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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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Choice of Law

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CASSA NAZIONALE DEL NOTARIATO



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Notary Chamber of Bulgaria



International
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**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**

- a succession should be governed by one, unique law
- ensure as far as possible that the courts of one State have jurisdiction to hear disputes relating to a succession
- to give possibility to select the law applicable to his estate



Why a Regulation?

- increase the mobility of EU citizens in and outside the European Union simplifying identification of the applicable law
- overcome problems related to different “Private International Laws” and different successions rules in the different Member States
- meet the need for predictability and certainty



Recital 37

“In order to allow citizens to avail themselves, with all legal certainty, of the benefits offered by the internal market, this Regulation should enable them to know in advance which law will apply to their succession.”

Harmonised conflict-of-laws rules should be introduced in order to avoid contradictory results. The main rule should ensure that the succession is governed by a predictable law with which it is closely connected.

For reasons of legal certainty and in order to avoid the fragmentation of the succession, that law should govern the succession as a whole, that is to say, all of the property forming part of the estate, irrespective of the nature of the assets and regardless of whether the assets are located in another Member State or in a third State.”



Solutions

- harmonise and avoid a conflict of laws
- avoid contradictory results applying the Private International Law of each Member State involved in the case
- fixing some connecting factors, such as the habitual residence at the time of death or the choice of law
- choice of law (art.22)



Article 21

“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.



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Habitual residence

a person of a foreign nationality B living in a certain country A will be subjected to the same rules of family and succession law as all nationals of country A.

Nationality

presumes that nationals of state B who established their habitual residence in state A will still feel linked more closely to their country of origin B than to country A.



The nationality of a person is normally stable and easy to ascertain.

Recital 23

In order to determine the habitual residence, the authority dealing with the succession should make an overall assessment of the circumstances of the life of the deceased during the years preceding his death and at the time of his death, taking account of all relevant factual elements, in particular the duration and regularity of the deceased's presence in the State concerned and the conditions and reasons for that presence. The habitual residence thus determined should reveal a close and stable connection with the State concerned taking into account the specific aims of this Regulation.



*By the look in your eye I can tell you're gonna cry, is it over me?
If it is, save your tears for I'm not worth it, you see.
For I'm the kind of guy who is always on the roam
Wherever I Lay My Hat That's My Home.*



*(Wherever I lay my hat)
(Marvin Gaye - 1962)*



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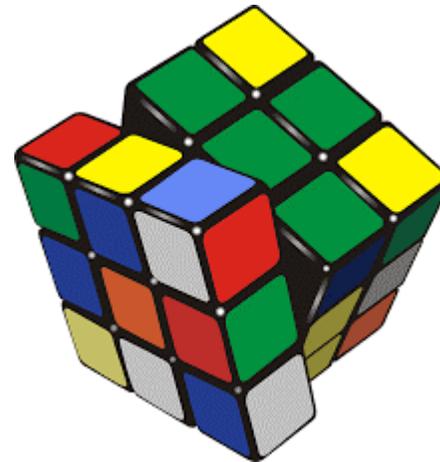
George is a Bulgarian citizen, and he is a keen yachtsman. He adores staying on his yacht, to travel around the world and to enjoy new places.

That is why he has organised his life in a way to make his passion for becoming a reality. He has bought an ocean sailing yacht and spends most of the time on it.

For some economic reasons, the yacht is registered under the flag of the Marshall Islands, but George does not have any other connection with this State. George is a self-employed IT specialist. He works from a distance for different projects in different countries. His work is going well, so he has bought properties in several countries, including Bulgaria, Italy and Florida, USA.

He is married. His wife looks after their two lovely children and shares her time between the yacht, Bulgaria and Italy, where their children attend a prestigious school.

Despite all this international mess, George feels closely connected with his national country – Bulgaria.



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Article 22

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.



Choice of law

- the choice of law needs a will, a testament
- the Regulation it is a compromise

Cross borders succession are becoming increasingly frequent, so we must learn how to use the Regulation.

Knowing the Regulation can also be an excellent opportunity to qualify our job because people who want to regulate their succession will need a professional.



Recital 38

"This Regulation should enable citizens to organise their succession in advance by choosing the law applicable to their succession.

That choice should be limited to the law of a State of their nationality in order to ensure a connection between the deceased and the law chosen and to avoid a law being chosen with the intention of frustrating the legitimate expectations of persons entitled to a reserved share."



article 22, par 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 partial choice of law its not allowed

"I choose the law of [State A] to govern succession to my assets, rights and obligations as a whole, including any not disposed of by this will."



multiple wills

- local will, which covers exclusively assets located in one country (so-called "separate situs will")
- general will ("principal will")

It is essential to keep the prohibition of partial choice of law in mind when faced with a situation where multiple wills are drafted

include a recital in the second will, referring to the election made in the parallel will.



Article 20

Any law specified by this Regulation shall be applied whether or not it is the law of a Member State.



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testators with multiple nationalities

Individuals with multiple citizenships can choose the law of any of the countries of which they are nationals

The choice may not be questioned by an heir or anybody else on account of the fact that the nationality chosen by the testator was not or less effective than another one

The Regulation makes it possible to choose the nationality possessed at the time of death and not only at the time of making the choice



Choice of law

- the choice of law is always admissible
- it is not limited to EU nationals
- does not limit the possibility to choose the law of a Member State
- it is restricted to the law of the State of the nationality at the time of making a choice **OR** at the time of death
- in case of multiple nationalities, any one of them can be chosen
- a choice for the law of one's habitual residence is of no value under the Regulation



Article 22, par 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."



Article 22, par 3

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

Verify the rules of the chosen law to know if that document is a valid will or not.



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Article 22

Article 22 makes it possible to submit one's succession to the law of one's nationality

It is not necessary to recall or explain in the will why and how the testator acquired this nationality

A reference to the nationalities of the person making the choice would be relevant if the person making a choice possesses more than one nationality

I am a national of France and Germany. I choose the law of France to govern my succession



multiple succession rules

the law "of the State whose nationality he possesses".

What if that State has more than one rule governing succession?



Article 36

“Where the law specified by this Regulation is that of a State which comprises several territorial units each of which has its own rules of law in respect of succession, the internal conflict-of-laws rules of that State shall determine the relevant territorial unit whose rules of law are to apply .“

In the absence of conflict of laws rules:

- the territorial unit in which the deceased had his habitual residence at the time of death
- the territorial unit in which the deceased had the closest connection
- the territorial unit in which the relevant element is located



Article 36

law of the territorial unit which has the "closest connection" with the deceased (Article 36 (2)(b))

I am a citizen of the United Kingdom, habitually resident and domiciled in and most closely connected with England and in accordance with the provisions of Article 22 and all other Articles of the European Union Succession Regulation (EU) No 650/2012 or any subsequent or amended Regulation, I choose the internal law of England to govern all of my dispositions of property upon death and the whole of my succession



- an **explicit choice**: when the person expressly designates the chosen law
- an **implicit choice**: when a choice can be demonstrated by the terms of the disposition



Article 22, par 3

*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.***

The Succession Regulation makes it possible to infer from the terms of a will that the deceased intended that his succession be governed by his national law



Recital 39

"A choice of law could be regarded as 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. "

Rome I Regulation: a choice must be "**clearly demonstrated**" by the terms of the contract

The search for the implicit intention of the testator must be strictly confined to those provisions appearing in the will



implicit choice

If an English testator establishes a trust, can we reasonably assume that he choose the English law to regulate his succession?



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implicit choice

A Dutch national who has been living in Belgium for twenty years dies in that country.

In his will, which has been drawn up with the assistance of a Dutch notary, he expressed the wish that his wife's daughter should be entitled, in his inheritance, to benefit from the same regime as his own children ("clause of equality").



Article 3, par 1

""disposition of property upon death" means a will, a joint will or an agreement as to succession."

- a **will** is an instrument by which a person makes a disposition of his property to take effect after his decease and which is in its own nature, ambulatory and revocable during his life
- a **joint will** is a will drawn up in one instrument by two or more persons (art.3, par.1 (c))
- an **agreement as to succession** is an agreement which, with or without consideration, creates, modifies or terminates rights to the future estate or estates of one or more person party to the agreement (art.3, par.1 (b))



Article 22, par 3

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

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. It should however be for the chosen law to determine the substantive validity of the act of making the choice, that is to say, whether the person making the choice may be considered to have understood and consented to what he was doing. The same should apply to the act of modifying or revoking a choice of law."



Article 23

“The law determined pursuant to Article 21 or Article 22 shall govern the succession as a whole”

- a) the causes, time and place of the opening of the succession
- b) the determination of the beneficiaries, of their shares and obligations
- c) the capacity to inherit
- d) disinheritance and disqualification by conduct;
- e) the transfer to the heirs and to the legatees
- f) the powers of the heirs, the executors of the wills and other administrators of the estate
- g) liability for the debts under the succession;
- h) the disposable part of the estate, the reserved shares and other restrictions
- i) any obligation to restore or account for gifts, advancements or legacies
- j) the sharing-out of the estate



Article 83

“This Regulation shall apply to the succession of persons who die on or after 17 August 2015.

Where the deceased had chosen the law applicable to his succession prior to 17 August 2015, that choice shall be valid if it meets the conditions laid down in Chapter III or if it is valid in application of the rules of private international law which were in force, at the time the choice was made, in the State in which the deceased had his habitual residence or in any of the States whose nationality he possessed.



Thank you very much for your attention



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