



EULawInEN

EU LAW TRAINING IN ENGLISH LANGUAGE:
BLENDED AND INTEGRATED CONTENT AND LANGUAGE TRAINING
FOR EUROPEAN NOTARIES AND JUDGES



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

Habitual Residence Practical Cases

Riccardo Menchetti

Civil law notary in Monte Argentario - Italy

This Project is implemented by Coordinator



Fondazione
Italiana
del Notariato

Partners



CASSA NAZIONALE DEL NOTARIATO



Magyar Országos
Közjegyzői Kamara



Notary Chamber of Bulgaria



International
Association of
Judges

promoting an independent judiciary worldwide

Case study n,1

Otto and Alexandra

Otto is a German consultant who was born in 1962.

He has two grown up kids from a first marriage, which ended in 2008:

- his son, Jan, lives in Prague where he practices as a lawyer
- his daughter, Julia, lives in Berlin where she works as a PR consultant.

After a long career with a big player on the market, Otto has created his own firm, specialised in health care.

In 2012, Otto married Alexandra, a Polish citizen, whom he met during his frequent business trips to Poland. The couple settled in Warsaw where Otto bought a house using a substantial part of his savings. Otto and Alexandra have since then lived in this house.

Otto works for the largest part of his time for German clients. He has started to seek new clients in Poland, but he has not been very successful at it.



In January 2017, Otto and Alexandra split up. Otto's heavy work schedule has strained the

relationship between the spouses.

After the separation, Otto goes back to Germany, while Alexandra stays in the house they own in Warsaw.

Otto has settled in Berlin to live close to his daughter and grandchild and continues to work as a consultant, with a clear focus on the German healthcare industry. Otto has given up on the idea of finding new clients in Poland.

Otto dies in June 2017 during a mountain hike in France, shortly after filing divorce proceedings before a court in Germany.

Even though she does not have the means needed to buy it, Alexandra has no intention to move out of the house in Warsaw.

After a few rounds of discussion with Jan and Julia, Alexandra realises that she needs to bring court proceedings in order to obtain a decision in her favour.



Question 1

Alexandra brings proceedings before a court of first instance in Germany, seeking a decision on the rights she may assert in relation to the house. Does the Succession Regulation apply?



EULawInEN



A succession could present a cross-border dimension in various cases, such as:

- when the deceased had another nationality than the nationality of the State in which he habitually resided
- when the deceased possessed assets in another State than the State in which he habitually resided; it does not matter whether these assets represent a substantial portion of the deceased's assets
- when some of the heirs or other beneficiaries of the succession are established in another State than the State in which the deceased habitually resided.



Answer

- Otto passed away after the Regulation came into force and became applicable
- the questions clearly concern succession issues, as defined in Article 23 and clarified in Recital 9
- the question is raised in the court of a Member State bound by the Regulation.

The fact that Otto, a German citizen, died while living in Germany, does not prevent the application of the Regulation:

- Otto has lived in two different Member States
- he is married with a national of another Member State and
- owns assets in that other Member State.

His succession therefore presents a sufficient cross-border dimension



Question 2

Does the court in Germany have jurisdiction to hear the claim made by Alexandra regarding Otto's succession?



EULawInEN



The main rule grants jurisdiction to the courts of the Member State where the deceased was habitually resident before passing away (Art. 4).

Other rules make it possible for Member States other than that of last habitual residence of the deceased to exercise jurisdiction.

In the present case, Otto passed away after moving out of Poland and going back to Germany. He settled in Germany and focused exclusively on German clients.

As Otto does not seem to have made a choice of law, the only possibility for German courts to establish their jurisdiction is Article 4, which makes it possible for the courts of the Member State where the deceased habitually resided to take jurisdiction over the whole estate.



Recital 23

“... In order to determine the habitual residence, the authority dealing with the succession should make an overall assessment of the circumstances of the life of the deceased during the years preceding his death and at the time of his death, taking account of all relevant factual elements, in particular the duration and regularity of the deceased’s presence in the State concerned and the conditions and reasons for that presence.

The habitual residence thus determined should reveal a close and stable connection with the State concerned taking into account the specific aims of this Regulation.”



Recital 24

“In certain cases, determining the deceased’s habitual residence may prove complex. Such a case may arise, in particular, where the deceased for professional or economic reasons had gone to live abroad to work there, sometimes for a long time, but had maintained a close and stable connection with his State of origin.

In such a case, the deceased could, depending on the circumstances of the case, be considered still to have his habitual residence in his State of origin in which the centre of interests of his family and his social life was located.

Other complex cases may arise where the deceased lived in several States alternately or travelled from one State to another without settling permanently in any of them. If the deceased was a national of one of those States or had all his main assets in one of those States, his nationality or the location of those assets could be a special factor in the overall assessment of all the factual circumstances.”



The concept of habitual residence is often used in the various European private international law Regulations.

In most of these Regulations, there is no requirement that a person should have resided for a minimum period of time in a country in order to be considered to be habitually resident.

As a consequence, a person could in some circumstances be considered to reside habitually in a country in which she has lived only for a short period of time.



Answer

In the present case, Otto decided to live in Berlin after he and Alexandra split up.

He never stopped working in Germany, even when he lived in Poland.

He chose to live in Berlin to be close to his daughter and grandchild. He also filed for divorce in Germany.

These elements, coupled with the facts that Otto is a German citizen and that his only remaining connection with Poland is the ownership of real estate in that country, point in the direction of Germany as the country where Otto established his habitual residence.

The German courts have jurisdiction to hear the claim.



Question 3

How should the court determine whether the house situated in Warsaw falls within Otto's estate?



EULawInEN



Before resolving the issue of Otto's assets, one should determine with precision which assets are included in Otto's estate.

This implies finding out whether the assets held by the deceased were his own assets or assets jointly owned with the surviving spouse.



The EU has adopted two Regulations dealing with the patrimonial relationships between spouses and partners (2016/1103 and 2016/1104).

These Regulations will, however, only apply to spouses married or partners registered after 29 January 2019 (Art. 69).

For spouses married before 29 January 2019, application should be made of the national rules of private international law.



These rules may vary:

- in some Member States, spouses may choose the law applicable to their relationships
- in other Member States, such choice is not possible, or may only be made in favour of certain laws.

Failing a choice of law, the law applicable to the patrimonial relations between spouses may also vary:

- in some Member States, reference will be made to the law of the common nationality of spouses
- in other Member States, the default rules subject spouses to the law of their first habitual residence after marriage.



The relevant rule of German private international law (Articles 14 & 15 EGBGB) provides that (in the absence of a choice by the spouses and if the spouses have no common nationality) the matrimonial property regime of spouses is governed by the law of the common habitual residence of the spouses at the time of their marriage.

Polish law provides that failing a choice by the spouses for another regime, the relevant regime is that of the community of assets (Art. 31 1964 Polish Family and Guardianship Code of 1964 – Act of 23 April 1964, with subsequent amendments)



Answer

In the present case, Polish law applies to the patrimonial relationships between the spouses.

It should therefore be determined under Polish law whether Alexandra may claim any rights on the house in Warsaw.



Question 4

Which law applies to Otto's succession?



EULawInEN



Under Article 21 of the Succession Regulation, a person's succession is governed by the law of the country in which the person last habitually resided.

In Question 2, we discussed where Otto was habitually resident before passing away.

We concluded that Otto resided habitually in Germany.

As a consequence, German law is applicable to his succession



Answer

In the present case, German law is applicable to Otto's succession since Otto resided habitually in Germany.

One should therefore examine under German law whether Alexandra may claim any right in Otto's succession.

The fact that the house is located in Poland is of no relevance to determine whether Alexandra may claim any right in relation to the house.



Case study n,2

The case of Mr. Peter

Mr Peter is a British citizen working in Paris from the late 80's where he bought a very spacious apartment.

His business grew very fast and it counted more than 150 employees. The business was set up as a limited liability partnership. Mr Peter has always been the largest shareholder.

Mr Peter, who has learned fluent French, became a member of the Paris Golf Club and has a wide circle of friends with whom he socialises.

Thanks to his network, he is also a member of the board of the Standard Athletic Club, one of the most exclusive British clubs in Paris, where he met Sarah, an Australian lawyer. Peter and Sarah soon became a couple.



Peter and Sarah started spending more and more of their days off in Portugal. Peter, in anticipation of his retirement and longing for peace and sun, bought a magnificent beach house.

After his retirement in 2007, Peter started to build a new network of friends, mainly among expatriate British retirees living in Portugal.

Sarah, who is fifteen years younger than Peter, continued to work from Paris and frequently flew in for the week-end.

With a few friends, Peter founded the British Golf Club, which now has more than 60 members.

He has learned bits of Portuguese, but is far from being fluent in the language, and his friends are more British expatriates than locals.



Furthermore, he spends at least five months a year in Paris, where he has kept his apartment and a very tight network of friends. His bank and main physician are located in Paris.

Peter also frequently travels, especially during the hunting season.

On average, he spends more time in Portugal than he does anywhere else. His beach house is also his most expensive asset.

During a hunting trip in the North of Russia in March 2014, Peter is trapped for three days because of a very heavy snow storm. Fearing for his life, he drafts a will on a piece of paper. The will includes the following provisions:

“I leave £ 150,000 to my dear sister, Angela.

I leave my collection of rare shotguns to my hunting buddy Michael Ford.

I leave my residuary estate to the love of my life, Sarah Aniston and appoint her as the sole executor of my will.”



Remembering the advice he once took from a solicitor, he also signs the will, which he stores in his wallet.

One day later, the storm subsides and he is able to find his way back to civilisation.

Three years after coming back from his dreadful experience in Russia, Peter is killed in a traffic accident.

A couple of weeks after the funeral, Sarah informs Angela about her late brother's will.

Angela would like to challenge her brother's last disposition of property.



Question 1

Which rules apply to address Angela's claim?

- *Private International Laws or*
- *European Regulation?*



EULawInEN



Answer

We can say that the case has:

- cross border dimension
- subject matter scope
- geographic scope of application
- temporal scope of application

In the present case, the Regulation is applicable.



Question 2

Do the courts in Paris have jurisdiction to hear the claim made by Angela?



EULawInEN



The basic principle under the Regulation is that jurisdiction goes to the courts of the Member State where the deceased habitually resided before his death (Art. 4). The courts of that Member State have jurisdiction over the whole of the assets, including assets which may be located in third States.

Remember that the Regulation does not make it possible for a person to determine beforehand the courts having jurisdiction to deal with his/her estate. A choice of court included in a will or other disposition of property upon death is not valid under the Regulation.

A choice of court may, however, only be agreed upon provided the person concerned has designated the law applicable to his succession.



Peter lived mainly in Portugal but he kept very strong links with France.
He was not a national neither of France, nor of Portugal.

Additional facts:

- religious institution attended by Peter;
- the place where his physician was established;
- where his bank account was kept;
- the tax residence;



EULawInEN



- how long the deceased has actually been residing in a given country and whether this residence is a stable residence;
- the reasons why the deceased has been residing in a given country;
- where is the center of interests of his family and his social life located;
- where are the assets of the deceased located, in particular the physical assets;
- where is the professional life of the deceased located (giving more weight to current professional activity than to former activity) and other economic activities;
- what is the deceased's nationality or nationalities;
- whether the deceased mastered the local language;
- whether anything is known about the deceased's intention and mindset. e or more person party to the agreement (art.3, par.1 (b)).



Portugal

- Peter's involvement in Paris is linked to his past there
- connection with Portugal is more recent and quite dynamic
- he has bought a house in Portugal, which is his biggest asset
- and founded a club there

France

- Peter has kept strong links with France, where he keeps spending much time
- his partner is still based in Paris
- Peter's involvement in Portugal is more recent and more limited
- he does not speak the local language and he has friends in the expatriate community only

Although this is far from a clear case, one may conclude that Peter has not moved the centre of interests from France to Portugal and that his habitual residence is still located in France.



Answer

If we choose France as the country of the habitual residence, the courts of Paris may therefore exercise jurisdiction.



Question 3

Assuming the courts of Paris have jurisdiction to hear the case, is the will drafted by Peter valid?



The will was drafted in rather peculiar circumstances.

The will was drafted in 2014, i.e. before the Regulation became fully applicable.

The fact that the will was drafted before the actual entry into force of the Regulation, does not mean the will is not covered by the Regulation.

Article 83 includes specific rules in relation to dispositions of property upon deaths concluded before 17 August 2015. These rules aim to guarantee that 'old' dispositions of property upon deaths remain valid even though they were drafted before the Regulation became applicable.



1961 Hague Convention in force in 42 countries, among which France. It is not in force in Portugal.

Article 75 of the Regulation gives this Convention precedence over the provisions of the Regulation.

The Convention would not apply if the succession is handled in Portugal.

In this case, Article 27 of this Regulation with regard to the formal validity of wills and joint wills will apply.

Article 27 has taken over the various requirements to be found in the 1961 Convention so that there are no substantial differences between the two.



Answer

- Under French law, a holographic will must be entirely hand-written, dated and signed by the testator (Article 970 Civil Code).
- Under Portuguese law, a testator may draw a public or a closed will. In both cases, a notary must intervene, either to draw up the will (public will) or to register the will (closed will). There does not seem to be any room for a holographic will under Portuguese law.
- Under Russian law, a person may in extraordinary circumstances, draft a will “in a simple written form”.

It appears that the will drafted by Peter is valid, as it was drafted in extraordinary circumstances.



Question 4

Will the courts in Paris grant Angela's claim and hold that Peter's will must be put aside or will these courts rule in favour of Sarah?

Which law applies to Peter's succession?



The Regulation attempts to have each succession governed by one and only one law.

- 1.a person's succession is governed by the law of the country in which this person habitually resided before his death (Art. 4), but with possible exception of the escape clause (art.21) if the succession presents a manifestly closer connection with the law of another State. (see Recital 25 for further clarification)
- 2.the Regulation also allows parties to make a choice of law: one may decide to submit his/her succession to the law of his/her nationality (Art. 22).



In the present case, the habitual residence of Peter is most probably located in France.

As a consequence, and failing any choice of law, French law applies to his succession.

Peter has built up an extensive network in Portugal and his succession therefore also presents a close connection with this country.

It is doubtful, however, that the succession presents a manifestly closer connection with Portugal than with France.



Answer

In the present case, Peter succession is governed by French law.

There does not seem to be sufficient reason to retain the application of Portuguese law using the exception clause, nor are there sufficient indications to conclude that Peter chose English law to govern his succession.

The law applicable under Article 21 therefore coincides with the law declared applicable under Article 24.

French law should be applied to assess the admissibility and substantive validity of the will; it should also be applied to find out whether the various provisions adopted by Peter in his will are valid and enforceable.

French law applies in particular to find out whether Angela, as a sister, benefits from a reserved portion which Peter should have respected.



Case study n,3

The case of Johnny Hallyday

Johnny Hallyday died on December 6, 2017, leaving an estate possibly worth over \$100 million.

Born Jean-Philippe Smet, he adopted the last name of an uncle and was survived by his fourth wife, Laetitia, whom he married in 1996 when she was 21, and they two adopted children.

He also had a liaison with French actress Nathalie Baye, with whom he had one of his two older children, Laura Smet.

The other older child is David Hallyday.

A controversy arose concerning the proper jurisdiction over the estate.



Johnny built a house in Los Angeles and spent a good portion of his last seven years in California, where he indulged his passion for motorcycles and once vowed never to return to live in France until it changed its tax laws.

J.H. drawn up an holographic will on 3 April 2014 with which he disposed of his estate excluding the children from the previous marriages.

The children challenged the validity of the will in front of the Court of Nanterre (Paris), contenting that it is contrary to French dispositions of law.

In this will J.H., in accordance with a widespread succession planning model in the USA, assigned all his assets to a trust called “The JPS Trust”

Beneficiaries of “The JPS Trust” are the wife of J.H., if she survives (as indeed happened) and, after the death of the wife, the two adoptive children



In the testament J.H. declares that he is resident and domiciled in Los Angeles and has not provided for, in the will or in any other documents relating to succession planning, assets in favour of his first two children, having already benefited them in the past.

His assets include a large home on the outskirts of Paris, where he died, a villa on the Caribbean island of St Barthélemy, and two properties in Los Angeles, in addition to rights to more than 1,000 songs, and a collection of prestige cars and motorbikes.

Laura Smet and David Hallyday commenced a suit in France (by Nanterre Court of first instance) seeking to annul the California will on the basis that under the Regulation, the law of succession that applies to a decedent's estate is the law of the country of the decedent's habitual residence.



Question 1

Does the Succession Regulation apply?



EULawInEN



Cross-borders elements:

- assets are located in France and in the USA.
- J.H. was a French citizen living in the USA.
- J.H. died after 17 August 2015, the date of the coming in force of the Regulation.



Question 2

Which law applies to J.H.'s succession?



EULawInEN



California

- his family was based there
- younger children attended school in Los Angeles
- he had a home in California
- he was tax resident in California
- he had a green card and planned to apply for American citizenship
- his last will was made in California and written in English

France

- he was born in France
- he died in France.
- As well as California, at one point he lived in Switzerland
- he wanted to be living in France when he had a Swiss base
- He seemed to have close bonds to France and 'being French'



Question 3

Does the court in France have jurisdiction to hear the claim made by the children regarding J.H.'s succession?

Was Johnny Hallyday habitually resident in France or the United States at the time of his death?



Laura and David produced their father's Instagram posts to support their argument that his true home was France.

Their lawyers compiled a chart tracking the singer's movements from Instagram.

It showed that Hallyday spent 151 days in France in 2015 and 168 in 2014.

Before his death at the age of 74, he spent eight consecutive months in France while being treated for cancer.

The court accepted Hallyday's digital footprints as proof and overturned the will, ruling that the inheritance dispute must now be settled in France.

The French court ruled that despite Johnny's significant time in Los Angeles, his Instagram account revealed that he had been spending considerable time on the French Caribbean island of St. Barts.



Objective element of habitual residence:

- the duration and regularity of Johnny Hallyday's presence in France in the years preceding his death and at the time of his death.

Subjective aspect:

- the real intentions of the singer were not easy to grasp, otherwise «the wish to no longer have as interlocutor the French tax»;
- the tours and the concerts almost exclusively in France and before a francophone audience;
- the centre of the financial interests was clearly in France, its income being mainly generated by its artistic activities on French soil.
- the choice to spend time in California was guided by a simple desire to escape media pressure, “to be quiet, to listen to music and to find inspiration”, all insufficient grounds to demonstrate a real will to establish in a stable way his last residence in the USA.



Question 4

Is the will drafted by J.H. valid?



EULawInEN



According to art. 27 let. a) of the Regulation

“A disposition of property upon death made in writing shall be valid as regards form if its form complies with the law:

(a) of the State in which the disposition was made or the agreement as to succession concluded

(b)”

So, despite the applicable law seems to be the French one, the formal validity of dispositions of property upon death made in writing is governed by the law of California.



Question 5

The succession rights for the children (forced heirship)



EULawInEN



Under California Probate Code § 21621, a parent may disinherit a child if that intention is manifested in the testamentary instrument.

Under French law, parents cannot disinherit their children, but Hallyday's will was drafted in English in California, where it is legal to do so.

Where there are three or more children, La Reserve consists of three-fourths of the estate, which must be divided equally among the children (a surviving spouse is entitled to one-fourth of the estate unless he or she is explicitly disinherited).



On appeal, Laetitia Hallyday will undoubtedly try to convince the court of «his» truth:

- even if the singer had a strong artistic activity in France and stayed regularly with family in Marnes-la-Coquette, where he saw his French friends, France would have been for him only a place of vacation and leisure;
- his will being to live in the United States;
- that the choice of place to “be quiet” is not incompatible with the intention of making it his habitual residence;
- the educational and social situation of Jade and Joy (the two adopted children) in the United States was apparently not taken into account by the judge;
- their daily lives in Los Angeles could be a natural cause for the regularity of Johnny’s presence on American soil;
- the recent application for American naturalization could influence the appeal decision.



Thank you very much for your attention

(I hope to see you next year for the second episode of the Johnny Hallyday story)



EULawInEN

