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

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The Succession Regulation before the European Court of Justice and other interesting cases

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- The "Hallyday" case (Nanterre court)
- "Mahnkopf" (EU Court of Justice)
- Civil Cassation section II, 03/01/2020, n.18

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Today, some court decisions will be analysed and, even if they do not all come from the Court of Justice, they should also be considered an integral part of that process of harmonisation, unification and sharing of those models that characterizes the constant dialogue between the Courts of the Union with the aim of implementing the European law.

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- Art. 19, par. 1, first paragraph of the TEU:

- “The Court of Justice of the European Union includes the Court of Justice, the Tribunal and the specialized courts. It ensures respect for the law in the interpretation and application of the treaties ".

<Obligation to ensure and guarantee the uniform interpretation of EU law.>

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- National courts are also required to ensure the direct and immediate application of EU law in each system, in particular through:
- the functional interpretation of national law for the purposes of European law;
- the non-application of the domestic provision incompatible with European law;
- the provision of compensation of damages for individuals arising from an infringment of EU law by the State.

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- National judges can be defined as "natural judges" of the European Union, to protect the legal situations governed by the supra-state law.

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- The direct-applicability of European law in the Member States has been raised to an essential principle of the European system:
- consolidated jurisprudence of the Court of Justice (Van Gend & Loos, 1963; Van Duyn, 1974).
- Art. 288 TFEU: mandatory and direct applicability of regulations in the Member States.

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According to the principle of the non-application of the different domestic provision (as set out by the Court of Justice, Costa v. Enel, 1964), full effectiveness is ensured to EU law and internal measures that limit its effects are to be disapplied by the judges of the Member States.

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In our examination of the European Jurisprudence (intended in its broadest sense), concerning the European Certificate of Succession and the Regulation n. 650/2012, we will face three important decisions, one of the CGUE and two by national courts of two different Member States (France and Italy). The first pronouncements subject to explanation Is this concerning habitual residence.

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While not directly affecting the ECS, the first measure is still fundamental to contain or to detect the criterion of «habitual residence», which is of undoubted and fundamental interest for each Authority in charge of issuing the certificate, due to the absence of a definition in the Regulations.

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The ECS (European certificate of succession) was established at the Community level with Regulation (EU) no. 650/2012 and entered into force on 17th August 2015. According to art. 32 of Law 30 October 2014, n. 161, the Notary is the Authority competent for its issuing. It is intended to be used by heirs, legatees who have inheritance rights and by executors of the estate or administrators of the inheritance involved in a cross-border succession and who need to assert their status or exercise their rights as heirs, in another Member State.

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The habitual residence.

UE Regulation No.650/2012

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- First of all, it is appropriate to clarify the content of the notion of "habitual residence", which represents one of the main innovations introduced by the Regulation of the Council and of the EU Parliament n. 650/2012, commonly known as … "Succession Regulations".

The habitual residence criterion is the cornerstone of reference not only regarding the jurisdiction that regulate a succession with transnational implications, but also regarding the applicable law.

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In fact, the Courts of the Member State (or in any case the competent authority in the field of succession) where the deceased had his habitual residence at the time of death (which may not coincide with the place of the opening of the succession) shall have jurisdiction to rule on the succession as a whole, according to and for the purposes of art. 4 of the Regulation (general Jurisdiction).

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The applicable law to the whole succession indeed, will be that of the State in which the deceased had his habitual residence at the time of death, according to and for the purposes of art. 21, par. 1 of the Regulation (the reserve clause found in the beginning of the rule is necessary to clarify that other criteria also contribute to determining which is the applicable law, especially in the cases of professio iuris, i.e. "choice of law", in all the hypothesis in which the deceased had manifested *“ex testamento”* the will to submit his succession to the national law).

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The habitual residence criterion has been examined by the most authoritative European civil and notarial doctrine, and it has been clarified that it does not coincide with citizenship, nor with registered residence, but rather indicates the place where the main interests of the subject are located, whose legacy it is, and where he has consolidated his network of personal and work ties and relationships.

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Furthermore, the doctrine on the basis of the indicators that are present within Regulation 650/2012 (Recitals 23 and 24), splits habitual residence into a dual profile, objective and subjective. Where both profiles are positively verified, the habitual residence is proven.

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In particular, the link between the deceased and the State of presumed habitual residence must be ascertained in terms of the appreciable duration (objective quantitative element), the potential stability (objective qualitative element), as well as the intention to permanently establish it as their home (subjective element) .

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However, some authors point out that the subjective element maintains its autonomy with respect to the objective element and with respect to it can sometimes determine a dominant character.

to give an example: imagine the long-term stay or habitual tourist residence (Caius's holiday in his summer house in Spain for 8 months a year, every year). Despite the certainty of indicative elements due to the lasting and stable link with Spain, the absence of the subjective element, according to which Caius intends to establish his residence in Spain, can exclude habituality.

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The case in point is an example of the application of the habitual residence criterion, interpreted and valued in the light of the theory of objective and subjective elements.

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The Johnny Hallyday Case

Tribunal de Grande Instance de Nanterre

Ordonnance de Mise en Etat del 28 maggio 2019

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REFERENCE RULES: Art. 4 and Recitals 23 and 24 of Reg. 650/2012.

PRINCIPLE OF LAW APPLIED: The habitual residence criterion, divided into the objective and subjective components

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Art. 4 - General jurisdiction. The court 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.

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Recital 23

In view of the increasing mobility of citizens and in order to ensure the proper administration of justice within the Union and to ensure that a genuine connecting factor exists between the succession and the Member State in which jurisdiction is exercised, this Regulation should provide that the general connecting factor for the purposes of determining both jurisdiction and the applicable law should be the habitual residence of the deceased at the time of death. 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.

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Recital 24

In certain cases, determining the deceased's habitual residence **may prove complex.** Such a case may arise, in particular, where the deceased for professional or economic reasons had gone to live abroad to work there, sometimes for a long time, but had maintained **a close and stable connection with his State of origin.** In such a case, the deceased could, depending on the circumstances of the case, be considered still to have his habitual residence in his State of origin in which the centre of interests of his family and his social life was located. Other complex cases may arise where the deceased lived in several States **alternately** or travelled from one State to another **without settling permanently in any of them.** If the deceased was a national of one of those States or had all his main assets in one of those States, his nationality or the location of those assets **could be a special factor** in the overall assessment of all the factual circumstances.

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IN FACT AND IN LAW: Johnny Hallyday, pseudonym of Jean-Philippe Smet, died on December 5th, 2017 in Marne-la-Coquette at the age of 74 . One of the best known French artists of the twentieth century, his life and work promoted the image of France globally, and his career was distinguished by the countless awards and prizes he received in recognition from the music world.

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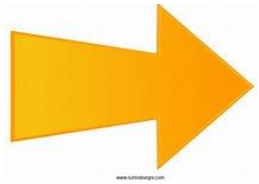
Protection  of legitimacy

According to French law, his heirs are the children, David Smet, born from the union with his first wife, Laura, born from a subsequent relationship, as well as the surviving spouse Laeticia Boudou in Hallyday and their two adopted daughters Jade and Joy. The de cuius resided alternately between France, where he went to visit his children Laura and David and to have medical treatment, and the United States, where he lived together with his wife Laeticia and his daughters Jade and Joy (who are perfectly integrated into the Californian social, school and work network).

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However, he had filed his will with a Parisian notary, with which he revoked any previous provision and indicated his wife Laeticia as universal heir in accordance with Californian law. In the event that she were to predecease him, the universal heirs, again according to Hallyday’s last wishes, would have been the couple's two adopted daughters. The French children were therefore excluded from the testamentary succession.

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The sons David and Laura, residing in France, challenged this will and asked the judge of Nanterre, territorially competent, not only to consider the adjudication that ousted them from the succession null and void, but also to declare the competence of French law to regulate the succession of the *de cuius* pursuant to art. 4 of Regulation 650/2012, since, they claimed in the appeal, that the habitual residence of the *de cuius* was France (whose legislation does not allow the legitimate heirs to be excluded from the successor expectations).

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The French judge proceeded to a very meticulous and detailed interpretation of the habitual residence criterion, in both the objective and subjective components. In particular, the judge cited Recitals 23 and 24, which act as a guiding criterion, and reconstructs the habituality of the residence of the deceased Hallyday, by evaluating the set of circumstances of his life, both in the years preceding death and at the time of death.

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The Court of Nanterre analyzed the arguments supported by both procedural parties which gave weight, each in its own way, to elements in favor of Hallyday's residence both in the United States and in France (basing them on the one hand, on his possession of an American Social security card and his real estate holdings in the United States, and on the other hand, to the medical treatments he underwent in France and to the Instagram posts he published from his country of origin).

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The Court declared, first of all, that the objective element (duration and regularity of the stay) referring to both the years preceding and at the time of death, indicated France as his habitual residence. On this point, the presence on social networks of the social and family life of the Hallyday spouses had significant weight in the evaluation of the judges.

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Regarding the subjective aspect (and therefore the motivations and intentions of the sojourns both on French and American soil) the judge, while acknowledging that it was not easy to prove the true intentions of the singer, observed the "professional" habits of the singer, showed he preferred almost exclusively to hold tours and concerts in France in front of his audience, so much so as to induce him to believe that the close and stable **link with France existed**. Furthermore, the center of the economic and financial interests of the deceased had been proven effectively to be **in France**, as his income was mainly generated there.

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Although it was not denied that Hallyday had spent time in Los Angeles, the judge felt that the time spent in the USA was due to a need to escape the pressure of the media, to regenerate, to listen to music and to find artistic inspiration: all reasons deemed insufficient to demonstrate the subjective element from which to deduce a true desire to permanently establish residence in the United States.

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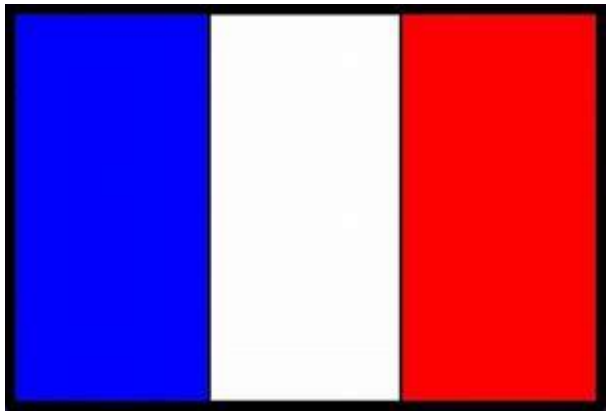
The succession of Johnny Hallyday should be governed by French law (although the unsuccessful parties have already announced that they want to appeal the pronouncement of Nanterre).



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But Nanterre's sentence is perhaps decisive for the French children due to the fact that they presented

an **Instagram geolocation table** of Laeticia and Johnny Hallyday. In fact, the lawyers demonstrated by analyzing the posts on instagram of the certified accounts of the rock star and his wife, that the couple spent most of the year in France.

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Sentence Mahnkopf

CGUE n. 558/16 del 1° marzo 2018

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REFERENCE RULES:
BGB: Art. 1371, Par. 1 and art. 1931
EU Regulation 650/2012: Art. 1, paragraphs 1 and 2, lett. D - Art. 67, par. 1 - Art. 68 - Art. 69

PRINCIPLES OF LAW APPLIED:
Principle of uniform application of EU law
Principle of the useful effect

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IN FACT AND IN LAW:

- Mr. Mahnkopf died on August 29th, 2015. At the time of his death he was married with a son and had his habitual residence in Berlin (Germany). Both of them were Germans

- The legal regime of communion between spouses, was limited, to the increase in property value during the marriage, and no marriage contract had been stipulated.

- In addition to the assets in Germany, the inheritance included 50% co-ownership with the spouse of a property in Sweden.

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The spouse applied to the Schönberg Tribunal *(*Germany) to issue a national certificate of Succession. The referring court acknowledged that the spouse is entitled, as an integration of the inheritance quota of ¼, according to German law, to an increment of ¼ as an increase for the legal regime of limited communion, due to the increase in property value during the period of matrimony.

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The spouse then turned to a notary to obtain the issue of a European Certificate of Succession that recognizes his rights and could be used to allow the registration of any inherited property in Sweden. The Notary submitted an application to the court, who responded negatively in consideration of the fact that art 1371 of the BGB concerns the matrimonial property regime, and not, the inheritance regime.

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Art. 1371 BGB: "When the property regime of the spouses ends, following the death of one of them, the balance of the capital increases, made in constant marriage takes place by increasing the inheritance quota by one quarter of the inheritance of the surviving spouse; to this-end, it is irrelevant whether or not the spouses have achieved a property increase in the individual case."

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Therefore, since the subject of property regimes is excluded from the field of succession regulation, according to art. 1, par. 2, letter d) of the same [“are excluded from the scope of this regulation: (...) questions regarding the matrimonial property regimes and property regimes of relationships deemed by the law applicable to such relationship to have comparable effects to marriage”] ,the increase of the further ¼ cannot be taken into account and cannot be indicated in the ESC.

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The lady, then appealed to the District Court of Berlin. The Court suspended the procedure and submitted the matter to the Court. In particular, the Berlin judge asked the **Court, whether the national rules governing matters relating to the property regime for the period, following the death of one spouse,** foreseeing an increase in the legal succession quota of the other, are or are not, included in the scope of application of the regulation 650/2012.

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If the answer to the first question is negative, the Court, therefore asks, whether Articles 68 letter l) and 67, par 1, of the Regulation must be interpreted as meaning that the hereditary share of the surviving spouse, even if it corresponds to a fraction that also includes an increase deriving from a national rule on property regimes (which, in fact, art 1371, par.1 of the BGB) can be fully registered in the European Succession Certificate.

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As we can see, Article 1, paragraphs 1 and 2, would clearly seem to consider that the Regulation applies only to successions due to death, and these do not include questions concerning the matrimonial property regime.

Art. 1 - Scope of application (Reg. 650/2012)

1. This regulation applies to succession due to death. It does not concern tax, customs and administrative matters.

The following are excluded from the scope of this regulation:

(...) d) matters concerning matrimonial property regimes and property regimes relating to relationships which according to the law applicable to the latter have effects comparable to marriage;

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However, art. 1371 of the BGB refers to the liquidation of a regime of marriage between spouses (and therefore to the discipline relating to the matrimonial property regime which is a matter excluded from the scope of the Regulation), but it concerns the liquidation of a matrimonial property regime which only works in the case of dissolution of the marriage in the case of death. The function, is to distribute the assets acquired during the marriage, at a flat rate, compensating for the disadvantage, that has arisen following the death of the spouse. In this way, with the legal status of the quota, you avoid having to count the composition and value of the assets at the beginning and end of the marriage.

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Such a ruling, would therefore, concern the succession of the deceased spouse more than the matrimonial property regime. Consequently, a rule of national law ends up relating to succession matters for the purposes of Regulation 650/2012.

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As already noted by the Advocate General, the return to the inheritance right of the share, due to the surviving spouse (by virtue of the provisions of art. 1371 BGB), allows information relating to that quota to be included in the european succession certificate, with all the evidentiary effects described in 'art. 69 of the Regulation (and therefore the presumption of accuracy of the qualities reported in the certificate and referring to the person indicated therein).

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The judges of the Court of Justice believe that the German national law (art. 1371 of the BGB), does not concern the division of assets between the spouses, but the question of the rights of the surviving spouse in relation to the assets already included in the estate. In this context, this provision appears to have as its main purpose, not the division of assets or the dissolution of the property regime, but the determination of the quantum of the share of succession to be attributed to the surviving spouse compared to the other heirs. According to the judges, such a provision therefore concerns mainly the succession of the deceased spouse and not the marital property regime.

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Consequently, a rule of national law such as that, at issue in the main proceedings, relates to succession matters for the purposes of Regulation No. 650/2012.

Therefore, an implementation of the principles of the uniform application of EU law and of the functional interpretation, to its objectives, this internal rule must be interpreted as meaning that it more effectively pursues European legislation and therefore the increase of the further ¼ will have to be taken into consideration, including it in the ECS.

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In conclusion, just think of the difficulties that would have arisen from the incompleteness of an ECS that did not include within it, the reference to the national law which attributes to the surviving spouse an increase in its share due to the dissolution of the marital regime following death.

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The Supreme Court

Cassazione civile sez. II, 3° of January 2020 n. 18

A domestic case law

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The last case concerning a problem of the applicable law, was sent to the First President of the Supreme Court, to assess the appropriateness to refer the case to the Joint Sections of the Supreme Court in order to rule on the following general issues of particular significance:

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- a) whether the substantive rules applicable, must operate on the basis of the foreign legal system or on the basis of the standards and qualifications of the lex fori;
- b) if the content of art. 13, co. 1, L. n. 218/1995 (renvoi), is excluded when the foreign law to which it refers, is in conflict with the principle of universality and unity of succession;
- c) in the case that the **renvoi rules** contained in the foreign law should be taken into account and if the **regulation of the foreign law provides the spoilt of succession**, within what limits and in what ways, does the renvoi also affects the validity and effectiveness of the title of succession, and if therefore it can operate in respect of only some of the assets included in the estate;
- d) if, on the other hand, the renvoi to the *lex rei sitae*, only entails the application of the rules concerning the methods of purchase of the assets of the estates.

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