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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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Practical cases on applicable law and circulation of decisions under EU Regulations 1103/2016 and 1104/2016

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International Association of Judges
promoting an independent judiciary worldwide

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General remarks

The two Regulations apply to 18 Member States (MS) - Belgium, Bulgaria, the Czech Republic, Cyprus, Germany, Greece, Spain, France, Croatia, Italy, Luxembourg, Malta, the Netherlands, Austria, Portugal, Slovenia, Finland and Sweden.

MS that do not participate in the enhanced cooperation shall apply their rules of private international law.

The provisions of applicable law (Chapter III) apply to:

- marriages or agreements on the law applicable to the matrimonial property regime on or after 29 January 2019;

- partnerships or agreements on the law applicable to the property consequences of their registered partnership on after 29 January 2019.

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General remarks

For marriages/partnerships concluded or registered before 29 January - private international law of the State applies.

The two Regulations do not cover substantive law. **Applicable law is the substantive law of the States.**

The two Regulations are mostly applicable in case of **death** or in case of a **divorce**.

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Case 1

A., a German national married to B., Bulgarian national. They bought a house in Bulgaria and lived in Bulgaria. Later they decided to separate – A. went back to Germany while B. lived in their house in Bulgaria. They did not divorce.

A. died suddenly in 2017 and left no will. His children from a previous marriage filed a claim in front of a German Court to decide as to the succession.

What is the competent Court? What is the applicable law?

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Case 1

A. had property in Bulgaria and thus we have a transnational element in the succession. As the death of A. is after 17 August 2015 , the Succession Regulation is applicable. Because A.`s habitual residence before his death was in Germany – the German Courts are competent to deal with the succession.

But which law is applicable to the transnational matrimonial property regime of the couple in 2017? As the competent Court is the German Court, it will apply its own rules of private international law to decide what is the applicable law. According to German private international law, the matrimonial property regime is regulated by the law of the State of the common habitual residence of the spouses during the marriage. This means that the Bulgarian law was applicable as the spouses lived in Bulgaria during their marriage. According to Bulgarian Family Code if the spouses did not choose separated property regime, then common property regime is applied. In this case A and B had equal parts of the house. As to the succession – the German law will apply according to the general rule of art.21 par.1 of the Succession Regulation.

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Applicable law

Regulated in **Chapter III** of each of the two Regulations.

The rules on applicable law are **universal -** the law of any State may be applicable. The law provided by the Regulations is applicable on all assets, irrespective of in which country the assets are situated - **one law** regulates the matrimonial property or the matters of the property consequences of registered partnerships. See also recital 43-45. The purpose is to allow the EU citizens to have **legal certainty and predictability**.

The spouses/partners **may choose** which State's law they want to be applicable to their matrimonial property regime/ to the property consequences of their registered partnership .

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Case 2

Two German nationals met in Switzerland where they married in 2010. They lived in Switzerland in the period 1 March 2010 – 31 August 2012. They did not have common children, and the wife did not have children at all. She had a sister.

On 31 July 2012 the wife bought a property in Bulgaria. On 10 August 2012 they concluded an agreement as to their succession in front of a Swiss Notary. In the contract they chose the Swiss law applicable to their matrimonial property and succession and also chose the Swiss Courts to have jurisdiction to the succession. In the agreement is stated that if the wife dies first, her universal heir will become her husband. In September 2012 the couple moved to Bulgaria. They lived in the property bought by the wife. In 2017 the wife died.

The same year the husband submitted an application to the local Bulgarian Court asking for issuing an European certificate of succession. He stated that upon the agreement as to succession he is the only heir of his wife. Additionally he presented a declaration signed by the sister of the deceased that she has no claim for the property and agrees that the husband be the only heir.

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Case 2

The first instance Court in Balchik found to be competent to deal with the application. The Court considered that the applicable law is the Bulgarian law as the law of the country of the last habitual residence of the deceased and decided that the heirs of the deceased are her husband and her sister with equal shares of the inheritance. The Court stated that the agreement was not valid as it is contrary to art.22 of the Succession Regulation and the case did not fall under the scope of art.83 of the SR.

The husband appealed the decision to the second instance Court – District Court of Dobrich. In January 2018 the Court issued a decision with which quashed the decision of the first instance Court and returned the case back to that Court to issue a European Certificate of Succession following the instructions of the upper Court.

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Case 2

District Court of Dobrich concluded that the Bulgarian Court is competent to deal with the Certificate nevertheless the choice of jurisdiction in the agreement, pursuant to art.7 B of the SR. As to the agreement the Court observed that it was concluded before entry of force of the SR and thus it has to be considered if art.83 par.2 of the SR shall be applied, as in any way the choice of applicable law is against art.22 par.1 of the SR.

The count accepted that the agreement as to the succession was valid as at the day of the choice the deceased has her habitual residence in Switzerland. The Swiss private international law accepts the application of the law at the habitual residence of the party signing the agreement. District Court of Dobrich accepted that the Swiss law in applicable to the succession, that the husband is the only heir.

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Applicable law

If **no law is chosen**:

Regulation 2016/1103 - the law applicable to the matrimonial property regime shall be the law of the State:

- of the spouses' first common habitual residence after the conclusion of the marriage . Failing that, the law of the State

- of the spouses' common nationality at the time of the conclusion of the marriage. If no common nationality - the law of the State

- with which the spouses jointly have the closest connection at the time of the conclusion of the marriage, taking into account all the circumstances.

Regulation 2016/1104 - 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.

Exception in art.26 par.2 of R 2016/1103 and in art.26 par.3 of R 2016/1104

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Case 3

A, a Bulgarian national , and B, a Dutch national married in Belgium in 2002 and lived there. A had a son from previous marriage who lived in Bulgaria. In 2012 the couple bought a summer house in Bulgaria. In 2013 A died. After his death B registered their marriage in Bulgaria.

In 2016 B initiated proceedings of property division of the summer house against the son of A. The son argued that B is not heir of A as their marriage was not recognized in Bulgaria and hence it is not valid according to Bulgarian law. The son considered himself to be the only heir of his father.

The first and second instance Courts decided that marriage between A and B is valid nevertheless it was not recognized in Bulgaria during its duration, but just after the death of A. The Courts concluded that the applicable law as to the inherited property is the Bulgarian law as the summer house was in Bulgaria. And as to the shares of the co-owners (B and A`s son) the Courts applied Bulgarian law and decided that B has ¾ shares of the house and the A`s son has ¼ share of the house.

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Case 3

The case was brought to the Supreme Court of Cassation. The Court confirmed the validity of marriage between A and B and that B is heir of A. But the Court decided that the applicable law to the matrimonial property regime was Belgium law.

According to the rules of Bulgarian private international law, the law applicable to the matrimonial property regime of the couple is the law of the State of the spouses' common nationality. If no common nationality - the law of the State of the spouses' common habitual residence. Failing that, the law of the State with which the spouses jointly have the closest connection.

As A and B did not have common nationality , the applicable law is the law of the state of their common habitual residence - Belgium. The Belgium substantive law will answer the question if the summer house in Bulgaria is under matrimonial property regime or it is an individual property of any of the spouses . If it is a matrimonial property, then the Bulgarian inheritance law will be applied in accordance to the rules of the private international law.

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Case 3

But what if A died after 17 August 2015?

The Succession Regulation shall be applicable and the competent Court would be the Belgium Court (art.4 – general jurisdiction – the Court of the MS in which the deceased has his habitual residence at the time of his death) and the applicable law would be the Belgium substantive family and inheritance law nevertheless the property is in Bulgaria.

And what if A and B concluded their marriage on 29 January 2019 in Belgium, bought the summer house in Bulgaria in February 2019 and A died in April 2019?

The competent Court to decide on the division of the summer house in Bulgaria would be the Belgium Court, the applicable law to the matrimonial property regime would be Belgium substantive law and the applicable law to the succession as a whole will be again Belgium substantive law.

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Applicable law

Effect in respect of third parties

The law applicable to the matrimonial property regime/legal consequences of a registered partnership between the spouses/partners cannot be invoked by a partner against a third party in a dispute between the third party and either or both of the spouses/partners unless the third party knew or, in the exercise of due diligence, should have known of that law.

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Applicable law

Adaptation of rights in rem

To allow the spouses/partners to enjoy in another Member State the rights which have been created or transferred to them as a result of the matrimonial property regime/ legal consequences of a registered partnership, the Regulations provides for the **adaptation of an unknown right in rem** to the closest equivalent right under the law of that other Member State. To adapt the right in rem it is necessary to take into account:

- the **aims** of the right in rem;
- the **interests** pursued by the right in rem;
- the **effects** attached to the right in rem.

Contact competent authorities – Registry officers, Notaries, Courts – of the State whose law is applied to the matrimonial property regime/legal consequences of a registered partnership for information on the nature and effects of the right in rem. **EJN Civil** can be also used – recital 25.

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C-218/16

Ms Kubicka, a Polish national was married to a German national. They lived in Germany and had two minor children. The spouses were joint owners of a family house in Germany.

Ms Kubicka wanted to include in her will a legacy ‘by vindication’, which is allowed by Polish law, in favor of her husband, concerning her share of ownership of the jointly-owned immovable property in Germany. She approached a notary in Poland. He refused to draw up a will containing the legacy ‘by vindication’ on the ground that creation of a will containing such a legacy is contrary to German legislation and case-law relating to rights in rem and land registration, which must be taken into consideration under Article 1(2)(k) and (l) and Article 31 of Regulation No 650/2012 and that, as a result, such an act is unlawful.

In Germany, a legatee may be entered in the Land register only by means of a notarial instrument containing an agreement between the heirs and the legatee to transfer ownership of the immovable property.

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C-218/16

Ms Kubicka brought an appeal against the refusal of the Notary to the Polish Court. She claimed that the provisions of Regulation No. 650/2012 should be interpreted independently and, in essence, that none of those provisions justify restricting the provisions of succession law by depriving a legacy ‘by vindication’ of material effects.

The Court of the EU ruled out that an authority of a Member State may not refuse to recognize the material effects of a legacy ‘by vindication’, provided for by the law governing succession chosen by the testator in accordance with Article 22(1) of the Succession Regulation, where that refusal is based on the ground that the legacy concerns the right of ownership of immovable property located in that Member State, whose law does not provide for legacies with direct material effect when succession takes place.

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Circulation of decisions

Circulation - recognition and enforcibility of decisions.

European area of justice - based on **mutual trust**. The Regulations provide for **free movement of judgments.**

Recognition - a foreign decision produces effects in another member State. A decision given in a MS shall be recognized in the remaining MSs **without** any special procedure. No legalization or other similar formalities are required.

In case the recognition is needed, any interested party may apply for the decision to be recognized. Competent Court - the Court at the MS where the recognition is sought.

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Circulation of decisions

Grounds for non recognition/same grounds to refuse the exequatur/

a) recognition is contrary to public policy;

b) decision violated procedural rights of defense of the defaulting defendant;

c) decision is irreconcilable with judgment given in MS of enforcement/ other MS;

d) decision violates the exclusive or protective jurisdiction rules .

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Circulation of decisions

Unlike SR, in the two Rs **referrence** is made **to the Charter of fundamental rights** and in particular art.21 on the **principle of non-discrimination**.

In the judgment of C-673/16 the **Court of Justice of EU** *held that the concept of public policy as justification for a derogation from a fundamental freedom must be interpreted strictly, with the result that its scope cannot be determined unilaterally by each Member State without any control by the EU institutions. It follows that public policy may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society.*

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Circulation of decisions

Enforceable decisions made in a Member State are likewise enforceable in other Member States when they have been **declared enforceable** in accordance with the procedure provided for in the Regulations – the application for a declaration of enforcebility shall be submitted to the Court or competent authority of the MS of enforcement.

Competent Courts or authorities - communicated by the MS /art. 64, see **e-justice portal**/.

Documents provided:

- copy of the decison
- attestation issued by the Court of origin.

Attestation forms : COMMISSION IMPLEMENTING REGULATION (EU) **2018/1935**

COMMISSION IMPLEMENTING REGULATION (EU) **2018/1990**

Enforcement procedure - governed by national law.

MS - provide the most favorable legal aid, no security, bond or deposit, no charge or duty or fee calculated by reference to the value of the matter.

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Thank you for your attention

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