets must be exercised jointly. Spouses who have not concluded another contractual agreement have the same rights (art. 65 (1), 63 of the Ukrainian Family Code, see also Himmelreich, No. 26).

1. **How does the Ukrainian PIL determine the law applicable to the matrimonial property effects of marriage?**

For the purpose of examining the applicable matrimonial property regime, it is important, from a German point of view, whether the marriage was concluded before or from 29 January 2019. In case the marriage has been or is concluded from that date, the matrimonial property consequences are governed by the conflict rules of Regulation 2019/1103.

If the spouses were married on or after 29 January 2019, the matrimonial property consequences of the marriage are governed by the law of the State in which the spouses had their first common habitual residence, in accordance with Article 26(1)(a) of Regulation 2019/1103. Therefore, if these two Ukrainians have always lived in Ukraine until the time of marriage, the Ukrainian matrimonial property regime applies. In this case, a *renvoi* by Ukrainian PIL rules should not be taken into account, in accordance with Article 32 of Regulation 2019/1103.

However, if the spouses were married before 29 January 2019, the objective connecting factor of the effects of the matrimonial property effects of the marriage is governed by art. 15 EGBGB *(Einführungsgesetz zum Bürgerlichen Gesetzbuch)* old version (see Article 69(3) of Regulation 2019/1103 and Article 229 para.47 second subparagraph, EGBGB). In accordance with art. 15(1) EGBGB old version, the matrimonial property effects of marriage are subject to the law applicable at the conclusion of the marriage for the general effects of marriage. In accordance with art. 14(1)(1) EGBGB old version, this is the law of the State of which the spouses are nationals at the time of marriage. Therefore, if, at the time of marriage, the spouses both had Ukrainian nationality, the German PIL refers to Ukrainian law. In accordance with art. 4(1)(1) of the EGBGB**,** this is a **global *renvoi*** *(including the PIL****)****,* so it is necessary to examine whether the Ukrainian PIL accepts the *renvoi* or makes a single or a double *renvoi.* In this respect, the provisions of the Ukrainian PIL remain relevant for marriages subject to Regulation 1103/2019.

In Ukraine, private international law is governed by the Law on Private International Law of 23 June 2005. It also includes international family law, in particular the international law of matrimonial regimes.

In accordance with Article 61 (1) of the law, the spouses may first choose the law applicable to the matrimonial property effects of marriage**.** In that regard, Ukrainian law therefore knows, like German law, the possibility of **choosing the** **law applicable to the** matrimonial property regime.

If the spouses have not chosen the applicable law, the matrimonial property effects of marriage are governed by article 61(3) of the Ukrainian Law on Private International Law, which governs the general effects of marriage. In accordance with Article 60 (1) of the law, the effects of marriage are in turn governed by the common personal status of the spouses. The personal status under Ukrainian law, in accordance with article 16 of the Ukrainian Law on Private International Law, is the law of the State of which the person concerned is a national.

Therefore, Ukrainian law does not follow the Soviet law of the time, which was based on the right of residence of the spouses. In the same way as in the German autonomous PIL applicable until 29 January 2019, the common law of spouses from the Ukrainian point of view is **primarily the common national law of both spouses.** Unlike the German PIL, however, the property regime is **changeable** in Ukraine. A change in the nationality of the spouses therefore also entails a change in the property regime. If the spouses have not agreed a common nationality and made no choice of applicable law, the applicable law shall be that of the State in which they currently reside. In that regard, a joint move on the ground of a new residence (see in this regard below) would therefore already lead to a change of the applicable law. That could also lead to a considerable *renvoi* from the German point of view, in accordance with the second sentence of Paragraph 4 (1) EGBGB.

A translation of the relevant provisions of the Ukrainian PIL was published by *Albertini* (StAZ 2006, 146). The reference is available at the literature research department of the *Deutsches Notarinstitut.*

1. **What is the regulation of intestate succession ­in Ukraine?**

On the basis of the Ukrainian Civil Code of 16 January 2003, the children of the deceased, his or her spouse and the parents are the heirs of the first degree. They inherit in equal shares. In the second degree, the deceased’s siblings and grandparents inherit. This applies only in cases where first-degree heirs have not survived. As a first-degree heir, the spouse therefore excludes siblings and grandparents from the intestate succession. Ukrainian succession law does not ­distinguish between ­legitimate, natural or adopted descendants. Registered partnership and same-sex marriage are not known under Ukrainian law. Therefore,­ under Ukrainian law, such relationships do not create intestate succession rights (on the non-matrimonial relationship in Ukraine, Ishyna, Die nichteheliche Lebensgemeinschaft in der Ukraine und in Deutschland, 2014, passim).

1. **What are the formal requirements that wills must meet under Ukrainian law and what types of wills are permitted?**

The only form of will recognized by Ukrainian law is the public (notarial) form. Unlike German law, Ukrainian law does not necessarily require an authentication when the will is drafted. The testator may draw up and sign the will himself or herself and hand it over to the notary, open or closed. A handwritten signature is required in both cases, but not a handwritten version of the text.

In addition to the unilateral will, Ukrainian law allows joint wills of the spouses in respect of their common property, in accordance with Article 1243 of the Ukrainian Civil Code. This does not affect the testator’s own assets, in accordance with the Ukrainian property regime of the community of assets. The will therefore covers only the common property of the spouses which form part of the joint property.

In the will, heirs (including substituted heirs) may be designated, legacies may be ordered and an executor may be appointed. Ukrainian law **does not recognise the provisional succession or the devolution to a subsequent heir**.

Finally, Ukrainian succession law provides for an agreement as to succession by which a third party, in exchange for certain obligations, takes over the deceased’s assets. The conclusion of the agreement as to succession requires notarial authentication (Süss, Succession, Erbrecht in Europa, 4rd edition 2019, ° 12).

As regards the formal effectiveness of wills, it is also sufficient from a Ukrainian perspective, in accordance with Article 72 of the Law on Private International Law, that the law of the place where the will has been drawn up has been respected. A will authenticated by a notary in Germany, in accordance with the rules of German law, is therefore still formally valid from the Ukrainian point of view. If so, the question might arise as to whether that the *renvoi* to German law also covers the question whether the wills of the spouses can be drawn up jointly.

1. **Who are the** persons entitled to a reserved portion **under Ukrainian law?**

In accordance with Article 1241 of the Ukrainian Civil Code, only minor or adult children, as well as parents and spouses who are unable to work and therefore cannot provide for themselves, are entitled to a reserved portion. The amount of the reserved share is half of ­the share of the intestate succession (Süß, Erbrecht in Europa, 4th edition 2019, Länderbericht Ukraine, No 15). Unlike German law, the reserved portion is not conceived as a claim, but the holder of the reserved share **becomes directly co-heir to** the extent of his percentage of the estate.

Ukrainian law does not recognise **the waiver of the reserved portion**.

1. **What should be taken into account when determining the succession regime?**

In accordance with Article 75 (1) of the European Succession Regulation (Regulation 650/2022), the Succession Regulation does not affect the application of international conventions which the Member States had already concluded at the time of the adoption of the Regulation on 4 July 2012. In relations between Germany and Ukraine, Article 28(3) of the Consular Treaty between the Federal Republic of Germany and the Union of Soviet Socialist Republics of 25.4.1958 (Bundesgesetzblatt,BGBl. II 1959, p. 233) applies. It is true that the former Soviet Union, as a contracting party to the German-Soviet Consular Treaty, has no longer existed since 31.12.1991. However, by note of 30 June 1993, Ukraine took over the international treaties of the former Soviet Union (Bundesgesetzblatt, BGBl. II 1993, p. 1189).

As regards the subject matter, the Convention applies where, in a Contracting State, there is immovable property forming part of the estate of a national of the other Contracting State (Odersky, in: Hausmann/Odersky, Internationales Privatrecht in der Notar-und Gestaltungspraxis, 4 edition 2021, para. 15, No. 366). Therefore, for immovable property of a Ukrainian deceased located in Germany, German succession law applies.

The remainder of the succession is not covered by the German-Soviet consular contract. From a German point of view, the succession is governed by Article 21 (1) of Regulation No 650/2012, taking into account, where appropriate, a priority choice of applicable law. The law of the State in which the deceased had his habitual residence at the time of death is therefore applicable. The EU Succession Regulation does not contain a definition of habitual residence, but recitals 23 and 24 provide guidance on its determination (see judgment of the Court of Justice of the EU in NJW 2020, 2947, paragraphs 37 et seq.). In principle, a case-by-case examination is necessary, it being understood that the ‘centre of interests’ of the deceased ‘from a family and social point of view’ is decisive (recital 24, third sentence). Recital 23 expressly emphasises that there must be ‘a genuine connecting factor’ and ‘a particularly close and stable connection with the State concerned’. Such a link is not yet to be assumed, as long as the deceased intends, for example, to return to Ukraine after the end of the war.

If, at the time of his death, the deceased had his habitual residence in that sense in Ukraine, the succession of movable property is the subject of a *renvoi* to Ukrainian law. The Ukrainian PIL should also be included in that *renvoi,* Article 34(1) of Regulation No 650/2012. In particular, account should be taken of a *renvoi* to German law.

In accordance with Articles 70 et seq. of the Ukrainian Law on International Private Law, from a Ukrainian perspective, the succession regime is divided: while movable property is governed by the law of the State in which the deceased was last habitually resident (Art. 70, first sentence of the Ukrainian Private International Law Act), immovable property is governed by the law of their respective situation, in accordance with Article 71 of the Ukrainian Law on International Private Law). In the case of movable property, the deceased may choose the law of his country of origin.

1. **Particularities of parentage (especially surrogate mothers)**

With regard to parentage, it should be noted that Ukrainian law admits surrogate mothers. Therefore, in the case of extracorporeal fertilisation, it is not the mother who gives birth and her husband who are parents of the child, but the genetic parents, in accordance with Article 123 (2) of the Ukrainian Family Code (see in detail BeckOGK/Markwardt, 1.3.2022, Art. 22 *Einführungsgesetz zum Bürgerlichen Gesetzbuch*, EGBGB, No 33 and the case-law cited).

1. **What is the law applicable to parental care and custody?**

Art. 21 of the EGBGB (*Einführungsgesetz zum Bürgerlichen Gesetzbuch*) governs the law applicable to parental care and custody under German autonomous law. However, account must be taken of the primacy of direct State treaties (Paragraph 3(2) EGBGB). The Hague Convention on the Protection of Children *(Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children*) which has come into force January 1, 2011, must be respected as a matter of priority. The Convention also is also in force in Ukraine since 1 February 2018.

Both the attribution of parental responsibility by operation of law without the intervention of a judicial or administrative authority (Article 16(1) of the Convention) and by unilateral act or agreement (Article 16(2) of the Convention), such as **a custody declaration or a power of attorney for parental care and custody, are governed by the law of the state of the child’s habitual residence** at the time when the agreement takes effect (Article 16(2) of the Convention). Where the right of care and custody results from a decision of the public authority (such as the guardianship ordered in a will), the competent authorities under Article 5 of the Convention of the Contracting State in which the child is **habitually resident** shall, in exercising their jurisdiction, apply their own law (see Article 15(1) of the Convention).

When a child comes to Germany with his or her parents or a relative as a refugee, the question arises as to whether­ habitual residence should be established. Taking into account the case-law of the ECJ (FamRZ 2015, 107), habitual residence is generally understood as the **centre of the vital interests** and is determined by social, family and occupational characteristics. Account must also be ­taken of the regularity, circumstances and duration of the stay, the reasons for ­the transfer of the family to that State, the child’s nationality, place and conditions of schooling and language skills (BeckOGK-BGB/Markwardt, 1.3.2022, Article 5 of the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Care and Custody and Measures for the Protection of Children, No 8). Habitual residence must be regularly designed for a certain period of time. The requirements are not as high as in succession law. A short temporary stay in a State is not yet a habitual residence there (see BGH NJW 2019, 1605, paragraph 19). Subjective criteria, in ­particular the intention to establish permanent residence in a given place, may­ be relevant. Since the intention does not presuppose a certain actual­ length of stay, the mere intention of a non-temporary stay ­may suffice (BeckOK-BGB/Lorenz, time: 1.2.2022, paragraph 5 of the EGBGB, point 17).

In the case of refugees, a short-term residence may also constitute a habitual residence if only permanent residence in Germany is envisaged (in detail on the question of the habitual residence of the refugees, see Baetge, StAZ 2016, No 289, 292 et seq.). On the other hand, if the concerned person wishes to return to his/ her country of origin, it will be possible to admit habitual residence within the meaning of that Convention only when the residence in the national territory has actually lasted longer. Ultimately, this is a **question of fact which** must be examined separately in each particular case.

1. **What form requirements must a power of attorney meet for use in Ukraine?**

Under Ukrainian law, the power of attorney is subject to the same form requirements than those necessary for the conclusion of the underlying legal act for which it is established (Art. 245, para. 1 of the Ukrainian Civil Code).

It is therefore necessary to assess, in each case, what form is required. Since contracts for the sale of immovable property must be authenticated by a notary (in accordance with Article 657 of the Ukrainian Civil Code), the power of attorney issued for this purpose is also subject to notarial authentication (notarial certification is not sufficient). General mandates are subject to notarial authentication, if they are also intended to cover legal acts which, in turn, must be authenticated by the notary. In case of uncertainty as to the form required by Ukrainian law, the power of attorney should be authenticated as a precautionary measure.

1. **Need for legalisation or apostille**

The Federal Republic of Germany initially opposed Ukraine’s accession to the Hague Convention abolishing the requirement for the legalisation for foreign public documents of 5.10.1961 on 2 April 2003. On 22 July 2010, the Federal Republic of Germany withdrew its objection pursuant to Article 12(2) of the Hague Convention. Consequently, the Hague Convention entered into force on 22 July 2010 in relations between the Federal Republic of Germany and Ukraine (see the communication of the Ministry of Foreign Affairs of 27 September 2010, *Bundesgesetzblatt* BGBl. II 2010, p. 1195). **For documents from Ukraine issued after 22.7.2010, the affixing of an apostille is therefore sufficient for their use in Germany.**

**Õ..C.R.**