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

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Solutions to practical cases

CASE 1 (Case E.E., C-80/19 - still pending before the CJEU)

A Lithuanian national whose habitual place of residence on the day of her death was possibly in another Member State, but who in any event had never severed her links with her homeland, and who, inter alia, had drawn up, prior to her death, a will in Lithuania and left all of her assets to her heir, a Lithuanian national, and at the time of the opening of the succession it was established that the entire estate comprised immovable property located solely in Lithuania, and a national of that other Member State surviving his spouse expressed in clear terms his intention to waive all claims to the estate of the deceased, did not take part in the court proceedings brought in Lithuania, and consented to the jurisdiction of the Lithuanian courts and the application of Lithuanian law.

Questions

1. Is the situation in the main proceedings to be regarded as a succession with cross-border implications under the Succession Regulation and this Regulation must be applied to this situation?

As the habitual residence of the deceased in another Member State is not certain, the answer might be - on the face of it - that the succession is not "cross-border".
However, the specification that the habitual residence of the deceased was "possibly" in another Member State leads to another issue, that is whether to qualify a succession as cross-border the applicant for an ECS must give evidence of an international connecting factor.
The answer might be that an ECS may be issued if the succession is not manifestly internal.
The ECS, in fact, may be also used just to get information about the existence of assets of the deceased in another Member State (this was the situation in the case No C-658/17, WB, decided by the CJEU).

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In his conclusions in the WB case No C-658/17 the AG Bot expressly states (see par. 48), that in order to be able to apply for a certificate for recognition of a judgment or for the use of an authentic instrument, it is not necessary to prove that certain assets are located in another Member State. This statement might well be extended to the ECS.

Therefore, in the EE case, the succession may be regarded as cross-border and it will trigger the application of the Regulation.

The fact itself that the deceased was ("possibly", indeed) living in a Member State other than the Lithuania (deceased's national country) is an international connecting factor.

2. Is a Lithuanian notary who opens a succession case, issues a certificate of succession rights and carries out other actions necessary for the heir to assert his or her rights to be regarded as a 'court' within the meaning of Article 3(2) of Regulation?

3. Is this certificate a 'decision' within the meaning of Article 3(1)(g) of the Regulation?

(The answer covers questions 2 and 3)

In preparation for the entry of the Regulation into force, the Lithuanian Parliament adopted a law clearly establishing that Lithuanian authority competent to issue the ECS under Article 64 of the Regulation is a Lithuanian notary of place of the opening of succession.

Whether notaries have to be regarded as a "court" and whether the ECS is a decision is an issue that has been already submitted before the CJEU in the case No C-658/17, WB.

The CJEU ruled:

"*The first subparagraph of Article 3(2) of Regulation (EU) No 650/12 must be interpreted as meaning that a notary that draws up a deed of certificate of succession at the unanimous request of all the parties to the procedure conducted by the notary, such as the deed at issue in the main proceedings, does not constitute a 'court' within the meaning of that provision and, consequently, Article 3(1)(g) of that regulation must be interpreted as meaning that such a deed does not constitute a 'decision' within the meaning of that provision*".

Actually, the judgment refers to 'unanimous request', but as most contains least, the same conclusion should be valid in case of a 'non unanimous request'.

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Anyway, before answering the question it needs to be assessed whether the Lithuanian notary is competent to issue the ECS under Article 64 of the Regulation.

Article 64 reads that the Certificate shall be issued in the Member State whose courts have jurisdiction under Article 4, Article 7, Article 10 or Article 11.

The issuing authority shall be:

(a) a court as defined in Article 3(2); or

(b) another authority which, under national law, has competence to deal with matters of succession.

This issue will be examined in the answer to question 4.

4. If not, are the Lithuanian notaries entitled to issue certificates of succession rights without following general rules on jurisdiction and such certificates are considered as the authentic instruments that have legal effects in other Member States?

The Lithuanian notaries (that under Lithuanian law are the Lithuanian authority competent to issue the ECS) will be entitled to issue the ECS following general rules in jurisdiction provided for by Article 64 of the Regulation.

In the Oberle case No 20/17 the CJEU ruled: «*Article 4 of Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on 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 must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, which provides that, although the deceased did not, at the time of death, have his habitual residence in that Member State, the courts of that Member State are to retain jurisdiction to issue national certificates of succession, in the context of a succession with cross-border implications, where the assets of the estate are located in that Member State or the deceased was a national of that Member State.*»

Consequently, the ECS is an authentic instrument that have legal effect in other Member States.

In the case concerned the Lithuanian notary may be competent to issue the ECS only under Article 4, Article 7, Article 10 or Article 11 of the Regulation.

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Competence under Article 11 must be excluded because the disposition is clearly not applicable to the case concerned.

The notary might be competent under Article 4 if the habitual residence of the deceased at the time of death was in Lithuania. However, the wording of the case reads that the habitual residence of EE was "possibly" in another Member State. Therefore, if the Lithuanian notary finding is that the deceased's habitual residence was in a State other than Lithuania, the Lithuanian notary would not be competent (another issue could arise in this situation: does the succession remain cross-border?).

Competence under Article 10(1)(a) of the Regulation must be excluded because, even if the deceased left assets in Lithuania and was a Lithuanian national at the time of death, her habitual residence was in another Member State. Article 10, in fact, is applicable only «*Where the habitual residence of the deceased at the time of death is* ***not*** *located in a Member State*»

In this case Article 10(2) would not be applicable as well because the deceased was habitual resident in another member State, whose courts would have jurisdiction under Article 4 of the Regulation.

5. The habitual place of residence of the deceased may be established in only one specific Member State?

No. Having more than one "habitual"' residence, besides being almost unreasonable, would be contrary to the objectives of the Regulation and would lead to maximize uncertainty. Even if the habitual residence were in one State but the applicable law was that of a different State by way of the application of the so-called "escape clause"' under article 21(2) of the Regulation, the habitual residence would remain always "unique", and would be the connecting factor to determine the competent court under article 4 of the Regulation.

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6. Must it be concluded that the parties concerned in the present case agreed that the courts in Lithuania should have jurisdiction and that Lithuanian law should be applied?
The determination of the competent court must follow the rules provided for by Article 4 and following of the Regulation, because under Article 5(1) of the Regulation, the parties concerned may agree that a court or the courts of a Member State are to have exclusive jurisdiction to rule on any succession matter only where the law chosen by the deceased to govern his succession pursuant to Article 22 is the law of a Member State.

As in the case concerned the deceased left a will, may be that the testator made an express or implied choice of the national (Lithuanian) law.
If it would be the case and the habitual residence of the deceased was in another Member State (as appears by the wording of the case), the parties concerned, under Article 5(1) of the Regulation, might choice the Lithuanian court to have exclusive jurisdiction to rule on any succession matter.
Anyway, the agreement can not concern the issue of the ECS, both because Article 5 is not mentioned in Article 64 and Lithuanian notaries should not be "court" under Article 3(2) of the Regulation.

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CASE 2

Peter Muller is a German citizen, married (for the third time) with a German citizen and with 3 children: Frank, living in German (from the first wife), Joseph, living in the USA and Christian, living in Italy (form the second wife).

He owns the 50% of a villa in St. Moritz (Joseph and Christian own the 50% as a succession from their mother) and the 100% of a holiday home in Italy.

He was an Italian residence, just for tax reasons, living in Switzerland for 9-10 months per year and died in Switzerland on 20th of January 2020

Peter, during the Summer of 2010, while he was in Switzerland, drafted an handwritten holographic) Will in German language.

The Will provides that all Peter's estate shall be divided in equal shares between the wife, Joseph, Christian an two nephews.

In the Will Peter also states that he is resident in Italy since 2004 and that he excluded Frank by the succession because he has been satisfied during is life. Frank, in fact, say Peter in the Will, received a gift worthing higher than that of the reserved share provided for Frank under the German succession law (that is 1/8).

Questions

1. Is the Will valid?

Yes, because Swiss law provide for the holographic will. The Hague Convention of 5 October 1961 on the conflicts of laws relating to the form of testamentary dispositions, that binds Switzerland, will apply, and it provides that a testamentary disposition shall be valid as regards form if its form complies with the internal law of the place where the testator made it.

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2. Reference by Peter to the German succession law may be considered a valid choice of law?

As the will was drafted in 2010 Article 83 of the Succession regulation has to be taken in account. Article 83, par. 2, is not applicable because the will does not contain a choice of law. Article 83, par. 4, is neither applicable because the will does not contain a disposition of property upon death made in accordance with the law which the deceased could have chosen in accordance with the succession regulation (the will does not contain dispositions typical and exclusive of the German succession law).

Conclusively, the answer is not.

3. Answer question no. 1 and no. 2 considering the Will drafted during the Summer of 2018.

The will is valid under Article 27 of the Succession Regulation. It provides that a disposition of property upon death made in writing shall be valid as regards form if its form complies with the law of the State in which the disposition was made (Swiss succession law provides for the holographic will). Is doubtable the will contains an implicit choice of law because the will does not contain dispositions typical and exclusive of the German succession law (the mere reference to German succession law for what concerns the gift to Peter is not a "disposition", actually).

4. If reference to the German succession law is not a valid choice of law, try to determine the habitual residence of Peter at the time of death.

Habitual residence of Peter is in Switzerland, because his centre of interests is clearly in that State and he is resident in Italy only for tax purposes.

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CASE 3

Davide is an Italian citizen who has been residing in London for a number of years, where he is *domiciled* (in the English meaning of the term) and works as manager of an investment fund.
Davide owns some bank accounts in London and Milan, an apartament in London, a villa in Porto Cervo (Sardinia, Italy) and a holiday home in Antibes (France).
Davide is married with an Italian woman, and bought the apartment in London when he was single, while the villa in Porto Cervo and the holiday home in Antibes after is marriage, that happened on 2nd of February of 2019.
Davide wishes to plan his succession choosing the English (& Wales) law of succession, leaving all his estate to her wife.

Questions

1. Determine the applicable law to Davide's succession if he does not make any choice of law, with specific reference to the situation of the immovables.

As Davide is habitual resident in London, English succession law will apply. As England is a third State, under Article 34 of the Succession Regulation, the private international law of England shall be taken in account. Under the private international law of England, English succession law will be applicable to the succession of movables whilst *lex rei sitae* will be applicable to the succession of immovables.

2. Can Davide choose the English law?

No, because Davide is an Italian national.

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3. What is the situation of David's estate if the law applicable to his succession is English law as chosen expressly or implicitly under article 22 of the Succession Regulation?

The choice of law is ineffective because it is not Davide's national law. Again, English succession law will be applicable to the succession of movables whilst *lex rei sitae* will be applicable to the succession of immovables. To avoid the *renvoi* Davude has to acquire British citie and choose English law to govern his succession.

4. What is the situation of the villa in Porto Cervo and the holiday home in Antibes under the regulation (EU) no. 1103/2016?

Assuming the first common habitual residence of the spouses to be in England, the villa in Porto Cervo and the holiday home in Antibes belong to Davide, as England does not provide any matrimonial property regime.