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

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PROPOSED SOLUTIONS TO THE PRACTICAL CASES

CASE 1

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?

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?

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?

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

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?

Answers

Q1
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).
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

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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.

Q2 – Q3
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'.
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 Q4.

Q4
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*

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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.

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.

Q5

Yes. 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.

Q6

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

Question
What is the position in relation to the various UK bank accounts? Will Ahmed's challenge succeed in relation to those accounts?

Answer
The succession of Mohammed's bank accounts is governed by English law, as he was domiciled in the UK at the time of death. One half of the balance of his bank accounts belongs to his wife Maria under the matrimonial property regime rules (the UK law is applicable).
In relation to those accounts the English court will apply English succession law. As a result, under English law Mohammed's testamentary dispositions will be valid and his wife Maria will be able to withdraw the whole balance of them.
Ahmed's challenge will not succeed.

CASE 3

Questions
1. Which rules apply to Jeanne's claim?
2. Do the courts in Paris have jurisdiction to hear the claim made by Jeanne?
3. Assuming the courts of Paris have jurisdiction to hear the case, is the will drafted by Mr. Johnson valid?
4. Will the courts in Paris grant Jeanne's claim and hold that Mr. Johnson's will must be put aside or will these courts rule in favor of Michael Franks?

Answers

Q1

The Regulation is applicable because Mr. Johnson passed away in 2017, i.e. after 17 August 2015.

Q2
The only possibility for the courts of Paris to exercise jurisdiction is to rely on Article 4 of the Regulation. One should therefore inquire where Mr. Johnson's habitual residence was situated. Considering all the facts, one may conclude that Mr. Johnson's last habitual residence was situated in France.

Q3
Under Italian law, a holographic will must be entirely hand-written, dated and signed by the testator. Applying the 1961 Hague Convention (if the matter is presented to a French court) or Article 27 of

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the Regulation (if the dispute is settled by a Spanish court), one should come to the conclusion that the will is valid, as it complies with the formal requirements set out by Italian law.

Q4

If French law should be applied to assess the admissibility and substantive validity of the will it should also be applied to find out whether the various provisions adopted by Mr Johnson in his will are valid and enforceable. French law applies in particular to find out whether Jeanne, as a sister of Mr Johnson, benefits from a reserved portion which Mr Johnson should have respected. As in France the deceased's sisters do not benefit form a reserved portion, the courts in Paris will not grant Jeanne's claim.