GOVERNING INHERITANCE STATUTES AFTER THE ENTRY INTO FORCE OF EU SUCCESSION REGULATION

GoInEU

This Project is funded by the European Union's Justice Programme 2014-2020

LIMITED NUMBER OF CASE STUDIES

REPORT

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Preliminary Remarks

During the Project's implementation all Partners' researchers have collected relevant European and domestic cases through the analysis of the received answers to the Project Questionnaires, through exchanges in the occasion of the Project Seminars in Valencia on 23rd March 2018 and in Brussels on 25th October 2018, as well as through a constant monitoring of institutional websites and of scientific legal publications. All the collected cases will be stored in the Project Database, that will remain open to further integrations.

Moreover, in accordance with the Grant Agreement's provisions, a limited number of case studies will be analysed and commented in the present Report, drafted by Dr. Marco Rizzuti of UNIFI, in order to better evaluate the results of the application of Regulation n° 650/2012 to model cases, taking into consideration the different kinds of interaction between the Regulation and the different internal contexts. More specifically, this Report deals with two European cases, discussed during the Brussels Seminar, that represent some of the first judicial direct applications of Regulation 650, and one national case, that has a specific relevance with regard to a core Project's issue, i.e. the relationship between transnational successions and migration.

European Court of Justice, 12th October 2017, C-218/16, *Kubicka*

The succession law issue at stake in *Kubicka* is a very cross-border one: Everything happens around the German-Polish border, established after the Second World War and today often crossed by intra-Community migratory flows. This border, as agreed by the Allies, follows the Oder-Neiße Line, dividing many of the cities built along the two rivers, and among them Frankfurt an der Oder and Słubice.

Ms Kubicka is a Polish national but has moved to the German side and, together with her German husband, owns an estate in Frankfurt an der Oder. Her wish was to bequeath her 50% share of this immovable directly to her husband. Therefore, she asked to a Polish

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notary of Słubice to draft a will providing for a so-called legacy by vindication, i.e. a legacy directly transferring ownership to the legatee.

This clause is valid under Polish law, as in many other legal systems deriving from the Napoleonic model, while in Germany, where the immovable is located, legacies cannot transfer property rights but can only create a duty of the heir to subsequently transfer the concerned estate. Such a solution, the so-called legacy by damnation, would entail difficulties in relation to the representation of Ms Kubicka's minor children, who will inherit too, as well as additional costs, and so she refused it. But a very wary Polish notary refused to draft a testament that could be considered invalid under German law. Ms Kubicka challenged the notary's refusal before a Polish Court and then the judges requested a preliminary judgement of the EU Court of Justice on the interpretation of Successions Regulation, n. 650/2012.

In fact, on one hand, the Regulation binds Member States to recognise the same material effects recognised by the law governing the concerned succession, in our case Polish law chosen by the testator. On the other hand, the nature of rights *in rem* and the public registration of immovable properties are expressly excluded from the scope of the Regulation, and one of the main cornerstones of the German registration system is that contracts or testaments cannot transfer property but only create an obligation to transfer: Therefore, a sale contract or a testament cannot be registered, while only the subsequent specific deed can.

According to the EU justices the applicable law has to govern the succession as a whole, avoiding fragmentations and thus eliminating obstacles to the free movement of persons who want to claim their rights arising from a cross-border succession, and so the above-mentioned exclusions have to be narrowly interpreted. Thus, the exclusion regarding the registration of acquired rights is interpreted as non-regarding the conditions under which such rights are acquired. Moreover, the adaptation of rights *in rem* pursuant to article 31 of the Regulation is not at stake in such a case, being undisputed that both States recognise the right of property. In fact, article 31 refers to the content of rights *in rem* and not to the methods of their acquisition, which have to be governed by the applicable successions law and cannot be adapted at all.

Accordingly, the German legislations providing for the adaptation of foreign legacies by vindication into legacies by damnation contrast with the European Regulation. As noted by the Advocate General in his Conclusions, a better solution has been provided by the Dutch legislators: In the Netherlands legacies by vindications are not allowed in the domestic law, and testaments cannot be directly registered, but the new provisions implementing EU Successions Regulation do not impose the adaptation of the foreign ones into legacies by damnation. Instead, the European Certificate of Succession will be registered: In substance it will play the role of the missing specific deed of transfer. A quite similar solution is in force in Italy since almost a century: The same succession law,

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admitting legacies by vindication, is nationwide applicable, but in some North-eastern Provinces a German-like registration system was preserved after the First World War, and therefore a certificate of succession has to be registered.

In conclusion, Polish law will have to prevail inside German territory: As one of the first Spanish commentators ironically remarked, "*Poland invades Germany*". Indeed, every classification *ratione materiae* is merely conventional, because in the law all matters are interrelated, and so successions law of course impacts on the registration system, and the other way around.

Let's consider a different example: In Spain a legatee may be entered in the land register only if his/her acquisition does not impact on reserved shares, while in Italy such a preliminary check is not necessary. According to the principles inferable from the *Kubicka* judgement, if Italian successions law is applicable to an estate located in Spain, the check will not be necessary, while if Spanish successions law is applicable to an estate located in Italy, it will be.

European Court of Justice, 21st June 2018, C-20/17, *Oberle*

The scenario of the other case is settled on the opposite German border: Mr Oberle, a French deceased who was residing in Lorraine, has left assets located partly in France and partly in Germany. At his two sons' request the District Court of Saint-Avold (a French town on the German border) issued a certificate stating that each of them has inherited half of those assets. They asked also a Local Court in Berlin for the issuing of another national certificate that, with regard to the part of inheritance situated in Germany, could state that, in accordance with France law, each brother has inherited half of the property. But the German judges doubted whether they have jurisdiction on such an issue, and so the question was referred to the EU Court of Justice.

On one hand, according to German laws, the above-mentioned Local Court in Berlin has jurisdiction when the deceased has never had habitual residence in Germany, but part of the inheritance is situated in Germany. On the other hand, according to article 4 of the EU Successions Regulation, the courts of the Member State where the deceased had his last habitual residence (i.e., in the concerned case, France) have jurisdiction to rule on the succession as a whole.

The EU Court of Justice stated that also the issuing of national certificates falls within the general definition of "succession as a whole" provided by article 4, and therefore it denied jurisdiction to the German judges. As in *Kubicka*, also this decision pursues the objective to avoid fragmentations, and ensures that the authority dealing with the succession will apply its own law. Moreover, the judgement demonstrates that national

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certificates of succession are not irrelevant from the EU Regulation's point of view, and that therefore its principles and provisions may impact on them.

Spanish Supreme Tribunal, *Sala III*, 24th January 2018, n. 84

According to the Spanish Report, collecting and analyzing the Spanish answers to the *GoInEU* Project Questionnaires, polygamous marriages cannot produce successions law effects, but the same Report shows that a quite similar effect has been recognized by this recent judicial decision, granting a survivor's pension to the widow of a polygamous deceased Moroccan soldier, who had served in the Spanish Army for West Sahara.

In countries, with a more recent history of immigration (and also a more limited modern colonial experience), such as Germany, Italy or Spain, the issue of whether recognizing effects to polygamous marriages is almost unprecedented. Therefore, such a decision turns out to be very interesting.

In the light of the European concept of public policy, it could be justifiable to deny effects to foreign polygamous marriages, in order to protect the position of the involved women. But, if this is the actual motivation, it implies also that in peculiar cases some effects have to be recognized. In fact, with regard to the succession of a deceased polygamous husband, it will be not justifiable to invoke public policy and deny the application of a foreign succession law rule, entitling the surviving spouses to inherit. Otherwise, precisely the women would be unjustly harmed by the denial of their rights to an inheritance share.