Notaries of Europe

Providing legal certainty

Handbook Explaining Regulation 650/2012 on Cross-Border Successions

Practical Handbook for Notaries

ENN
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Introduction

In order to adapt the rules to the increasing mobility of citizens and to coordinate the coexistence of national inheritance laws, EU Regulation 650/2012 on international successions was adopted on 4 July 2012. It provides a simplified framework for people who have private and financial interests in at least two countries, both within and outside the European Union.

The regulation, which came into force on 16 August 2012, will only apply to successions opened from 17 August 2015.

The regulation applies to all aspects of a succession: from opening to settlement, including devolution and administration. However, the regulation explicitly excludes, inter alia, everything related to donations, life insurance contracts, tontines, trusts, matrimonial property regimes, maintenance obligations, the nature of rights *in rem* and taxation.

The regulation introduces a single connecting factor, the law of the last habitual residence of the deceased, in order to designate both the competent jurisdiction to rule on the whole of a succession and the law applicable to a succession. It also introduces the possibility to choose the law of one of the states whose nationality one possesses as the law applicable to one's succession.

Finally, the regulation creates the European Certificate of Succession, whose purpose is to simplify the procedures with which heirs are confronted in order to gain possession of the property comprising the estate. The European Certificate of Succession will be automatically recognised in all Member States.

The aim of this handbook is to provide an outline of this new regulation so that you have some initial answers when faced with a succession that has a foreign element.

The regulation is available at the following address:
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:201:0107:0134:EN:PDF

Universal application and the general rule regarding the applicable law

ARTICLE 20

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

ARTICLE 21.1

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.

EXAMPLES

1. *Ms Larsson, a Swedish national, dies in Capri (Italy) on 17 August 2015 [1] where she has lived since 2000. She has moveable and immoveable property in Sweden and Italy. She has one daughter. Which law is applicable to the succession?*

   - Regulation 650/2012:
     law of the last habitual residence of the deceased: Italian law for the whole succession.

2. *Mr Garcia, of French nationality, dies in 2016 in Argentina where he has lived since 1990. He leaves one son and moveable and immoveable property in Argentina and France. Which law is applicable to the succession?*

The conflict-of-law rules of each State linked to his situation need to be examined (Argentina and France).

- Argentinian PIL
  Law of last residence of the deceased: Argentinian law for the whole succession.
- Regulation 650/2012
  Law of last habitual residence of the deceased: Argentinian law for the whole succession.

[1] In application of Article 83.1, the Regulation applies to the successions of persons who die on or after 17 August 2015.

The exception to the general rule

ARTICLE 21.2

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.

EXAMPLE

Mr Schmitt, of German nationality, moves in to a nursing home in Slovakia. He dies there in 2018, five years later. Apart from a current account opened in Slovakia, all his moveable and immoveable property is in Germany. His only child – whom he visits regularly – lives in Germany. Which law applies to his succession?

- Regulation 650/2012
  The law applicable to the succession is normally the law of the last habitual residence of the deceased (Slovakian law). However, given the circumstances leading Mr Schmitt to spend the end of his life in Slovakia (only because nursing homes are much less expensive there), Art. 21.2 could be applied, considering that he was manifestly more closely connected with Germany. If such an interpretation were chosen, German law would thus apply to the succession.

At this stage, and in the absence of case law regarding the definition of habitual residence, it is appropriate to refer to Recitals 23, 24 and 25 to have a deeper understanding of the situation.

The exception to the general rule

Recital 23

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

Recital 24

In certain cases, determining the deceased's habitual residence may prove complex. Such a case may arise, in particular, 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. Other complex cases may arise where the deceased lived in several States alternately or travelled from one State to another without settling permanently in any of them. If the deceased was a national of one of those States or had all his main assets in one of those States, his nationality or the location of those assets could be a special factor in the overall assessment of all the factual circumstances.

Recital 25

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. That manifestly closest connection should, however, not be resorted to as a subsidiary connecting factor whenever the determination of the habitual residence of the deceased at the time of death proves complex.

Choice of law

ARTICLE 22.1

A person may choose as the law to govern his succession as a whole the law of the State whose nationality he possesses at the time of making the choice or at the time of death. A person possessing multiple nationalities may choose the law of any of the States whose nationality he possesses at the time of making the choice or at the time of death.

ARTICLE 22.2

The choice shall be made expressly in a declaration in the form of a disposition of property upon death or shall be demonstrated by the terms of such a disposition.

ARTICLE 83.4

If a disposition of property upon death was made prior to 17 August 2014 in accordance with the law which the deceased could have chosen in accordance with this Regulation, that law shall be deemed to have been chosen as the law applicable to the succession.

This choice can already be made now, but will only apply if the death occurs on or after 17 August 2015.

EXAMPLE

Ms Gomes was born in Porto and has lived there all her life. She has dual Portuguese-German nationality. She dies in Porto in 2016 leaving moveable and immoveable property in Portugal and Germany. When she wrote her will in 2013 she chose German law as the law applicable to her succession. Which law is applicable to the succession?

Choice of law

- Regulation 650/2012
  The choice of German law is possible and valid > German law is applicable to the whole succession.

✍ *It is particularly advisable to make an express choice of law in one's will.*

✍ *The choice of law in favour of future nationalities (even if they are valid at the time of death) is strongly discouraged because of the uncertainty it creates.*

Renvoi

ARTICLE 34.1

The application of the law of any third State specified by this Regulation shall mean the application of the rules of law in force in that State, including its rules of private international law in so far as those rules make a *renvoi*:

a) to the law of a Member State; or
b) to the law of another third State which would apply its own law.

EXAMPLES

Which law applies to the succession in the following cases?

1. Ms Brown, an Englishwoman residing in London, dies in 2016 leaving moveable and immoveable property in England, Germany and Italy.

- Regulation 650/2012
  Law of last habitual residence of the deceased: English law for the whole succession.
- English PIL
  English law for the moveable property (wherever it is) and immoveable property located in England, German law for the immovable property in Germany, Italian law for the immovable property in Italy.

If a notary is called upon in Germany or Italy, he/she must accept the renvoi by English law to German and Italian law . In such a case, three different laws will apply to the succession: English law will govern the devolution of the movable property, wherever it is, and immovable property located in England; German law will govern the devolution of immovable property located in Germany; Italian law will govern the devolution of immovable property located in Italy.

[2] The United Kingdom, like Ireland, not having chosen an opt-in, is considered as a third State with respect to the application of the Regulation. The same situation applies in Denmark, in light of the exclusion provided for by the Treaty of Amsterdam.

Renvoi

2. Ms Strauss, of Austrian nationality, residing in Dakar (Senegal), dies in 2016 leaving moveable and immovable property in Senegal, France and Romania.

- Regulation 650/2012
  Law of the last habitual residence of the deceased: Senegalese law for the whole succession.
- Senegalese PIL
  National law of the deceased.

Renvoi by Senegalese law to Austrian law is accepted: if a notary is called upon in France or Romania, he/she will have to apply Austrian law.

However, in application of Article 34.2 [3], *renvoi* is not accepted in the case of application of the safeguard clause or in the case of *professio juris*.

EXAMPLE

An American residing in New York dies leaving moveable and immoveable property in the United States and Greece. She specified in her will that she designated the State of New York as the law applicable to her succession.

- *Renvoi* by American law to Greek law will not be accepted: the law of the State of New York will apply to the whole succession.

[3] Article 34-2: No renvoi shall apply with respect to the laws referred to in Article 21(2), Article 22, Article 27, point (b) of Article 28 and Article 30.

Agreements as to succession

ARTICLE 25.1

An agreement as to succession regarding the succession of one person shall be governed, as regards its admissibility, its substantive validity and its binding effects between the parties, including the conditions for its dissolution, by the law which, under this Regulation, would have been applicable to the succession of that person if he had died on the day on which the agreement was concluded.

ARTICLE 25.2

An agreement as to succession regarding the succession of several persons shall be admissible only if it is admissible under all the laws which, under this Regulation, would have governed the succession of all the persons involved if they had died on the day on which the agreement was concluded.

EXAMPLES

1. A German couple resides habitually in France. The couple expressly chooses German law as the law applicable to their succession and the couple concludes an agreement as to succession in Germany before a German notary, stipulating that German law has jurisdiction to govern this agreement as to succession. The husband dies in France and a French notary has to settle the succession. The agreement is valid, as it had been concluded by two Germans having expressly chosen German law as being applicable to the agreement as to succession pursuant to Article 25.3.

Agreements as to succession

2. *However, a French couple residing in France will not be able to choose German law as the applicable law, whether to their succession in virtue of Art. 22, or to an agreement as to succession in virtue of Art. 25.3. Consequently, this couple will not be able to validly submit the planned agreement to German law.*
3. *Finally, in virtue of Art. 25.3, a bi-national couple (he is German, she is Austrian), residing in France, will alternatively be able to designate German or Austrian law as the law applicable to an agreement as to succession, whereas in the absence of a choice, the law applicable to the succession would have been French succession law (which does not recognise agreements as to succession).*

✍ The validity of an agreement as to succession (like that of a will) is assessed at the time it is concluded. In practice, it is strongly advised to designate the law applicable to the succession at the time the agreement as to succession is established.

Public policy

ARTICLE 35

The application of a provision of the law of any State specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (ordre public) of the forum.

EXAMPLE

An Algerian citizen residing in Algeria dies in Algeria in 2016 leaving bank accounts in France and immovable property in Algeria. He leaves two children living in France: a and a son and a daughter. Which law will apply to the succession?

- Regulation 650/2012
  Algerian law for the whole succession.
- Algerian succession law
  Results in inequality between the son and daughter.
- French public policy
  The French notary must not take into account discrimination based on gender and must therefore substitute French law for the Algerian law that would normally be applicable[4].

[4] There is currently no notion of European public policy and each country will apply its own. Whether the reserved portion is subject to public international policy therefore depends on the internal policy of each country.

Acceptance of authentic instruments

ARTICLE 59.1

An authentic instrument established in a Member State shall have the same evidentiary effects in another Member State as it has in the Member State of origin, or the most comparable effects, provided that this is not manifestly contrary to public policy (*ordre public*) in the Member State concerned.

A person wishing to use an authentic instrument in another Member State may ask the authority establishing the authentic instrument in the Member State of origin to fill in the form established in accordance with the advisory procedure referred to in Article 81(2) describing the evidentiary effects which the authentic instrument produces in the Member State of origin.

ARTICLE 74

No legalisation or other similar formality shall be required in respect of documents issued in a Member State in the context of this Regulation.

EXAMPLES

1. *Mr Ionescu, of Romanian nationality, has drawn up authentic wills in Italy, Spain and in Romania, which was his habitual residence when he died. His heirs request a European Certificate of Succession and, for this purpose, submit the deceased's various wills to a Romanian notary.*

   - **In virtue of Art. 59.1, the wills drawn up before a notary in Italy and Spain have effect in Romania without any formalities, on the same basis as the will drawn up in Romania.**

2. *Mr Vekemans, of Dutch nationality, lives in Italy, where he dies leaving a son and a daughter. The partition document states that the Poussin painting located in the Netherlands is allocated to the daughter. The partition document drawn up in Italy will be accepted in the Netherlands* [5].

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[5] As Article 1.2 k) and l) excludes from the scope of the Regulation the nature of rights in rem and any recording in a register of rights in immovable or movable property, including the legal requirements for such recording, and the effects of recording or failing to record such rights in a register, it is up to the country where the property is located to determine the conditions under which recording is carried out. To this end, Recital 18 states that the requirements for the recording in a register of a right in immovable or movable property should be excluded from the scope of this Regulation. It should therefore be the law of the Member State in which the register is kept (for immovable property, the lex rei sitae) which determines under what legal conditions and how the recording must be carried out.

Moreover, Article 30 states: Where the law of the State in which certain immovable property, certain enterprises or other special categories of assets are located contains special rules which, for economic, family or social considerations, impose restrictions concerning or affecting the succession in respect of those assets, those special rules shall apply to the succession in so far as, under the law of that State, they are applicable irrespective of the law applicable to the succession.

Moreover, Article 31 states: Where a person invokes a right in rem to which he is entitled under the law applicable to the succession and the law of the Member State in which the right is invoked does not know the right in rem in question, that right shall, if necessary and to the extent possible, be adapted to the closest equivalent right in rem under the law of that State, taking into account the aims and the interests pursued by the specific right in rem and the effects attached to it.

Finally, note that in some legal orders, the distribution of the estate must also respect the legal requirements applicable to transactions inter vivos.

Enforceability

ARTICLE 60

An authentic instrument which is enforceable in the Member State of origin shall be declared enforceable in another Member State on the application of any interested party in accordance with the procedure provided for in Articles 45 to 58. [i.e. in accordance with the procedure provided for judgements].

EXAMPLE

A partition document is issued by an Italian notary between a brother, living in Italy, and his sister, living in France. In the document, it is observed that the sister must pay compensation to her brother within one year. As the sister has not done this within the agreed time frame, the brother, equipped with a copy of the document, has a certificate issued by the competent authority in Italy stating that the document is indeed enforceable. Equipped with these documents, he will ask the competent authority in France for a declaration stating enforceability.

The European Certificate of Succession (ECS)

1) The rules of jurisdiction

ARTICLE 64

The Certificate shall be issued in the Member State whose courts have jurisdiction under Article 4, Article 7, Article 10 or Article 11.[6]

ARTICLE 4

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.

ARTICLE 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.
2. Such a choice-of-court agreement shall be expressed in writing, dated and signed by the parties concerned. (...)

EXAMPLES

1. *Mr Dupont of Belgian nationality dies in 2016 in France, where he has lived for ten years, leaving moveable and immovable property in Belgium, Luxembourg and France. He leaves one son. Which authority has jurisdiction to issue the ECS?*

   - **The only authority with jurisdiction will be the French notary chosen by the heir** [7].

The European Certificate of Succession (ECS)

2. Mr Durand of French nationality has lived in Portugal since 2000 and dies there in 2016. He leaves moveable and immovable property in France, Luxembourg and Portugal. He had designated French law as the law applicable to his succession in his will. He leaves two offspring.

- **His two offspring, the only heirs, can conclude an agreement and ask a French notary to issue a European Certificate of Succession. In the absence of such an agreement, only a Portuguese notary can issue a European Certificate of Succession.**

2) What is the European Certificate of Succession?

THE ECS:

- is a uniform 'document' that has value of proof, meant to be used by heirs, legatees that have direct rights to the succession, executors of wills and administrators of the succession in order to prove more easily their status, rights or competencies not only in the issuing State, but also and above all in a Member State other than the one in which the certificate was issued;
- circulates freely, as no formality is needed for its acceptance in the destination state;
- benefits from a presumption of accuracy regarding its content;
- is a streamlined form originating from EU law;

[6] By application of Article 78, it is the Member States that designate the authorities with competence to issue the ECS. Depending on the State, the competent authorities shall be notaries, the courts or both.

[7] Subject to the French State confirming its decision to designate notaries as the competent authority to issue the ECS.

- appears to be neither an authentic instrument nor a judgement;
- is not a document reflecting the definitive solution of a succession that has cross-border implications;
- is not a mandatory document;
- does not replace either national documents or national procedures, although it can also be used on the territory of the issuing State;
- is not an enforcement order.

EXAMPLE

A citizen of Luxembourg dies in Luxembourg where she has resided habitually since her birth. She had bank accounts in Germany. She leaves behind one offspring. The Luxembourg notary issues an ECS mentioning the capacity of heir of the offspring, stating that it is Luxembourg law that applies to the succession, in addition to the elements based upon which this law has been determined. The Luxembourg notary keeps the original of the ECS and issues a copy to the child.

- **The offspring will be able to present a certified copy[8] of the ECS to the bank in Germany in order to receive the funds relating to the succession directly, subject to justification that inheritance duties have been paid.**

[8] Whose validity is limited to six months in application of Article 70.3.

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