EULawInEN

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

E. Ioriatti, D. Muritano, C. Oliver

HANDBOOK ON EU CIVIL LAW

A Self-Learning Tool for Legal Practitioners Integrating the Content and Language Learning (C.L.I.L.) Methodology

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INTRODUCTION

Under the financial support of the European Union – 2014-2020 Justice Programme of the European Commission – the Fondazione Italiana del Notariato, as Coordinator, and the partners - the Notary Chamber of Bulgaria, the Hungarian Chamber of Civil Law Notaries, the International Association of Judges and the Cassa Nazionale del Notariato (Italian Pension's Fund) - successfully completed a two-year Project titled "**EU Law Training in English Language: Blended and Integrated Content and Language Training for European Notaries and Judges - EULawInEN**". The Project mainly envisaged blended training (both in presence and online) for European notaries and judges, with an eye to train future trainers in EU law in English for better implementation and coherent application of EU law across Europe.

The work will be useful for both notaries and judges to whom the results of the Project, including this Handbook, are dedicated. For this reason, I would like to express my deep appreciation to the authors of the Handbook, Professor Elena Ioriatti, the colleague Daniele Muritano and the lawyer Charlotte Oliver, who have supported the training of trainers throughout the two-year Project implementation and offered their precious insight at the training events delivered in presence, for the development of numerous e-learning tools and also in the present Handbook, with their dedicated efforts.

You will be able to find texts and exercises integrated in this publication that apply the C.L.I.L. (Content and Language Integrated

Learning) methodology and have been tested during the seminars and the exchanges of best practices delivered in the different partner countries. They have been re-elaborated in the form of a useful and practical tool for legal professionals' everyday work, covering the three EU Regulations addressed in the action, dealing with cross-border successions, matrimonial property regimes and property consequences of registered partnerships (650/2012; 1103 and 1104/2016). In fact, through the study of EU law in English, legal practitioners were and are still able to improve their linguistic skills, building more confidence while having to interact with counterparts in other EU countries in order to solve transnational cases.

I am sincerely grateful also to the European Commission for having believed in us and agreed to support us in the development of several other e-learning tools (a course of 20h of video lessons, one serious game and three sit-coms) we designed beyond the Handbook, tested and published on our Project web site at www.eulawinen.eu and freely available on the MOOC platform EMMA at https://platform.europeanmoocs.eu/.

Last but not least, please allow me to thank the implementing team of the Fondazione Italiana del Notariato meaning the Senior Project Manager Alessandra Bianca, the Internal Staff Supervisor Emanuela Paolucci and the Project Secretary Claudia Offidani for their effortless work that greatly contributed to the success of the Project.

Enjoy the Handbook!

July 2020

Brunella Carriero
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Scientific Coordinator of the Project

CHAPTER 1

THE LEGAL LANGUAGE OF EU CIVIL LAW

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The Chapter will introduce the reader of the Handbook to the EU legal language, explained from a legal, rather than a linguistic point of view.

The knowledge of how the multilingual legal language of the EU is formulated and the meanings of few legal concepts of the three Regulations will be analysis in this section of the Handbook, as part of the educational aim of EuLawInEnglish project: the training on EU legal language, in particular, is important because EU norms are composed by concepts that have to be interpreted and applied by the national jurists and operators in the Member States.

The explanation of EU legal language and terminology will be accompanied by examples, so as to enable professionals to understand the difference between the European neologisms (new EU concepts) and the national ones. This subject will be briefly analysed from the cornerstone of the method of comparative law too, as some specific tools of this science are very useful to understand and apply the EU norms at the national level.

1. INTRODUCTION

The EULawInEN project, whose educational and scientific conclusion is represented by this Handbook, has a very challenging and important aim, that is the improvement of the effective, coherent and uniform interpretation and application of the legislation of the European Union by national jurists in the Member States.

This achievement is essential to reach a real and full implementation of the EU legislative framework and to realise the European Commission's harmonization action in particular with regard to EU civil law.

This is particularly true for the recent civil law EU sources, such as the Regulations (EU) no. 650/12 on cross-border successions, on matrimonial property regime (1103/16) and on property consequences of registered partnership (1104/16), as they are the core of the ambitious project of unification of international private law, pursued by the European institutions. Because of the specificity of the EU legal system, the interpretation and the application of the Regulations in the national Member states involve different levels of knowledge: for national jurists, it is not sufficient to learn norms and principles provided for in the Regulations and in the decisions of the Court of Justice of the European Union. Actually,

because of multilingualism and its impact on the European Union's legal terminology, the language in which norms are formulated is a relevant part of their training too. For this reason, as it can be inferred from the title of the "EU Law in English" project, even if the substantive analysis of the three Regulations is carried out in English, as a matter of fact, in the EULawInEN project, English is not only the language chosen for training, but also an object of the legal education at the same time.

Indeed, some Chapters of the present Handbook provide an explanation of the roots and the history of the English legal language, as it evolved alongside the common law and the system of equity in England and Wales[1]. Furthermore, other Chapters will examine the main features of the three Regulations and the innovations they bring to the rules of private international law of the participating States[2]. Next, the two above-mentioned aspects of the training - the substantive and linguistic one - need to be complemented with a third level of legal education, related to the knowledge of the specific legal language of the European Union, which, because of the linguistic regime of multilingualism must be formulated in all official languages.

As we will see, the EU language is the expression of new European and autonomous legal concepts, which often do not belong to the culture or background of national jurists. The Italian, Bulgarian, Hungarian, and English legal languages - as well as all the other official languages - in which the EU legislation is formulated, are

[1] *See the Chapter on English law of this Handbook written by Charlotte Oliver.*
[2] *See the Chapters of this Handbook written by Daniele Muritano.*

entirely new and their concepts do not coincide with those in the legal tradition of the Member States.

All this leads to considerable differences between the EU and the Member States, as if in a monolingual homogenous legal system legislation may be clear and precise enough to national jurists, that is not always true in a multilingual context.

Problems of clarity and understanding might firstly arise with terms that belong to the ordinary, natural language. Even for words like "cheese" or "milk", when included in EU legislation, interpretation might not be so easy: in case of legislation regulating cheese production, for instance, the question arose whether national jurists have to qualify such products by referring to the national way of production and so, for instance, whether the fermentation process is a necessary phase for a milk product in order for it to be called "cheese". The same words of the natural language (Italian, Hungarian, Bulgarian and others) used by the European legislator can therefore cause interpretation problems in the EU countries, since their meaning must be considered in "European" terms, and not in national ones.

In this framework, one can therefore understand that the comprehension, interpretation and application of the EU legal language is even more complex than the natural one.

In particular, as all jurists know, the meaning of EU terms is particularly difficult to be understood and qualified when it has to be attached to abstract legal concepts, like "possession", "contract", "succession".

Legal meaning in multilingual contexts is the results of complex

problems of legal translation, drafting, interpretation, hermeneutics, comparison. All these aspects have favoured the growth of a specialist literature in the field of EU law and language and, with the passing of time, the consequences of framing the law in a plurality of languages have increasingly been added to the research agenda of comparative law science[3].

This Chapter will introduce the reader to the EU Civil law legal language, explained from a legal, rather than a linguistic point of view.

We will then explore some of the characteristics of the EU legal multilingualism related to the very peculiar nature of law, language and terminology, as well as of the environment in which it is formulated and enacted.

The explanation will be accompanied by examples, so as to enable professionals to understand the difference between European neologisms (new EU concepts), and national ones. This subject will also be briefly analysed from the angle of the method of comparative law, as some specific tools of this science are very useful to understand and apply EU norms at the national level.

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[3] Castellani, L. & Sacco, R., Les multiples langues du droit européen uniforme, Turin: Harmattan, 1999. Sacco, R., Langue et Droit, in: E. Jayme (ed.), Langue et Droit, XV International Congress of Comparative Law (Bristol 1998), Collection des rapports, Brussels: Bruylant, 2000, p. 229 - 260. Gambaro, A., Interpretation of Multilingual Legislative Texts, vol. 11.3, Electronic Journal of Comparative law, December 2007, p. 1-20. Sacco, R., Dall'interpretazione alla traduzione, in: E. Ioriatti (ed.), Interpretazione e traduzione del diritto, Padua: Cedam, 2008, p. 3 - 12. Derlén, M., Multilingual Interpretation of European Community Law, The Hague, New York: Kluwer Law International, 2009. Ioriatti, E., Interpretazione comparante e multilinguismo europeo, Padua: Cedam, 2013. Paunio, E., Legal certainty in multilingual EU law. Language, discourse and reasoning at the European Court of Justice, Farnham, Surrey (UK): Ashgate, 2013 (second edition London-New York: Routledge, 2016) Van Der Jeught, S., EU Language and Law, Groningen (NL): Europa Law Publishing, 2015. S. Šarčević (ed.), Language and Culture in EU Law: Multidisciplinary Perspectives, Abingdon Oxon (UK), New York (USA): Routledge, 2016. Baaij, C., Legal Integration and Language Diversity. Rethinking translation in EU lawmaking, New York: Oxford Studies in Language and Law, 2018.

2. THE LANGUAGE OF THE LAW

The analysis of the language of the law is one of the recent fields of research that have been pursued by both law scholars and professionals.

Although unwritten, oral and even mute legal sources do still exist[4], in the majority of the world's legal systems norms are nowadays verbalized and written, and hence formulated in a specific legal language. An evolved legal system, therefore, implies the development of a specialised language of the law, composed of concepts that synthesize legal provisions in abstract formulae[5].

It is the historical evolution of the world's systems that explains the presence of many different legal languages, each of them having its own taxonomy. The clearest example is the difference between *civil law* and *common law* legal terminology, with the former reflecting the huge heritage of Ancient Rome, and the latter deriving from the casuistic law of the English Courts, originally of the Curia Regis and then of the Courts of Chancery[6]. Some of these connections between language and law are natural in every contemporary legal system, including monolingual ones, that is, those characterized by the presence of only one official language. However, bilingualism and multilingualism highlight the role of the linguistic factor as a component of any specific legal system[7].

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[4] *Sacco, R., Mute Law, The American Journal of Comparative Law, Volume 43, Issue 3, Summer 1995.*
[5] *Ioriatti E., Language barriers and EU citizenship, in de Vries S., Ioriatti E., Guarda P., Pulice E. (ed.), EU citizens' economic rights in action. Rethinking legal and factual barriers in the Internal market, Edward Elgar, 2018.*
[6] *Mellinkoff D., The language of the law, Wipf and Stock Publishers, 2004.*
[7] *Robertson C.D., Multilingual Law. A Framework for analysis and understanding, Routledge, New York, 2016.*

So, in order to understand a legal system and to facilitate the interpretation and application of its legal sources, it is important to be introduced to its legal language.

In the case of European law, this training is particularly relevant. As it has already been pointed out, EU directives and regulations, even if enacted in all the official languages, provide new norms expressed with new legal concepts, which are not familiar to national jurists.

3. EU MULTILINGUAL LAW

As everybody knows, ever since the Treaty of Rome establishing the European Economic Community was signed, multilingualism was chosen as the European Union's linguistic system, and this has remained basically unchanged until today.

The choice of multilingualism was then definitely confirmed by the *Lisbon Treaty*: art. 342 of the Treaty on the Functioning of the European Union recalls the content of the precedent primary law, by assigning to the Council the decision (by unanimous vote) regarding the EU's linguistic regime.

Multilingualism was soon enforced by the European Economic Community (EEC) through the first Regulation, n. 1 dated 15 April 1958[8], on the Community linguistic system. In the original version, and after having established the four original official languages of the European Economic Community (Italian, French, Dutch and German), the article provided, among others, for the obligation

[8] *EEC Council: Regulation No 1, April 15th, 1958, determining the languages to be used by the European Economic Community, Official Journal 017, 06/10/1958 P. 0385 - 0386*

to enact documents and other texts of general interest in all the official languages[9].

This is the principle of linguistic equality, that includes the equal authenticity of all language versions and, from an operational point of view, involves the (formal) obligation to translate EU secondary legislation in all of the official languages of the Union.

4. THE EUROPEAN UNION: A SUPRANATIONAL (MULTILINGUAL) LEGAL SYSTEM

Multilingualism is not the only element that characterizes the European Union.

In this regard, the first aspect worthy of attention is that the EU is a legal system, unlike the national ones composing it, not of a State but of a supranational entity, with specific aims and tasks; among them, the Single Market is nowadays still the core aim of the Treaties and the creation of an area of free movement of goods, services, people and capital is, and has always been, at the heart of the European project.

For this reason, EU legislation has had, since the very beginning and above all, a harmonizing scope, which goes beyond any possible performative message contained in the norms. When it comes to EU law, transferring a normative message contained in EU directives and regulations (and, in general, in all EU secondary legislation) to a social group is not its primary aim. At the time of

[9] *Reg. 1/1958, art. 4 "Regulations and other documents of general application shall be drafted in all the official languages".*

the ECC, the very first purpose of Community law was to achieve harmonized effects in the different legal systems.

Furthermore, in the specific case of Private International Law instruments like, for instance, Regulation (EU) No 650/2012, the aim of the EU legislator is not only harmonization, but principally that of ensuring compatibility of the rules concerning conflict of laws and of jurisdiction in the area of succession law applicable in the Member States.

A recital of Regulation 650/12 specifies that "The Union has set itself the objective of maintaining and developing an area of freedom, security and justice, in which the free movement of persons is ensured. For the gradual establishment of such an area, the Union is to adopt measures relating to judicial cooperation in civil matters having cross-border implications, particularly when necessary for the proper functioning of the Internal market".

Because of the specificity of the EU legal systems, EU norms and terminology do not have the typical features of national laws in terms of structure and style of the sentences, syntax and level of abstraction of the legal norms and concepts. If compared to national statutes, EU sources of law - both primary (the norms of the Treaties) and secondary law (mostly directives and regulations) - are made of rather concrete norms, their semantic level is not very abstract and the rules are very close to factual situations.

Furthermore, the legal categories and terminology are different from those utilized in the Member states, even if expressed in the same language.

As we will see, the EU legal terminology refers not to national concepts and institutes, but to European ones. Just to make a well-known example, the Directive 2011/83/EU on consumer rights[10] includes some key concepts such as "consumer", "product", and "right of withdrawal" which have to be qualified and interpreted as European terms and do not necessarily semantically match similar national concepts.

5. CHARACTERISTICS OF THE EU TERMINOLOGY

5.1 The Economic Nature of Norms and Concepts

In the Fifties, the Treaty of the European Economic Community established the institutional framework and the core objects of the Common Market. By doing so, the primary layer of EU concepts and categories of this new legal system had been shaped, as well as a new European legal terminology.

Common market (marché commun), *free circulation of goods* (libre circulation des marchandises) free *circulation of persons* (personnes) *services* (services) and *capitals* (capitaux) *competition* (concurrence) are principles and concepts on which the European Union is still based today, and have been constantly evolving.

Even from a first, fleeting analysis of the Rome Treaty, it is clear that those principles were, and in part still are, of a pure economic nature.

[10] *Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights.*

This is the reason why, at the origins of the EU legislation, there were no pre-existing legal categories, such as, for instance, "property", "family law", or "succession". On the contrary, the provisions of primary law, which settled the Common Market, were those forming the categories of EU law and have been transformed into substantive rights for the EU citizens.

This happened later on, thanks to the broad interpretation that the Court of Justice of the European Union has given to this substantially economic terminology, and by the evolution of the aims and competences of the Economic Community (EC), which has changed in meaning since its inception. Not surprisingly, this terminology, largely equipped with words borrowed from the economic taxonomy, represented the central core of the legal language of the Treaties establishing the European Institutions. An interesting example of this legal and linguistic meaning construction is the concept of "free movement of persons": the first provisions of primary law enacted with the Rome Treaty establishing the European Economic Community regulated the free movement of workers and the freedom of establishment. Thus, in the concept of "free movement of persons" the "person" was primarily the employee. Later on, with the Treaty of Maastricht[11] introducing "EU citizenship", the right to move and reside freely within the territories of the Member States was also recognized to individuals in general[12].

[11] *The Maastricht Treaty is formally known as the Treaty on European Union, signed on February 7, 1992.*
[12] *Ioriatti, Language barriers and EU citizenship, cit., p. 191.*

This first taxonomy was gradually increased by the EC secondary law, whose function is still the implementation of the objects and commitments, by the Member States, laid down in the Treaties.

This has been done particularly through harmonising legislation under Article 114 of the Treaty on the Functioning of the European Union, as a prerequisite for the creation of a free-circulation area is, in fact, the existence of harmonized legislation in some areas of the law of the Member State.

With regard to the free circulation of persons, in particular, the EU action has mainly focused on instruments of private international law in the framework of the well known action of judicial cooperation in civil (and commercial) matters. Again, the challenge of setting up a Common Market had played a central role in the definition of the characters of the EU secondary legislation and, consequently, of the legal language and terminology, as the emphasis of the Treaties on free movement was transposed in the directives and regulations.

In this regard, the Succession Regulation is an example of this level of integration within the European Union. Through the Regulation, the EU legislator intended to eliminate the existing legal barriers to the free movement of persons that resulted from the individual Member States' different succession legislations. Thus, this tendency to use legal concepts that are "neutral" from the point of view of the national legal culture - as the concept "habitual residence", as we will see - also explain the intention of the EU legislator to think in economic rather than in legal-cultural terms.

This market - oriented way of creation of the EU legal terminology is an ongoing process, accompanying daily the enactment of every single directive and regulation as still nowadays the Single Market is the core aim of the EU and constitutes a fundamental driving force behind the European secondary law.

Thus, the economic origins of the EU legal system still "radiate" the legal terminology of the Treaty and, consequently, of EU secondary law too. This is one of the reasons why EU terms are not organized in pre-existing legal categories like in the legal systems of the Member States, and they are not the current expression of a pre-existing legal culture but, rather, that of an economic one.

But let us turn now to the other aspect that has played an important role in shaping the EU legislation and terminology - the linguistic origin of the EU concepts.

5.2 The EU Legislative Drafting

The written European legislation - particularly directives and regulations - is the result of a very complex legislative and drafting process, which influences the legal language too[13].

Such complexity depends, firstly, on the fact that the European legislative power is not assigned to a specific institution, but is shared by the Commission, the Council, and the European Parliament; to an outside observer, the European "legislative function" it the result of a dynamic but complex collaboration of powers[14]. In reality,

[13] *Gallas, T., , L'Écriture d'un accord multilingue: un exercice difficile, Massart-Piérard (F., ed.), L'Europe prédite: La signification des mots, Academia, Louvain-La-Neuve, 1994*

[14] *Capotorti, F., The law-making process in the European communities, in Pizzorusso A. (ed.), Law in the Making: A Comparative Survey, Springer-Verlag, Berlin and Heidelberg, 2012.*

the legislative one is a fragmented drafting process, involving a countless number of actors (officials, lawyer-linguists, translators, national experts etc.) who all contribute to the final norm, often in their own language.

In order to coordinate the works of all actors involved in the legislative process, the EU institutions have enacted some drafting indications, contained in "*The Joint Practical Guide of the European Parliament, the Council and the Commission of European Union legislation for persons involved in the drafting of European Union legislation*" (hereinafter the Guide), enacted in its last edition in 2016.

The Guide includes rules intended to ensure that the legislative texts have, in the different languages, the same horizontal structure and the same length, in order to facilitate reference to a rule or a paragraph in all language versions. This requires not only the content, but also the structure of the directive or regulation (paragraphs, articles, form of the text) to be as homogeneous as possible in all language versions. In this regard, some authors ironically speak of "full stop rule"; according to this rule, each language version should contain an equal number of full stops!

Therefore, the European legislation also depends on the characteristics of the European text. For instance, the horizontal correspondence of the sentences in all the language versions is stylistic in nature, but may have consequences on the content and on the terminology of an EU legislative source.

A curious example is the formulation of Article 158 of the Treaty establishing the European Community, which deals with financial aid to the regions.

When compared to the English and the French versions, the Italian one has a different meaning.

English: In particular, the Community shall aim at reducing disparities between the levels of development of the various regions and the backwardness of the least favoured regions or islands, including rural areas.

Italian: In particolare la Comunità mira a ridurre il divario tra i livelli di sviluppo delle varie regioni ed il ritardo delle regioni meno favorite o insulari, comprese le zone rurali (literal translation: .....of the least favoured regions and the islands....)

While almost all versions of the other languages speak of "actions to support the *least favoured* regions or islands", so referring only to the islands considered to be in a less developed situation, the Italian text refers to the least advantaged regions and *to all the islands without distinction*.

This difference in meaning is due to the structure in the "original" English text, then translated into Italian, and probably to the need to align the Italian version with the structure of the paragraph[15].

Another striking character of the EU legislative drafting is due to the circumstances that - according to the *Guide* - norms are addressed to jurists or Governments, but also to EU citizens, and so to lay people too. As a consequence, some terms and norms have to be written in such a way as to allow EU citizens, who are not trained in law, to understand the message of an EU norm.

[15] *See Cosmai D., Tradurre per l'Unione europea, Hoepli, 2007.*

As the aim of the title of an EU directive or regulation is to inform, in respect of the legislative style of the Union, the title of EU legislation should be written by using simple language and a less formal register, half way between a legal and communication message; therefore, the purpose of the description is to make the content of the document comprehensible for citizens of the European Union.

Nevertheless, sometimes, the attempt to combine the need of making the title understandable to lay people and its legal, technical value might disorient its interpretation and application by a national jurist.

One of the most typical examples is the attempt to combine both the legal effect and an informative message in the title of *Rome II* Regulation[16], regarding the conflict of laws on the law applicable to non-contractual obligations.

While the title of the Regulation mentions "non-contractual obligation", Art. 2, contains definitions such as *unjust enrichment* and *negotiorum gestio*. According to *Rome II*, both such institutions are regulated under the title "non-contractual obligations"; nevertheless, this result is not clearly the consequence of their attribution to a specific category - qualified in the Member States as "tort law" - but, rather, of a dissociation between the title and the normative content of the EU Regulation.

[16] *Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).*

5.3 The EU Linguistic Regime: the Origins

David Mellinkoff, in his book *The language of the Law*[17], wrote that "The law and the language of a country depend on history. However, history has no end and it is likewise that has no fixed point of beginning".

This deep thought is certainly true if related to the legal language of the national legal systems and Member States. National legal language is rooted in the culture of each State and is conditioned not only by the law and the prevailing language of its environment (ordinary language), but also by the history, the legal education of jurists, and many other components.

The origins of the legal taxonomy of almost all national legal systems (and so the language of statutes, courts, process, teaching, readings) are, more or less, lost in time.

But this is not the case of the European Union.

The very moment when the EU legal language was created is rather clear. The beginning of the European legal language dates back to around 1950, with the start of the negotiations for the creation of the European Coal and Steel Community, established in 1951 by the Treaty of Paris that was signed by Belgium, France, Italy, Luxembourg, the Netherlands and West Germany.

So, the history of the EU legal language has a clear start and - surprisingly enough - the origins of the current European Union are not really multilingual.

[17] *Mellinkoff, cit., p. 34*

The historical archives of the European Community show that the original text of the Treaty establishing the European Economic Community (EEC) was drawn up in French.

Even if the EEC Treaty provided for equal authenticity of the four original languages (French, Italian, German, and Dutch), the negotiations were conducted in French and the original text, the one the negotiations were based on, was drafted in this official language, that is, French. The same drafting procedure was used for the Treaty establishing the European Community of Steel and Coal, which included no provision on the Community's language regime.

Once an agreement on the individual parts of the Treaty was reached, they were translated into the other three languages, namely Italian, German, and Dutch.

The experience of the first Treaties originated therefore under the dominance of the language that, even historically, represented the reference language of European diplomacy; hence, the international *koine* was chosen.

Inevitably, words convey a structural and cultural vision of things in the "French way", a way of seeing the World that seems to have its point of observation in Paris. The consequence of using the French legal language in the negotiating and drafting phases was that the Rome Treaties consist not only of French words, but also of French concepts and institutions.

By using comparative law terminology[18], we could say that several

[18] *Sacco, R., "Legal Formants: A dynamic Approach to comparative Law", The American Journal of Comparative Law, XXXIX, 1991, p. 1 - 34 and 343 - 402.*

French *models* circulated into the Rome Treaties because of the French language.

A permanent trace of such vision can be found in the structure of the Treaties, which was inspired by French public law and, only to a small extent, by the German one, only limited to the experience of the division into the Federation and the Länder.

Furthermore, some of said words, which are still present in the Treaties, have an evocative meaning that was lost later on: hence, sometimes, the language of primary law was formulated by means of loans and metaphors, recalling French symbols. One example is the word "Parlement" (Parliament) introduced in 1962, which soon replaced the original word "Assemblée"; it was clearly a term with a strong evocative value, a model that in France is the symbol of democracy and "power" to the people. However, it is well known that, operationally speaking, the *Parlement* as an European institution soon became synonymous with democratic deficit. Even elected directly by the citizens, that was initially attributed no legislative competences, and that only with the Lisbon Treaty[19] and the strengthening of the co-decision procedure finally acquired a greater representative democratic function. Only then did the word "Parliament" draw closer to the original French model.

So, words with a French origin that were originally included in the Treaties are still there formally, but the original evocative meaning is lost and they have later acquired a new European one.

[19] *Treaty on the Functioning of the European Union and Treaty on the European Union signed at Lisbon, 13 December 2007.*

Another example of this typical phenomenon of EU terminology is a word that is closely related to the subject matter of this Handbook - the concepts "droit civil" - as being the three Regulations on cross-border successions (650/12), on matrimonial property regime (1103/16), and on property consequences of registered partnership (1104/16) enacted within the EU instruments on judicial cooperation in "civil matters".

The origin of the current "civil matters" category are to be found in the Treaty on the European Economic Community and, in particular, in Art. 58 "droit civil ou commercial" which was negotiated and initially written only in French.

The term "droit civil" originally referred to the prestigious and traditional "droit civil" français, and, even if it was afterwards translated into English as "civil matters" thus losing its specific attribute, this word of EC primary law was initially drafted as rooted into the national French terminology.

Things started to change with the Treaty of Amsterdam in 1997[20] and the alternation of two Presidencies: the Dutch and Luxembourg ones. The former preferred the English language, the latter, instead, preferred French. Although the basic text remained the French one, the English translation became equally important as a reference text during the negotiations, with the consequence that French was no longer alone in the leadership.

[20] *The Treaty of Amsterdam, formally know as the Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, was signed on 2 October 1997.*

Enlargement to the north and east of the Union, besides making English necessary at that point, marked the entry of other languages into the control room. Thanks to the effective multilingualism the concept of "civil law" in the English version stopped being the translation of "droit civil", and with the Maastricht Treaty and, most importantly, the Amsterdam Treaty, it acquired the meaning of "civil matters".

As the language of the Treaties was updated by adding new idioms, multilingualism changed the meaning of the *words*. As highlighted above, a meaningful example is the term "Common market", which not only symbolizes, but also legally labels what is the primary aim of the Treaty. An example of the normative taxonomy of primary law that was filled and adjusted is the original word "Common Market", later changed into "Internal Market" and, lastly, into "Single Market".

As the Treaties absorbed new languages, the different linguistic versions gave a new structure to the words of primary law. Over the course of time and with the changes in the Treaties, in the Community's competences and languages, the gap between words and linguistic expression increased.

This was the advance of multilingualism: one of the indirect effects of drafting the norm in all the official languages was that of stopping this phenomenon of "circulation" of French institutions into the Treaties through the French language.

As it has already been pointed out, multilingualism changed the meaning of many original words of the Treaties. Originally, the concept of "droit civil" was related to one of the general categories of the French

legal system but, later on, with the introduction of English and of the following national official language, the original meaning was lost.

This phenomenon affected the French language, but not the English one.

Unlike French, English, once it was officially introduced into the European Community, was immediately used as a "neutral" language, and not as the language of the Common Law.

So, what is the current meaning of "civil" in EU primary law?

In the EU treaties, "civil law" is a general category, regulated in Title V, "Area of Freedom, Security and Justice, Chapter 1 (General Provisions).

Article 67 of the Treaty on the Functioning of the European Union provided that:

The Union shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters.

Article 81 ruled "*The Union shall develop judicial cooperation in civil matters having cross-border implications*".

It is well known that, pursuant to the above-mentioned norms, a new generation of EU instruments on private international law was enacted.

"Civil law" as a category is related to international private law instrument, at the EU level; while "private law" as a category is related to the instruments of substantive law harmonization.

All directives and regulations dealing with the action of harmonization of EU private law (consumer protection, IP law, product liability and so on) belong to the second area , while the first one includes all the

instruments of private international law, like Regulations (UE) no. 650/12 on cross-border successions, on matrimonial property regime (1103/16) and on property consequences of registered partnership (1104/16).

Therefore, the original meaning of "droit civil" in the Rome Treaties is lost in time.

5.4 The EU Legal Language: the Neologisms

Another very interesting aspect of the EU legal language is the way in which legal concepts are formulated, in order to respond to the duty of drafting EU legislation in all of the official languages. As noted already, art. 4 of Regulation N° 1 of 1958 provides that "Regulations and other documents of general application shall be drafted in all the official languages". Even if it is not explicitly written in the norm, multilingual drafting implies an indispensable, but crucial activity: legal translation[21].

The difficulties of legal translation, with its false friends and tricks, are for certain clear to every jurist in Europe. Even if, in the past, legal texts were equated to the religious ones and, therefore, they were translated literally, word by word, legal translation is nowadays a scientific discipline with its own dignity and methodology.

Most importantly, legal translation is the core aim of comparative law, a science whose main aim, as that of all other sciences, is the acquisition of knowledge. In order to collect legal data, norms, concepts and operational rules, comparative law scholars are supposed to acquire a deep knowledge of the legal language of

[21] *Sacco, Legal Formants, cit., p. 10 ff.*

the systems that form the object of their studies. Furthermore, for comparative law scholars not only understanding the meaning of a concept in a different language and legal systems is crucial, but also their capability of transferring and describing foreign institutes into their legal systems and legal language.

Thanks to many years of research, comparative studies, and data analysis, the legal comparative science has achieved a wide experience in legal translation, by classifying the main problems and developing some solutions.

The very first difficulties that a jurist encounters in legal translation is that legal concepts cannot be translated literally from one language into another, by simply relying on the words of ordinary languages. As legal concepts are components of a technical language (a language that is not natural, but "administrated"), most of the time ordinary words and legal concepts do not match. As a consequence, when we translate an institute belonging to a specific legal system into the language of a different legal system, by simply resorting to the ordinary language, we might not transfer the same meaning and the same legal effects.

The Italian word "contratto" translated into English is a typical example.

If we resort to ordinary language, that is, the English language, and we translate "contratto" into "contract", the "transfer" of the meaning is not be accurate; firstly, in English law, this specific institute is called "simple contract" and not just "contract".

Secondly, as under Italian law donation is a contract while in

English law a donation or a gift is a *deed (or act under seal)*, thus being a unilateral act, which means that the Italian *contratto* and the English *simple contract* do not perfectly match.

Moreover, in some legal systems, even if they share the same ordinary (natural) language, the legal language in which the legislation, and law in general, is formulated might not coincide: even if German is spoken in Germany, in Austria and in a part of Switzerland as an official natural language, the technical concepts in which the law is formulated are often different.

A typical example is the concept "Besitz", that in the legal language of Austria means:

de facto power over a thing with *animus domini*.

The same concept "Besitz", in the legal languages of Germany and Switzerland has a different meaning, that's to say *de facto* power over a thing in general, (with no *animus domini*), thus also including situations that are usually referred to as "Innehabung" (holding).

A similar phenomenon occurs in Italy and in the part of Switzerland where Italian is the official, natural language: as to Italy, the taxonomy include *de facto* power over a thing with *animus domini*, opposed to the concept "detenzione" (material control over a thing without animus domini). Conversely, according to the Italian legal language of Switzerland, the meaning of «possesso» is *de facto* power over a thing in *general*[22].

This simple example suggests how difficult legal translation can be. In fact, if it is difficult to translate a legal concept from one

[22] *Sacco, Legal Formants, cit., p. 16 ff.*

language into another, within the same natural language, then the translation of a concept into many different languages, as it is the case for the European Union, is even more challenging.

Furthermore, because of the specific features of EU legislation, translation of EU legislation even multiplied this complexity. Unlike other multilingual legal systems, like Switzerland or Canada's, the EU does not draft national law in more than one language, but it creates an entirely new legislation in 24 language versions. Furthermore, EU concepts are not organized in pre-existing legal categories like in the legal systems of the Member States, and they are not the current expression of a pre-existing legal culture or legal language.

Hence, translating every single legal concept and norm of this new EU legislation into 24 legal languages is even more complicated, if not impossible.

Furthermore, the translation of the rules by a multilingual legislator is not a mere communication activity but, rather, an effective one, since every language version has binding normative power. One could say that each word, each translated legal term, can theoretically influence the lives of millions of people.

Over time, legal translation theorists have developed techniques that, in various cultural environments, served as a method and as a guide for those who were about to transpose norms and concepts into different languages. Simplifying a certainly more complex evolution, it is possible to identify three main phases: literal translation, idiomatic translation, co-drafting. The latest is the current point of arrival of the studies on legal translation and methodology[23].

[23] *Šarčević, S., New Approach to Legal Translation, The Hague: Kluwer Law International, 1997.*

Although nowadays co-drafting is supported by specific studies and consolidated techniques, translating the norms in a multilingual environment is still a very challenging activity.

Therefore, when it comes to the EU legal terminology, the tension between the institutional duty of enacting the harmonized legislation in all official languages and the technical difficulties of translating legal terms into 24 languages has been managed through an autonomous "dictionary" where the European law is constantly created through neologisms. So, ever since the beginning, EU terminology was developed through a special mechanism of lexical creation that is still at the basis of most of the drafting of the European texts. The creation of neologisms has permitted to overcome the main problem arising from the drafting of multilingual texts, that is, the fact that the European Union could not refer to any previous legal linguistic experience, resulting into the elaboration of a unique legal culture, enabling the translation of the same concept in all the official languages of the Union.

This technique formulates neologisms shaped in such a way that all languages ideally have the same concept. Each European concept thus formally acquires the same meaning in the different linguistic versions, thanks to the fact that, according to the treaties, they have an equally authentic value.

This translation model is now integrated into the formulation process of the European norm and has allowed the EU a certain general application, also thanks to the terminology collected in databases for translators (Interactive Terminology for Europe,

IATE). This technique has ensured a relatively flexible system in view of the enlargement of terminology to new languages. It is with these terms that the Community system dealt with the accession of Great Britain, Ireland and Denmark in 1972; that phase started the first European cultural revolution, brought about by the contact between civil law and common law, by the birth of the principle of the *Acquis communautaire* and the consequent obligation for the new Member States to translate again all European legislative texts.

An example is the word "Common market", which is a calque of the French term "Marché commun" and the Italian neologism "Mercato comune", then followed by the Spanish "Mercado común" and so by all the other language versions.

According to this method, words were created by means of a calque in other languages. In EU law, "habitual residence" is a typical neologism as far as its meaning is concerned: the expression is not new as such, bearing in mind its common-law homologue, but the meaning attributed in the European context is different. Here we are dealing with a formal transposition from the English of the common-law to the English as used in the EU; the latter has then given rise to a linguistic calque in the Italian language (*residenza abituale*) and French (*résidence habituelle*).

Thus, creating neologisms by means of calques of already existing words or by new concepts was used from the very beginning by the European legislator.

Therefore, initially, the implementation of multilingualism with the highly symbolic enactment of Regulation no. 1 of the Council, was not perceived as a problem at the early stages of the European

adventure; even less imagined, at the time, were the consequences that art. 4 would have had on the formulation of the European standard, as well as on the structure of EU acts.

The tangible repercussions of this principle, which is substantiated by the duty to translate the documents into all the official languages, was initially managed quite easily by the bureaucratic apparatus of the Union.

The reason was that the terminology involved in the multilingual drafting was essentially of a factual nature, due to the limited number of languages and of the object of the legislation, initially limited to sectors such as the economy[24].

But it is important to highlight that that was the period when the European Economic Community intervened mainly in technical sectors (for example, the agricultural market), using models of legal norms intended to regulate situations that did not require an abstract and conceptual discipline.

However, it is common knowledge that, over time, the legitimation of the Union has extended, as the Union's response to an increasingly complex social situation. The enlargement of the competences of the European Union has not come together with a reflection on how to adapt the technique of formulating terminology in more complex and delicate areas of the law, as it is for instance, private law. On the contrary, the translation model, used in a standardized way to regulate technical sectors, over time has also been applied by inertia to private law in the private law in the European Union, which is thus formulated in words that have not been previously

[24] *Gambaro, A., Interpretation of Multilingual Legislative Texts, vol. 11.3, Electronic Journal of Comparative law, December 2007, p. 1-20.*

ordered by traditional categories like “property” - “contract” - “tort”, or “private law” and “public law”, as it is the case of most of the national legal systems[25].

However, despite its capability of formally recognizing the same value of authenticity to all concepts, this translation model might not always respond to a substantive correspondence to their legal meaning and effects in the different Member States or, simply, such correspondence is not easy to find by the national jurist.

6. EU LEGAL CONCEPT IN THE MEMBER STATES

As noted above, EU law is formulated in a very peculiar and specific environment: firstly, EU norms have, above all, a harmonizing scope, which goes beyond any possible performative message as it is the case in the Member States. Secondly, the EU legislative norms have an economic rather that a legal origin, and they are not drafted according to a pre-existing system of categories, concepts, and terminology.

Finally, EU law is multilingual, so concepts and norms are supposed to have a shared meaning, transferring the legislative intent to all of the 24 official language versions.

As this specific environment influences the content and the structure of the EU norm, the legal language of the EU acts is inevitably unique and original, sometimes opaque for the national jurist, who has to apply norms that are not formulated in his/her legal cultural environment.

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[25] *See Gambaro, cit.*

6.1 The Court of Justice of the European Union

In this context, since the very beginning of the European Union adventure, the Court of Justice of the European Union has been contributing to establish criteria on the interpretation of the EU terminology.

It is interesting to note that, in the original structure of the Union's form of Government, the Court of Justice had not been conferred any institutional role in the European legislative procedure. However, the Court's contribution to the creation of this legal system has been crucial, and the principles established by its case law still represent the fundamentals for the relationship between the European Union and the Member States.

The Court has always carried out this function through the well-known "preliminary ruling", regulated by art. 267 of the Treaty on the Functioning of the EU (Article 234 of the EC Treaty).

It is well known that the purpose of the preliminary ruling is mainly to avoid divergences in the interpretation of EU law by national judges, but also to facilitate the application of EU law, so as to ensure full effectiveness of European law in the Member States. The task assigned to the Court of Justice by art. 267 TFEU also concerns the monitoring of the final implementing measures, for instance the European national act, both in terms of validity and of correct interpretation: in the light of the aims of the Treaty, the correct interpretation must be a "uniform interpretation", the only one that would allow a consistent application in the Member States of rules issued in Brussels, as a precondition for the practical implementation of the main objective of the Treaty - the completion of the Single Market.

In the institutional system of the European Union, harmonization and approximation of national legislations (based on art. 26 TFEU) are not only reflected in the adoption of European legislative acts, but also in the determination of their content and their correct application in the Member States by the Court of Justice.

As EU law is enacted through written documents, an important indirect effect of this function is the contribution of the Court to the creation and consolidation of the legal language of the European Union. Language is the law harmonization tool in the context of the Union, given that language and law are inseparable in the formulation of the rule, and the task of ensuring a uniform interpretation of EU law by the Court is also achieved through the clarification of the meaning of words and their consolidation.

The key element of this action is to be found in the binding force of the Court's judgments, which have their own function of legal, autonomous uniformity, independent from the legislative activity of the Council, as well as in the effectiveness of the Court's interpretative preliminary.

In such institutional framework, the Court of Justice does not only fulfil tasks that are linked to the "traditional" judicial function, but it also actively plays an autonomous role of harmonization, monitoring and guaranteeing the implementation of the European Union norms in the Member States, as well as the terminology of this institution.

It is therefore possible to affirm that, in this sense, the Court provides for the "institutional" harmonization of the law and so, indirectly, of the legal terminology.

The role as “guardian” of European integration also involves the development of interpretative techniques aimed at favoring the harmonization of national rights, consolidating European terminology, and assigning it a single meaning. In answering any question raised by the national judge, generally the Court does not deal with the mere meaning of a linguistic expression, i.e. its semantic meaning, since its aim is to make sure that rule is interpreted uniformly. In most cases, the Court rules on the norm and, consequently, only indirectly on its concept, harmonizing it.

One of the most interesting and important cases that can help us understand the way legal terms must be conceived and interpreted within the multilingual context of the European Union, is the decision of the Court of Justice of the European Union in the case 283/81 - Srl CILFIT and Lanificio di Gavardo (SpA) v Ministry of Health.

The decision exemplifies the normal judicial function of interpretation where the text is open to doubt and there is a practical problem to be solved: a legal concept having a different meaning in EU law and in the national law of various Member States.

The question was raised in connection with a dispute between wool importers and the Italian Ministry of Health, concerning the payment of a fixed health inspection levy in respect of wool imported from outside the Community. Regulation (EEC) No 827/68 prohibited Member States from levying any charge having an effect equivalent to a customs duty on imported “animal products”: the legal issue was whether or not wool could be considered as an “animal product” for the effect of the Regulation, as this word was expressed differently in various language versions.

Probably, the most important indication given by the Court of Justice is the following sentence "it must be borne in mind that even where the different language versions are entirely in accord with one another, *Community law uses terminology which is peculiar to it*". As the Court emphasized, *legal concepts do not necessarily have the same meaning in Community law and in the law of the various Member States*.

Another very important case that follows the path started by the ruling in Cilfit, is the decision ruled in the Case C-467/08 Padawan SL v Sociedad General de Autores y Editores de España (SGAE). This reference for a preliminary ruling arose in connection with the interpretation of the concept of 'fair compensation' within the scope of Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society, paid to copyright holders in respect of the 'private copying exception'.

Among the various questions referred to for a preliminary ruling, the Court was asked to establish *whether the concept of "fair compensation" (as referred to in Article 5(2)(b) of Directive 2001/29/EC) is an autonomous concept of European Union law which must be interpreted in a uniform manner in all Member States.*

The Court ruled that *the concept of 'fair compensation', within the meaning of Directive 2001/29, is an autonomous concept of European Union law which must be interpreted uniformly in all the Member States that have introduced a private copying exception*.

The ruling in the Padawan case is particularly important, not only in a perspective of progressive harmonization of the legislation on

copyright, but also for stating the principle *that - unless a Directive or a Regulation makes express reference to the law of the Member States in order to determine the meaning and scope of a legal term - the legal term must be considered an autonomous concept of European Union law to be interpreted uniformly in all the Member States*.

The two cases mentioned above are examples of decisions in which the Court of Justice was consulted in order to clarify the correct interpretation of a European legal concept, as it was expressed differently in some of the linguistic versions.

Over the years, the Court has developed some "hermeneutical criteria" to guide national judges in the interpretation of European concepts. By simplifying a more complex heritage of case law, for our purposes it is important to remember the following indications.

a) EU concepts contained in a provision of European law which makes no express reference to the law of the Member States are autonomous EU terms with an independent meaning, which does not necessarily coincide with the one provided in the law of the various Member States.

b) The need for a uniform application of European Union law and the principle of equality require that the terms of a provision of European Union law must normally be given an independent and uniform interpretation throughout the European Union.

c) Different language versions are all equally authentic.

d) The interpretation of a provision of EU law involves a comparison of the different language versions.

These criteria have been developed by the Court of Justice on request of a national judge, who pointed out some translation discrepancies in the various linguistic versions.

However, the Court of Justice was also appealed to, pursuant to article 267, about the definition of a specific term.

It was about the expression "habitual residence" - which was the object of several decisions of the Court, and which, as we will see in the next Chapters[26] plays a central role in the interpretation of several regulations, in particular Regulation 650/12 in matters of succession. As already noted, "habitual residence" is a term used in British, American, and Canadian - and, in general, in common law countries - statutes, basically for the purpose of making reference to a particular relationship between an individual and a given geographical territory.

This term has been borrowed by the European legislator and, in the terminology of the EU, has lost its own common-law connotation. It has been re-adapted as a neologism in the EU acts, initially for the achievement by individuals (usually workers) of the right of establishment and freedom to provide services.

"Habitual residence", so far as Community law is concerned, has been defined in a consistent line of case law from the Court of Justice[27], as "the centre of one's own interests".

However, under art. (8) (1), of Regulation 2201/2003 on competences, recognition and execution of judgments in the

[26] *See the Chapters of this Handbook written by Daniele Muritano.*

[27] *See the following decision: Case C-452/93 P. Judgment of the Court (Third Chamber) of 15 September 1994. Pedro Magdalena Fernández v Commission of the European Communities. European Court reports 1994 Page I-04295.*

field of family law and parental responsibility, the jurisdictional competence of Member States' authorities is determined on the basis of the "habitual place of residence of a minor", specified later as the "habitual residence of the child". "Habitual residence", under Regulation 2201, however, refers to a novel situation, in that it pre-supposes the physical presence of the minor in the territory of a particular Member State, a presence that cannot be occasional in nature and that produces a procedural result, and not the recognition of any individual enforceable right.

The semantic drift of the term "habitual residence" has become the subject of a preliminary reference, referred by a Finnish judge to the Court of Justice[28], concerned precisely with the definition of this concept under Regulation 2201/2003. This is an interesting decision, as the Court, in defining the concept of "habitual residence", expressly stated that it "cannot make reference to its own precedents relating to this concept which up to the present time have been used in Community law" . In this context, "habitual residence" was differently defined as meaning "the place which represents the social, scholastic and familial integration of the child".

With the passing of time, the CJEU has given different interpretations of the concept "habitual residence", like "centre of a person's interests", "centre of a person's life", "centre of a person's social and family life", and many others.

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[28] *Case C-523/07, Judgment of the Court (Third Chamber) of 2 April 2009. Reference for a preliminary ruling: Korkein hallinto-oikeus - Finland. European Court reports 2009 Page 00000.*

Some striking difference in the meaning of "habitual residence" appear, however, once we adopt the position of an observer of a different area of EU law. As it has been pointed out above- and as it will be illustrated in the following Chapters - "habitual residence" is a key concept of Regulation 650/12 on cross-border successions and in this different context of EU law this terms have to be qualified from the perspective of Private International Law aims and scopes.

Article 4 (General jurisdiction) of the regulation provides that:

The courts of the Member State in which the deceased had his habitual residence at the time of death shall have jurisdiction to rule on the succession as a whole.

In the Regulation, "habitual residence" is the criterion determining the jurisdiction and, from this point of view, the function of the concept is not the harmonization of substantive law, but to indicate the competent court.

It is interesting to note that, notwithstanding the presence of a consolidated case law of the Court of Justice on this term, "habitual residence" is not defined in the Succession Regulation, nor is the object of one of the general definitions listed in art. 3 of the Regulation itself.

Differently, the elements that are necessary to qualify the habitual residence of the deceased are ruled in the recital 23 and 24 of the Succession Regulation, providing for that the "habitual residence" of the deceased should be determined "by taking account of all relevant factual elements" (like the duration and regularity of the presence of the person in the State concerned).

Habitual residence is an example of an EU neologism, but also of a polysemy[29], a typical phenomenon occurring in EU legislation, when the same concepts, even if they are identical from a semantic/linguistic point of view, must be interpreted differently, as they are expressed in norms that are supposed not to produce the same legal effects.

The double nature of EU terms is part of the training of national jurists dealing with EU legislation.

7. EU LEGAL LANGUAGE AND COMPARATIVE LAW

Comparative law is a science and, as all the other sciences, its first aim is the acquisition of knowledge. This science is rather new and in Italy, one of the countries where comparative law is an academic discipline (introduced and developed by prof. Rodolfo Sacco) learning comparative law is mandatory for students who choose the law curricula.

As a science, comparative law is equipped with a methodology as well as with specific instruments, which have been shaped, during the last century, in order to analyze, penetrate, and clarify the different legal systems of the world and their sources of the law[30].

As such, it is the ideal discipline to support the national jurist in the interpretation and application of EU law in the Member States: as it has already been highlighted, as this unique environment influences the content and the structure of the EU norm, the legal language of

[29] *Ioriatti, E., Linguistic Precedent and Nomadic Meanings in EC Private Law, in Revista General de Derecho Público Comparado, 2009.*
[30] *Sacco, R. & Rossi, P.C., Introduzione al diritto comparato, 7° edition, Turin: Utet, 2019.*

the EU acts is inevitably unique and original, sometimes opaque for the national jurist, who has to apply norms that are not formulated in his/her legal cultural environment.

As noted already, the Court of Justice of the European Union has played a very important role in solving the interpretative difficulties of EU norm and concept. However, several problems remain unsolved: firstly, cases that are taken to the attention of the Court are a small part of the situations in which the national jurist might have difficulties in understanding or giving the correct interpretation to the EU text; so, the national jurist is somehow left alone. Secondly, the solitude of national judges does not contribute to the project of reacing a sufficient uniform interpretation and application of EU law in the Union.

Establishing precise connections among European jurists and solid cooperation might contribute to the achievement of this ambitious and positive project of supporting the European adventure by preserving the national identities of the different Member States.

In this regard, we will explore some specific difficulties and will discuss some methodological instruments that could facilitate the interpretative approach. As the rest of this Chapter seeks to show, the complexity of the relationship between law, language, praxis, actors and policy characterizing the EU legal discourse makes comparative law methodology of paramount importance for its interpretation and application.

In particular, the attributes of the EU language in the area of EU private international law are relevant to comparative law[31],

[31] *Ioriatti E., Formulation of rights and European legal discourse: any theory behind it? In Intl J Legal Discourse 2016, 1(2), pp. 375–400.*

as comparison allows seeing how individual systems concretely respond to legal problems; it tries to understand the facts and the circumstances that, if added up, lead to the operational rule. Thus, the instrument of comparative law can be an effective support to the national jurist interpreting EU regulations and could act as a guide in this new EU legal context.

In this framework, two methods of comparative law are particularly worth mentioning, namely homologation and legal formants.

The homologation technique is useful and crucial in order to verify weather two legal concepts (or institutes) from different legal systems are similar or not, and to measure the similarities, that is to say, the legal effects that are concretely produced in the two legal systems under analysis.

This well elaborated instrument of comparative law proved to be very valuable. It consists in splitting a national legal institute (for example, the usufruct in Dutch law) into smaller concepts (immovable property, enjoyment, right to consume etc.) and then measuring the similarities and differences of the same smaller concepts in, e.g., Italian Law.

This method allows scientifically comparing the two institutes and facilitates the discovery of all differences that may be hidden behind the concept of "usufruct", which is similar in both legal systems. This type of analysis underlines, for instance, that while under Dutch law the usufructuary has the right to dispose and to consume the property subject to usufruct (Article 3:215 Dutch Civil Code), under Italian law the usufructuary has the duty to return the property (Article 1001 Italian Civil Code), which is not composed by goods to be consumed (use up).

USUFRUCT IN ITALY (Usufrutto)	USUFRUCT IN THE NETHERLANDS (Vruchtgebruik)
The usufructuary has the right to enjoy an object but must preserve its economic destination.	The right of usufruct provides the right to use things that belong to another person and enjoy the fruits thereof.
Art. 981 C.C.	Art 3:201 BW
The usufructuary must return the things that are the object of his/her right at the end of the usufruct (...)	A usufructuary can use and use up (consume) the things under the usufruct in accordance with the rules made upon the creation of the usufruct, or where such rules are lacking, in accordance with the nature of the things and the local practice in respect to the use and using up.
Art. 1001 co. 1 C.C.	Art 3:207(1) BW

Once the comparison is made, it is up to the jurist to measure whether and within which limits the two models - the Dutch and the Italian one - are "homologues" and, consequently, decide for the equivalence in terms of comparative law.

According to comparative law, this standard has to be made by uncovering the *operational rule*, that is to say the final legal effects that an institute is producing in a legal system, regardless of its formal definition. Here, it is interesting to underline that the Italian legal system too, within certain limits, allows the parties to conclude a usufruct with goods to be consumed as its object. However, unlike Dutch law, this institute is called "quasi usufrutto" (nearly a usufruct), and it is not qualified as a right in rem, but as a contractual agreement. Again, behind the same definitions (usufrutto - Vruchtgebruik) different legislative formants are enacted, even if the relevant legal effect (operational rules) are similar.

Homologation is the ideal technique at the national jurist's disposal to take the delicate decisions deriving from the application of the "adaptation of right in rem principle" provided for in *reg. 650/12 art. 31 (and reg*. 2016/1103; 2016/1104 art. 29)

According to this principle, where a person invokes a *right in rem* he is entitled to under the law applicable to the succession/ matrimonial property regime and the law of the Member State in which the right is invoked does not know the right in rem under consideration, that right shall, if necessary and to the extent possible, be adapted to the closest equivalent right in *rem* under the law of that State, taking into account the aims and the interests pursued by that specific right in rem and the effects attached to it.

The jurist needs a standard to measure differences and correspondences to the *right in rem* that he considers as being the closest equivalent under the law of the Member States in which the right is invoked. In this regard, the very recitals of the Succession Regulation suggest the need for a "mean facilitating the understanding of foreign law": thus, the homologation method is crucial to decide which right in rem is to be considered the closed equivalent, according to its effect (as provided for by the norm), and this technique very useful, as proved by the above-mentioned exercise.

A second comparative law method is a milestone in the development of the methodology of comparative law, that is, professor Sacco's theory of the *legal formants*.

The starting point of his theory is the result of a simple observation: as noted, "in general, jurists have the tendency to presume that in

a given legal system any specific legal matter is regulated by one legal rule, providing "the" solution. They assume that at a given moment, the rule enacted in the constitution or in legislation, the rule formulated by scholars, the rule declared by courts, and the rule actually enforced by courts, have identical content and are, therefore, the same. Jurists assume therefore the unity of each legal system, as there was only "one legal rule" regulating a specific legal matter".

The premise of the theory is that it is misleading to analyse the legal rule in force in a country as if there was only one such rule[32]. This means that "living law" is the sum of different elements such as statutory rules, judicial decisions and the work of scholars and that those elements, known as "legal formants", do not necessarily declare the same rule. Thus, *formants* are groups of norms sharing the same characteristics in providing solutions to a specific legal problem (or legal matter, question of law). As the solution to a question of law can be found in the legislation (legislative formant), in case law (judicial formant) and in the work of scholars (doctrinal formant), these groups of rules are the three main *formants*.

According to this method, "the unity" of a legal system is an illusion and a preconception, dominated by the assumption that rules contained in the different *formants* have identical content. Thus, a realistic observation of the legal systems makes it clear that there can be situations in which the rule formulated in the civil code (legal formant) does not correspond to the rule enforced by the courts (case law - or judicial - formant), or to the one described by scholars

[32] *Sacco (1991), Legal Formants, p. 21.*

(doctrinal formant)[33]. For instance, with regard to a specific legal matter, a norm formulated in legislation could be overcome by a rule enacted by a Court (case law - or judicial - formant).

Thus, a legal institute, a solution, a rule, might be present in a legal system regardless of its formulation in its legislation or civil code. An example is the French system of property rights. According to the French Civil Code (Article 543), there is a limited number of property rights available in the French legal system, which deals with rights of enjoyment, land services, the right of emphyteusis, usufruct, use, and habitation. Regardless of the legislative "numerus clausus", in 2012 the Cour de Cassation[34] recognized in favour of a foundation (*Maison de Poésie*) the right of enjoyment or occupation, on exclusive basis and with no time limit, of the second floor of a building. The Cour de Cassation explicitly established that the right granted to the Maison de Poésie by the deed of sale was a right of perpetual exclusive enjoyment, and not a right of use and habitation (which have different characteristics and, when they are not granted to private individuals, they may last only thirty years).

Thus, notwithstanding the *legislative formant*, in France the case law formant admitted the creation of a perpetual right to use.

The use of methods - such as *homologation and the legal formants* - allowing to acknowledge the existence of a concept or a norm in a legal system, regardless of the fact that it is explicitly regulated by the civil code or legislation, will be more and more important in the interpretation and application of the European Union's private law but, in particular, of the regulations making the object of this study.

[33] *Idem, p. 21 ff.*
[34] *Arrêt n° 1285 du 31 octobre 2012 (11-16.304) - Cour de cassation - Troisième chambre civile*

To give just one example, consider the very recent opinion of the Advocate general M. Campos Sánchez-Bordona, dated 26th March 2020[35], making explicit reference to comparison as a way to understand the will of the deceased, according to regulation 650/12.

As it is already known, recital 39 of the above-mentioned regulation establishes that, in a will, "A choice of law could be regarded as being demonstrated by a disposition of property upon death where, for instance, the deceased had referred in his disposition to specific provisions of the law of the State of his nationality, or where he had otherwise mentioned that law".

As regards the method of investigation, the Advocate General established that "a *comparison* is necessary with the law of habitual residence, as a predefined law, to establish to what extent such regulations are typical only of the legal system the choice of which is under discussion".

The Advocate general's reference to comparison opens up to the chance for national jurists to use the tools of this science. The *formants* analysis, in particular, is be the tool that will allow to understand whether the law or the specific provisions that the deceased mentioned in his will are typical only of the State whose decision of law is under discussion, or if they are also present in the judicial system where the deceased had his habitual residence.

As it will be explained in the following Chapters[36] a typical example could be that of a deceased English citizen, having his habitual

[35] *Cause C-80/19*
[36] *See Daniele Muritano's Chapters of the present Handbook.*

residence in Italy, who in his will mentions a trust. Although it is well-known that the trust is a typically English institute (an English "original model" according to comparative law terminology), the analysis of the Italian legal formants could lead to the conclusion that, in that specific situation, many solutions of the trust are acknowledged by the Italian judicial system and, therefore, on an operational level, one can conclude that the regulations of the trust are no longer only typical of their original system.

It is clear that the theory of the legal formants and that of the homologation leaves a great deal of freedom to the judge. As it occurs during the translation process, homologation too is an activity that, beyond a certain limit, implies decisions. The judge will make his decision based on the circumstances and on further elements (language of the will, cultural level of the deceased), with special reference to the actual knowledge of the law under consideration.

The great degree of freedom following the use of the comparative method could help judges who have been assigned juridical authority by the Regulation, to favor the application of the substantive law of their system, which they know better.

8. CONCLUSIONS

Beyond its democratic and political value, the EU multilingual regime is at the origin of the creation and development of a new legal language, composed of new autonomous concepts, formulated in all the official languages of the Member States.

At the same time, the enactment of EU regulations - namely Regulations (EU) no. 650/12 on cross-border successions, on matrimonial property regime (1103/16) and on property consequences of registered partnership (1104/16) - which aim at solving the conflicts of laws in Europe and at unifying international private law provisions in Europe - gave start to a huge phenomenon of rules and concepts comparison, between the EU and the Member States, as well as among the Member States.

Needless to specify that, in such an environment, the EU legal language is an invisible but decisive actor of the legislative process, of court decisions, and of the practices of law in Europe.

This legal-linguistic grounding force is still in need of further studies and research, as well as of targeted legal education programs. Nevertheless, as noted at the beginning of this Chapter, a reliable training program on the EU regulations on cross-border successions, on matrimonial property regimes and on property consequences of a registered partnership cannot prescind from an educational introduction to the EU legal language, to the problems of legal translation, and to some of the solutions offered by the comparative law science.

At the same time, in legal practice, the training on the legal language of the EU cannot always be separated from that on the English legal language and on the content of the three Regulations that form the object of the EuLawInEnglish project. This is the reason why the educational message and aim of this Handbook should be understood as unitary, just as unitary is the motto of the European Union: “united in diversity.”

EXERCISE

1. The English legal language of the European Union is:

A. the legal language of England;

B. the legal language of the Common Law;

C. the legal language of the European Union expressed in English;

D. the legal language of international law.

2. How would you define the *legal formants*?

A. Legal formants are groups of norms sharing the same characteristics in providing solutions to a specific legal problem.

B. Legal formants are the concrete questions of law to which legal professionals are required to give an answer.

C. Legal formants are the questionnaires supporting legal scholars in comparing different legal systems.

D. Legal formants are components of the EU legislative process.

3. How would you describe the *homologation* method?

A. Homologation is a specific method that consists in splitting a legal institute into smaller concepts, in order to compare them with the components of a legal institute of a different legal system.

B. Homologation is a drafting technique of EU terminology.

C. Homologation is a method used in order to uncover norms sharing the same characteristics in providing solutions to a given legal problem.

D. Homologation is the method provided for by Regulation n. 1 of 1958, which governs the language regime of the European Union.

4. *Neologisms* are:

A. EU concepts organized in pre-existing legal categories.

B. The current expression of a pre-existing EU legal culture or legal language.

C. New concepts composing the legal language of the European Union.

D. Autonomous EU concepts having the same meaning in the legal languages of the Member States.

5. *Operational rules* are:

A. The final legal effects that an institute is producing in a legal system, regardless of its formal definition.

B. The final legal effects that an EU institute is producing in the Member States.

C. The results of the EU harmonization process.

D. Norms and principles enacted in multilingual secondary legislation.

6. The "Besitz" concept:

A. Has the same meaning in Austria and Germany.

B. Has a wider meaning in Austria than in Germany.

C. Has a wider meaning in Germany that in Austria.

D. Has the same meaning in Austria and Germany, but in the two legal systems it is expressed with different legal concepts.

7. The obligation to translate EU secondary legislation in all of the official languages of the Member States originates:

A. In the Amsterdam Treaty.

B. In the Rome Treaties.

C. In Regulation n. 1, 15 April 1958.

D. In the result of the negotiations after the first EU enlargement.

8. An EU *polysemy* is:

A. A new EU concept having the same meaning both at the EU and national level.

B. A neologism having different meaning in the same EU directive or regulation.

C. An EU concept having different meanings in EU secondary legislation.

D. A neologism acquiring different meanings over time.

SOLUTIONS*: Exercise 1: C; Exercise 2: A; Exercise 3: A; Exercise 4: C; Exercise 5: A; Exercise 6: B; Exercise 7: C; Exercise 8: C.*

CHAPTER 2

LEGAL ENGLISH IN PRACTICE

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The various paragraphs of this Chapter will focus on the following topics.

The first paragraph will trace the roots and history of legal English terminology as it has evolved alongside the common law system and the system of equity in England and Wales.

Some key English language terms and vocabulary, referred to in the following paragraphs of this Handbook, will be particularly useful to EU legal practitioners studying the Succession and Matrimonial Property Law Regulations. The key terminology is explained in more details in the Glossary at the end of the Chapter.

The second paragraph will focus on key elements of the English legal system in the areas of succession law, property law, and family law, which are particularly relevant to this training project, in the context of the European Regulations.

Studying and interpreting the EU Regulations in the English language requires background knowledge of the original concepts as seen in the context of common law.

The key concepts of English law of property and succession examined in this paragraph refer to the legal system of England and Wales.

The final paragraph contains a description of the procedure of litigation in the English courts, with special focus on the most relevant terminology.

This is followed by three practical exercises on legal English , using key vocabulary from the English law described in paragraphs 1 and 2 and from the previous section on litigation terminology.

At the end of this paragraph is the Glossary of legal terminology.

The Glossary was compiled by our trainers specifically for this course, using vocabulary relevant to succession and property law. During the two-year programme, the Glossary was complemented with input received from the Notaries, Judges, and legal practitioners who took part in the seminars in Bulgaria, in Italy and in Hungary.

1. ROOTS AND HISTORY OF THE LEGAL ENGLISH

1.1 Legal English

Legal English, meaning the English language as spoken in courts, used in legal proceedings and written in legal documents in the modern sovereign State of the United Kingdom, draws from its historic roots in French, Latin and the Germanic languages. Legal English can seem particularly complex given the varied vocabulary, grammatical structures and terminology to which each of the above languages has contributed. Traditional legal texts are made up of very lengthy sentences, which can be difficult to follow or interpret into modern-day spoken English. Sentences often have apparently peculiar structures, as for example this typical clause in a commercial contract: "*the provisions for termination hereinafter appearing or will at the cost of the borrower forthwith comply with the same*". This is sometimes described as "Legalease".

This complex language has been broken down in recent decades, into what we now know as plain English, avoiding the use of Legalease. A new "neutral" language has emerged to enable EU law to be written down and understood by practitioners in 28 countries. Legal English today is renowned for its clarity, its conciseness and its structure, and for this reason it also remains the main language used in international commercial and contract law.

The development of Legal English is entwined with the colourful and varied history of the United Kingdom and, in particular, with the unique *common law* legal system of Britain, or more specifically the individual countries of England and Wales (Northern Ireland and Scotland have their own separate legal systems).

The words and phrases which we now use in international contract law, or in the English versions of the EU Regulations being studied during this training programme, will probably all have roots which are many centuries old, and were developed to fit the specific needs of *common law*.

The roots of the English language can be traced back to more than 2000 years ago, to the Roman invasion of Britain in 55 BC, when Roman Law and the Latin language were imposed. Up to that time, Britain had only known the Celtic language. Following the departure of the Romans from Britain in the 5th century AD, the arrival of the Vikings and the Anglo-Saxons in the following centuries introduced the Germanic language. The Norman invasion and the conquest of Britain in 1066 entailed the introduction of the French language.

For several centuries following the Norman invasion, the historical feudal system of local courts, presided over by local landowners, was abolished. Britain was then ruled by a King, and a system of law based on the King's court was developed. The beginning of civil litigation as we now know it began in Norman England, whereby an individual could lodge a claim, a petition or an application known as a "writ", which was presented to the Chancellor at the King's court. A judge would then be appointed by the King's court and sent to the local area to determine the dispute and decide on the

facts of the case. The most effective local laws began to be applied at a national level, thereby creating a new body of rules which were "common" to the whole country ie, *common law*.

While English remained the spoken language of the majority of the population, for a few hundred years thereafter almost all writing and speaking in the English courts was carried out either in Norman French or in Latin. Some of the earliest known legal words which originated in that historical period are derived from the French language: "Estate", "Executor", "Property", "Chattels", "Lease", "Tenant".

The Norman French language, however, was hardly known to the common people of England. This certainly put them at a disadvantage when involved in legal proceedings, as they would have no knowledge of what was being said for or against them in court. In 1362, Britain adopted new legislation, "The Statute of Pleadings", which imposed English as the spoken language in all court proceedings, although court judgments continued to be written in Latin. In 1730, further legislation provided that English should also be the language of court judgments.

The Legal English language has therefore been developing and adapting over more than 1000 years, since the early origins of the *common law* system at the time of the Norman courts, but more particularly from the 14th century onwards, when English was established as the spoken language in all law courts.

Legal English evolved as the courts sought to establish clear written definitions and precise interpretations of legal principles. The reason for this is the very cornerstone of the *common law*

system: there is no written legal code setting out the rules for each single area of law, as is the case in legal systems based on civil law. *Common law* is simply developed and shaped by court decisions. The *ratio decidendi* (the reason for a decision) of the higher courts is binding on the lower courts, when it has to decide a case based on the same generic set of facts, which must therefore be judged in the same manner. The Latin term "stare decisis" can be translated as "*let the decision stand*". A binding decision is commonly known as a "*precedent*", and where a judge decides that a precedent should not be followed because the facts on the case in question are different from the previous case, this the case is "*distinguished*".

Language is therefore absolutely key in understanding and interpreting *common law* – if a court in a prior decision determined that a word had a particular meaning, that meaning must be clearly expressed and formulated.

One example of the development of the legal language to fit *common law* is the emergence of "Middle English" in the period known as the "Middle ages" in Britain, from roughly the 16th century onwards. By this period, the English language had been firmly established as the spoken language in the courts. New words – consisting of two or more pronouns or verbs – were created to place extra emphasis, and were integrated into the existing language. We can still see examples of Middle English in formal legal texts today, e.g. "NOTWITHSTANDING", "AFORESAID", "WHEREBY".

Another feature of the Legal English terminology introduced in that period were "doublets" or "triplets". To give further certainty to the meanings of some English words, or to avoid any doubt over their

interpretation when a matter came to court, it became common to use a phrase of two or three synonyms for extra emphasis, (including a word from each of the Latin and French and Anglo-Saxon languages).

Many such phrases are still commonly used today, in modern Legal English, and they include the following:

LAST WILL AND TESTAMENT - TERMS AND CONDITIONS - NULL AND VOID - CEASE AND DESIST - SIGNED SEALED AND DELIVERED - GOODS AND CHATTELS - LAW AND ORDER - GIVE, DEVISE AND BEQUEATH

1.2 The English Legal System

The *common law* legal system described earlier in this Chapter as evolving alongside the history of Britain, is now the legal system specific to England, Wales, and Northern Ireland. Scotland, instead, has its own separate legal system and court structure. The law described in this Chapter will be predominantly English law, that of England and Wales.

The *common law* system has been adopted by most of today's predominantly English-speaking nations. Approximately 80 countries of the world now have a legal system based on *common law*, such as the United States, Canada, Australia, New Zealand, and South Africa, India, and Hong Kong.

Cross-border legal practitioners studying the EU Regulations are likely to be confronted with *common law* issues of these non-EU Member States (for the purpose of the EU Regulations: "Third

States"), when considering a matter relating to a citizen of a state that has adoped the *common law* system, or a person habitually resident in that Country.

In 1536, when King Henry VIII enacted legislation to confirm England and Wales as one and the same country, governed by the same laws, the *common law* system became a unified and definitive legal system in the Kingdom of England and Wales. In 1707, the Kingdom of England and Wales later joined with the Kingdom of Scotland to form Great Britain and then, in 1800, it was united with the Kingdom of Ireland and became the United Kingdom. Only in 1922 did Ireland (Eire or Southern Ireland) withdraw from the United Kingdom and become an autonomous Republic.

As explained earlier, the *common law* legal system lacks one single body of codified law, unlike civil law systems such as those of Italy or France, whose laws are based on the Napoleonic code, which in turn derived from the tradition of Roman law written codes.

Common law is a combination of:

- Caselaw made by the highest courts (the Supreme Court, previously the House of Lords, the Court of Appeal)
- Primary legislation made by the Parliament of England and Wales, known as Statute

1.3 Structure of the English Civil Law Courts

The EULawInEN training project focuses on matters which are within the jurisdiction of civil law courts, in other words, the courts that generally settle disputes between individual private parties, as

opposed to criminal law proceedings heard in the criminal courts.

This section will briefly set out the structure of the civil courts in England and Wales.

The civil courts of England and Wales consist of the County Court, known also as the "small Claims court". This court has a limited jurisdiction, and deals with matters of low financial value including standard landlord and tenant disputes, family matters such as uncontested divorce, and debt recovery up to the value of £30.000. Proceedings which relate to any other disputes are issued in the High Court of Justice.

The High Court of Justice consists of three Divisions. The Family Division hears disputes in contested divorce matters and deals with applications for Probate and the administration of estates of deceased persons. The Chancery Division deals with commercial law disputes, as well as issues of Equity and Trusts. The Queen's Bench Division deals with damages claims in contract and tort law, for example in cases of breach of contract, personal injury, negligence, and defamation. The Queen's Bench Division also includes the administrative courts, which hear cases of judicial review brought against the public authorities.

Following a judgment in the County Court or High Court of Justice, a case will proceed on appeal to the Court of Appeal, and then to the Supreme Court (known up to 2009 as the House of Lords). The Supreme Court, made up of 12 judges who were former Law Lords sitting in the House of Lords, will decide cases of the greatest public or constitutional importance affecting the whole population. Cases decided by the courts of Scotland and Northern Ireland may

also be referred on appeal to the Supreme Court in London. The United Kingdom has a doctrine of parliamentary sovereignty, so the Supreme Court is much more limited in its powers of judicial review than the constitutional or supreme courts of some other countries. It cannot overturn any primary legislation made by Parliament.

Common law is historically based on a strong tradition of oral submissions, and on the presentation of the facts of an argument by way of speeches rather than in writing, which distinguishes it from the code-based civil law and the practice of written pleadings.

The legal profession of England and Wales is divided into two branches and two types of lawyers: *Solicitors* regulated by the Solicitors Regulation Authority, and *Barristers*, who are members of the Bar Council. The legal profession as a whole is overseen by the Law Society. Traditionally, it is the Barrister who represents each party in the civil and criminal court, but particularly in the higher courts in more complex proceedings where trials can last for weeks. The Barrister specialises in advocacy and is usually the lawyer who presents the oral arguments and submissions to the judge during a trial. The Barrister takes their instructions from the Solicitor, who is directly instructed by the client.

2. KEY ELEMENTS OF THE ENGLISH LEGAL SYSTEM

2.1 Equity

Equity is a historical feature of the *common law* system. For many centuries, the law of equity was a separate entity with a separate court. The instrument known as the “trust” originated from the

equity system, and is key to English property law, family law, and succession law.

The word equity signifies fairness, or a quest for justice, or what is "right" according to natural law or moral codes. The system of equity developed alongside the *common law* in Medieval England, due to failings in the early system of petitions to the court by way of "writ". If an application by writ to the King's court was indeed successful, the only available remedy for the petitioner was an award of financial damages. In other words, the person claiming to have been wronged, could merely be compensated for their loss, which may not have been a satisfactory remedy. The *common law* courts were deemed very rigid and procedural, and they had no flexibility to make any order other than said remedy. It therefore became common for complaints to be made directly to the King, by way of protest, seeking remedies that were more practical and fitting to the situation needing to be resolved.

On receipt of such a complaint, the King then referred the question to his Lord Chancellor. A separate parallel system of court was set up by the Lord Chancellor, alongside the King's court, with powers to award equitable remedies. This court was known as the Court of Chancery.

In practice, once the *common law* court had decided that a law had been violated or a contract had been breached, the Chancery Court then had the power to order an additional equitable remedy. An example of an equitable remedy is an "*injunction*", a prohibitive order stopping a party from repeating an action that had been found to violate a law or a court order, such as forbidding a person

to come within a certain distance of another person, or forbidding a person to enter another person's property or land.

Another example of an equitable remedy is "*specific performance*", an order forcing a party to carry out an action that they should have taken if the contract had not been breached.

A further example of an equitable remedy applied in English succession and property law, is the doctrine of "*proprietary estoppel*". This concept has become particularly important in English matrimonial property law. For example, when a spouse moves into a home owned by the other spouse, if that spouse believes that he or she is going to be given a legal and economic interest in the house, and then acts to his or her detriment in reliance on this belief, that spouse may be deemed to acquire an "*equitable interest*" in the property. In other words, as the law deems it fair to recognise their interest, such an interest becomes legally enforceable.

The Court of Chancery and the *common law* courts fused into one single body, by legislation made in the 19th century, the Judicature Act 1873. The Court of Chancery is today represented by the Chancery Division of the High Court of Justice. Equitable relief is now a regular feature of civil proceedings, and the remedies that developed in the former Court of Chancery still apply today.

2.2. Trusts

The development of "*equitable relief*" as an additional remedy in a dispute, as ordered by the Courts of Equity or the Court of Chancery, was described in the previous Chapter.

The "*trust*" is an instrument of *common law* and equity, inextricably linked to property law, and one of the earliest forms of an "*equitable remedy*" in English law.

Legal practitioners in the EU will be aware that the creation, administration, or dissolution of Trusts are specifically excluded from the scope of the Succession Regulation (see Art. 1 (2) (j)). However, it is important to underline that a person deceased in any EU member State may well have left an English law will containing a testamentary trust or, alternatively, a trust may arise automatically by operation of the *common law* rules in an "*intestate*" succession, and therefore the concept of trust may frequently feature in cross-border succession or property disputes.

This possibility is recognised and provided for by Recital 13 of the Succession Regulation, which clarifies that the exclusion from the Regulation: "…. *should not be understood as a general exclusion of trusts. Where a trust is created under a will or under statute in connection with intestate succession the law applicable to the succession under this Regulation should apply with respect to the devolution of the assets and the determination of the beneficiaries*."

History of trust law

The trust has roots dating back even earlier than the origins of *common law*. For example, the concept of a "testamentary trust" (*fideicommissum*) was even a feature of Roman law. The word "trust" itself can be traced back even further to Indo-European origins, and later to the Old Norse word traust ("confidence, help, protection") and, more recently, to the Middle English word truste ("trust, protection").

The *common law* trust developed in 12th and 13th century England, as a means of protecting land rights while the owner was overseas fighting in the religious wars of the Crusades, and their land was being managed by a third party. From the time of the Crusades onwards, and throughout the following centuries, the concept of the trust was developed by the Lord Chancellor's Court, the Court of Chancery, as an equitable remedy in property law disputes.

By way of example, although a legal owner of property was recognised as having full title of that property, the courts could infer the existence of a trust in favour of a person with a beneficial interest in that property, and therefore impose a legal obligation on the owner. The courts could decide that it was fair, just, or "equitable" that the legal owner be compelled to use that property for the benefit of another person. In other words, the legal owner would not in fact be free to dispose of the property. The need to establish a trust could arise in particular circumstances where the beneficiary was the weaker party, for example where a beneficiary was a child or otherwise lacked legal capacity.

In summary, the concept of trust recognises a split between "*legal ownership*" and "*beneficial ownership*" of property. The legal owner is referred to as a "trustee" (because he is "entrusted" with property) and the beneficial owner is the "beneficiary".

Caselaw or binding precedent made by the *common law* courts has developed the rules relating to the trust. Two key elements introduced by the English law courts are, firstly, that a trust can be established in relation to any type of property, whether moveable or immoveable and, secondly, that a trust (whether a public or

private trust) can be created either for a purpose, or for the benefit of individuals.

The modern-day trust is commonly used as an estate planning tool, a lifetime wealth management tool, a tax planning structure, or in a will. A hybrid form of trust is used today in many *common law* systemsand is often applied for commercial purposes, including in financial investments and business structuring, or in the establishment of charities.

Types of trust

Legal practitioners applying the EU Regulations in succession and property law, when dealing with a cross-border scenario involving *common law*, may come across one of two types of "*express trust*" – in other words, a trust expressly made in writing - namely the lifetime or "*inter vivos trust*", and the "*testamentary trust*". Both types of trust will be explained in more detail in this Chapter.

Both *inter vivos* and testamentary trusts are formally recognised (albeit as an instrument of foreign law) by a handful of EU Member States (The Netherlands, Malta, Republic of Cyprus, Italy, and Luxembourg), as well as by some other non-EU countries including Australia, the United States, and Canada, with such countries having signed and ratified the Hague Convention of 1st July 1985 on the Law Applicable to Trusts and to their Recognition.

In addition to the aforesaid types of trusts, the "*statutory trust*" is an unwritten principle applied to the English law of intestacy. An unwritten trust may also arise automatically in property law disputes "*by operation of law*", where the English courts are

requested to acknowledge the creation or existence of a trust in favour of a beneficiary, to prevent unjust enrichment, to correct wrongdoing, or to create property rights where intentions are unclear. Such types of trusts, imposed by a court, are known as "resulting" or "constructive" trusts.

Each of the above types of trust instruments, whether written or unwritten, will feature the dual relationship, between the legal and beneficial ownership of the property.

Inter vivos trust

In the early 19th century, the inter vivos trust began to develop as a unilateral contract, set out in writing by way of a "trust deed" during a person's lifetime. The trust deed formalises the passage of property to be held on legal and beneficial ownership and contains the terms and conditions by which the property should be administered. The parties consist of the "*Settlor*" or "*Grantor*" (the original owner of the property) who executes the "*Trust Deed*", by which he transfers the ownership of the property to the "*Trustee*" (who could be the Settlor) to hold this property behalf of the ultimate named "*Beneficiary*". The following are examples of inter vivos trusts:

"*Bare trust*" – where property is transferred to the Trustee to hold for the benefit of a third person.

"*Life Interest trust*" – by which income from property is to be paid by the Trustee to the Beneficiary, often a surviving spouse, known as "*the life tenant*", during their lifetime, and which on their death is transferred to another person.

"*Discretionary trust*" – by which the Trustees may pay out income, or capital, to whichever of the Beneficiaries named in the Trust Deed which they, in the reasonable exercise of their discretion, think fit.

A trust relationship in English succession law

The passage of property on death in the *common law* system is fundamentally different to the concept in civil law jurisdictions.

In civil law systems, the property rights and liabilities of a deceased person pass directly to the beneficiaries of a will or the heirs in intestacy at the moment of death, subject to their acceptance. In the *common law* system, on the other hand, property passes instead to the "personal representative", who will be either an Executor (or in fact up to four Executors) where one has been nominated in a will, or an Administrator in case of intestacy.

A trust relationship is considered to be established between the personal representative who is entrusted with administering the deceased's assets and the beneficiaries to whom the assets will eventually be distributed.

Testamentary trust

A testamentary trust is established expressly in writing in a Last Will and Testament by which a Testator nominates one or more Executors, who are instructed to hold property on behalf of the named beneficiaries. The Executors are also referred to in the Will as the "Trustees", in recognition not only of their powers of administration, but also of their duty to hold property on trust. This is subject to the will being approved and the nomination of Executors and Trustees being confirmed by the Court of Probate.

Statutory trust on intestacy

The category of heirs entitled to share the deceased's estate – when the deceased died domiciled in England and Wales – are set out in section 46 of the Administration of Estates Act 1925[1].

In summary, the following family members are entitled by the English law rules of intestacy:

- If the intestate leaves a spouse or civil partner, but no children, the residuary estate of the deceased shall be held in trust for the surviving spouse or civil partner.
- If the intestate leaves children, the surviving spouse or civil partner shall be entitled to all personal chattels, a statutory legacy (currently fixed at £250,000) and one half of the remainder of the estate. The children of the deceased receive the other half of the residuary estate (after the personal chattels and statutory legacy).

Even where the deceased dies intestate, without leaving a formal Last Will and Testament, or where a Last Will fails to dispose of all the deceased's property, the concept of a statutory trust is imposed by equity in favour of the heirs.

The deceased's assets are held on a statutory trust by the personal representative who will administer the estate until the moment that the assets are liquidated, and the debts of the estate are paid off, and the property can be assigned to the full ownership of the heirs. The personal representative in intestacy will usually be one of the family members who is entitled to claim to be an heir.

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[1] *As amended by the Inheritance & Trustees' Powers Act 2014 s.1*

2.3 Succession Law

In this Training we have examined the following key concepts of English Succession Law, which are of particular relevance to EU legal practitioners dealing with an estate which contains elements of *common law*.

2.3.1 Freedom of Disposition

In English succession law, a person is free to make a Will disposing of his or her property to any person, without restriction. Since the legislation *Statute of Wills* of 1540, it has been possible to dispose of land and immoveable property freely by a will. Originally a person's personal or movable property could formerly be disposed of by a document known as a testament.

The full name given to a will, the Last Will and Testament, originates from the right to dispose of these two types of property.

There is no fixed statutory share that can be claimed by family members in English law, by contrast with the so-called "forced heirship" regimes of most civil law systems. Even Scottish law has a form of forced heirship, in that the spouse and children are reserved a share of the estate, although this only applies to moveable assets.

The concept of freedom of disposition by will was once a feature of Roman law and is now a unique and particular feature of the *common law* system of England and Wales. English law did not always recognise freedom of disposition. In medieval times, property was only owned by a man, and all his property had to be left to the first-born son. The concept of individual freedom to dispose of property emerged during the period of enlightenment

and liberal thinking, from the 17th century through to the early 19th century, and it revolutionised English culture and society, as well as changing concepts of property ownership. Legal philosophers such as John Locke, Jeremy Bentham, and John Stuart Mill promoted the idea of freedom from state control in favour of the power of the individual. John Stuart Mill wrote, in 1848, in his Principles of Political Economy : "*...the ownership of a thing cannot be looked on as complete without the power of bestowing it, in life or on death, at the owners' pleasure*".

The freedom of disposition is no longer absolute and does now have some restrictions. There is a possibility for close family members or dependents to challenge a will in which no "reasonable financial provision" has been made for them, or to claim that the rules of intestacy did not provide sufficiently for them. The English courts have a discretion, after the death of the deceased, to consider applications made by certain categories of relative or dependent persons who present a claim that they should have been entitled to a share of the estate, according to the provisions of the Inheritance (Provision for Family and Dependents) Act 1975. An application can be made up to 6 months after the date of the formal appointment of the personal representative by the Probate Registry, but only in the event that the deceased was deemed to have been domiciled in England and Wales at the time of death.

The categories of persons who may make a claim are

- the spouse or civil partner of the deceased;
- the former spouse or civil partner of the deceased (as long as that person has not remarried/entered into a subsequent civil partnership);

- a person who, for the two years prior to the death, was living with the deceased as spouse or civil partner;
- a child of the deceased;
- a person who was treated as a child by the deceased; and
- any other person who was being maintained by the deceased prior to their death.

Although the powers of the courts in those types of claim are discretionary, the fact that civil partners and cohabitees, and even "any other person being maintained by the deceased" are also entitled to claim a share of the estate, creates a far wider category of potential claimants than even that of civil law forced heirship regimes.

2.3.2 The Formalities of an English Will

In Article 3 (d) of the Succession Regulation, a 'disposition of property upon death' is defined as a will, a joint will or an agreement as to succession. The formal validity of a last will may often be the first question raised where a succession is opened in a country other than the country where the will was made.

The Succession Regulation provides in Article 27 that "*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) of a State whose nationality the testator or at least one of the

persons whose succession is concerned by an agreement as to succession possessed, either at the time when the disposition was made or the agreement concluded, or at the time of death;

(c) of a State in which the testator or at least one of the persons whose succession is concerned by an agreement as to succession had his domicile, either at the time when the disposition was made or the agreement concluded, or at the time of death;

(d) of the State in which the testator or at least one of the persons whose succession is concerned by an agreement as to succession had his habitual residence, either at the time when the disposition was made or the agreement concluded, or at the time of death; or

(e) in so far as immovable property is concerned, of the State in which that property is located."

In one or more of these scenarios it is therefore possible for an English form of will to legitimately dispose of assets situated outside the UK. However, where the court of a member state determines that an English will was made in accordance with one or more of the criteria provided by paragraphs (a) to (e) of Article 27, they will need to consider whether that will was valid under English law.

In considering whether a will complies with English law or, in other words, whether the will is "formally valid", a court will need to consider the requirements of Section 9 of The Wills Act 1837[2], which deals with the form of testamentary dispositions, including codicils.

[2] *The Wills Act 1937 s. 9 has since been substituted by the Administration of Justice Act 1982 s. 17*

S.9 Wills Act provides that an English will must be written, and signed by the testator, or by some other person in his presence and at his direction. The will must also be signed in the presence of two witnesses, who also then sign the will in the testator's presence, acknowledging the due execution of the will.

Compared to the rules in EU member states there is actually enormous flexibility in English law as to how a testator should sign the will, including the possibility even for another person, other than the testator, to sign the will at "their direction". The English courts have on many occasions considered the provisions of the 1837 Wills Act and have created binding precedents in relation to many scenarios. For instance, it has been confirmed by caselaw that if a person is ill or illiterate, then their hand may be guided to assist them in writing their signature, or they may make merely an illegible mark or a thumb print to denote a signature. There is a "*presumption of due execution*" made by the courts that a will has been properly executed if it contains an attestation clause and has been signed by two witnesses. In case of any doubt relating to the intention of the testator, the witnesses may be asked to provide a sworn declaration of the facts concerning the signing of a will, in the form of an Affidavit.

An English form will may be drafted by a lawyer, but it is not required to be authenticated by a professional or a Notary. The signature of the testator in the presence of witnesses is sufficient. The will may often be drafted by a lawyer, but it is also common practice for a testator to purchase a standard form of will from a stationery shop, and then complete his or her personal details. The

English will usually includes the following clauses:

- Declaration as to capacity: "*being of sound mind*"

- Revocation of previous wills

- Nomination of Executors and Trustees

- Legacies

- Gift of residue

- Funeral arrangements

It is not usual for a clause providing for an express choice of law to be found in an English will, as the UK is not a party to the Succession Regulation, and the internal rules of private international law apply according to the scission principle, which automatically decide the applicable law depending on the deceased's domicile and on the location of the immoveable property.

However, in some instances a British citizen may leave property situated in an EU member state, which would be subject to the Succession Regulation, In such a case, it may be advisable to make an express choice of law for the avoidance of doubt, such as in the following example:

I DECLARE *that I am a British citizen, and in accordance with the provisions of Article 22 of the Succession Regulation (EU) No 650/2012, it is my express wish that my Will, together with all matters relevant to my succession, shall be construed and take effect according to English Law, being the internal law of the United Kingdom with which I am most closely connected.*

2.3.3. Probate and Administrates of Estates

The procedure known as "Probate" is followed both when the deceased left a will, as well as when the deceased died intestate. The word probate comes from the Latin word "*probare*", which means to test, or to prove.

If the deceased left a will and was domiciled in England and Wales, or held property located there of the value of at least £20.000, the original will must be presented to the Probate Registry, which is part of the Family Division of the High Court of Justice of England and Wales. This will usually be presented by one of the persons named as Executor.

The Probate Registry will check that the formal validity requirements of s.9 Wills Act 1837 are complied with. If so, a *Grant of Probate* (or *Grant of Administration* in case of intestacy) will be issued, to which a copy of the last Will and Testament will be attached.

From that moment on, the named *personal representative* is formally appointed (either the *Executor* or, in the event of intestacy, the *Administrator*), and such person or persons will be deemed to have full powers to administer the estate of the deceased, to collect in the assets, to make an inventory and value the estate, to pay debts and liabilities including inheritance tax, to keep accounts, to approve or disprove claims by creditors, and eventually to distribute the assets to the beneficiaries of the will or heirs in intestacy.

The Grant of Probate will be valid proof of the acceptance of the Last Will and Testament by the English courts. As such, it can be considered to be an "authentic instrument" under the terms of the

Succession Regulation and, if necessary, it may be presented to authorities dealing with the succession in any EU Member State. In such an event, the Grant of Probate together with the attached will, should be formally legalised, to confirm the status of the instrument as a valid and authentic public document. In order to legalise the Grant of Probate and attached will for use in the EU, following the procedure required by the 1961 Hague Convention, an Apostille stamp should be fixed on the Grant of Probate by the Foreign and Commonwealth Office in London.

Where no Grant of Probate is issued, for example in the event that the deceased left no assets in the UK, the original will can be directly recognised in an EU member state. In that case, it may be necessary for the translation and formal recognition, such as a deposit in the local courts or as a "public deed" authenticated by a local Notary.

In a situation where a testator leaves two wills, one covering foreign property and the other dealing with property located in England, then it is common practice to only apply for a Grant of Probate in respect of the latter will.

The powers granted to an Executor or Administrator cannot be exercised outside the jurisdiction of England and Wales. In order to prove their entitlement to deal with assets abroad, the Executor or Administrator will need to seek the authority of the courts or authorities of that jurisdiction. There may be a conflict where a person entitled to the status of heir in another jurisdiction could apply to deal with the estate.

Different rules apply, on the other hand, to the taxation of the estate

by the UK authorities HMRC. Where a deceased died "domiciled" in the UK, then the total value of their worldwide property must be declared in the application for Probate, and inheritance tax will be applied to the value of the entire estate.

2.4 English Private International Law Rules

In the Preamble to the Succession Regulation, reference is made to third states in Recital (57): *The conflict-of-laws rules laid down in this Regulation may lead to the application of the law of a third State. In such cases regard should be had to the private international law rules of that State. If those rules provide for renvoi either to the law of a Member State or to the law of a third State which would apply its own law to the succession, such renvoi should be accepted in order to ensure international consistency. Renvoi should, however, be excluded in situations where the deceased had made a choice of law in favour of the law of a third State*.

As the United Kingdom is not a party to the Succession Regulation, where English law is found to be a connecting factor, a legal practitioner in the EU will need to consider the internal rules of English private international law which apply to succession law, for example to determine the law applicable to a deceased's estate if the deceased died habitually resident in England. It is necessary to determine the applicable law in order to confirm the "*substantive validity*" of the will of the deceased.

The rules of private international law of England and Wales are unwritten and are predominantly determined by caselaw, in a similar way to other aspects of English domestic law. Reference is

commonly made to the leading authority in interpreting the private international law rules, the textbook Dicey Morris & Collins on the Conflict of Laws[3].

The private international law rules that govern English succession law are based on the principle of scission, in which renvoi may operate and, as a result, moveable property and immoveable property may be treated under different laws.

- The succession of moveable property will be governed by the law of the domicile of the deceased.
- The succession of immovable property on the other hand will be governed by the law of the place in which immoveable property is situated, the lex rei sitae.

The domicile of a person – that is, the connecting factor for the applicable law to movable property – could be compared to the concept of habitual residence of the Succession Regulation, but is probably stricter, as it must contain an intention of permanent residence ("*animus manendi*").

According to English law, a person is born with the domicile of his or her father, irrespective of where the family is resident. This is the "*domicile of origin*". Then, at the age of 16, a person may change or elect a new domicile, which becomes the "*domicile of choice*". When there is a dispute in a succession matter, the English courts will need to consider whether the deceased had person had moved to a country where they had established the centre of their interests with an intention to remain there permanently.

[3] *Dicey Morris & Collins 15th Edition, 5th Cumulative Supplement ISBN: 9780414070042 Sweet & Maxwell Publishers*

The factor of domicile is a key feature of the *common law* system. It also determines, as explained earlier, whether an heir has the right to bring a claim under the Inheritance (Provision for Family and Dependents Act 1975); it also applies in disputes over matrimonial property, as discussed further in this Chapter.

It is an interesting turn of events that now, although the UK chose not to opt-in to the Succession Regulation, British citizens who have a connection with English law, do actually benefit indirectly from the Regulation, in terms of the possible choice of law and the clarity this brings.

Prior to the introduction of the Succession Regulation, where a deceased died abroad for example, a connection with the deceased's estate to English law could lead to renvoi from English law back to that country or to another country, in a sort of ping-pong match. Absolute clarity over the applicable law was extremely rare. However, since August 2015, when the Regulation entered into force, there has been far more certainty for testators who are British citizens and are able to make a choice of English law, at least with respect to their property located in the EU.

If the deceased has made a clear express choice of English law in his/her will, under the terms of Art. 22 of the Regulation, the possibility of renvoi from the scission rules of English private international law is now excluded under the terms of Art. 34(2). Therefore, British testators are given greater liberty and protection by the Succession Regulation, in that they may exercise their "freedom of disposition" to leave their EU-based assets to who they choose, without any threat of forced heirship rights.

The scission rule does of course conflict with the principle of the universality of succession, according to which a person's estate should be governed, as a whole, by one law. This principle is key to the EU Succession Regulation, and it aims to provide clarity.

2.5 Matrimonial Property Law

In the United Kingdom, same-sex couples were permitted to formalise their relationship by entering into a civil partnership, under the Civil Partnership Act 2004. The legal consequences of a civil partnership are virtually identical to those of a marriage. Since 2013, same-sex marriage has now been fully introduced into English law in the Marriage (Same Sex Couples) Act 2013. Since 2013, any couple previously registered in a civil partnership may convert that partnership into a marriage.

When discussing the rules of matrimonial property law, in this Chapter the reference to marriage or spouses in English law can be deemed to equally apply to civil partnerships and spouses of a same-sex marriage.

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English law does not impose any matrimonial property regime on spouses at the time of marriage. There are no proprietary consequences of a marriage.

Since the Married Womens Property Act of 1882, English law recognises the separation of the property of a husband and a wife whereas, prior to that legislation, a wife could not own property in

her own name. Only unmarried women – also called "feme sole" – were entitled to own property.

Both spouses are now fully at liberty to purchase and sell property in their own name during their marriage, and all property is considered to be owned individually, with no possibility of legal claim by the other spouse.

The division of matrimonial property can only take place on divorce, at which stage the English courts have wide ranging powers to make financial orders and to redistribute property in favour of one or other party, under the terms of the Matrimonial Causes Act 1973. The leading English court case dealing with the division of matrimonial property and divorce is White v White, which was decided in 2000.[4] The English divorce courts are required to consider all the circumstances of the case and the marriage and, in deciding a fair and equitable division of matrimonial property, they will need to take into account "the yardstick of equality"

In order to temper the power of the courts on divorce, it is also common practice for spouses to enter into a pre-nuptial agreement before marriage, which is considered valid in English law; however, the court can choose what weight to attach to it, or can override it completely.

As explained earlier, a spouse also has the right to apply to the court in the event of the death of the other spouse, for reasonable financial provision to be ordered under the Inheritance (Provision for Family and Dependants) Act 1975.

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[4] *White v White [2000] UKHL 54, [2001] 1 AC 596*

It also important to note that, when property is purchased during marriage, the spouses may choose joint ownership in the form of "joint tenancy", which gives further protection to a surviving spouse. In joint tenancy, on the death of one spouse their share passes automatically to the other and does not pass in succession to their heirs. Where joint tenancy is not chosen, property is owned as tenants-in-common, and a share of property in that form of ownership would pass to heirs on succession.

The principles of equity are commonly applied by the English courts in disputes over matrimonial property owned by a married couple, as well as ownership by cohabitees or a couple in a registered civil partnership. The courts will distinguish legal ownership from equitable, or beneficial ownership. A body of caselaw has developed in the past few decades which recognises that a women who has contributed to the home and family for many years, but is not formally the owner of property, should be recognised as having an equitable interest.

For example, where a dispute arises as to the ownership of the legal title, in the case of an unmarried couple who had lived for many years in property owned only by one of them, the law of equity might intervene to protect the beneficial interests of the weaker party, in the form of a resulting or constructive trust or proprietary estoppel.

The United Kingdom did not opt-in to the Matrimonial Property Regulations, although British spouses or civil partners may benefit from the provisions of those Regulations, in that they may make an agreement on the applicable law in relation to property held in an EU member State.

In the absence of any agreement made under the Matrimonial Property Regulations, or in the absence of a pre-nuptial agreement, the rules of English private international law will apply to disputes over the ownership of property held outside the United Kingdom. An example of such a dispute may be a claim by one spouse that property abroad is owned jointly in community of property, with the latter being the default regime of the country where the property is located.

The concept of domicile, as in English succession law, is a key concept relevant to disputes in matrimonial property law. According to caselaw of the English courts, movable property situated abroad is governed by the law of the domicile of the spouses; in other words, the matrimonial domicile or the place where married life is mainly based. This can present the courts with some difficulty if the matrimonial domicile cannot easily be established. If, indeed, the matrimonial domicile is impossible to determine, then by default the domicile of the husband at the time of marriage will apply. Since the introduction of the Domicile and Matrimonial Proceedings Act 1973, it is no longer the case that a wife automatically has the same domicile as her husband.

There is some conflict in the authorities of the English courts as to the determination of the applicable law to immovable property in disputes over matrimonial property. Immovable property owned by one of the spouses has historically been dealt with by the law of *lex rei sitae*. However, this general criterion is also very controversial, as it creates a scenario in which many different property regimes may apply to different properties in different countries. This could lead

to a situation where a spouse may unwittingly find, on purchasing personal property in a country where community of property is the default regime, that they jointly automatically own the property with their other spouse, even though this was not their intention.

There is general consensus on the principle that the law applicable to both immoveable and moveable property situated abroad should be that of the law of the matrimonial domicile; however, there is as yet no clear legal authority for this in English law. The law of the matrimonial domicile at the time of marriage is considered to be an appropriate system, as it is most likely to be the system which the spouses would reasonably expect to apply to the purchase of all their any property, including the properties located abroad.

In practice, however, given the lack of legal certainty in English law, and where it is impossible to ascertain the law of the matrimonial domicile, it may be concluded by authorities in the place where immovable property is situated that the law of lex rei sitae still applies. This may lead to an assumption of community of property, even against the intention of the spouses, perhaps where deemed necessary for the protection of heirs and creditors, for example.

British citizens may now choose, under the terms of the Regulations n. 1103 and 1104/2016, to make an agreementin which they make an express choice of the law applicable to their matrimonial property held in member states of the EU. However, if they choose the place of their habitual residence or nationality as the applicable law, this may not be upheld subsequently by the English courts for UK-situated property, unless this coincides with the place of the matrimonial domicile.

As the United Kingdom has now left the European Union, we are unlikely to see further harmonisation of EU law with English private international law rules on succession and matrimonial property. However, more clarity from the English courts would be welcome, in the future, on some of the concepts discussed during this project. Decisions to uphold the choice of English law made by British testators in a will dealing with property in the EU will be of particular interest, as well as decisions clarifying the applicable law in the framework of matrimonial property disputes.

3. LITIGATION TERMINOLOGY IN ENGLISH

The following paragraph describes the process of civil litigation in the English Courts and explains some of the key vocabulary and legal terminology of court proceedings. Some of those key terms are also frequently used in the EU Regulations that regulate the competence of the courts, jurisdiction, and enforcement of orders.

ALTERNATIVE DISPUTE RESOLUTION: Before starting legal action, a lawyer will advise a client on possible means of avoiding litigation. The lawyers representing each of the parties may meet to find an agreement. The case might be referred to arbitration or mediation, which may be mandatory if the dispute arises from a contract and an arbitration or mediation clause was included. The parties may alternatively discuss the case between themselves, in an attempt to negotiate a settlement. Arbitration, mediation, and negotiations are all conducted on a "without prejudice basis", meaning that any statements made in a genuine attempt to settle a dispute cannot be put before the court as evidence against the party that made them, if the case goes to trial.

LETTER BEFORE ACTION: It is very rare that legal proceedings will begin without warning to the other party. Court proceedings should always be a last resort. It is certainly good practice to warn the other party that legal action is intended, and to propose arbitration or mediation or try to find a settlement, otherwise there could later be consequences as to costs. A letter before action contains a warning that, if given action is not taken, or if a given conduct is not stopped, legal proceedings will be initiated. Such a letter will normally give a period of time after which a case will start without further warning. Sufficient information must be provided in the letter to enable a prospective defendant to investigate their legal position, and at least put a broad valuation on the claim. The prospective defendant should acknowledge safe receipt of the letter of claim and, after investigating the matter, should state whether or not liability is admitted. Reason should be given if liability is denied. The prospective claimant should respond to any denial of liability before issuing proceedings.

STARTING A LEGAL ACTION: The Limitation period for a claim may need to be considered before it is commenced. English legislation, namely *The Limitation Act 1980*, specifies the time within which proceedings must be commenced to prevent the claim becoming time-barred. If the limitation period has expired, the defendant will have a complete defence to the claim. Some Examples of limitation periods are:

- simple claims in contract – 6 years from the date of the breach of contract
- claims brought in respect of deeds – 12 years from the breach of the obligation contained in the deed

- tort – a claim for damages by an injured party against a person who owed them a duty of care – 6 years from the date the damage was suffered.

There are many alternative verbs which can be used to describe the commencement of the process of civil litigation in court, for example:

*Peter decided **to bring civil proceedings** against the Executor of the estate*

*Peter intended **to sue** his neighbour for damages (this implies a claim for damages or another type of remedy whereas "bring civil proceedings" is a more general term)*

*Jane threatened to **take legal action** against her husband for selling property without her consent*

THE CLAIM FORM: Civil proceedings are commenced by the Claimant, who lodges a completed claim form at a county court or the High Court of Justice, which is then served on the other party, the Defendant. Full details of the claim, called particulars of claim, must also be served on the Defendant, within prescribed time limits and in accordance with special rules. The particulars of claim must set out a summary of the basic facts of the claim against the Defendant. In order to contest the claim, the Defendant must file a defence at the court, and serve it on the Claimant. Alternatively, they may simply send an acknowledgment of service to the court and to the Claimant within 14 days, which will then give them extra time to submit a defence.

ALLOCATION OF THE CASE: Once a defence has been filed, this triggers the allocation of the case to a particular "track" of the civil

court. A claim which has a request for compensation or damages of up to £10,000 will usually be allocated to the small claims track. Typically, these claims concern consumer disputes, and the court does not expect the parties to be legally represented.

Claims between £10,000 to £25,000 are usually allocated to the fast track. Whilst the parties will usually have legal representation on this track, the court will tightly control costs, as well as the type and amount of evidence each party can rely on. For example, the expectation is that a single joint expert should be used by the parties where expert evidence is necessary, and the trial should be conducted within one day. Claims exceeding £25,000 are usually allocated to the multi-track. A claim cannot be started in the High Court unless it exceeds £25,000. Whatever the track, the parties will be working towards either a known trial date, or at least a period of time in the future when the trial will occur.

DIRECTIONS: Directions will be given to the parties by the court, as to the steps that must be taken to prepare for trial. A strict timetable will be imposed as to when each step must be taken.

In multi-track cases of any complexity, it is usual for the parties to meet initially with a judge at a case-management conference, in order clearly to define the issues in dispute and to provide directions as to what steps need to be taken, and when, in order to prepare for trial.

The most common case-management directions are for:

(a) Standard disclosure (The parties list the documents in their possession that they intend to rely on, or which are

adverse to their case, or support an opponent's case, including confidential documents or electronic documents such as emails. Typically, any other party to the litigation has the right to see said documents or ask for copies. This procedure is known as "inspection". Certain documents may be exempt from disclosure on the grounds of legal professional privilege, such as correspondence between the lawyer and a client.

(b) The exchange of evidence before trial that the parties intend to rely on (such as experts' reports and 'witness statements').

In addition to case management directions, the parties may, at this stage, resort to the court for any specific orders that might be required (for example to force an opponent who has neglected to take a required step in accordance with the timetable to do so, in default of which the action could be struck out of court).

INJUNCTIONS: In some cases, it may be necessary to urgently stop a party from doing something, or to preserve assets until after the trial. The court may grant an injunction, an equitable remedy to preserve the parties' position until their rights have been determined. The party applying for an injunction does not have to prove the underlying claim at the injunction hearing, but must show a reasonable arguable claim, and must provide an undertaking to compensate the other party for any loss caused in the event that the injunction is later shown to be wrongly granted.

PRE-TRIAL REVIEW: There will be an administrative hearing before the trial in which the court will

- Check that the parties have complied with the timetable and with any other orders the court has made during the litigation;
- Fix the date for trial;
- Finalise the timetable for the trial and a list of issues to be decided.

TRIAL: The English legal system is “adversarial” in nature. The judge plays an advisory role, not an investigatory one. However, the judge has wide powers to control and manage the proceedings. During the proceedings, the court may allow a “stay of the proceedings”. With the exception of civil fraud and defamation cases, there is no right to a trial by jury in civil litigation, the trial will be determined by the judge alone.

In the English courts, the lawyer qualified as Barrister, also known as Counsel, will usually deal with the advocacy at trial in the civil courts. A Solicitor will normally represent the party in the lower courts or small claims matters. A Barrister can only be instructed by a Solicitor, and not directly by a party. The document that the Solicitor will write to a Barrister setting out the facts of a case is called the Brief to Counsel. As the Solicitor is the one establishing the relationship with the client, they manage the case, but the Barrister is asked to advise.

English trials are predominantly oral, requiring the Barrister for each side to make oral submissions and draw the judge’s attention to the relevant evidence and law. Before the start of the trial, the judge will generally have read the court documents, the witness statements, the expert reports, and the skeleton arguments drafted by the Barrister. The Barrister in a trial will ask questions or, in other

words, will take evidence from the party he or she represents and from any witnesses. The Barrister representing the other party will then conduct cross-examination. During the trial or court hearing, there will usually be a qualified lawyer employed by the court, known as the Clerk, who will be advising the judge.

In civil litigation, the judge (or the jury if present, depending on the type of case) will consider all the evidence. The Claimant must prove their claim on the "balance of probabilities". This is in contrast with the burden of proof in criminal litigation, where a Defendant prosecuted by the state can only be found guilty if the evidence shows beyond any reasonable doubt that the offence was committed.

PROCEDURAL RULES: A trial on the small claims track is informal and conducted at the discretion of the judge. The formal rules of evidence apply on the fast track and multi-track. At the end of a fast track trial, the judge will usually have resolved all issues including liability, quantum of damages, and an award of costs.

Civil litigation in the English courts follow the procedure set out in the Civil Procedure Rules. These follow the principle that:

- The parties are on an equal footing;
- The case is dealt with in a method proportionate to the amount of money involved, the importance of the case, the complexity of the issues and the financial position of each party;
- The case is dealt with expeditiously and fairly.

A typical claim dealt with by the High Court will take approximately 12-18 months to get to trial, from the date of issue of the claim form.

JUDGEMENT: Judgement may be given immediately after the trial or, in more complicated cases, it may be reserved until a later date. When the judge makes a final order, judgement or ruling, this will invariably include an order for damages. It is the amount of money that a Defendant will pay to the Claimant. Damages can be compensatory (for loss or injury suffered), or may be punitive (to punish the losing party and deter future misconduct). The claimant could be awarded the relief or remedy that they sought simply because the defendant failed to enter an appearance in the proceedings or failed to respond to the case.

COSTS: The judge will decide if a party should pay the other party's costs and, if so, determine the amount. The general rule is the loser pays the winner's costs. This is known as a summary assessment of costs. On the multi-track, the trial judge will decide who should pay costs and, in such cases, the amount of costs may be assessed post-trial by a costs judge.

ENFORCEMENT OF JUDGMENT: When a judgement in civil proceedings is obtained, the unsuccessful party may make payment voluntarily. If it does not, various enforcement procedures are available:

- Third party debt order – this is a procedure by which the Claimant may obtain an order which directs a person who owes a debt to the Defendant to pay the claimant instead.
- Charging order – the Claimant may obtain a charge on certain of the Defendants assets, such as property or bank accounts or shares, and obtain an order that those assets are sold or liquidated, and the proceeds paid to reduce the judgement debt.

- Attachment of earnings order – if the defendant is in employment the claimant can obtain an order requiring the Defendant's employer to deduct a specific sum from the monthly salary until the judgement debt is paid.
- Taking control of goods – a court officer (bailiff) attends at the Defendant's home or premises and seizes the goods which are then sold, and proceeds paid to the Claimant.
- There is also the option of forcing the party into insolvency if the judgement sum is not paid.

APPEAL: After a decision of the first instance court, a party may decide to appeal, to request a higher court to review the decision to determine if it was right. A party who appeals is called the Appellant, while the other party is the Appellee. If a party does seek to appeal a judgement, it must obtain the permission of the court known as "leave to appeal".

EXERCISE 1 - MATRIMONIAL PROPERTY REGIMES

FACTS

Alessandro (an Italian citizen) and Carlotta (a Spanish citizen) met in the 1960's while working in the hotel industry in the UK. They got married in London in 1965 and had no children. They built up a successful coffee shop business in London. Using part of the proceeds of their business, they bought the matrimonial home in London as joint tenants in 1990. In 2002, Alessandro also bought a luxury villa in Lake Como in his sole name. The couple visited the villa in Italy every year for the summer months. After a breakdown in their relationship, they separated in 2010. They lived apart from that year but never divorced. Carlotta made a claim in the Italian court that she was in fact joint ownership of the Italian property, claiming that the matrimonial property regime for overseas assets was the lex rei sitae.

EXERCISE QUESTIONS

1. Assuming that English law is applicable to the matrimonial property, the spouses had the liberty to purchase and own property _____ during the marriage.
2. On the death of Arturo, his share of the UK property held as joint tenant passes to _____.

3. If the property was owned as tenants-in-common, his share would have passed to his _____.

4. As Alessandro moved his residence from Italy to the United Kingdom and intended to live permanently there, the United Kingdom was his domicile of _____.

5. In relation to the matrimonial property regime, the law applicable to the moveable property, according to English law, is the law of the _____.

EXERCISE 2 - SUCCESSION AND FORCED HEIRSHIP RIGHTS

FACTS

Anthony, a wealthy British citizen, was widowed and had four daughters and a son. He owned a historic castle in the North of England and a valuable collection of sculptures. After the death of his wife, Anthony decided to start a new life and moved to Italy in 1980, where he purchased a Villa near Siena. He made an Affidavit declaring that Italy was now his domicile, being his main centre of interests, and he declared that he intended to live permanently in Italy.

He made an English will, in front of two witnesses, which was drawn up and signed in Italy in 1995. In his Will, he named his brother Arthur as Executor and Trustee, directing that his worldwide property should be held on Trust for his son Andrew until he reached the age of 25. He exercised his English law right to freedom of disposition. He did not make any choice of applicable law in his will. Anthony died in Italy in January 2020, following which his four daughters brought legal action in Italy claiming that they were entitled to a share of the Italian estate.

EXERCISE QUESTIONS

1. Anthony's original will was required to be deposited with the _____Registry.
2. Article 27 (1) (b) of the Succession Regulation governs the _____validity of the will.
3. The will is formally valid as made according to the law of Anthony's _____.
4. As the will was executed before the entry into force of the Succession Regulation, the _____ in Article 83 of the Succession Regulation apply.
5. Because of the English law principle of scission, which treats immovable and moveable property differently, the applicable law to the succession of Antony's immovable property would be the law of the_____ and, therefore, Italian law. According to forced heirship rights Antony's daughters were entitled to a share in the Italian property.

EXERCISE 3 - CIVIL LITIGATION

FACTS

John lived in London in the home he owned with his long-term girlfriend Geraldine. He also owned several apartments in London, which he rented out. John and Geraldine lived on the income they received from this business. John had one son, George, from a previous relationship, but had been estranged from him since he was a child. John made a will naming his wife as Executor and

Trustee and stating he wished to leave all his property to his charity. After his death in 1995, both Geraldine and George made a claim challenging the validity of John's will in the English courts: they made an alternative claim under the Inheritance (Provision for Family and Dependents) Act 1975.

EXERCISE QUESTIONS

1. Before commencing legal action, Geraldine and George held mediation proceedings in an attempt to reach a _____.
2. Following the principle of common law, John had freedom of _____ and was not bound to leave a fixed share of his estate to family members.
3. Geraldine and George had to bring the Inheritance Act claim within 6 months from the Grant of Probate, otherwise the case would be _____.
4. Geraldine and George claim in the courts that Giulio did not make reasonable _____ provision for them in his will.
5. The court is not bound to grant their application but will exercise _____.

ANSWERS

EXERCISE 1 - MATRIMONIAL PROPERTY REGIMES .
1. Individually | 2. Carlotta | 3. Heirs (or beneficiaries) | 4. Choice | 5. Matrimonial domicile

EXERCISE 2 - SUCCESSION AND FORCED HEIRSHIP RIGHTS
1. Probate | 2. Formal | 3. Nationality | 4. Transitional provisions | 5. Lex rei sitae

EXERCISE 3 - CIVIL LITIGATION
1. Settlement | 2. Disposition | 3. Time-barred | 4. Financial provision | 5. Discretion

GLOSSARY

In the following Glossary, a simple definition for each legal term is suggested, alongside the term itself. An example of the term in Legal English is provided in RED TYPE. Further comments where deemed useful are included in BLUE TYPE.

Administrator

FROM THE VERB TO ADMINISTRATE, (TO MANAGE, ORGANISE, DEAL WITH). In some legal systems, the property of the deceased vests directly in the heirs. In the common law system, the property of the deceased vests directly in Administrators or Executors (Personal Representatives) who are responsible for ensuring the estate is correctly distributed and all debts and liabilities are paid. The Administrator is the name given to the person who administers an intestate succession. The Executor will be the person named in a will and appointed to deal with the testate succession. There may be a gap of time between death and property vesting in the Administrator, until the Administrator is appointed by the court

EXAMPLE: The deceased died intestate and an Administrator was nominated by the Probate Registry for the management of the estate

Admissibility

TO ADMIT, TO BE ADMISSIBLE A Disposition of Property upon Death, in other words a will, is admissible if the applicable law considers it capable of recognition and able to produce its material effect, subject to its substantive validity, or in other words whether the contents of the will and wishes of the testator can be put into effect

EXAMPLE: The Probate Registry considered the admissibility of the deceased's will

Agreement

Where two parties reach consensus on a set of facts or course of action. ALSO SETTLEMENT

EXAMPLE: The heirs were able to reach an agreement as to the division of the estate

Agreement as to succession

The agreement as to succession or succession agreement, allows two or more parties to plan their future succession in contemplation of the death of any of the parties, by appointing one or more heirs, waiving any forced heirship rights and providing for the assignment of the estate or portions of it ALSO SUCCESSION AGREEMENT OR SUCCESSION PACT

COMMENT: Succession agreements are considered null and void in Italian law, as having been made in violation of the rule that an inheritance is transmitted by law and will

Assets

Property, whether immovable or movable, which makes up the estate

EXAMPLE: The assets of the estate of the deceased included a villa in Tuscany and a bank account

Attestation

A clause whereby a person states that they have witnessed a document, for example a will, with all the necessary formalities having been complied with

EXAMPLE: The witnesses certified in the Attestation Clause that the Last Will and Testament had been signed in their presence by the Testator

Authentic instrument

This is a formal legal document (for example a certificate, deed, bond, or agreement)

COMMENT: The exact definition of an authentic instrument may vary according to national law or EU law. Authentic instruments were defined by the European Court of Justice in the Unibank decision, and also by the EC legislator in Regulation No 805/2004 on the European Enforcement Order. According to the currently recognised legal definition, "An Authentic instrument is an instrument which has been established by a public authority or other authority empowered for that purpose by the Member State in which it originates. It must be in the required form. The authenticity must relate not only to the signatures, but also to the content of the instrument."

Beneficiary

Any person or entity (such as a charity) who will receive assets or profits from an estate under a will

COMMENT: We should contrast the definition of beneficiary which is used in common law succession with the definition of an heir in civil law countries, as an heir will usually be responsible for both the assets as well as the liabilities of an estate, which a beneficiary would not

Bequeath

To give or leave by will (used especially for "personal property")

EXAMPLE: She bequeathed her private art collection to her niece

Binding

An agreement will be considered binding if it involves an obligation, or if it is provided with legal authority

EXAMPLE 1: A lease contract for an apartment is legally binding, because upon signing the document, the lessor and the lessee are agreeing to be bound by certain conditions

EXAMPLE 2: In common law legal systems, precedent is a principle or rule established in a previous legal case that is either binding on lower courts, or persuasive for a court or other tribunal when deciding subsequent cases with similar issues or facts. If a case has different facts, the court may decide that it is not bound, as the binding precedent is distinguished

Burden

A restriction on a property right. Can also be described as an encumbrance, lien, or charge

COMMENT: A burden is an obligation affecting the land or property, which normally requires the owner to do something or to refrain from doing something for the benefit of another property. The burden must also be registered against the title of the burdened property, and not be in contravention of public policy. This word is not so commonly used in modern legal English. In property law we would normally refer to the specific type of burden e.g. mortgage, charge covenant, easement, right of way

Charge

Any legal document signed by a borrower and which is registered against a property at the Land Registry, which will alert any potential buyer of the existence of a debt which would need to be repaid on sale. A charge can always be referred to as a burden

EXAMPLE: The charge was protected by registration at the Land Registry, so it took priority over an earlier charge which had not been registered

Chattels

Refers to personal effects (contents of household) or whatever property may not be easily defined as movable or immovable. Used in the doublet of Middle English origin: “goods and chattels”

EXAMPLE: The Trustees have recently received the support of the Courts following a dispute over the ownership of certain valuable chattels

Clawback

This is an English word used to describe the following legal concept in civil law systems: After the death of a testator, in order to calculate the gross estate and the reserved portion to be attributed to heirs claiming forced heirship rights, the value of any lifetime gifts or donations are taken into account, that is they are brought back into the total property of the deceased

EXAMPLE: A clawback claim was brought by an heir in connection with his father’s estate under Swiss jurisdiction in relation to a lifetime gift of a property made to his brother

Co-ownership: joint tenancy and tenancy in common

In most common law countries, there are two forms of co-ownership: the joint tenancy and the tenancy in common. When two or more parties purchase property together, they will decide at the time of purchase how they will own their respective shares. Note that the word "tenant" used by itself can also have another meaning: a person who does not own a property but signs a contract with a landlord and pays a monthly rent to occupy the property

COMMENT: An example of **Joint tenancy** is the ownership over a house by a married couple in equal shares. In joint tenancy, the parties enjoy the right of survivorship. This means that when one of the co-owners die, the survivor co-owner shall receive the deceased's share over the property

Tenancy-in-common on the other hand, refers to ownership of property by two or more individuals without any right of survivorship. The shares owned between the co-owners of the property are equal. However, there are also situations in tenancy in common when the parties do not have equal shares. The sharing scheme shall depend entirely on the stipulation of the parties

Conveyance

The legal process of sale or transfer of property. The word conveyance could also refer to the deed of transfer itself

EXAMPLE: On signing the conveyance deed, the original owner transferred all legal rights over the property in question to the buyer

Deceased

A person who has recently died

EXAMPLE: When either husband or wife dies intestate, one-third of the real estate of the deceased goes to the survivor

Declaration

A statement, or an Affidavit, usually made under oath or in the presence of a lawyer. In English law a person can declare any facts in a statutory declaration signed in the presence of a Solicitor, even that they intend to change their name

EXAMPLE: The surviving spouse made a **declaration** in front of a Notary that there were no other heirs entitled to claim against the estate

Deed

Written document signed in the presence of two witnesses (English law), Notarial deed (civil law)

EXAMPLE: The **deed** of gift was signed and witnessed, and the original kept in the office of the donor's lawyer

Dependent relative

A relative who is unable to maintain him/herself due to incapacity due to age, ongoing education or infirmity. A dependant relative has the right to claim that they have been unfairly excluded from the deceased's estate in a will under the Inheritance (Provisions for Family and Dependents) Act 1975. The claim is at discretion of judge

EXAMPLE: Lifetime gifts may be exempt from an inheritance tax charge if made in favour of a **dependent relative** of the donor

Devise (noun)

To dispose of real property

EXAMPLE: I hereby give, devise, and bequeath to my son Marcus the sum of € 10,000

Disinherit

To exclude a person who would by law be a rightful heir from the inheritance

EXAMPLE: As his eldest son had been estranged for many years, the testator had decided to disinherit him from his will

Disqualification

An heir who is prevented by operation of law from receiving an inheritance due to conduct (such as a sentence of life imprisonment)

EXAMPLE: The only way in which, in Hindu law, a lawful heir can be deprived of inheritance is by disqualification, if he is convicted of murder of the person from whom he is otherwise entitled to inherit

Disposition of Property Upon Death

This the general term in the Succession Regulation which includes a Will, a Joint Will or an Agreement as to Succession

EXAMPLE: When determining whether a given disposition of property upon death is formally valid under this Regulation the competent authority should disregard the fraudulent creation of an international element to circumvent the rules on formal validity

Disposable portion of the estate

The portion of the estate which is at the free disposal of the testator (only relevant to legal systems with forced heirship rules)

EXAMPLE: Where the testator is a widow and has only one child, according to Italian law half of his estate is reserved for that child and the other half is the disposable portion

Domicile

In common law countries this is the state of origin or closest connection which must have an element of permanence. Domicile of "origin" or domicile of "choice"

EXAMPLE: The courts held that her place of domicile was France, having lived there as her main place of residence for more than 50 years and having no intention to return to her domicile of origin

Easement

A non-possessory right to use and/or enter the property of another without possessing it. An easement may be active or passive. If passive it would fall in the category of a burden

EXAMPLE: Two neighbouring land-owners agreed that one should have the right of way through the other's land and created an agreement establishing an easement

Estate

The Property owned by the deceased, or in which he had a proprietary interest or entitlement, at the time of his death. This may also include assets, rights and obligations

EXAMPLE: An estate, in common law, is the net worth of a person at any point in time alive or dead

Executor/Executrix

The person nominated in a Last Will and Testament to administer the estate of a deceased person (male or female versions)

COMMENT: Acceptance of the office of Executor need not be formal and may be shown by the Executors taking out a Grant of Probate or by effectively acting as Executor. A person named as Executor may renounce that office at any time after but not before the testator's death

Forced heirship

A feature of civil-law legal systems, which do not recognize total freedom of disposition. The right given to certain family members to claim a fixed percentage of the estate and challenge the will if they have been excluded or not attributed the correct value by law

EXAMPLE: Piero could not choose to leave his estate to his sister because he knew his son would challenge the estate under the forced heirship rules

Formal Validity

Whether the form of a will, in the way that it is written or structured, fulfils the rules of the Hague Convention of Testamentary Dispositions or in relation to the member states who have adopted the Succession Regulation, Art. 27

EXAMPLE: There was doubt over the **formal validity** of a will as it was not dated

Grant of Representation

This is the general term given to the document issued by the Probate Registry in the UK, which is needed to confirm the legal status and ability of a Personal

Representative to deal with the Estate of the deceased. If the deceased left a Will appointing Executors, then the Grant will be known as the Grant of Probate. If there was no Will, this will be known as the Grant or Letters of Administration

Heir

Can also be described as Beneficiary. A person entitled to the residue of the estate after payment of obligations

COMMENT: Usually a person entitled to the estate where the deceased died intestate is an heir, whereas a beneficiary is a person entitled to a share left by the will

Inheritance

Whatever is received upon the death of a person either by a will or in intestacy

Intestate succession

Any succession regulated by Law when a person dies without leaving a valid will

COMMENT: If the deceased died intestate in the UK, Parts III and IV of the Administration of Estates Act 1925 apply to:
- all the movable property of the deceased wherever situated, provided the deceased was domiciled in England and Wales, and
- all immovable property of the deceased in England or Wales, whether the deceased was domiciled there or elsewhere

Issue

A person's children or other lineal descendants such as grandchildren and great-grandchildren. It does not mean all heirs, but only the direct bloodline

EXAMPLE: The deceased was unmarried and left no issue

COMMENT: There are many meanings of the word issue in the English language, derived from French word referring to "flowing out" of water". To issue proceedings, to issue a newsletter, a legal issue

Joint wills

A joint will is one executed by two or more persons, usually a married couple, which combines the parties' last will and testament. Under a joint will, the surviving party inherits the entire estate when the other party passes away

COMMENT: This type of will is not lawful in many countries. In the UK it is lawful only if it contains a "clause of non-revocation"

Last will and testament

A written document which leaves the estate of the person who signed the will to specific named persons or entities

Leasehold

A leasehold estate is an ownership of a temporary right to hold land or property for a fixed term, by which a lessee or a tenant holds the right to real property by some form of title from a lessor or landlord

COMMENT: Possession of property owned on a Lease will be subject to the payment of an annual ground rent to the Freeholder. When the lease expires, ownership of the property reverts back to the Freeholder. Nearly all apartments in the United Kingdom are leasehold and are usually on a time of 99 years or 125 years. Freehold property, on the other hand, denotes permanent ownership and no time limit

Legacy

An outright gift made in a will

EXAMPLE: I give a legacy of £100.000 to the Save the Children Fund

Legalise

To validate the authenticity of a public document for use abroad

COMMENT: In US English replace the s with z. Legalisation is commonly arranged by fixing an Apostille on the document at the Foreign Office of the country where it was issued (in countries who are signatories to the Hague Convention on the Legalisation of documents of 1961)

Legatee

A person to whom a legacy is bequeathed. The person making legacy is legator

Liabilities

The debts and obligations of an estate or a business owed to its creditors

COMMENT: Contrast with the word liable which means “responsible or answerable in law or legally obligated under a duty”

Liquidation

To release the monetary value of assets or in other words convert to cash funds. Liquidation is also the term used to refer to the winding up of a company at the end of its business activities

EXAMPLE: After the Grant of Probate had been issued, the Executor dealt with the liquidation of the investments

Lis pendens rule

Latin term for a rule that, in principle, precludes one court from considering a case that is already pending before another court

COMMENT: In US law Lis Pendens is actually the name given to a legal notice served, in other words a written notice that a lawsuit has been filed concerning real estate, involving either the title to the property, or a claimed ownership interest in it

Ownership

The exclusive legal right to enjoy and dispose of things in an absolute manner, provided they are not used in a way prohibited by statutes or regulations. Ownership must have been conferred by a legal title

EXAMPLE: The spouses agreed to take ownership of the property in equal shares

Probate

Legal permission provided by a Probate Registry for someone to deal with someone else's estate after they die leaving a will

EXAMPLE: The widow instructed a law firm to apply for a Grant of Probate following her husband's death

Renunciation

A declaration by which a person claims they will abandon their rights and not pursue any legal action

EXAMPLE: the heir signed a deed of renunciation in which he gave up his right to claim a share in the estate

Rights in rem

Real rights to use, enjoy or dispose of property

COMMENT: Also known as jus in rem, to be differentiated from jus in personam which concerns the rights and obligations between individuals

Succession law

The rules governing the whole transmission process of the estate of a deceased person

EXAMPLE: In a choice of law clause, a Testator can choose his or her national law to be the applicable succession law governing their estate on death

Tenancy-in-common

A shared form of property ownership in which each owner has a distinct, separately transferable interest

EXAMPLE: The three brothers owned the property as tenants-in-common, so on the death of one of them, their individual share would pass to their respective heirs

Testator/testatrix

A person who has written a will disposing of his or her assets on death

EXAMPLE: The Testator named his wife as his sole Executrix

Transfer

The passage of property from one person or entity to another or the passage of title to property from the owner to another person

EXAMPLE: The transfer of the property to the Buyer was effective on the date on which the definitive sale deed was signed

Title

The formal right of ownership of property, enforceable in a court of law. The same word refers to documentary proof of such ownership (also known as “title deeds”)

EXAMPLE: The Seller was asked to prove to the Buyer that he could show title to the property

Usufruct

The right to use something belonging to another, or life interest. The gain to a person who is entitled to usufruct can be clearly seen in the Latin phrase from which the word developed: usus et fructus, which means “use and enjoyment”. This was a term first applied under the Roman empire to portions of land, the usufruct of which was granted by the emperors to their soldiers or others for life, as a reward or benefit for past services, and as a retainer for future services

EXAMPLE: The man’s will give his wife 30-year usufruct, but after that the house would go to his children

Waiver

A declaration that a person wants to decline liability or renounce rights. VERB - TO WAIVE

EXAMPLE: The heirs gave consent to the waiver of their inheritance rights

CHAPTER 3

SUCCESSION REGULATION 650/2012

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The Chapter will examine the main features of the Succession Regulation 650/2012 and the innovations it brings to the rules of private international law of the participating States.

The presentation of the rules introduced by the Regulations will be accompanied by practical examples, so as to enable operators to identify the rules themselves and their characteristics immediately.

In particular, it will set out the general criteria for identifying the law applicable in the absence of choice, the options available to private individuals to plan their succession and the rules governing their assets in the event of marriage or registered partnership, the renvoi (which applies only in matters of succession), the provisions on jurisdiction, the European Certificate of Succession.

1. GENERAL OVERVIEW

1.1 Introduction

The new European legislation in the area of succession law, entails a true paradigm shift in the general application of private international law. As stated by the European Commission, approximately 450,000 cross-border succession cases occur every year in the European Union; this made it necessary to establish new EU rules facilitating cross-border succession proceedings and ensuring better legal certainty.

Although the Succession Regulation (hereinafter also "SR") came into force nearly 5 years and a half ago, great divergences still exist in the field of substantive succession laws in Europe.

The shares that the family members inherit vary widely, depending on the national law applied to the succession. In particular, the sharing of the inheritance between a spouse and children is handled very differently in the EU Member States.

All Member States recognize testaments. Some Member States furthermore provide for more elaborate instruments to plan successions, namely joint and reciprocal wills, as well as succession agreements.

All Member States, except for the UK (specifically, England and

Wales), grant a compulsory share of the inheritance to close family members, regardless of any testamentary dispositions by the deceased.

The procedural rules governing succession are very different in the various Member States. While in some Member States all possessions of the deceased become the property of his or her heirs automatically upon death, in other Member States the estate is managed by an administrator and transferred to the heirs after their shares have been established and any inheritance tax has been paid.

The rights of unmarried or same-sex partners, as compared to those of spouses, vary widely between the Member States. While some Member States treat a registered same-sex partner as a spouse in most respects, the other Member States that do not provide for same-sex marriage or registered partnerships, as a consequence, do not have any rules granting a share of the inheritance to the registered partner.

Actually, there are some examples of convergence.

For example, reforms in family law impact on succession law, as it happened for the implementation of same-sex marriages in some EU countries, and for rules on marital capacity and divorce (although some slight divergences still exist).

An important role is played by case-law of the European Court of Human Rights – for example about the right to marry, guaranteed by Article 12 of the European Convention on Human Rights, the right to respect for private and family law, guaranteed by Article 8 of the same Convention.

The low number of ratifications of most Hague instruments indicates the difficulties of unification in this area of law.

The legal juridical base for the implementation of the SR is, now, article 81 of the Treaty on the Functioning of the European Union (TFEU), but the original initiative of the EU was based upon Article 61(c), and on the second indent of Article 67(5) of the EC Treaty. Following the entry into force of the Treaty of Lisbon on 1 December 2009, those provisions were replaced by Article 81 of the TFEU.

From a chronological point of view, the SR origins from the Green book of March 1st, 2005, followed by the European Parliament of October 16th, 2006, the regulation Proposal of October 14th, 2009 and, finally, the adoption of Regulation no. 650/2012 on July 4th, 2012.

The SR entered in force on August 17th 2015, with some exceptions – articles 79, 80, and 81 entered in force July 5th, 2012.

1.2. The Scope of the Succession Regulation

The scope of Regulation (EU) no. 650/2012 on the 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 can be underlined on the basis of the (little) existing practice to date before the ECJ and the national instances of some Member States.

The regulation applies to all international cases, also in relation to third states (including the UK, Ireland, and Denmark, treated as third states).

The jurisdiction and applicable law are, however, regulated differently in member and non-member states.

Recognition of judgments (that is acceptance of authentic documents) is limited to the relations between Member States applying the regulation. Recognition of judgments from non-member states is still regulated by national law.

The issues raised in this framework can be classified into three different categories related with 1) the material scope of application, 2) the personal scope of application and 3) the temporal scope of application.

1) The material scope of application is regulated in Article 1. Under this provision, this Regulation shall apply to "*succession to the estates of deceased persons", a rule which must be completed with the definition of "succession" included in Article 3(1)(a), which states that "1. For the purposes of this Regulation: (a) 'succession' means succession to the estate of a deceased person and covers all forms of transfer of assets, rights and obligations by reason of death, whether by way of a voluntary transfer under a disposition of property upon death or a transfer through intestate succession; (...)".*

The scope of application of the Regulation on Successions is very broad, as reflected in Recital 9: "The scope of this Regulation should include all civil-law aspects of succession to the estate of a deceased person, namely all forms of transfer of assets, rights and obligations by reason of death, whether by way of a voluntary transfer under a disposition of property upon death or a transfer through intestate succession".

The Regulation covers most of the issues usually qualified as successions in domestic laws of EU Member States, except for some aspects such as the exclusion of the formal validity of dispositions of property upon death made orally (Article 1(2)(f)).

By contrast, the Regulation shall not apply to revenue, customs or administrative matters (the classical exclusion of public matters included in other Regulations), nor to other matters listed in its paragraph 2, some of which have been tackled by the CJEU as it has been pointed out by two of the national reports drafted by the Project teams.

The SR applies only to international successions (Art. 1)

The determination of the law applicable to the succession, the jurisdiction of courts, and the circulation of judgments and authentic instruments or any other administrative documents (for example the European Certificate of Succession) are matters covered by the SR.

The SR does not concern the status/legal capacity of natural persons, matrimonial property regimes, any tax or administrative aspects, rights in rem, recording in registers, succession issues governed by the law of companies, trusts etc. (Art. 1).

1.3. Rules on the Jurisdiction

Following the scheme of previous EU Regulations, Chapter II of the Succession Regulation establishes both the grounds for international jurisdiction and rules related to their application in practice (the time a court is deemed to be seized; examination as to jurisdiction; examination as to admissibility; *lis pendens*; related

actions). The Regulation sets the international jurisdiction of the Member State that are bound by it for procedures in succession matters, which will arise once the succession has been opened.

It does not distinguish between contentious or voluntary jurisdiction. In view of the fact that authorities other than the judicial ones may perform similar functions under national law in certain succession matters, the jurisdictional rules of the Regulation are also binding on them.

The system of jurisdictional grounds of Regulation 650/2102 is a closed one: there is no place left for the national criteria of the Member State - in return the Regulation provides for a residual forum (Article 10) and a forum necessitatis (Article 11). The principles followed in Chapter II are common to the rest of the instrument: unity and universality of the succession, where "unity" means as well the forum / ius parallelism.

Consequently, as a rule, the seized court will exercise its jurisdiction to rule on the entire succession, and it will do so by applying its own law. The best expression of these principles is Article 4, which admits, however, three main exceptions.

Firstly, should a deceased leaving assets in a Member State not have had his last habitual residence in the EU:

A) The courts of the Member State where the assets are located shall decide on the succession as a whole, provided that the deceased had the nationality of that Member State upon his death; or failing that, if he had the habitual residence in that State provided that at the time the court is seized, not more than five years have elapsed since that habitual residence changed [Article 10(1), (a) and (b)].

B) Failing the above conditions, the courts of the Member State where assets are located may still rule on the succession, but only in relation to such assets [Article 10(2)].

Secondly, if the deceased has chosen the applicable law, according to Article 22 the courts of the last habitual residence, competent according to Article 4, should apply the law of the nationality of the deceased and not their own. To avoid this, the parties concerned are allowed to agree on the jurisdiction of the courts of the chosen nationality [Article 5, Article 7(b)]; in that case, any other court must decline their jurisdiction [Article 6(b)]. Additionally, in the absence of an agreement between the parties concerned, the courts of the Member State of the last habitual residence of the deceased may, at the request of one of the parties to the proceedings, decline jurisdiction if they consider that the courts of the Member State of the chosen law are better placed to rule on the succession, taking into account the practical circumstances of the succession, such as the habitual residence of the parties and the location of the assets; the courts of a Member State whose law had been chosen by the deceased pursuant to Article 22 shall then have jurisdiction to rule on the succession [Article 6(a),Article 7(a)].

Thirdly, where the estate of the deceased comprises assets located in a third State, the court seized to rule on the succession may, at the request of one of the parties, decide not to rule on one or more of such assets if it may be expected that its decision in respect of those assets will not be recognized and, where applicable, declared enforceable in that third State (Article 12).

1.4. Main Principles

The SR is applicable to all international successions in Europe as of August 17th, 2015, excluding the United Kingdom, Ireland, and Denmark.

The SR aims at the principle of *unity of succession*: succession as a whole, including both movable and immovable property, will be regulated by *the law of the State in which the deceased had his habitual residence at the time of death* (Art. 21); no division between movable and immovable property.

Example 1: the death of a Frenchman living in Spain at the end of his life where he had his habitual residence: succession as a whole will be regulated by Spanish law, including any immovable and movable property in France.

This single law on succession regulates all issues tied to succession, as mentioned under article 23(2).

The SR provides for the "*professio juris*", with the possibility of *choosing a single law on succession by will and only the law of one's nationality* (Art. 22), equally applicable to all one's property, in any country; this is a moderate choice (solely in favour of national law) within the framework of freedom that is controlled (succession as a whole necessarily) and appropriate (the "de cuius" will generally make such a choice if he retains evident ties with the State of his nationality and still possess important assets there). Please note that one may choose the law of the state whose nationality he possesses at the time of making the choice or at the time of the death. There are surely some considerable practical advantages,

especially if most of the assets are still found in the country of origin.

Example 2: the death of a Frenchman, living in Spain, who however during his life opted for the law of his nationality in his will, namely French law, to later regulate his succession.

The SR does not contain a notion of the last habitual residence of the deceased person (Art. 21)

Habitual residence should mean the deceased had a close and stable connection with the State under consideration (recital no. 23: 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).

Of course, the habitual residence may be changed later: in case of doubt as to the applicable law of succession, it may be useful to explicitly designate it in one's will, in accordance with the limits set out under Art. 23(2)(h): respecting the disposable part of the estate, reserved shares and other restrictions on the disposal of the property upon death.

Another important part of the SR concerns the recognition and enforcement of judgments, acceptance and enforceability of authentic instruments and of other administrative documents.

This matter is regulated by Article 39 and subsequent articles (judgments).

Instead, Art. 59 and subsequent articles deal with authentic instruments.

The main rules are, in short, the following:

- for the acceptance of authentic instruments, apostilles or legalisation are no longer necessary;
- regarding the enforcement of authentic instruments, there is no longer the duty to request an "exequatur" for the act abroad, providing that a certificate is drawn up in the country where the act was received (as it already existed for uncontested claims) (this for civil and commercial matters).
- for the recording or transcription of notarised acts in registers (Mortgage Registry – Grundbuch), it will always be necessary to respect the national rules for the transfer of real property (Art. 1 and 69).

1.5. The European Certificate of Succession.

The European Certificate of Succession (hereinafter "ECS") is the main innovation of the SR.

The ECS is provided for under Article 62 and subsequent articles, to allow the beneficiaries of a succession (heirs and legatees) and the executors and administrators of a succession to easily prove their status of heir or legatee and exercise their succession rights (Art. 63).

The ECS is provided for to secure contacts with third parties (banks- administrations) concerning the succession.

It is a probative instrument for heirs and legatees. But the Certificate is not a title of property in itself.

It is a valid document for the recording of a succession property in a land register. The certificate does not make it superfluous to comply with national provisions on the recording of rights tied to real property, to be recorded in a register in accordance with national law [Art. 69 and 1 (k) and (l)]. It does not replace the sharing-out of the estate, nor the issue of enforcement of a legacy. It merely provides indications as to the succession.

A model has been prepared within the European Commission: all the information set out under Article 65.3 will be included in the ECS, after having duly checked them on the basis of documents and statements (Art. 66).

The validity of ECS is 6 months (Art. 70.3). It is not a compulsory document – it is an optional instrument, which however is strongly recommended; one can therefore also use a national succession certificate (if the national authority is competent to issue it).

1.6. Relationship With Existing International Conventions

Conventions concluded before the EEC Treaty entered into force are basically not affected by the law of the Union (see Art. 351 TFEU).

The "area of justice" which also covers Art. 81 TFEU, that is the legal basis of the SR, has been classified as one of the shared competences of the European Union [Art.4(2)(j) TFEU]. However, the jurisprudence of the European Court of Justice with regard to the implied external competence plays an important role in determining the scope of the Member States' ability to conclude bilateral and multilateral international agreements. In several

judgments and opinions, the Court has stressed that the Union has an implied external competence if participation in international commitments is necessary to achieve a given objective within common policies, provided that the Union already has internal legislative competence.

It is doubtless that the SR establishes a unified and coherent system in succession matters. Consistent application of the SR is necessary for the proper functioning of the system. Therefore, the Union will have the exclusive external competence in matters covered by the SR. Accordingly, the Member States will have no authority to conclude further treaties so as to supersede the outdated rules with modern principles of private international law in matters of succession.

Under Art. 75, existing international agreements between the Member States and third States that cover matters of succession are not affected by the SR.

2. THE APPLICABLE LAW

2.1. The Habitual Residence General Criterion

To determine the law applicable to succession, the SR introduces the general criterion of the habitual residence of the deceased at the time of death.

Under Article 21 of the SR, «Unless otherwise provided for in this Regulation, the law applicable to the succession as a whole shall be the law of the State in which the deceased had his habitual residence at the time of death.»

It is useful to make a reference to the opinion of Advocate General M. Campos Sánchez-Bordona, presented on March 26th, 2020 to the ECJ in the EE. case no. 80-19.

The SR does not provide any definition of habitual residence in its text, and the content of the expression "habitual residence" has to be determined autonomously. It does not refer to the concepts used to designate this same phenomenon in national law. Failure to do so would jeopardise the uniformity of application of the Regulation, leaving room for different opinions of the authorities responsible for applying it.

Thus, in the context of the SR, habitual residence merely indicates that it should reveal a "close and stable connection" with a State. It must be assessed in the light of the specific objectives of this Regulation, which are listed in recital 7 of the SR.

All legal practitioners will therefore have to identify the deceased's last habitual residence in that perspective and, hence, in the light of the indications given to him by the SR, using the others connecting factors only in a subsidiary manner.

Anyway, recital no. 23 of the SR provides for useful criteria to determine the habitual residence. Recital 23 reads that «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.»

To synthesize:

(a) Overall assessment of the circumstances of the life of the deceased during the years preceding his death and at the time of his death.

(b) Duration and regularity of the deceased's presence.

(c) Conditions and reasons for that presence.

Therefore, legal professionals have to check the duration of the presence, the deceased will to remain (animus manendi), the relevant contact points of the case – such as home and family and personal contacts – his/her social activities and friends, the language spoken, any business interests and typology of assets (movable, immovable, intangible assets, bank accounts, remittances to family members in the country of origin).

It might happen, however, that no evidence is found of a stable and long-term presence of the deceased in a particular State.

These cases are described in recital 24 of the SR: «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.»

Basically, these cases may regard a professional choice which led the person to move abroad, but without changing "the centre of interests of his family and social life", or the de cuius may also have lived in several States, without having consolidated a stable connection with any of them.

In such cases, the following criteria may be used:

(a) personal element (the nationality of the deceased);

(b) economic element (the place where his main assets are located)

Anyway, the nationality of the deceased and the location of his assets are factors determining his habitual residence on a subsidiary basis.

2.2. The Escape Clause

The SR also includes a provision (Art. 21(2)) concerning the situation in which the deceased was manifestly more closely connected with a State other than the State of his last habitual residence: «Where, by way of exception, it is clear from all the circumstances of the case that, at the time of death, the deceased was manifestly more closely connected with a State other than the State whose law would be applicable under paragraph 1, the law applicable to the

succession shall be the law of that other State.»

The rationale of this escape clause is unclear, and its scope of application is limited. Since the determination of the habitual residence already requires an overall assessment of the circumstances of life of the deceased (Recital no. 23 sentence 2), it is hard to understand how even more justice could be done in the individual case by applying the escape clause.

An explanation of the situation designed in Article 21(2) is offered by Recital 25: «With regard to the determination of the law applicable to the succession the authority dealing with the succession may in exceptional cases – where, for instance, the deceased had moved to the State of his habitual residence fairly recently before his death and all the circumstances of the case indicate that he was manifestly more closely connected with another State – arrive at the conclusion that the law applicable to the succession should not be the law of the State of the habitual residence of the deceased but rather the law of the State with which the deceased was manifestly more closely connected. That manifestly closest connection should, however, not be resorted to as a subsidiary connecting factor whenever the determination of the habitual residence of the deceased at the time of death proves complex.»

3. THE CHOICE OF LAW

The SR allows the choice of the law applicable to the succession. The relevant provisions are in Article 22, which reads:

«1. A person may choose as the law to govern his succession as a

whole the law of the State whose nationality he possesses at the time of making the choice or at the time of death.

A person possessing multiple nationalities may choose the law of any of the States whose nationality he possesses at the time of making the choice or at the time of death.

2. The choice shall be made expressly in a declaration in the form of a disposition of property upon death or shall be demonstrated by the terms of such a disposition.

3. The substantive validity of the act whereby the choice of law was made shall be governed by the chosen law.

4. Any modification or revocation of the choice of law shall meet the requirements as to form for the modification or revocation of a disposition of property upon death.»

4. THE IMPLIED CHOICE OF LAW

Under Article 22 of SR 2, the choice of law shall be made expressly in a declaration in the form of a disposition of property upon death or shall be demonstrated by the terms of such a disposition.

To infer an implicit choice of law can be difficult. Recital 39 indicates some elements to be taken into account.

Such elements include:

a) Reference to specific provisions of the law of the State of his nationality (e.g. a testamentary trust by a British national).

b) Language.

c) Drafting of the will by the notary of the State whose law is implicitly chosen.

d) External circumstances (confirmative of the choice).

The opinion of the Advocate General in the E.E. Case C-80/19 give us further clarifications.

The Advocate General believes that the professio iuris cannot be inferred from elements outside the testamentary disposition itself. Thus, factors external to the testamentary disposition (such as, for example, the testator's moving to a particular country to draw up the will, the nationality of the intervening authority or the law applicable to it) are not decisive. They may be used as arguments ad abundantiam, i.e. in support of the conclusion as to whether or not the choice of law resulting from the testamentary provision itself exists.

The meaning of the expression «demonstrated by the terms of such a disposition» is that the deceased referred to specific provisions of the law of his State of nationality or otherwise mentioned that law. A comparison with the law of habitual residence, as the default law, will be necessary to establish to what extent those provisions are typical only of the system whose choice is being discussed.

The interpretative problems, anyway, remain.

For example, would the deceased really choose (implicitly) the law or did he dispose that way because believed that that was the law?

On the other hand, the Article 22 reads "demonstrated by the terms", so it is generic compared to formulas used in other EU acts

(which use terms such as “clearly” or “unambiguously”).

To conclude, it is possible to believe that Article 22 provides for a fiction of law, because those who want to choose the law should do so expressly.

5. LAW APPLICABLE TO THE FORMAL AND SUBSTANTIVE VALIDITY OF THE PROFESSIO JURIS

The SR provide for the autonomy of the provision about the choice of law compared with the other disposition upon death [see also Article 3 (1) (c)].

This means that the assessment of the choice of law provision is independent from the other clauses contained in the will, even when they are contained in a single document.

Another distinction shall be made between substance and admissibility of the choice of law.

The admissibility of the choice derives from the conflict rule, which confers the power of choice.

See Recital 40: «A choice of law under this Regulation should be valid even if the chosen law does not provide for a choice of law in matters of succession».

Thus, if the law resulting from the application of the conflict rule allows the choice, it is valid even if the power of choice is not allowed by the foreign law that is the object of the designation.

Example: the Italian/English citizen can choose the English law even if it does not allow the professio juris.

The substance concerns, instead:

a) The process of formation of the will of the author (absence of vices and other forms of interference).

b) Capacity, representation, and interpretation (under Article 26 applied by analogy for identity of ratio and to avoid gaps).

Under Article 22 (3), the law applicable to the substance is the same law to be chosen.

6. LAW APPLICABLE TO THE MODIFICATION OR REVOCATION OF THE PROFESSIO JURIS

As to form will be relevant Article 22(4): «shall meet the requirements as to form for the modification or revocation of a disposition of property upon death.» and Article 27(1) and 27(2) regarding formal validity of dispositions of property upon death made in writing (rule of conflict about the formal validity of mortis causa dispositions).

Thus, under Article 27 (2), the modification or revocation shall also be valid as regards form if it complies with any one of the laws according to the terms of which, under paragraph 1, the disposition of property upon death which has been modified or revoked was valid.

The law applicable to the substantive validity of the act amending a previous law chosen is that of the law chosen initially and not the new law (see Recital 40 and Article 22(3)).

Another question is whether the revocation of the will is an implicit revocation of the choice of law?

Probably not, because Article 22(4), expressly excludes implicit revocation (unlike Article 22(2), which allows implicit choice) and Article 27 concerns written provisions. But, is strongly advisable to regulate in the deed of revocation of the will the treatment of the choice of law.

Finally, as to the effects of "legal" revocation of dispositions of property upon death on the professio juris, is likely to believe that it does not overwhelm the professio juris.

In fact:

a) this type of revocation serves to protect the interests of certain persons and does not concern the problem of the chosen law;

b) the SR does not contain any standards.

c) the laws that provide for the "legal" revocation do not provide for its extension to the professional (also because in many of these countries it is not allowed);

d) the application of the chosen law could continue to respond to the intention of the person concerned.

7. THE CHOICE OF LAW BEFORE THE SR ENTERED INTO FORCE AND THE TRANSITIONAL PROVISIONS

It is important to highlight that a choice of law was also possible before the entry into force of the SR.

In this situation, the transitional provisions of Article 83(2) apply, which read that «If the deceased had chosen the law applicable to his succession before 17 August 2015, that choice shall be valid

if it satisfies the conditions set out in Chapter III or if it is valid in the application of the rules of private international law in force at the time of the choice in the state in which the deceased had his habitual residence or in any of the States of which he possessed the nationality.»

The aim of the aforementioned provisions is to attribute an effect to the choice of one of the laws referred to in Article 22, even when the systems of conflict closest to the deceased in force at that time did not allow such choice. It retains effect to the choice of laws other than those referred to in Article 22, even when the admissibility of the choice was assessed on the basis of the Regulation.

Below is an example to clarify the above provisions.

Could an Italian national residing in France have chosen Italian law in 2014?

Italy allowed to choose the law under Art. 46 of law 31 May 2015 no. 2018, but only the law of the place of residence (France). Conversely, France did not allow the choice of law.

Under Article 83.2, the Italian national may choose the Italian law as the law applicable to the succession because it is the law of the nationality.

However, the choice of the Italian law will only be effective if he dies on or after the 17th of August 2015, otherwise the conflict rules between Italy and France existing prior to that date will apply.

8. THE "DEEMED" CHOICE OF LAW

Under Article 83 (4) «If a disposition of property upon death was made prior to 17 August 2015 in accordance with the law which the deceased could have chosen in accordance with this Regulation, that law shall be deemed to have been chosen as the law applicable to the succession.»

The purpose of the rule is to keep the successions which would have been subject to the law of nationality under the connecting factor in force in the country of the deceased at the time when the will was drawn up, even if there does not appear to be any formal choice of law.

It is assumed that the deceased also wished to submit his succession to additional national rules.

Article 83 (4) introduces a "fiction" of law and, as it has also been stated by the Advocate General in her aforementioned opinion, it eliminates the need to ascertain whether, in a will drafted before 17 August 2015, there was a choice of law, where this is not clearly apparent from the text (in which case Article 83(2) must be taken into account), provided, of course, that the condition laid down in that provision is met.

Be that as it may, the opinion of the Advocate General shall be confirmed by the ECJ.

CASE 1

Carlo (Italian citizen) is married to Jennifer (Canadian citizen of Ontario).

They have two adult children: Filippo (who lives in Italy), and Paul (who lives in Toronto), with whom they have no relationship.

Carlo and Jennifer have been travelling continuously between Toronto, Como and Cap Ferrat (France - Côte d'Azur) since they sold their company 10 years ago, spending similar periods of time in each location.

Over time, they have established their main friendship relationships in France with people from different countries.

Carlo and Jennifer mainly and fluently speak English and Italian; they don't know much French.

Their assets (in common) are located in Switzerland (current accounts and financial assets, € 100 million), Toronto (real estate, € 2 million), Bellagio - Italy (real estate, € 2 million) and Cap Ferrat (real estate, € 25 million).

How to determine the habitual residence of Carlo and Jennifer?

ANSWER

Habitual residence is complicated to be determined, but could be located in France, giving more emphasis to the real estate present there and to the main centre of their social relations.

CASE 2

Herr Müller, a German national, has been an official at the Council of Europe until his death. He lived in Strasbourg and he has just died there.

As Herr Müller was a posted worker, how to determine his closest links in order to establish his habitual residence?

ANSWER

The habitual residence may be determined as being in Strasbourg and it is, therefore, French law that the objective connection clearly indicates as applicable to his succession.

CASE 3

James is a 60 years old Hungarian citizen and a businessman. The headquarters of James' firm are located in Budapest, Hungary, while a subsidiary firm is in Spain, Madrid. Because of his work, he commutes a lot between the two countries.

James is not exactly a model of loyalty, because he has two families in two countries, but these two families don't know about each other. James met with the young Katarina from Budapest in 2010, and he married her in August 2011, but two months after this, during his business travel he got to know the Spanish Selena, whom he met in Madrid, and in a sudden passionate moment of his, he married her as well, in the summer of 2012 in front of a Spanish registrar.

He has one child from both marriages, and for 6 years he succeeded to hide the two families from each other.

After a very short serious illness, on 8 November 2018 he died. The death came with a lot of surprises and question of succession.

His assets are two family houses, one in Hungary and one in Spain.

Where was his habitual residence at the time of his death?

DISCUSSION AND ANSWER

First of all, and undoubtedly, the second marriage of James is null and void because he was already married, and European countries do not allow double marriage (in some countries, e.g. Italy, it is also a crime). Therefore, at the time of death, James should be considered as having only one wife and two children (but, of course, the second marriage needs to be declared null and void by a court).

As far as the determination of his habitual residence is concerned, the question is to find a "close and stable connection" with a State, also considering that he commuted between two countries.

As clarified also by Recital 23, various elements have to be assessed to determine the habitual residence at the time of death.

(a) Overall assessment of the circumstances of the life of the deceased during the years preceding his death and at the time of his death.

(b) Duration and regularity of the deceased's presence.

(c) Conditions and reasons for that presence.

Therefore, legal professionals have to check the duration of his presence, his will to remain (animus manendi), the relevant contact points of the case, such as home, family and personal contacts,

his social activities, his friends, the language spoken, his business interests, and the typology of assets (movable, immovable, intangible assets, bank accounts, remittances to family members in the country of origin).

However, in complex cases (as that of James may be), the following criteria may be used:

(a) personal element (the nationality of the deceased);

(b) economic element (the place where his main assets are located).

These factors are relevant: the headquarters of James' firm are in Hungary; James his a Hungarian national and was married in Hungary; his second marriage is certainly null and void.

All these factors may lead to state that James' habitual residence at the time of death was in Hungary.

CASE 4

On 10.4.2019 Giovanni, an Italian citizen who is habitually resident in Spain and owns a property in Italy, intends to choose Italian law as the law governing the succession of the above-mentioned property only.

Is this possible?

ANSWER

No, it is not, because the applicable law must govern the succession as a whole, under Article 21(1) of the SR.

CASE 5

A couple living in London would like to make two mutual wills. The husband is English, the wife was born in Germany and has a German passport. The wife left Germany as a child, has no property in Germany and is not expected to inherit any. The wife has a bank account in Belgium, and there is a slight possibility that she may inherit real estate in Belgium. Apart from this, all of her assets, including the co-owned assets, are located in the UK.

The wife wants to leave everything with her husband.

DISCUSSION AND ANSWER

In this case, the private international law of the UK and Belgium are relevant.

If the wife is domiciled in the UK, her national law (German) will not be relevant.

Under the SR, Belgium will apply the law of the last habitual residence (the UK) since August 17th, 2015. The UK will apply Belgian law only to real estate in Belgium, and this renvoi will be accepted if the deceased has real estate in Belgium. Movable property in Belgium will be subject to the law of the "domicile" (in the UK meaning of the term).

The wife can only choose German law (but it will be irrelevant, as she does not own assets in Germany).

CASE 6

Carlo is an Italian citizen.

For a number of years, he has been habitually resident in London, where he has his home (according to the English meaning of the term) and works as a conductor.

He owns movable and immovable property in London and immovable property in Italy.

He wishes to plan his succession by choosing the English law as the succession governing law.

DISCUSSION AND ANSWER

Under Articles 21 (1) and 4 of the Regulation, the English law will apply to the entire succession, and the English judge will have jurisdiction over the whole succession.

However, according to the English PIL, the law of domicile will apply to the succession of movable property and the lex rei sitae to the succession of immovable property.

Therefore, the English PIL will make renvoi to the Italian law for immovables located in Italy. Italy will accept the renvoi under Article 34 of the Regulation (because the UK is not a "Member State", i.e. it is a country "not bound" by the Regulation).

In order to avoid renvoi to the Italian law, could Carlo make a choice of law (i.e. choose English law)?

This choice of law is not allowed by Article 22 of the Regulation (Carlo is an Italian citizen, not a British one).

Could it be useful for Carlo to choose the English law as the law of his habitual residence?

The choice of English law would exclude the implicit choice of Italian law (national law), that being a “negative” choice of law.

The choice of the English law could help to clarify that Carlo’s habitual residence is in England.

Would the professio iuris in such circumstances exclude the application of Italian law to immovables located in Italy?

In order to apply English law to property located in Italy, Carlo would have to acquire English citizenship, but this could be seen as a fraud to the law, aimed at frustrating the expectations of his forced heirs.

CHAPTER 4

"TWIN" REGULATIONS 1103-1104/ 2016

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The Chapter will examine the main features of the "Twin" Regulations 1103-1104/ 2016 and the innovations they bring to the rules of private international law of the participating States.

The presentation of the rules introduced by the Regulations will be accompanied by practical examples, so as to enable operators to identify the rules themselves and their characteristics immediately.

In particular, they will set out the general criteria for identifying the law applicable to the matrimonial property regime and the property consequences of registered partnerships in the absence of choice of law, the opportunities that the two Regulations offer to couples as to the rules governing their assets in the event of marriage or registered partnership, and the provisions on jurisdiction.

1. INTRODUCTION

According to the European Commission, there are currently some 16 million international couples in the European Union. That means that cross-border family issues are likely to happen frequently. In fact, statistics show that the number of international divorces and separations has increased in the EU in the last few years. For example, Denmark, Latvia, Lithuania, and Portugal are the countries with the most divorces per year in the EU.

At the same time, legal alternatives to marriage, like registered partnerships and others, have become more widespread and national legislations have changed to confer more rights on unmarried and same-sex couples.

In 2017, 13 of the 28 Member States regulated same-sex marriages. This supposes a potential increase of marriages in the EU and a greater likelihood - correlative to this increase - of legal separations and divorces in the States where they are possible.

Considering the above, the interest of the EU legislator is justified in providing a uniform response throughout this field with instruments such as the Regulations no. 1103 and 1104 of 2016.

Therefore, on 24 June 2016, the EU Council, following certain Member States' wish to establish enhanced cooperation between

themselves within the framework of the Union's non-exclusive competences and to exercise those competences by applying the relevant provisions of the Treaties, adopted the two Regulations aimed at establishing common rules on jurisdiction, applicable law, and the recognition and enforcement of decisions in the area of property regimes for international couples, covering both marriages and registered partnerships. The two Regulations entered into application on 29 January 2019.

The above-mentioned common rules fill an important gap in the area of Union private international law. They complement and allow the full operation of other Union instruments applicable in private international family law, in particular those dealing with succession and divorce.

The policy objective is to clarify the rules applicable to property regimes for international married couples and registered partnerships, in order to avoid parallel and possibly conflicting procedures in different EU Member States, for instance on property or bank accounts.

These instruments complement two other existing instruments in matrimonial matters namely

- Regulation (Brussels II bis) 2201/2003 (under revision at the moment) regarding jurisdiction and recognition of decisions in matters of annulment, separation or divorce.
- Regulation (Rome III) 1259/2010 regarding applicable law to divorce and separation.

By referring to Article 81.3 of the Treaty on European Union as its legal basis, the regulations acknowledge that their subject matter belongs to family law – a special legislative procedure.

The Regulation has been adopted under the special regime of enhanced cooperation, as provided for by Article 20 of the Treaty on European Union (TEU) and by Articles 326 to 334 of the Treaty on the functioning of the European Union (TFEU), authorized by Council Decision (EU) 2016/954 of 9 June 2016

This means that only the EU Member States which have declared their wish to participate in the enhanced cooperation are bound by the Regulation. The others will continue to apply their national law (including their rules on private international law). Enhanced cooperation acts are not regarded as part of the acquis, which has to be accepted by candidate countries for accession to the Union.

To date, 18 Member States are participating in the enhanced cooperation; however, Member States can join it any time.

Two different instruments have entered in force on 29 January 2019:

- Regulation 2016/1103 of June 24th, 2016 implementing enhanced cooperation in the areas of jurisdiction, applicable law, and the recognition and enforcement of decisions in matters of matrimonial property regimes.
- Regulation 2016/1104 of June 24th 2016, implementing enhanced cooperation in the areas of jurisdiction, applicable law, and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships.

2. REGULATION NO. 1103/16: A GENERAL OVERVIEW

The Regulation clarifies which national court is competent to help couples manage their property or distribute it between them in the event of the dissolution or annulment of the partnership, or of the death of one of the partners (jurisdiction rules).

It clarifies which law shall apply when the laws of several countries could potentially apply to the case (rules on applicable law).

It facilitates the recognition and enforcement in one Member State of a judgment on property matters given in another Member State.

The Regulation does not deal with substantive rules on the definition of a registered partnership, with the requirements to conclude a registered partnership, or the rights and obligations derived from a registered partnership. It does not concern the recognition of the civil status of the partners as such.

These issues will continue to be governed by the national law of each Member State. Furthermore, the regulations do not require a Member State to recognise a registered partnership concluded in another Member State, as an appropriate safeguard to take into account the legal traditions of the different Member States.

Regulation no. 1103/16 does not include a definition of "marriage", because it is a Regulation whose purpose is to solve the conflicts of law and not to harmonize the substantial law of the participating countries.

Instead, Regulation no. 1104/16 includes a definition of *"registered partnership", but only for the purposes of the Regulation itself: "regime governing the shared life of two people which is provided*

for in law, the registration of which is mandatory under that law and which fulfils the legal formalities required by that law for its creation".

The reason for this is that de facto cohabitation is not covered by the Regulation.

Regulation no. 1103/16 has a temporal scope and a territorial scope.

As to the temporal scope, under Article 69.1, the Regulation shall only apply to legal proceedings instituted, to authentic instruments formally drawn up or registered, and to court settlements approved or concluded on or after January 29th, 2019, subject to paragraphs 2 and 3.

As to the territorial scope the Regulation, it should be binding and directly applicable only in the Member States that participate in enhanced cooperation, by virtue of Decision (EU) 2016/954, namely Belgium, Bulgaria, the Czech Republic, Cyprus, Germany, Greece, Spain, France, Croatia Italy, Luxembourg, Malta, the Netherlands, Austria, Portugal, Slovenia, Finland, and Sweden.

The scope of the Regulation should include all civil-law aspects of matrimonial property regimes, both the daily management of matrimonial property and the liquidation of the regime, in particular as a result of the couple's separation or of the death of one of the spouses.

The Regulation does not apply to:

- Revenue, customs, and administrative issues.
- Legal capacity, existence, validity or recognition of marriage/ registered partnership, maintenance obligations, succession,

social security, rights to retirement or disability pension.

– The nature of rights in rem relating to any property. Recital 24 clarifies that the Regulation should allow for the creation or the transfer resulting from the matrimonial property regime of a right in immovable or movable property, as provided for in the law applicable to the matrimonial property regime. It should, however, not affect the limited number ('numerus clausus') of rights in rem known in the national law of some Member States. A Member State should not be required to recognise a right in rem relating to property located in that Member State if the right in rem under consideration is not known in its law.

- Any recording in a register of rights in immovable or movable property, including the legal requirements for such recording, and the effects of recording or failing to record such rights in a register.

Recital 27 clarifies that the requirements for the recording a right in immovable or movable property in a register, should be excluded from the scope of this Regulation. It should therefore be the law of the Member State where the register is kept (for immovable property, the lex rei sitae) that determines under what legal conditions, and how, the recording must be carried out and which authorities, such as land registers or notaries, are in charge of checking that all requirements are met, and that the documentation presented or established is sufficient or contains the necessary information.

In particular, the authorities may check that the right of a spouse to a property mentioned in the document presented for registration is a right that is recorded as such in the register, or which is otherwise

demonstrated in accordance with the law of the Member State where the register is kept.

In order to avoid duplication of documents, the registration authorities should accept such documents, drawn up in another Member State by the competent authorities, whose circulation is provided for by the Regulation.

This should not preclude the authorities involved in the registration from asking the person applying for registration to provide such additional information, or to present such additional documents, as are required under the law of the Member State in which the register is kept, for instance information or documents relating to the payment of revenue. The competent authority may indicate to the person applying for registration how the missing information or documents can be provided.

Moreover, Recital 28 adds that the effects of the recording of a right in a register should also be excluded from the scope of this Regulation. It should therefore be the law of the Member State in which the register is kept that determines whether the recording is, for instance, declaratory or constitutive in effect. Thus, where, for example, the acquisition of a right in immovable property requires recording in a register under the law of the Member State in which the register is kept, in order to ensure the erga omnes effect of registers or to protect legal transactions, the moment of such acquisition should be governed by the law of that Member State.

Both Regulations also include:

- an article on fundamental rights

- a specific reference to Article 21 of the EU Charter on the principle of non-discrimination.

The specific reference to the Charter of Fundamental Rights recalls that a Member State cannot discriminate when a couple requests the recognition and enforcement of a decision given in another Member State.

3. THE RULES ON JURISDICTION

Firstly, it is worth remembering that, just as Regulation 650/12 on successions, the two Regulations contain a definition of Court: judicial authority and other legal professional acting as, or on behalf of, a court.

This means that notaries, who often deal with property regime matters, if acting as, or on behalf of, a court, are subjected to jurisdictional rules.

The main principle is the unity of the court: various related procedures are handled by one court.

In case of death, the court having jurisdiction over the property consequences of the registered partnership is the same court as that having jurisdiction under Regulation 650/2012 on the succession of the deceased partner (Article 4).

In case of dissolution/annulment of the registered partnership, the court having jurisdiction is the same court as the court having jurisdiction over the dissolution or annulment of the partnership (Article 5).

In other cases (e.g. change of the property regime of the registered partnership), a list of connecting factors will apply in order of precedence (Article 6):

– the common habitual residence of the partners,

– the last common habitual residence,

– the habitual residence of respondent,

– the common nationality of the partners,

– the place where the registered partnership was created.

In order to increase legal certainty, predictability, and the autonomy of the parties, in cases covered by Article 6, Article 7 of the Regulation gives the parties the possibility to agree that the courts of the Member States whose law is applicable in accordance with the Regulation or under whose law the registered partnership was created, shall have exclusive jurisdiction to rule on the property consequences of their registered partnership. Such an agreement should be expressed in writing, dated, and signed by the parties. Any communication by electronic means providing a durable record of the agreement, shall be deemed equivalent to writing.

Article 9 deals with alternative jurisdiction.

As specified before, the Regulation does not impose the recognition of a registered partnership concluded in another EU Member State. The existence, the validity, and the recognition of a partnership fall outside the scope of the Regulation.

Member States that do not know registered partnerships, may not want to deal with the property consequences of couples bound by

such institutions. The Regulation entitles the courts of a Member State that does not recognise a registered partnership to decline jurisdiction to hear disputes about the property consequences of such couples.

This accommodates those Member States, but also avoids a couple from finding itself before an authority that may either refuse to admit their request, or may rule on their property disregarding the status of their property as property in a registered partnership (thus treating the couple as ordinary citizens that have joint ownership of the property).

In order to ensure that such couples have access to justice, the Regulation allows them to go to any other court that would have jurisdiction in accordance with the Regulation.

The possibility to decline jurisdiction for Member States that do not know the registered partnership institution is balanced by the obligation on those Member States to recognise and enforce in their territory a decision obtained by the couple in another Member State (for example, because the couple may have assets in the Member State where recognition or enforcement is sought).

The connecting factor of the locus celebrationis is also used by the same Regulation in matters of jurisdiction, in the sense that, in the absence of the grounds of jurisdiction already described earlier for spouses, jurisdiction shall lie with the courts of the Member State under whose law the registered partnership was created.

4. THE APPLICABLE LAW AND THE CHOICE OF LAW

In the absence of any agreement pursuant to Article 22, and with a view to reconciling the need for predictability and legal certainty with the consideration of the life actually lived by the couple, the law applicable to the property consequences of registered partnerships shall be the law of the State under whose law the registered partnership was created.

Nevertheless, one of the partners can ask a court that the law applicable should be the law of another State where (a) the partners had their last common habitual residence for a significantly long period of time; and (b) both partners had relied on the law of that other State in arranging or planning their property relations.

To facilitate partners' management of their property, the Regulation authorises them to choose the law applicable to the property consequences of their registered partnership, regardless of the nature or location of the property, among the laws with which they have close links:

(a) the law of the State where the partners or future partners, or one of them, is habitually resident at the time the agreement is concluded

(b) the law of a State of nationality of either partner or future partner at the time the agreement is concluded, or

(c) the law of the State under whose law the registered partnership was created.

However, in order to avoid depriving the choice of law of any effect and thereby leaving the partners in a legal vacuum, such

choice of law should be limited to a law that attaches property consequences to registered partnerships. This choice may be made at any moment, before the registration of the partnership, at the time of registration of the partnership, or during the course of the registered partnership.

The applicable law will govern issues such as:

- responsibility of one couple's member for debts of another member;
- rights and obligations of couple's members regarding property;
- distribution of property;
- property relationship between a couple's member and third parties.

The connecting factor of the locus celebrationis is also used by the same Regulation in the matter of professio iuris, in the sense that, in addition to the same laws made available to spouses under Article 22 of Regulation 2016/1103, the partners may choose, as the law regulating their property relations, the lex loci celebrationis [Article 22, paragraph 1 (c) of Regulation 2016/1104].

5. THE RECOGNITION, ENFORCEMENT, AND ENFORCEABILITY OF DECISIONS

In line with the other EU instruments in the field of judicial cooperation in civil matters, the aim of these provisions is to ensure the free circulation of decisions, authentic instruments, and court settlements concerning matrimonial property regimes.

The Regulation establishes a uniform procedure based on the rules of Regulation 650/2012 on succession and wills. There is no special procedure required for the recognition in the other Member States of a decision given in a Member State.

Limited grounds for the refusal of recognition (Article 37) - In line with other EU instruments in civil matters, a limited number of grounds for refusal exists.

No review as to substance (Article 40)

Under no circumstances may a decision given in a Member State be reviewed as to its substance.

Enforcement of decisions.

A unilateral procedure to obtain the declaration of enforceability governed by the law of the Member State of enforcement is provided; this procedure is initially limited to the verification of documents.

Appeal is possible for both parties only on the grounds specified in Article 37

Authentic instruments and court settlements.

In order to take into account the different systems for dealing with matters of the property consequences of registered partnerships in the Member States, the Regulation guarantees the acceptance and enforcement in all Member States of authentic instruments and the enforcement of court settlements in matters of the property consequences of registered partnerships. 5

The basic rules are as follows (Articles 58-60):

- Authentic instruments shall have the same evidentiary effect as in the court of origin.
- The enforcement of authentic instruments and court settlements is the same as for decisions.

In short, the Regulation reiterates in the field of matrimonial property regimes the significant step forward made by the Regulation on successions, as it extends the simplified recognition regime – which up until now was only applicable to judicial decisions – to the evidentiary effects of the authentic instruments established in a Member State by civil law notaries.

This ensures the transnational circulation of the agreements entered into by spouses concerning their property relations, given that, in most Member States, such agreements have to take the form of notarial deeds.

PRACTICAL CASES

CASE 1

Mr. and Mrs. Leew, both Dutch nationals, established their common habitual residence in Germany, immediately after their marriage. Two years later, they moved to Amsterdam, where they lived for 15 years, with their matrimonial property regime being that of full community of property provided by Dutch law. When they retired, they decided to purchase a holiday home in Tuscany.

The Italian notary informed them that the applicable law to their matrimonial regime is not Dutch law, but German law, which has a default property regime of community of accrued gains (Zugewinngemeinschaft).

Is it possible for the couple to modify their property regime?

What happens if Mr. Leew purchases a cottage in Hungary (where purchase documents are usually drawn up by solicitors) and he is not informed of the applicable law, so he thinks the cottage is common property with his wife, and Ms Lee realized only after the death of her husband that German law has to be applied to their matrimonial property regime?

DISCUSSION AND ANSWERS

As to question 1, it is certainly possible for the couple to choose a different law applicable to their property relationship. The choice is permitted by Article 22 of the Regulation no. 1103/16, which enables spouses to choose:

« (a) the law of the State where the spouses or future spouses, or one of them, is habitually resident at the time the agreement is concluded; or

(b) the law of a State of nationality of either spouse or future spouse at the time the agreement is concluded. »

In the specific case, Dutch law may be chosen, either because it is the law of the State where the spouses are habitually resident or because it is their national law.

It is also important to recall that, under Article 22(3) and (4) « Unless the spouses agree otherwise, a change of the law applicable to the matrimonial property regime made during the marriage shall have prospective effect only» and that, in any case, «Any retroactive change of the applicable law under paragraph 2 shall not adversely affect the rights of third parties deriving from that law.»

As to question 2, it is certain that, pursuant to Article 26, the law applicable to the purchase is the German law, as it is the law of the State of the spouses' first common habitual residence after the conclusion of the marriage.

However, the Regulation provides for an exception in Article 26(3), which can only be raised before the court: «By way of exception and upon application by either spouse, the judicial authority having jurisdiction to rule on matters of the matrimonial property regime may decide that the law of a State other than the State whose law is applicable pursuant to point (a) of paragraph 1 shall govern the matrimonial property regime if the applicant demonstrates that:

(a) the spouses had their last common habitual residence in that other State for a significantly longer period of time than in the State designated pursuant to point (a) of paragraph 1; and

(b) both spouses had relied on the law of that other State in arranging or planning their property relations. »

Evidence of requirement (a) is easy to offer, because 15 years of residence in the Netherlands are objectively verifiable. It will be more difficult to give evidence that «both spouses had relied on the law of that other State in arranging or planning their property relations», because it depends on the intention of the parties.

CASE 2

In the context of a matrimonial property agreement, Mr. and Mrs. Schulze, Austrian nationals living in Brussels, established a separation of property regime under Austrian law.

Mrs. Schulze takes out a loan with a Belgian bank, without specifying her matrimonial property regime. What happens in the event of a non-repayment?

DISCUSSION AND ANSWER

The case poses two questions.

The first one is to determine the scope of the applicable law, that is governed by Article 27 of Regulation no. 1103/16, which reads the following:

«The law applicable to the matrimonial property regime pursuant

to this Regulation shall govern, inter alia: (a) the classification of property of either or both spouses into different categories during and after marriage; (b) the transfer of property from one category to the other one; (c) the responsibility of one spouse for liabilities and debts of the other spouse; (d) the powers, rights and obligations of either or both spouses with regard to property; (e) the dissolution of the matrimonial property regime and the partition, distribution or liquidation of the property; (f) the effects of the matrimonial property regime on a legal relationship between a spouse and third parties; and (g) the material validity of a matrimonial property agreement. »

Under Article 27, the applicable law governs the responsibility of one spouse for liabilities and debts of the other spouse.

This provision leads to the second question: whether the law applicable to the matrimonial property regime between the spouses, that does not provide the responsibility of one spouse for liabilities and debts of the other spouse, may be invoked or not against a third party.

In this specific case, it is possible to assume that the applicable law was the Belgian law under Article 26, par. 1, as it was the law of the State of the spouses' first common habitual residence after the conclusion of the marriage.

Then the spouses made an agreement under Article 22, par. 1, Subpar. (b), choosing the law of a State of nationality of either spouse or future spouse at the time the agreement is concluded.

Under Belgian law, spouses that have not concluded a marriage

contract are, as of the day of their civil marriage, subject to the statutory regime, which only entails community of the property acquired after the marriage has begun.

In addition, as a general rule, each spouse is liable for his/her own debts with his/her own estate (Article 1409 of Civil Code). Some exceptions to this general rule apply (Articles 1410 to 1412 of the Civil Code). In the event that it concerns a debt entered into by both spouses, it can be recovered both from the separate estate of each of the spouses and from their common property (Article 1413 of the Civil Code). A common debt can also be recovered both from the separate estate of each of the spouses, and from their common property, albeit with certain exceptions (Article 1414 of the Civil Code).

Conversely, in Austria, the legal matrimonial property regime is that of separation of property and, in principle, each spouse is liable only for the debts incurred by himself/herself individually.

In the case under consideration where the husband, who did not take out the loan is called to repay the debt he may invoke the lack of responsibility under Austrian law only if, as Article 28, par. 1, reads, «the third party knew or, in the exercise of due diligence, should have known of that law. »

Article 28 provides for a series of rules that lead to apply the law chosen (= Austrian law).

Anyway, under Article 28, par. 3, «Where the law applicable to the matrimonial property regime between the spouses cannot be invoked by a spouse against a third party by virtue of paragraph 1, the effects of the matrimonial property regime in respect of the

third party shall be governed: (a) by the law of the State whose law is applicable to the transaction between a spouse and the third party; or (b) in cases involving immovable property or registered assets or rights, by the law of the State in which the property is situated or in which the assets or rights are registered.»

Therefore, if Austrian law may not be invoked, Belgian law will apply as it is the law of the State whose law is applicable to the transaction between a spouse and the third party.

As a result, the husband could be liable for the repayment of the loan taken out by the wife.

CASE 3

Dennis, Dutch national and Katarina, German national entered into a registered partnership in the Netherlands in April 2019. After that, they lived in Amsterdam and had two children in 2020.

Which is the applicable law if they want to dissolve the registered partnership?

Which court has jurisdiction?

What is the role of habitual residence in this case?

DISCUSSION AND ANSWERS

To solve the case under consideration, it is important to bear in mind that the Regulation no. 1104/16 concerns the jurisdiction, applicable law, and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships.

Actually, under Article 2, par. 2, subpar. (b), the existence, the validity or the recognition of a registered partnership shall be excluded from the scope of the Regulation.

In the Netherlands, the Act of 6 July 2004 on Conflict of Law Rules for Registered Partnerships applies, whose Article 22 reads: «Whether a registered partnership that has been entered into in the Netherlands can be ended by mutual consent of the partners or through a dissolution and, if so, on what grounds, is governed by Dutch law ». Accordingly, as both partners are also habitual residents in the Netherlands, the Dutch court will be competent to rule about the dissolution.

In this case, under Article 5 of the Regulation, the Dutch court seized to rule on the dissolution or annulment of the registered partnership, shall have jurisdiction to rule on the property consequences of the registered partnership arising in connection with that case of dissolution or annulment, where the partners so agree.

Even if the partners do not agree, that court will be competent as well under Article 6, par. 1, subpar. (a) of the Regulation, which reads that «jurisdiction to rule on the property consequences of a registered partnership shall lie with the courts of the Member State: (a) in whose territory the partners are habitually resident at the time the court is seized ».

Being the partners habitual resident in Amsterdam, the court seized to rule on the dissolution of the partnership will also be competent to rule on the partnership property consequences.

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FOR EUROPEAN NOTARIES AND JUDGES

E. Ioriatti, D. Muritano, C. Oliver

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