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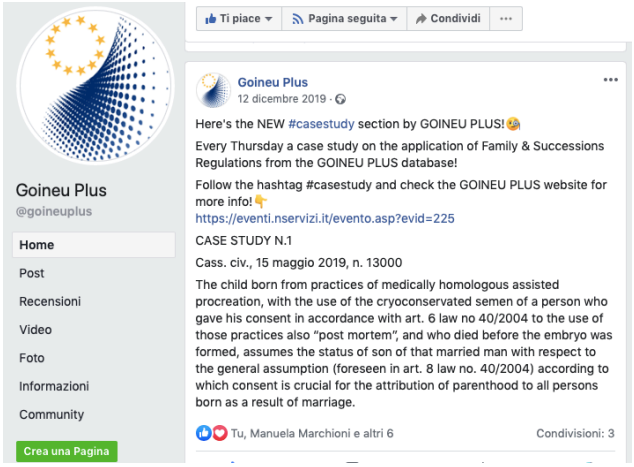
GOINEU PLUS CASES

Introduction

This document collects judicial and hypothetical cases on important matters concerning the main issues related to the European Regulations Nos 650/2012 and 1103 and 1104/2016.
The collection was carried out through the collaboration of all the partners of the project, who took care to select the most interesting cases in their national context.
In addition to cases dealt with by national courts, cases have also been selected from the Court of Justice of the European Union and the European Court of Human Rights.

Cases are periodically disseminated through social media channels in order to make it known and accessible to European citizens and professionals.

For example:



This is the first published case in our #casestudy section on Facebook.

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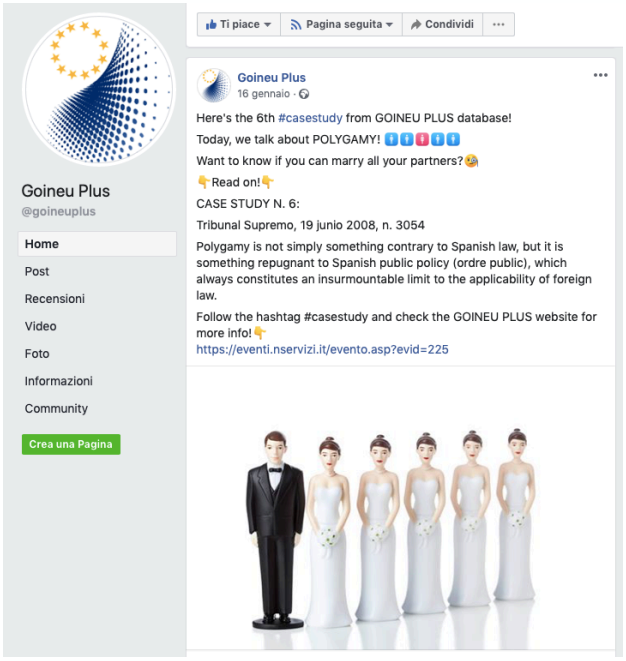

This is the sixth published case in our #casestudy section on Facebook.

This is the eighth published case in our #casestudy section on Facebook.

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List of Cases

EUROPEAN CASES

European Court of Justice

1. **Court of Justice of European Union, case C-80/19 [*pending case*]**

CONCEPT OF CROSS-BORDER SUCCESSION.

Can we consider the present case as a succession with cross-border implications, within the meaning of Regulation (EU) No 650/2012?
A Lithuanian citizen, at the time of his death, had his habitual residence in another Member State, but had never ceased his ties with the homeland and, in particular, before his death, had drawn up a will in Lithuania leaving all his property to heirs who are Lithuanian citizens too.
Moreover, the entire estate consisted of immovable property situated exclusively in Lithuania and the surviving spouse, a national of the other Member State, has explicitly stated its intention to waive any right to inherit.

2. **Court of Justice of European Union, case C-361/18, 6 June 2019**

WHAT SHOULD A MEMBER STATE'S COURT DO WHEN HEARING AN APPLICATION FOR A CERTIFICATE CERTIFYING THAT A JUDGMENT GIVEN BY THE COURT OF ORIGIN IS ENFORCEABLE?

1. Article 54 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that a Member State's court hearing an application for a certificate certifying that a judgment given by the court of origin is enforceable must, in a situation such as that at issue in the main proceedings, where the court which gave the judgment to be enforced did not adjudicate, when giving that judgment, on whether that regulation was applicable, ascertain whether the dispute falls within the scope of that regulation.
2. Article 1(1) and (2)(a) of Regulation (EC) No 44/2001 must be interpreted as meaning that an action, such as that at issue in the main proceedings, concerning an application for dissolution of the property relationships arising out a de facto (unregistered) partnership, comes within the concept of 'civil and commercial matters' within the meaning of Article 1(1) of that regulation and falls, therefore, within the material scope of that regulation.

3. **Court of Justice of European Union, case C-658/17, 23 May 2019**

HOW SHOULD WE INTERPRET THE SECOND SUBPARAGRAPH OF ARTICLE 3(2) OF REGULATION (EU) NO 650/2012 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL?

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1. The second subparagraph of Article 3(2) 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 meaning that failure by a Member State to notify the Commission of the exercise of judicial functions by notaries, as required under that provision, is not decisive for their classification as a 'court'.
The first subparagraph of Article 3(2) of Regulation (EU) No 650/2012 must be interpreted as meaning that a notary who 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.
2. Article 3(1)(i) of Regulation (EU) No 650/2012 is to be interpreted as meaning that a deed of certification of succession, such as that at issue in the main proceedings, drawn up by a notary at the unanimous request of all the parties to the procedure conducted by the notary, constitutes an 'authentic instrument' within the meaning of that provision, which may be issued at the same time as the form referred to in the second subparagraph of Article 59(1) of that regulation, which corresponds to the form set out in Annex 2 to Implementing Regulation (EU) No 1329/2014.

4. Court of Justice of European Union, case C-129/18, 26 March 2019

HOW SHOULD WE INTERPRET THE CONCEPT OF A 'DIRECT DESCENDANT' OF A CITIZEN OF THE UNION?

On those grounds, the Court (Grand Chamber) hereby rules:
The concept of a 'direct descendant' of a citizen of the Union referred to in Article 2(2)(c) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC must be interpreted as not including a child who has been placed in the permanent legal guardianship of a citizen of the Union under the Algerian kafala system, because that placement does not create any parent-child relationship between them.
However, it is for the competent national authorities to facilitate the entry and residence of such a child as one of the other family members of a citizen of the Union pursuant to Article 3(2)(a) of that directive, read in the light of Article 7 and Article 24(2) of the Charter of Fundamental Rights of the European Union, by carrying out a balanced and reasonable assessment of all the current and relevant circumstances of the case which takes account of the various interests in play and, in particular, of the best interests of the child concerned. In the event that it is established, following that assessment, that the child and its guardian, who is a citizen of the Union, are called to lead a genuine family life and that that child is dependent on

its guardian, the requirements relating to the fundamental right to respect for family life, combined with the obligation to take account of the best interests of the child, demand, in principle, that that child be granted a right of entry and residence in order to enable it to live with its guardian in his or her host Member State.

5. **Court of Justice of European Union, case C-20/17, 21 June 2018**

COMPETENT JURISDICTION AND HABITUAL RESIDENCE.

The article 4 of Regulation (EU) No 650/2012 about 'General jurisdiction' (which provides that 'The courts of the Member State in which the deceased had his habitual residence at the time of death shall have jurisdiction to rule on the succession as a whole') must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings [German], 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.

6. **Court of Justice of European Union, case C-673/16, 5 June 2018**

DEFINITION OF THE TERM 'SPOUSE' IN EUROPEAN LAW.

The Court affirms that "[a]lthough the Member States have the freedom whether or not to authorise marriage between persons of the same sex", […] the term 'spouse', used in the Directive 2004/38/ EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the EU and their family members to move and reside freely within the territory of the Member States, refers to a person joining another person by the bonds of marriage and it is gender -neutral and may therefore cover the same-sex spouse of an EU citizen. In other words, not having a discipline on same-sex marriage in a Member State does not mean the possibility to infringe the Directive 2004/38/CE.

7. **Court of Justice of European Union, case C-218/16, 12 october 2017**

IUSSES 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.

Article 1(2)(k) and (l) and Article 31 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 refusal, by an authority of a Member State, to recognise 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 that regulation, where that refusal is based on the ground that

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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.

European Court of Human Rights

1. **<u>European Court of Human Rights, case Quilichini v. France, 14 March 2019</u>**

EQUALITY IN DIVISION PROPERTY: WHAT HAPPENS WHEN PARENTS ARE NOT IMPARTIAL?

Relying on Article 14 (prohibition of discrimination) of the European Convention on Human Rights and on Article 1 of Protocol No. 1 (protection of property) of the Convention, the applicant argued that she had been treated differently from the other heirs in a disproportionate manner, as regards the division of property in 2005, following the modification in the French law establishing the principle of equality, for inheritance purposes, between all children.

2. **<u>European Court of Human Rights, case Molla Sali v. Greece, 19 December 2018</u>**

INHERITANCE DISPUTES AND SHARIA LAW.

Sharia law applied to an inheritance dispute contrary to the will of the testator, a Greek person belonging to the Muslim minority: violation of article 14 of the Convention, read in conjunction article 1 of the First Additional Protocol of the European Convention on Human Rights.

3. **<u>European Court of Human Rights, case Adilovska v. North Macedonia, 23 January 2020</u>**

The applicant, Ajše Adilovska, is a Macedonian/citizen of the Republic of North Macedonia who was born in 1963 and lives in Skopje.
The case concerned the dismissal of her claim to a plot of land belonging to her late father.
In 2004 Ms Adilovska brought a civil action for recognition of her title to her father's property. Her two sisters subsequently joined the proceedings.
The first-instance court granted the claim in 2004, but the judgment was overturned on appeal in 2013 and her claim was dismissed because of her lack of standing as she and her sisters were not the only legal heirs of their late father, who had five other children. The appeal court did not take into consideration the argument raised by the applicant's lawyer that the other potential legal heirs had no intention of joining the proceedings.
Relying in particular on Article 6 § 1 (right to a fair hearing) of the European Convention on Human Rights, Ms Adilovska complained about the domestic courts' dismissal of her claim without examining the merits.

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ITALY

1. Cass., 15 maggio 2019, n. 13000

The child born from practices of medically homologous assisted procreation, with the use of the cryoconservated semen of a person who gave his consent in accordance with art. 6 law no 40/2004 to the use of those practices also "post mortem" and who died before the embryo was formed, assumes the status of son of that's married man with respect to the general assumption (foreseen in art. 8 law no. 40/2004) according to which consent is crucial for the attribution of parenthood to all persons born as a result of marriage.

2. Cass., 1 marzo 2019, n. 6161

DIVORCE AND THE PALESTINIAN LAW N. 3/2011

In order to be able to verify the compliance of a divorce order, issued by a Palestinian Tribunal with the public policy limit (ordre public), it is necessary to assess the Palestinian law "n. 3/2011", regulating the divorce between the spouses, with specific regard to the profiles related to:
a) the jurisdictional nature of the Sharia Court;
b) the presuppositions of the repudiation by the husband;
c) the existence of a corresponding capacity of repudiation for the wife;
d) the guarantee of the respect of the adversarial procedure and the right of defense in the procedure;
e) the subject matter of the investigation reserved to the Sharia Court.

3. Trib. Trieste, uff. giudice tavolare, decr. tav., 8 maggio 2019, n. 4537

Succession certificate and inheritance certificate: is the recognition of the exchange between the two mandatory? in which case?

In the event of a cross-border succession, for which Regulation (EU) No. 650/2012 is applicable, the exchange, from all point of views, between the European succession certificate and the inheritance certificate must be recognized in the case of application for the registration.

4. Trib. Bergamo, 4 febbraio 2019, n. 300

MOROCCAN LAW BE APPLIED IN ITALY?
Divorce without prior separation

Moroccan law may be applied in Italy, in particular the reform of family law (c.d. Moudawana), which regulates the possibility of divorce, by mutual agreement, without prior separation, in accordance with art. 5 of Regulation EU 1259/2010 (c.d. Rome III), concerning the dissolution

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of the marriage celebrated in Italy by two Moroccan spouses, provided that the consensual agreement between the spouses is not contrary to imperative rules.

5. **Trib. Trieste, uff. giudice tavolare, decr. tav., 24 luglio 2019, n. 7418**

SUCCESSION AND INHERITANCE CERTIFICATES.
What to do when requesting the registration of successor rights to the land judge?

In the event of a cross-border succession, for which regulation (EU) 650/2012 is applicable, the exchange, from all point of views, between the European succession certificate and the inheritance certificate must be recognized when requesting the registration of successor rights to the land judge.

6. **Cass., 3 gennaio 2020, n. 18**

SUCCESSION OF A FOREIGN CITIZEN MARRIED TO AN ITALIAN.

The United Section will have to decide:

a) if, by the combined disposition of law no 218 of 1995, art 13, paragraph 1, art 15 and art 46, paragraph 1, the qualification of institutions and subjects, for the purpose of identifying the substantive rules applicable in individual cases, must be based on the classification carried out by foreign law or on the norms and qualifications of the *lex fori*;
b) if the operation of the referral, pursuant to no 218 of 1995, article 13, paragraph 1, is excluded when the invoked foreign law is contrary to the principle of universality and unity of the succession transposed in law no 218 of 1995, article 46;
c) so far as the rules of referral contained in foreign law have to be taken into account, if such referral affects also the validity and effectiveness of the title to succession, to which extent and in which way, and therefore whether it can operate in a partial way (with regard to part of the assets only);
d) if the referral to the *lex rei sitae*, pursuant to the invoked foreign norm, involves - instead - only the applicability of the norms concerning the modalities of purchase of the heritable assets.

7. **Cass., 12 luglio 2019, n. 18831**

If a trust produces effects towards the beneficiary only after the death of the settlor, what the latter has transferred during his/her lifetime is not considered as part of the hereditary asset.
The transfer from the trustee to the final beneficiaries, that constitutes the second segment of the operation, must therefore not be considered as a *mortis causa* act, because such translative action impact on legal spheres different from those of the original settlor: with respect to such transfer, the death of the settlor has no causal relevance, being able at most to identify the moment of execution of the final attribution.
Therefore, regulation EU No 650/2012 does not apply.

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SPAIN

1. Tribunal Supremo Español, 28 marzo 2012, n. 2534

DEFINITION OF "MARITAL LIFE" IN SPANISH LEGAL SYSTEM:

The qualification of the phrase "marital life with another person" can be done from two different points of view: one, from the subjective point of view, which results in the fact that the members of the new couple assume a serious and lasting commitment, based on fidelity, without form; the other one, the objective element, based on stable cohabitation. In general, it is argued that this cohabitation occurs when the subjects live as spouses, i.e., *more uxorio*, and this produces a generalized belief about the character of their relationships.
The two ways of trying to define the nature of what the Code calls "marital life" are complementary, not reciprocally excluding, and the not indissoluble nature of marriage in our days does not allow for a rapprochement between the two institutions on the basis of purely objective criteria other than formal existence: therefore, a relationship lasted for a month is marriage if there was a formal act, while a relationship lasted thirty years is marital cohabitation if there was not the form of marriage.

2. Tribunal Supremo Español, 9 febbraio 2012, n. 624

MARRIAGE AND COHABITATION

Since the entry into force of the Act of 17 July 1981, many efforts have been made to interpret the provision contained in art. 101.1 CC, which is now being challenged in this litigation. Two positions have been held in legal literature: according to some scholars the Civil Code uses the phrase "marital life" as equivalent to marriage, whilst according to other ones any kind of stable cohabitation of a couple leads to the extinction of the pension but occasional or sporadic cohabitation are not included. The same discrepancy has been reproduced in the judgements of the Provincial Hearings.
To give meaning to the said rule, two interpretative criteria must be used: the purpose of the norm and the social reality of the time when the norm have to be applied. According to the first one, the reason for introducing this cause of extinction of the compensatory pension was to prevent the concealment of real situations of stable cohabitation, more or less prolonged, and not formalized as marriage precisely in order to prevent the loss of the compensatory allowance, since only the new marriage of the creditor spouse was initially envisaged as a cause of loss. According to the second one, i.e. social reality of the time when the norm have to be applied, the qualification of the term "marital life with another person" can be made from two different viewpoints: the subjective one, resulting in the fact that the members of the new couple assume a serious and lasting commitment, based on fidelity, with no form; the objective one, based on stable coexistence.

3. Tribunal Supremo Español, 25 enero 2006, n. 4338

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CAN MOROCCAN LAW BE APPLIED IN SPAIN?

From a procedural point of view, repudiation, in its various forms, under Islamic law takes place with the authorization of the judge and in the presence of two officers to attest to it. Judicial authorization is granted only after all possible attempts of reconciliation between the spouses have been made, and documented in the relevant minutes, recording the position of each of the parties, and the judge states if there is a reason for repudiation, or if, on the contrary, the situation conceals a simple abuse of power, and accordingly assesses the so-called consolation compensation to be paid by the husband for the possible damages suffered by the wife.
Well, the conflict arises when of this act, attached to acts or documents granted by non-Spanish authorities, is asked the recognition by the Spanish authorities for the incorporation into the Civil Registry or for other administrative or judicial purposes, in accordance with Spanish law or with international treaties.
Thus, the extraterritorial effectiveness of the foreign document certifying that a situation has been established under a particular foreign law (in this case, the repudiation or divorce of the applicant) will depend on the valuation to be carried out in accordance with the provisions of the conventional system existing between the two countries (Spain and Morocco in this case), and, if not, in accordance with the provisions of our legal order.

4. Tribunal Supremo Español, 27 enero 1998, 2924

ORDRE PUBLIC, '*REPUDIO*' AND SPANISH LAW

Compliance with public order - which at the international level has a clearly constitutional character linked to the fundamental rights and public freedoms defined and guaranteed by the Constitution – depends on the type of divorce pronounced by the Moroccan judicial authorities. On the one hand, we can call divorce or repudiation the act that led to the dissolution of the marriage between the spouses, but it is true that the regulatory order assigns to both husband and wife the power to promote it (see article 44, 61 et seq., 66 et seq., of the Code), and it is clearly evident in the present case, where it is the woman who "declares to seek divorce from her husband"; ion the other hand, the concerned type of divorce or repudiation belongs to the so-called "Khole" of Moroccan law, and article 67 of the same law proclaims the irrevocable nature of this type of divorce or repudiation, as pointed out in the report issued by the Moroccan authorities.
In this case, therefore, we can conclude that no constitutional right, nor any other guiding and inspiring principle of our legal system that concurs to define the concept of public policy, has been violated.

5. Tribunal Supremo Español, 21 noviembre 2017, n. 624

HABITUAL RESIDENCE

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Habitual residence in Spain within the meaning of the Brussels II *bis* Regulation, as a social center of life and place where the concerned person has voluntarily established the center of his/her interests, is not denied by the residence permit nor by the registration in the Consular Office of another country. These circumstances do not render the other country the habitual residence in a realistic sense, but only in a formal and administrative sense. What is decisive is the fact of that habitual residence, on a realistic basis, adapted to the mobility of the spouses.

6. **Tribunal Supremo Español, 8 octubre 2010, n. 602**

HEREDITARY SUCCESSION: GOVERNED BY THE NATIONAL LAW OF THE DECEASED; PUBLIC ORDER AS A LIMIT TO THE APPLICATION OF FOREIGN LAW

The concept of public policy in private international law is a particular aspect of the general notion of public policy in Spanish law. When article 12(3) of the Civil Code provides for the exception of public order with reference to foreign law, it constitutes an absolute limit to the application of foreign law.
However, it is an indeterminate concept that encompasses the set of values or principles that inspire and preside over the national order, functioning as a guideline for its proper functioning. Public order can be considered as indicating the "minimum conditions" to which the existence of the legal system is subordinated.
Therefore, the revocation or irrevocability of a particular will cannot be considered a rule of public policy: neither it is a principle that inspires and presides over our order, nor is it a guideline for its concrete functioning, neither it is one of the minimum conditions to which the existence of our order is subordinated, nor it is a condition that operates for the protection of its integrity.

7. **Tribunal Supremo Español, 15 enero 2019, n. 18**

APPLICATION OF REGULATION NO 650/2012

For a succession prior to the application of the Regulation, the choice of law (and the provision valid under the law he could have chosen) made by the deceased before 17 August 2015, even before 17 August 2012, shall be valid provided that the death occurred from 17 August 2015.

8. **Tribunal Supremo Español, 19 June 2008, n. 3054**

POLYGAMY

Polygamy is not simply something contrary to Spanish law, but it is something repugnant to Spanish public policy (ordre public), which always constitutes an insurmountable limit to the applicability of foreign law.

9. **Resolución de 26 de julio 2016, de la Dirección General de los Registros y del Notariado**

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HOW TO QUALIFY A CERTIFICATE OF INHERITANCE ISSUED BY A SLOVAK NOTARY?

The appeal deals with the adequacy or otherwise of the documentation submitted in relation to an international succession as well as with the proof of the applicable material law.
The deceased, a Slovak national, dies before the entry into force of Regulation (EU) No 650/2012, so that Article 9.8 of the Civil Code applies, and accordingly the applicable law is the law of nationality of the deceased at the time of death: in this case Slovak law.
According to that law, notaries settle the succession, as commissioners of the competent territorial court, and issue a certificate of succession or of inheritance, which is considered as a judicial decision.
Therefore, for inheritances subject to Regulation (EU) No 650/2012, their certificates are considered to have been issued by the Court on the basis of Article 3(2) thereof and circulate between the Member States participating in the Regulation, as judicial decisions (the form is annex I to Regulation [EU] No 1329/2014, 9 December).
In the present case, the certificate of inheritance was issued in 2011, the year of the deceased's death, prior to the entry into force of the Regulation, on 17 August 2015. It is accompanied by an apostilled, as a notarial document, and translated certificate of the inheritance law in force at the time of the deceased's death.
It should be borne in mind that the regime of proof of foreign law in courts is regulated by Article 33 of that Act, which does not modify nor affect the specific rules on its extrajudicial application, in particular Article 36 of the Mortgage Regulation.

10. Resolución de 24 de julio de 2019, de la Dirección General de los Registros y del Notariado

APPLICATION OF REGULATION (EU) NO 650/2012

The scope of application of the Regulation (EU) No 650/2012 (Article 1(2)(a)) does not cover issues relating to filiation (the civil status of natural persons, as well as family relations and those relationships that, under the law applicable, produce comparable effects) and therefore it does cover the possible incidental recognition of the proof of filiation of the deceased, according to certifications which she displayed and which were incorporated into the qualified deed.
Moreover, under the Regulation's Article 4 governing general jurisdiction, the courts of the Member State in which the deceased had his habitual residence at the time of death shall have jurisdiction to rule on the entire succession. General jurisdiction, which must be supplemented by Article 22, *quater* (g) LOPJ, in its wording by Organic Law 7/2015 of 21 July, which leads to the courts of the habitual residence of the deceased, i.e. the competent ones in the Balearic Islands.

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11. **Resolución de 14 de marzo de 2019, de la Dirección General de los Registros y del Notariado**

This decision deals with the suspension of the registration of a deed entitled 'liquidation of the spousal partnership and the allocation of property by inheritance', relating to the succession of a Swedish national opened before 17 August 2015.
Pursuant to Article 83 of Regulation (EU) 650/2012, the date of the deed determines that Article 9.8 of Civil Code applies, and that accordingly the applicable law is the national law of the deceased: in this case Swedish law.
Furthermore, the succession settlement of the matrimonial property regime shall not be governed by Regulation (EU) 2016/1103, establishing enhanced cooperation in the field of jurisdiction, law applicable, recognition and enforcement of judgments in matters of matrimonial property regimes, given that, pursuant to Article 69(1), it applies from 29 January 2019.

12. **Resolución de 4 de enero de 2019, de la Dirección General de los Registros y del Notariado**

SUITABILITY OF A EUROPEAN CERTIFICATE OF SUCCESSION

By notarial deed, W.A.H., a German national resident in Spain, accepted the inheritance of his father, resident in Germany, on the basis of a European certificate of succession issued by a German authority. The copy of such deed presented to the Property Registry was qualified negatively, because the registrar argued that the corresponding «Testament» of mr. W.W.H, duly translated (articles 14 LH and 76 and 78 RH), was missing. The question raised is that of the suitability of a European Certificate of Succession issued in Germany as a title of succession provided for in Article 14 LH, as well as that of translation as a formal requirement.
The receiving authorities may request translation in accordance with their national law. Therefore, in view of the purpose of the European norm, i.e. to facilitate the movement of citizens in cases of international successions, the registrar may, without being obliged to do so, request a translation if he/she does not have sufficient linguistic knowledge to understand it.
But such a request is unnecessary in the present case where the notary declared to be sufficiently familiar with the German language in the simple translation that results from the fields filled in in the concrete Certificate used, so that further requirements would be unfounded.

13. **Resolución de 14 de febrero de 2019, de la Dirección General de los Registros y del Notariado**

SUCCESSION IN SPAIN OF A BRITISH CITIZEN

The origin of this resolution is in a deed of award of the inheritance of W.M., of British nationality and resident in Spain, died on 15 October 2015 (after the entry into force of the European Union Regulation 650/2012), who had drawn up a notarial will in Spain on 18 July 2011, where he exercised the "*professio iuris*", choosing his personal law as the law applicable to

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govern the succession, being of British nationality; and in such will he instituted his wife as universal heiress of all his possessions in Spanish territory.
The Registrar refused registration on the grounds that the consent of the executors (*Albaceas*) to the award of the inheritance was required and had to be granted by means of a public deed and with the formalities required by art. 3 LH in relation to art. 33 HR; the accompanying 'private document' signed by the executors, by which they grant the widow all the property owned by the deceased throughout the world, is not valid. Moreover, he did not accept the will, with an institution limited to property situated on Spanish territory, as the title of the succession.
According to the doctrine emanating from the case-law of the Court of Justice (Judgment of 12 October 2017 in Case C-218/16 Kubicka) the acquisition of hereditary assets derives directly from the transfer of property *mortis causa* without any adjustment being made, so that the will of the deceased is perfectly safeguarded when, as planned by the testator, his successor acquires the inheritance, in accordance with the applicable law, under the terms of the qualified public deed. This fulfils the main objective of the Regulation, which is to simplify the succession of European citizens, although in the tradition of European instruments on the applicable law, its application is universal.

14. **Resolución de 2 de marzo de 2018, de la Dirección General de los Registros y del Notariado**

The value of any implied '*professio iuris*' under Article 83 of Regulation (EU) No 650/2012 in respect of wills prior to the entry into force of the Regulation (successions occurred on or after 17 August 2015) is established reiterating previous doctrine (Resolutions of 15.6.2016 and 14.6.2016). Due to the application of the Regulation to the whole succession, unitary despite the limited functioning of the referral (art. 34), affirmed the current impossibility of those wills that are limited to the institution of heir over property in Spain, practice, based on its utility, that was frequent prior to 2015. It also clarified that the so-called 'probate' marks the beginning of the liquidation of the succession in the United Kingdom, a subject different from the list of *mortis causa* dispositions in the light of article 3 of the Regulation. It concluded that 'probate' in Spain was unnecessary for successions of British citizens on the basis of a will establishing the '*professio iuris*' (even tacit) with respect to British law

PORTUGAL

1. **Portuguese Supreme Court of Justice, 18 June 2013**

At stake in this case was a will made in the Portuguese Consulate of Brazil, by a Portuguese citizen. This Portuguese citizen had two daughters; therefore, according to the Portuguese Law they were entitled to a mandatory portion of 2/3 of the succession. Nonetheless, the Portuguese citizen made her will according to the Brazilian Law, that affords only a ½ of mandatory portion.
The Court considered that the will was against Portuguese Law, and therefore of no effect.

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2. **Portuguese Supreme Court, 16 April 2013**

A and B concluded a preliminary contract of sale (promessa di vendita), in 1997. A agreed to sell to B her portion acquired by succession from her mother, upon her death. The price agreed was around 60,000 Euro and was immediately paid.
A's mother died in 2004, but she has refused to conclude the contract of sale.
B initiates the judicial proceedings against A and she defends herself invoking that the preliminary agreement was a successory contract, void according to the Portuguese Civil Code (Article 2028). Her argumentation did not succeed.
The Court considered that the agreement at stake was not a successory agreement; on the contrary, it was valid, and A should compensate B for not complying on due time.

3. **Portuguese Supreme Court of Justice, 23 October 2008**

In this case, A and B, married to each other, had celebrated a will agreement in Luxembourg, where they had their residence, according to which at the one's death, the other would be universal heir. This will was considered contrary to Portuguese Law, and of no effect, because they had eleven children, mandatory heirs of 2/3 of the succession. Mandatory succession was considered a "fundamental principle of Portuguese legal system".

4. **Court of Appeal of Évora, 5 February 2009**

A and B (an English citizen) were married, they lived in Portugal, and had one child. In his will, B left his patrimony to his three children, excluding his wife and the son they had in common. This will was against the Portuguese Law, that imposes a mandatory portion to spouse and children. Therefore, the question to the Portuguese Court was to determine if recognition of the will was against Portuguese public order. The answer is twofold: the exclusion of the youngest son was clearly against Portuguese public order, because mandatory succession of children is a fundamental principle. In what respects the spouse, the Court did not find the same consideration. The Court noticed that the spouse is entitled as mandatory heir only since 1977 and that it does not correspond to a fundamental principle of the Portuguese legal order.

5. **Court of Appeal of Lisbon, 18 October 2007**

The case was the following:

R and X got married to each other in 2000, in Morocco.
In 2004, R initiated the procedure for repudiation.
The Court of Rabat, in the same year, confirmed the repudiation.
X did not oppose to the repudiation procedure; she did not oppose neither to the decision of the Court of Rabat.
In 2004, R had residence in Portugal, and X in Morocco.
In 2005, R initiated the legal proceedings necessary to the recognition of the divorce.

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The Portuguese Supreme Court considered a divorce can be agreed upon by both spouses and that is not necessary to invoke a specific reason for divorce. Further, one spouse could ask, unilaterally, for a judicial divorce, in they did not cohabit during a certain period. In some European countries one spouse could already ask for a judicial divorce on demand. Therefore, the court concluded that a judicial decision that recognized a divorce, unilaterally demanded by one spouse, without a justification, cannot ne rejected, as a matter of principle. Following the analysis of the Moroccan legislation, the Court noted that the law did not equally treat both spouses in what respects the capacity to initiate a repudiation proceeding. However, in the present case, the woman had never opposed to repudiation. Consequently, the Court considered that the decision of the Court of Rabat did not offended Portuguese public order.

6. **Court of Appel of Porto, 11 May 2010**

The case was the following:
D and F got married in 1936 and had two children, E and C.
In 1946, D had a daughter out of wedlock, G.
In 1999 F died. Her heirs (D, the spouse, and E and C, their children) made the division, firstly, of the matrimonial property and, secondly, of the successory patrimony. The patrimony at stake was an immovable property and two graves. At the end of negotiation, D would received 125,00 Euros. At the time of the division, he was already 87 years old.

7. **Court of Appeal of Porto, 6 May 1993**

A and B agreed that A would transfer to B all the movable and immovable property that constituted the future succession of their mother. The contract was concluded on consideration, and A would receive immediately the price.
The Court considered that this agreement was a successor contract and, therefore, void.

FRANCE

1. **Cour de cassation, 21 November 2012, n. 1330**

French case-law considers the *testaments conjonctifs* (joint wills) null and void because they are contrary to the freedom of will; in fact, they are acts of common will.
It is precisely in France that such a problem of international private law has arisen. Two spouses had established, in a testament drawn up in Morocco before two rabbinic notaries in a single act, the will that, in the event of the death of one of them, the other one would be heir and vice versa for the same share. When the wife, resident in France, died, her son asked French judges to annul the will, because it was a joint testament.
According to the Court of Cassation, in international private law the rules governing the establishment of a joint will are rules of form and the will was drawn up in accordance with the forms of Moroccan law, being the law of the place of drafting: therefore, in application of the Hague Convention of 5 October 1961, the joint testament was valid as to its form.

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The French judges, in the search for a solution, seem to ponder the two different legal systems, so demonstrating the importance of comparative methodology in the solutions of private international law issues, where "foreign law is placed on an equal footing with national law as an instrument that can be used together with it for the same practical purposes".

2. **Cour de cassation, 29 May 2019, n. 497**

The French Court states that jurisdiction cannot be French because no property of the succession is situated in France and at the time of death the deceased was not habitually resident in a Member State: given that under Article 10, paragraph 2, of EU Regulation No 650/2012, if the habitual residence of the deceased at the time of death is not situated in a Member State and no court of a Member State has jurisdiction under paragraph 1, the courts of the Member State where the estate is situated are nevertheless competent to rule on such property; that, having found that the title to ownership of the apartment situated [...], in Paris, established on behalf of the spouses X..., and noted that it would be for the competent court to determine the estate, the judgment held that, at the present stage of the proceedings, no real property belonging to the deceased is situated on French territory; that, as regards its findings and assessments, which resulted in the absence of any estate situated in France, the Court of Appeal lawfully justified its decision to exclude the subsidiary jurisdiction of the Tribunal de Grande Instance of Paris.

3. **Court of Nanterre, 28 May 2019 (case Hallyday)**

The Nanterre court declared that it does have jurisdictional competence to hear the dispute about Hallyday's case. The court established the he was indeed "habitually resident" in France at the time of his death, as claimed by his eldest of the two children who had been excluded from his US will.
He was deemed to still have habitual residence in France despite his "itinerant and bohemian lifestyle", the number of visits he made to the U.S., his property held there and his family life there before his death.
The court noted that Hallyday had performed concerts in major venues in France until the end of his life attended by a "reverent French public and French-speaking audience."
His son had submitted evidence via his father's Instagram account that the singer had spent 151 days in France in 2015 and 168 days in 2016. The fact that Hallyday was undeniably a French icon was given substantial weight by the court in finding that he was habitually resident in France at the time of his death.
This contrasts with the previous judgements of the French Supreme Court regarding the succession of Maurice Jarre who had actually been resident in the U.S. for many decades.
This interpretation of the EU Succession Regulation no. 650/2012 (which was in force since August 2015) and its habitual residence test means that French law is deemed to apply to the worldwide assets of the late singer. This means that, because of the French civil code forced heirship rules, the "reserved share" of 18.75% in his estate is due to each of his children.
The general rule which prevails in cross-border succession disputes, where the deceased is a national of an EU member state, or leaves assets situated in an EU member state, is set out in

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Article 21 of the 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".

4. **Hypothetical case**

Determining the country where a deceased had their habitual residence is normally a straightforward matter, but where there is any doubt then the usual tests of legal residency will apply, i.e., duration and regularity of stay, location of economic assets, family location.
That being the case, a person who is habitually resident in France will have their worldwide estate determined by the inheritance laws applicable in France. This includes real estate located outside of France.
However, the law also provides that "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."
Accordingly, whether or not an expatriate living in France has assets outside of the country, they can elect via a Will that their inheritance for the whole of their estate be governed by the rules of their native country. This would enable an expatriate in France to escape French forced heirship rules.

HUNGARY

In Hungary no court cases were found concerning the issues covered by the GoInEU Plus project. This seems to stem, first of all, from the failure of Hungary to transpose Regulations Nos 1103 and 1104/2016 and, with reference to Regulation No 650/2012, from the low rate (compared to other EU countries partners) of immigration of European citizens in this Country.
Nevertheless, the Hungarian Partner has elaborated an interesting hypothetical case study of issues arising on international succession issues, with possible solutions.

1. **Hypothetical case**

Variation Nr. 1.: András is a 68 year-old widower whose wife passed away and has two adult children. Given that during his active years he had a successful career as the managing director of a company, he acquired multiple real estates, from which three are located in Italy and one in Hungary. András was born in Hungary in 1950, and later settled in Italy, in the hometown of his deceased wife in Florence. His children are Italian citizens, while he has both Italian and Hungarian citizenships. They used to live in Florence with her wife and children, but 4 years ago, after the death of his wife, András decided that the time has come for him to retire and he needed some environmental change. At that point he decided that he will spend his retired years in his one-time home, Hungary, on the shore of the lake Balaton. His children had already established their own families in Rome, and they had also had successful careers. Thus, he made his decision at ease, knowing that he will spend the last chapter of his life in Hungary. He had lived 3 quiet years in Hungary, when he was found dead on a late autumn day in his house in Balatonfüred.

-Which state has jurisdiction to rule on the succession?
-Which state's law shall be applicable to the succession?

According to the main rule *„the jurisdiction and the applicable law shall be determined based on the habitual residence of the deceased (at the time of his death), see Art. 4. and Art 21. (1).*
In this case at first sight it seems it can be unequivocally determined, that the last habitual residence of the deceased was in Hungary, according to this a Hungarian notary will be entitled to rule on the succession, applying Hungarian law. As the deceased did not exercise his right of choice of law during his life, that is, he did not make a declaration in which he would express which state's law shall be applied to rule on the succession after his death, according to the main rule, the last habitual residence of the deceased shall be the basis when determining the jurisdiction and the applicable law.

At the same time, the fact that the majority of the assets are located in Italy must be considered, furthermore the fact that the heirs also live in the state where the assets are located is important as well. Still, because of the fact that the last habitual residence of the deceased can be determined without any doubt, the main rule shall be applied, regardless of the fact that the major part of the assets as well as the heirs are located in another state. As a result of this, consistent arguments can be brought up in favor Italy, thus the succession procedure would be more advantageous to conduct in Italy.

Nevertheless, taking into consideration the principle of the unity of the assets, the ruling authority shall consider the fact, that the majority of the deceased's assets are located in Italy. Regarding this, the second phase of Art. (24) of the Preamble of the Regulation shall be taken into consideration, because the majority of the assets were located in one of the mentioned states, *„his nationality or the location of those assets could be a special factor in the overall assessment of all the factual circumstances."* It shall be made clear, that this phrase refers only to the situation, when the determination of the last habitual residence of the deceased is a complex task. In this situation, this is not a case, because the last habitual residence can be determined without any doubt.

Variation Nr. 2.: András was aware that in case of his death he would make easier the settlement of succession-related issues for his children (heirs) if he chose Italian law as applicable law to the succession. Before his death he exercised his right of choosing the law according to Art. 22 of the Regulation, so he made expressly a declaration in the form of a disposition of property upon death that after his death the succession shall be governed by Italian law.

-Which state has jurisdiction to rule on the succession?
-Which state's law shall be applicable to the succession?

Art. 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."

In this case the declaration in the form of a disposition of the deceased shall be taken into consideration, which relates to the applicable law.

As the deceased had chosen Italian material law as the one applicable to the succession, this law shall be applicable.

In this case the heirs are advised to consider the possibility defined in Art 5. of the Regulation.

Art. 5. (1) „Where the law chosen by the deceased to govern his succession pursuant to Article 22 is the law of a Member State, the parties concerned may agree that a court or the courts of that Member State are to have exclusive jurisdiction to rule on any succession matter."

Therefore, in this case the parties concerned according to Art. 5. (1) may agree that Italian courts shall have exclusive jurisdiction to rule on the succession. If they do, Italian courts will have exclusive jurisdiction, which would be in this case on every account the most plausible solution. (see additionally for this Art. 7 b):

„The parties to the proceedings have agreed, in accordance with Article 5, to confer jurisdiction on a court or the courts of that Member State."

2. Hypothetical case

Bálint is a 46 year-old married man and the father of a minor child. As he teaches in Spain as a guest-professor, he spends 1 month every year in Madrid. Apart from this, he often travels by plane because he is a well-known professor and researcher on an international level, thus he is invited very often to conferences abroad. During the last symposium in Madrid which he attended, he was asked to be the head of the research group which is entrusted with the research of microorganisms. Bálint was very excited about the request and he accepted it immediately, although he knew that as a result, he will have to spend much more time in Spain and abroad in the future. Bálint and his wife Hanna are Hungarians from Transylvania, thus, they have both Hungarian and Romanian citizenships. The assets of the family are comprised of a smaller family-house in Szentendre, Hungary and a small studio apartment in Madrid. Because of the new job opportunity Bálint started to consider the idea that he will move his family to Madrid for a while, as long as the project he participates in lasts. Bálint was aware that because of his frequent travels he has to face certain risks, so he expressly made a declaration in the form of a disposition of property upon death that after his death the

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succession shall be governed by Spanish law. He was travelling home from Madrid to tell the news to his family when his flight had to make an emergency landing due to an unexpected malfunction, which resulted in a fire in the cabin. Three passengers perished in the fire and Bálint was one of the victims.

- Which state has jurisdiction to rule on the succession?
- Which state's law shall be applicable to the succession?

Althought Bálint made use of the possibility of choosing the law according to Art. 22. of the Regulation, the application of the chosen law (Spanish) is not possible in this case, because Article 22. (1) says that *„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."* It is true, that Bálint often stayed in Spain, but as he was not a Spanish citizen, his choice of law is not valid. His choice of law would have been valid, if he had chosen the law of one of those states, which state's citizenship he possesses. (Romania or Hungary) In the absence of the validity of the choice of law, the main rule shall be applied, which means that the jurisdiction and the applicable law shall be determined according to the last habitual residence of the deceased. This means, that as Bálint's last habitual residence was in Hungary, the Hungarian notary will have the jurisdiction to rule on the succession applying Hungarian law.

3. Hypothetical case

Variation No 1. Éva is a 32 year-old single woman, who has a child from her earlier relationship, who is 3 years old now, and of whom Éva's parents are taking care in Győr, Hungary. Éva had nevertheless found her happiness for the second time with the Austrian Klaus, and from their relationship another child was born. The three of them live and work in Vienna, and they also bought an apartment after the birth of their child. Éva visits her older child (Áron) every two weeks, who is being raised by her parents in Hungary, but for the time being she does not intend to bring Áron to herself. They are not married with Klaus but amongst their plans for the near future, marriage is to be found. Éva is a Hungarian citizen. On a foggy autumn morning Éva was doing the regular shopping for the day, and she was in a hurry to the supermarket, walking fast. While she was stepping downwards on the slippery steps of the subway, in a careless moment she slipped and she fell 64 stair-steps down the steep metro-entryway. She has suffered so grievous a skull injury, that she deceased on site. She did not have a will, her assets were the the ½ of the apartment bought together with Klaus.

-Which state has jurisdiction to rule on the succession?
-Which state's law shall be applicable to the succession?
-Who will be Éva's heirs?

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In this case it can be obviously determined that Éva's last habitual residence was in Austria, she was residentially living there with her new partner and the child born from this relationship. At the same time, it cannot be disregarded that Éva had another child too, of whom Éva's parents took care. This child is a connection point, connecting Éva to Hungary. According to the first phase of the Preamble (24) of the Regulation *„where the deceased for professional or economic reasons had gone to live abroad to work there, sometimes for a long time, but had maintained a close and stable connection with his State of origin. In such a case, the deceased could, depending on the circumstances of the case, be considered still to have his habitual residence in his State of origin in which the centre of interests of his family and his social life was located."*

Nevertheless, the situation in this case is more complicated than the content of the Preamble (24) considering the fact, that Éva had not only gone abroad for professional or economic reasons but she had a stronger connection to Austria: her relationship, her child born from that relationship and the part in the real estate owned with Klaus. At the same time her child living in Győr with her parents is a strong connection to Hungary.

In the absence of a will and a disposal upon death in this case the main rule shall be applicable, that is to say Articles 4. and 21. of the Regulation are applicable. *„the jurisdiction and the applicable law shall be determined based on the habitual residence of the deceased (at the time of his death)"*

According to this, because of the fact that Éva's last habitual residence was in Austria, the succession will be ruled by an Austrian notary applying Austrian law. The determination of Éva's heirs will be made based on Austrian law. This way, after Éva the heirs are her two children, and they will inherit in equal shares.

According to Art. 731. of the Austrian Civil Code "*the deceased's intestate heirs are at first those persons who originate from the deceased, that is to say his/her children and their descendants.*"

Variation Nr. 2. Éva and Klaus got married after the birth of their child, but as Éva didn't intend to leave her first child Áron born from her earlier relationship with her parents, they agreed with her husband that for the time Éva is staying home because of the newborn child, she will be living in Győr with the two children, and Klaus will come to them every weekend and spend the weekend with them at Éva's parents' place. In this variation the accident with Éva happens in Győr and she dies in Hungary.

- Which state has jurisdiction to rule on the succession?
- Which states' law shall be applicable to the succession?
- Who will be Éva's heirs?

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Considering that in this case Éva's habitual residence at the time of her death was in Hungary, further, due to her children, she had a strong connection to Hungary, the Hungarian notary will be managing the succession applying Hungarian law. In this second variation there are changes in the the heirs too as due to the marriage between Éva and Klaus at this point Klaus is an intestate heir of Éva, too, besides the two children. This way the assets of Éva, which are the ½ of the apartment bought together with Klaus will be inherited according to Hungarian succession law rules. According to Art 7:58 of the Act V of 2013 on the Civil Code

„ [Succession by a spouse and descendants]

If there is a descendant heir, the spouse of the testator shall be entitled to

a) lifelong usufruct on the residential premises where the spouse and the testator lived together and on the related furniture and equipment; and

b) a share equal to that of a child from the remainder of the estate.

Consequently Klaus will be entitled to a lifelong ususfruct on the apartment, because the apartment in Vienna is qualified as a residence where the spouse and the deceased lived together besides the above mentioned fact, whether Éva moved to Győr in the last period or not. The property of the apartment will be inherited by the two children in equal shares. The rest of the property of Éva will be inherited by the two children and Klaus in equal shares.

4. Hypothetical case

Ferenc is a 43 year-old Hungarian citizen. He works as a professional mountain rescuer. He lives in Hungary with his wife but due to his profession, he is not a permanent employee, but he undertakes seasonal jobs in various places in the world. In the winter of 2019 the work and responsibility called him to Transylvania, Romania where he undertook the mountain rescue service for the winter period in a ski centrum in the area of the Rodna Mountains. The first period of the service went by without any complications but at the end of December the number of ski emergencies had risen and the services of the mountain rescue group were needed more often. On the occasion of a ski accident, the group was called on site as usual. Ferenc was a member of the ski rescue team of three people, which has been working on the most dangerous ski track. When the team arrived to the location of the accident, they started the rescue action quickly and effectively as they always did, but meanwhile they did not realize in the blizzard that a giant avalanche was descending. The avalanche came so quickly on the team and the injured that it was impossible to prevent or evade it. The Rodna Mountains took four lives that night. From the four victims Ferenc, the always brave mountain rescuer was one.

- Which state has jurisdiction to rule on the succession?
- Which states' law shall be applicable to the succession?

In this case according to the main rule the habitual residence of the deceased at the time of death can be obviously determined. However, the case needs to be examined further, because considering the circumstances of the deceased it is clear that the habitual residence at the time of his death was only the result of the seasonal job, and when ending the seasonal job the deceased would have presumably moved back to Hungary. Based on these facts Art. (25) of the Preamble of the Regulation must be taken into consideration: *„With regard to the determination of the law applicable to the succession the authority dealing with the succession may in exceptional cases – where, for instance, the deceased had moved to the State of his habitual residence fairly recently before his death and all the circumstances of the case indicate that he was manifestly more closely connected with another State – arrive at the conclusion that the law applicable to the succession should not be the law of the State of the habitual residence of the deceased but rather the law of the State with which the deceased was manifestly more closely connected."* In this case it is obvious that the deceased was more closely connected to Hungary, because he was a habitual resident in Hungary together with his wife. Although his habitual residence at the time of death was in Romania, he had not had any connections to Romania except the seasonal job. According to this Ferenc's succession case will be managed by a Hungarian notary applying Hungarian law.