

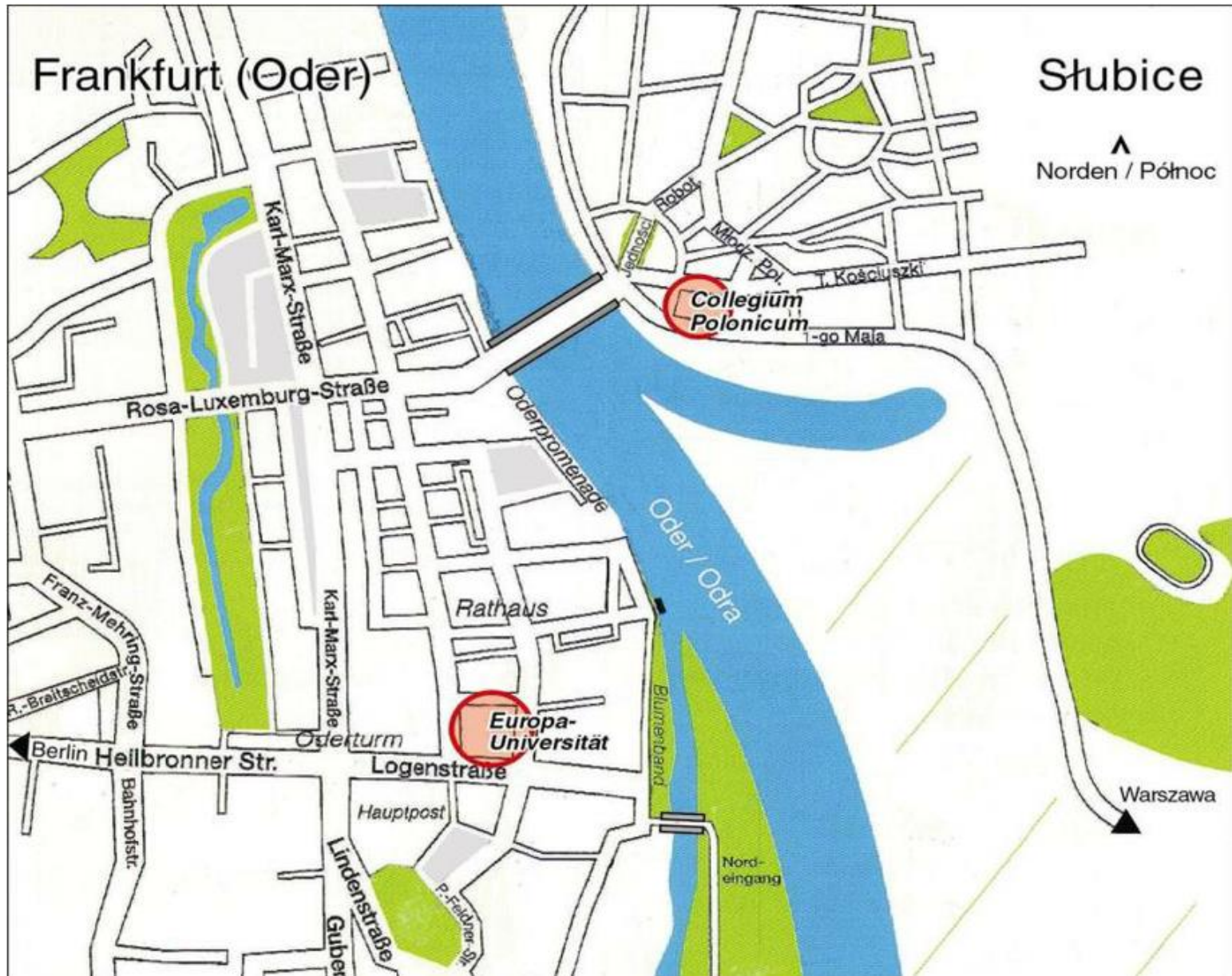
JUDGMENT OF THE COURT (Second Chamber)

12 October 2017 ([*1](#))

Case C-218/16

The facts:

- Aleksandra Kubicka – a Polish citizen, married to a German, living in Frankfurt an der Oder
- she and her husband are the owners of an estate (with a house) – each of them had a half of the ownership (50 % share);
- she wanted to make the last will,
- as she was a Polish citizen, she turned to a notary in Słubice (Poland) to do so;
- she wanted to include in her will a legacy ‘by vindication’ (which is allowed by Polish law) – the idea of this institution is that in a moment the testator dies, the asset to which a legacy relates, shall pass to a specified person (it must be done in a notarial instrument) – that is what she wanted to do with her share in the estate, the rest of her assets she wished to be left for the statutory order of inheritance;
- she didn’t want to use an ordinary legacy, called legacy „by damnation” (which is also possible in Polish law system) – it would be bound with difficulties with the representation of her minor children and would involve additional costs;
- the notary’s assistant refused to draw up her will;
- she submitted to the notary an appeal against the decision refusing to draw up a will containing such a legacy ‘by vindication’;
- since her appeal to the notary was not upheld, Aleksandra Kubicka brought an appeal before the Regional Court, Gorzów Wielkopolski, Poland, which made the request for a preliminary ruling under Article 267 TFEU.



The law:

There is a difference between Polish and German law as according to the Polish system it is possible to use a legacy by vindication (Article 981 (1) of the Civil Code) while the German system does not have this institution (they have the possibility to use an ordinary legacy, but apart from this you need to have an additional act of passing the ownership – from the heirs to the legatee),

The notary's reasoning was like this:

In Germany, a legatee may be entered in the land register only by means of a notarial instrument containing an agreement between the heirs and the legatee to transfer ownership of the immovable property; foreign legacies 'by vindication' will, by means of 'adaptation', would be considered to be legacies 'by damnation' in Germany, under Article 31 of Regulation No 650/2012;

The Kubicka's reasoning:

The provisions of Regulation No 650/2012 should be interpreted independently and, in essence, that none of those provisions justify restricting the provisions of succession law by depriving a legacy 'by vindication' of material effects.



The referring court's reasoning:

Pursuant to Article 23(2)(b) and (e) and Article 68(m) of Regulation No 650/2012, legacies 'by vindication' fall within the scope of succession law

However - it is uncertain to what extent the law in force in the place where the asset to which the legacy relates is located can limit the material effects of a legacy 'by vindication' as provided for in the succession law that was chosen

Given that, under Article 1(2)(k) of Regulation No 650/2012, the 'nature of rights in rem' is excluded from the scope of the regulation, legacies 'by vindication', as provided for by succession law, cannot create for an asset rights which are not recognised by the *lex rei sitae* of the asset to which the legacy relates

However - it is necessary to determine whether that same provision also excludes from the scope of the regulation possible grounds for acquiring rights in rem

Referring to Article 1(2)(l) of Regulation No 650/2012, the referring court also wondered whether the law governing registers of rights in immovable or moveable property may have an impact on the effect of a legacy under succession law. In that regard, it states that if the legacy is recognised as producing material effects in matters relating to succession, the law of the Member State in which such a register is kept would govern only the means by which the acquisition of an asset under succession law is proven and could not affect the acquisition itself

As a result - the referring court considered that the interpretation of Article 31 of Regulation No 650/2012 also depends on whether or not the Member State in which the asset to which the legacy relates is located has the authority to question the material effect of that legacy, which arises under the succession law that has been chosen



The Court of Justice of The EU

decision:

Article 1(2)(k) and (l) and Article 31 of Regulation No 650/2012 must be interpreted as precluding refusal, by an authority of a Member State, to recognise the material effects of a legacy ‘by vindication’, provided for by the law governing succession, chosen by the testator in accordance with Article 22(1) of that regulation, where that refusal is based on the ground that the legacy concerns the right of ownership of immovable property located in that Member State, whose law does not provide for legacies with direct material effect when succession takes place

The Court of Justice reasoning:

The question refers to: Article 1(2)(k) , Article 1(2)(1) and Article 31 of Regulation No 650/2012 and is:

Is there any obstacle to recognise in Germany the material effects of a legacy by vindication provided for in Polish law?



Potential obstacles:



Art. 1(2)(k) , but:

- it excludes not the right itself, but „the nature of the rights in rem”
- the provision covers only the classification of property and rights and the determination of the prerogatives of the holder of such rights
- the existence and number of rights in rem in the legal order of the Member States (numerus clausus) are covered by this provision (recital 15)

WHILE in the case both the legacy „by vindication” (in Poland) and the legacy „by damnation” (in Germany) constitute only the METHOD of transferring the right (ownership), which DOES exist in BOTH countries

In other words – the direct **transfer** of the ownership by the legacy „by vindication” is therefore **only the way** by which that right in rem is transferred at the time of the testator’s death which – according to the recital 15 – is the aim of the Regulation to be achieved and such methods of transfer are **not covered by Article 1(2)(k).**

Art. 1(2)(1), but:

- this concerns only the recording in a register, including the legal requirements for such recording and the effects of non/recording such rights in a register **AND NOT the conditions under which such rights are acquired**

- this reasoning is supported by:

fragmentation

- the principle that **the law governing succession should govern the succession as a WHOLE** as provided for in Article 23, particularly Article 23(2)(e)

- **the objective** pursued by the Regulation, referred to in recital 7 under which **all the obstacles to** proper functioning of the **internal market**, the **free movement of persons** (who want to claim their rights arising from a cross – border succession) **should be eliminated**

Article 31:

- the ownership, which is to be transferred by the legacy „by vindication”, is a share in an immovable property – located in Germany; **it is undisputed that the German law recognises the right of ownership** with which the legatee would be vested under Polish law.



The conclusion:



- 1. Art. 31 does not concern the method (of the transfer of rights in rem, including the legacy „by vindication” or „by damnation”), but only the respect of the content of rights in rem, determined by the law governing the succession (lex causae), and their reception in the legal order of the Member State in which they are invoked (lex rei sitae)**
- 2. Therefore there is no need for the adaptation provided for in Article 31 (both in Poland and in Germany there exists the same right – ownership).**



**THANKS FOR
YOUR ATTENTION
AND
PLEASE ASK
BUT NOT TOO MUCH**