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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 CASE OF MR A

Mr A, the person whose future succession is concerned, is an Italian citizen and he moved to Paris (France) long time ago (more than two decades). Mr A is a widower and has children who are Italian citizens and all reside in Italy.
Mr A's place of registered residence is in France (that is, Mr A is anagraphically resident in France).
Mr A owns a number of immovables in France, where he also holds some bank accounts. He does not own assets in Italy.
A few years ago, as a result of his deteriorating health, he was transferred to Italy by his children and lives in a rest home.
Moreover, his children were appointed as guardians by the French court, as Mr A, due to his health conditions, has become a vulnerable person.
Mr A has not made a will and due to his health conditions is not able to made one.
One of Mr A's children seeks a notarial advice on : 1) the law applicable to the future succession of his father, and 2) the future tax treatment of the succession and means to avoid or at least minimize its weigh.

Question 1

On 17 August 2015, the Regulation (EU) No 650/2012 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 entered into force.
The Regulation replaces, for the purposes of identifying the law applicable to successions opened as of 17 August 2015 (included), the previous rules of private international law in force in the States bound by the Regulation (which are all Member States of the European Union except the United Kingdom, Ireland and Denmark). Italy and France are therefore States bound by the Regulation.
The Regulation 650/12 will undoubtedly be applicable to the future succession of Mr A, as it is likely to be a succession with elements of internationality. The fact that Mr A is an Italian national and that he possesses property in a country other than that of his nationality are sufficient elements for this purpose.
Article 21(1) of the Regulation provides that «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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Mr A currently appears to have his habitual residence in France but in fact lives in Italy, having been transported there by his children because of his deteriorating health. It is possible that Mr A's registered residence may also be moved to Italy.
In this case, at the time of the death of Mr A, it will be necessary to check whether this change of residence will also lead to a change in the law applicable to the succession (which will become Italian law) or whether, given the very long stay of Mr A in France, his habitual residence will continue to be in France, with the subsequent application of French law to the succession. This problem could also arise where the death of Mr A occurred and his habitual residence remained in France.
In both cases, irrespective of the anagraphical findings, the exception clause contained in Article 21(2) of the Regulation could operate. It provides that «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».
Under this provision, therefore, the French law or the Italian law could be applicable to Mr A's succession where it is shown that he was «manifestly more closely connected» with France or Italy respectively.
In some cases it may be complex to determine the habitual residence of the deceased. Such a case may arise, in particular, where for professional or economic reasons the deceased had gone to live abroad for work, even for a long period, but had maintained a close and stable connection with the State of origin. In such a case, the deceased could be regarded, in the circumstances of the case, as still having his habitual residence in the State of origin where the centre of his family and social life is situated. Other complex cases may arise where the deceased had lived alternatively in several States or had moved from one State to another without having settled permanently in any of them. If the deceased was a national of one of those States or possessed all his main assets there, his nationality or the place where those assets are located could be a special element for the general assessment of all the factual circumstances.
As regards the determination of the law applicable to the succession, the authority dealing with the succession may, in exceptional cases where, for example, the deceased had moved to the State of his habitual residence at a time relatively close to his death and all the circumstances of the case indicate that he was manifestly more closely connected with another State, conclude that the law applicable to the succession should not be the law of the State of the deceased's habitual residence but the law of the State with which the deceased was manifestly more closely connected.
What should always be considered, however, is that manifestly closer links should not be invoked as a subsidiary connecting factor whenever the determination of the habitual residence of the deceased at the time of death is complex.
In the case of Mr A, one fact which could lead to his habitual residence in France even if he transferred it to Italy is as follows.
Mr A has not 'chosen' to move to Italy nor - where appropriate - will change his place of residence as a result of an individual choice. Mr A, in fact, in view of his current state of health,

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which makes him unfit to provide for his own interests, is represented by his children under the protective court order referred to above.
The children moved their father to Italy, with the obvious aim of providing better medical care and treatment. And it will always be the children, if necessary, who decide whether or not to transfer his residence from France to Italy.
The fact that Mr A has moved to Italy as a result of a choice which is not his own but that of a third person, would lead to the conclusion that Mr A's habitual residence is in France and that it will remain so even if his children (not Mr A personally, therefore) were to transfer his registered residence to Italy.
The succession of Mr A could then be governed by French law and the French court would have jurisdiction to rule, where appropriate, on any dispute arising out of the succession.
The devolution of the estate, however, will be no different from that which would be the case if the succession were governed by Italian law.
Since Mr A has not made a will and has left only children, his estate will be divided among the children in equal parts pursuant to Articles 734 and 735 of the French Civil Code, just as it would be divided among the children in equal parts pursuant to Article 566 of the Italian Civil Code.
It should be noted that where in the case of Mr A the law applicable to the succession is determined by the exception clause in Article 21(2) this does not mean that the habitual residence of the deceased is in Italy, but only that the law applicable to the succession will be the Italian law. In practice the provision means that even if the habitual residence is in State A, the law applicable to the succession will be the law of State B. The habitual residence will continue to be relevant for identifying, under Article 4 of Regulation 650/12, the court having jurisdiction to rule on any litigation in the succession.
In any event, from the point of view of "substantive" effects, the devolution of succession, as already mentioned, is identical, whether French law applies or Italian law applies.

Questions 2

For the purposes of identifying the future tax treatment of inheritance, Regulation 650/12 is out of the question. Article 1 provides that «This Regulation shall apply to succession to the estates of deceased persons. It shall not apply to revenue, customs or administrative matters». Therefore, national tax provisions have to take into account. The applicability of these prosivions will not depend on the identification of the law applicable to the succession. This means, in other words, that inheritance tax will be applied on the basis of its own criteria without regard to those used to identify the law applicable to the succession.
The prerequisite for the applicability of inheritance tax, both in France and in Italy, is the residence of the deceased. In this case the tax is due in respect of all assets and rights transferred, even if they exist abroad.
If, on the other hand, the deceased was not resident in the State at the date of the opening of the succession, Italian law provides that the tax is due only in respect of assets and rights existing in Italy. A similar provision is contained in French law, although there are distinctions (not relevant for our purposes) depending on whether the beneficiaries are or are not resident in France.

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France and Italy provide for different tax rates and thresholds.
As far as we are concerned, in France inheritance tax is progressive in the case of transfer to children, and the rates range from 5% to 45%, with a threshold of €100,000 for each child. In Italy, on the other hand, inheritance tax is proportional and the rate is 4%. Threshold is € 1,000,000 for each child.
It is therefore clear that if only Italian law were to apply, the tax would be much lower than that due in France.