Case study:
Cross-border successions (advanced level)

PROJECT: BETTER APPLYING THE EU REGULATIONS ON FAMILY AND SUCCESSION LAW

Co-funded by the Justice Programme 2014-2020 of the European Union

This publication has been produced with the financial support of the Justice Programme 2014-2020 of the European Union. The contents of this publication are the sole responsibility of ERA and can in no way be taken to reflect the views of the European Commission.

Cross-border successions
Case study no 6, advanced level
The case of Mr Peter Hewitson

Mr Peter Hewitson is a British citizen born in 1942 in Brunei. Starting in the 1970's he worked in Paris for an international organisation. In the early 1980's, he bought a very spacious apartment in an upcoming neighbourhood in Paris. In 1985, Mr Hewitson founded a consultancy firm based in Paris, providing advice to large companies in their dealings with governments. The firm grew very fast and in the 1990's it counted more than 150 employees. The business was set up as a limited liability partnership. Mr Hewitson has always been the largest shareholder.

Early on, Mr Hewitson became a member of the Paris Welsh Society ('*Cymdeithas Cymry Paris*'). Mr Hewitson, who has learned fluent French, has a wide circle of friends with whom he socialises. Thanks to his network, he is also a member of the board of the Standard Athletic Club, one of the most exclusive British clubs in Paris. This is how he met Michael Johnson, an Australian lawyer working in the field of international maritime law. Peter and Michael soon became a couple.

Shortly after 2000, Peter and Michael started spending more and more of their days off in Portugal. Mr Hewitson liked it very much there. In anticipation of his retirement and longing for peace and sun, he bought a magnificent beach house in Vilamoura, Portugal. After his retirement in 2007, Mr Hewitson started to build a new network of friends, mainly among expatriate British retirees living in Vilamoura. Michael, who is ten years younger than Peter, continued to work from Paris and frequently flew in for the week-end when his companion was in Portugal. With a few friends, Mr Hewitson founded the Vilamoura Lawn Bowls Club, which now boasts more than 60 members and is one of the best lawn bowls clubs in the Algarve. He has learned bits of Portuguese, but is far from being fluent in the language. With the exception of the maid who comes in every day, he mingles more with British expatriates than with locals.

On average, Mr Hewitson spends at least five months a year in Paris, where Michael continues to work. Mr Hewitson has kept his apartment there and has kept a very tight network of friends in Paris. His bank and main physician are located in Paris. He prefers to spend the winter in Portugal, with Michael joining him for the week-ends and occasionally for a longer stay. Mr Hewitson also frequently travels, especially during the hunting season. On average, Mr Hewitson spends more time in Portugal than he does anywhere else. His beach house is also his most expensive asset.

During a hunting trip in the North of Russia in March 2014, Mr Hewitson is trapped in a hunting watchtower for three days because of a very heavy snow storm. Fearing for his life, he drafts a will on a piece of paper. Mr Hewitson's will include the following provisions:

"I leave £ 150,000 to my dear sister, Jeanne.
I leave my collection of rare guns to my hunting buddy Michael Gladstone.
I leave my residuary estate to the love of my life, Michael Johnson and appoint him as the sole executor of my will."

Remembering the advice he once took from a solicitor, Mr Hewitson also signs the will, which he stores in his wallet. One day later, the storm subsides and he is able to find his way back to civilisation.

Three years after coming back from his dreadful experience in Russia, Mr Hewitson is killed in a traffic accident on his way home from a dinner in Faro.
A couple of weeks after the funeral, Michael informs Jeanne about her late brother's will. Jeanne would like to challenge her brother's last disposition of property.

Question 1
Which rules apply to Jeanne's claim?
Question 2
Do the courts in Paris have jurisdiction to hear the claim made by Jeanne?
Question 3
Assuming the courts of Paris have jurisdiction to hear the case, is the will drafted by Mr Hewitson valid?
Question 4
Will the courts in Paris grant Jeanne's claim and hold that Mr Hewitson's will must be put aside or will these courts rule in favor of Michael Johnson?
Question 5
After the claim made by Jeanne has been rejected and Michael has been found to be the beneficiary of most of Mr Hewitson's estate, what rights could Michael exercise vis-à-vis the limited partnership founded by the late Mr Hewitson?

Alternative scenario: assume paragraphs 3 and 4 of the facts are modified as follows.
Shortly after 2000, Peter and Michael started spending more and more of their days off in Morocco. Mr Hewitson liked it very much there. In anticipation of his retirement and longing for peace and sun, he bought a magnificent *riad* in the Medina in Marrakech. After his retirement in 2007, he started to build a new network of friends, mainly among expatriate retirees living in Marrakech. Michael, who is ten years younger than Peter, continued to work from Paris and frequently flew in for the week-end when his companion was in Marrakech. While Mr Hewitson has kept his apartment in Paris, he spends most of his time in Marrakech where he has built a close circle of friends. The *riad* is also Mr Hewitson's most expensive asset. Inspired by the rich cultural tradition of Marrakech, Mr Hewitson has started writing poetry. He also formed a club where expatriates, living in Marrakech, invite prominent Moroccan intellectuals to discuss current events. Occasionally, Mr Hewitson, who has learned a great deal about the history of the city, serves as unofficial tour guide for high ranking British officials visiting Morocco.

Question 6
Read the alternative scenario and answer questions 2 and 4 again.

Question 1
Which rules apply to address Jeanne's claim?

Methodology
*Step 1. Identify the **area of law** concerned.*
*Step 2. Consider which **aspect of private international law** is at issue*
*Step 3. Find EU and international **legal sources**.*
*Step 4. Check the **scope** of the EU and international texts, and where more than one exist, their relation to each other.*
*Step 5. Find the correct **rule**.*

1. First approach: the Succession Regulation

The first question which should be addressed, relates to the identification of the relevant rules. The European Union has adopted a Regulation dealing specifically with cross-border succession cases: Regulation 650/2012[1]. The first question to be asked is whether this Regulation may be applied.

As part of European law, the Succession Regulation enjoys ***priority*** above provisions of national law dealing with issues of cross-border succession. Therefore, no reference may be made to the national rules when examining the various issues which may arise in the framework of a cross-border succession.

GOOD to KNOW

A number of Member States have adopted specific provisions designed to make it easier to apply the Regulation in their legal order. These provisions may provide details on how to apply the various rules of the Regulation. Other provisions modify the national legal framework to adapt it to the Regulation. When applying the Succession Regulation in one Member State, it is always advisable to take a look at the national measures adopted on the basis of the Regulation.

Note to the instructor: you may ask participant to find out whether their Member State has adopted any specific provision aimed at facilitating the practical application of the Regulation.

2. Finding out whether the Succession Regulation may be applied

Each Regulation adopted as part of the European area of justice has a specific **scope of application**. As a first step in resolving a case, it is important to verify whether a given Regulation properly applies to a given dispute.

The scope of application of the Succession Regulation is determined by a number of preliminary questions, namely:

- whether the case possesses a sufficient *cross-border dimension*;

1 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 (*O.J.*, L-201/07 of 27 July 2012).

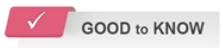
- whether the facts fall within the *subject matter scope* of the Regulation;
- whether the facts fall within the *geographical scope* of the Regulation;
- whether the facts fall within the *temporal scope* of the Regulation.

- **Cross-border dimension**

Although this has not yet been confirmed by the CJEU, the application of the Succession Regulation requires that the dispute at hand possesses a **cross-border dimension**. There exists no precise definition of this requirement. A succession could present a cross-border dimension in various cases, such as:

  - when the deceased had another nationality than the nationality of the State in which he habitually resided;
  - when the deceased possessed assets in another State than the State in which he habitually resided; it does not matter whether these assets represent a substantial portion of the deceased's assets;
  - when some of the heirs or other beneficiaries of the succession are established in another State than the State in which the deceased habitually resided;

There are other situations where a succession could present a sufficient cross-border dimension.

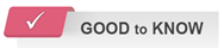


The Succession Regulation is not limited to successions with a European dimension. The Regulation may be applied even though the succession is linked with a third State. The Regulation replaces the private international law of Member States in relation to cross-border succession. As such, the Regulation may also be applied when a succession is linked with one or more third States.

- **Subject matter scope**

According to its Article 1, the Regulation applies to "the estate of deceased persons". This is a wide scope of application, which is further clarified in Recital 9 of the Preamble, which states that "The scope of this Regulation should include all civil-law aspects of succession to the estate of a deceased person, namely all forms of transfer of assets, rights and obligations by reason of death, whether by way of a voluntary transfer under a disposition of property upon death or a transfer through intestate succession".

Some issues which may be related to the succession of a person are, however, **excluded** from the scope of application of the Regulation. This is notably the case for tax issues. The Regulation does not aim to replace the tax rules applicable in each Member States for succession. The Regulation could, however, have an impact on the tax treatment of a cross-border succession. It may be that the law declared applicable under the Regulation grants rights to other beneficiaries or grants other rights to beneficiaries than the law of the State where the succession is handled. This could give rise to a change in the total amount which a State may claim as tax, or modify the tax bill of individual beneficiaries.



Member States have adopted various rules to deal with taxation of cross-border successions. In some Member States, a succession will only give rise to taxation if the deceased was habitually resident in the State concerned. Other Member States may levy succession tax as soon as the deceased possessed assets in the State.The CJEU has issued a number of rulings dealing with the possibility for Member States to tax cross-border successions. In Van Hilten-Van der Heijden (Case C-513/03), the CJEU decided in 2006 that the free movement of capital provisions of the TFUE did not prevent a Member State from taxing the estate of a national of that Member State who lived abroad at the time of death, on the basis that she died within 10 years of ceasing to be a resident in that Member State, particularly if the legislation in question allowed relief for inheritance taxes levied by other States.

Further issues which are expressly excluded from the subject matter of scope are questions relating to the status of natural persons and family relationships, the legal capacity of persons, questions relating to the disappearance or absence of a natural person and questions relating to the matrimonial property regimes.

Those issues should be dealt with using the relevant rules of private international law. Those rules may sometimes be found in other EU private international law regulations. This is the case for matrimonial property issues (at least, starting on 29 January 2019)[2]. Most issues left out of the Succession Regulation will be dealt with using the relevant private international law rules of the Member State where the succession opened. This may lead to the same question being addressed differently depending on the Member State where the question is addressed.

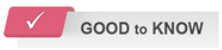
When looking at the various exclusions from the subject matter scope of the Regulation, one should also pay attention to Article 23. Article 23 lists a number of issues which are deemed to fall under the law applicable to the succession. Hence, Article 23 may provide guidance on what must be understood as falling under the concept of 'succession'.

In the present case, the Regulation squarely applies with Mr Hewitson's succession. There are, however, a number of preliminary questions which cannot be answered using the Regulation: this applies among other to the question of the nature of the relationship between Mr Hewitson and Mr Johnson.

- **Geographic scope of application**

The Succession Regulation was adopted by the European Union. It is only in force in the Member States – with the caveat that three Member States are not bound by the Regulation, i.e. Denmark, the United Kingdom and Ireland. The fact that these three Member States are not bound by the Regulation does not mean that the Regulation cannot be applied in relation to the succession of a citizen of one of these countries, or when the deceased resided habitually or possessed assets in one of these three countries.

2 Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes (OJ L183/1 of 8 July 2016) and Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships (OJ L 183/30 of 8 July 2016).



Denmark, the UK and Ireland are not bound by the Regulation. This means that the authorities of these countries are not required to apply the Regulation when dealing with a cross-border succession. It also means that whenever the Regulation points to the application of the law of one of these countries, the authorities of a Member State dealing with a case of cross-border succession should consider that the applicable law is that of a third State. As a consequence, the mechanism of 'renvoi' may be triggered (Article 34). Further, if the deceased habitually resided in Denmark, the UK or Ireland, an additional rule of jurisdiction may be triggered, which grants jurisdiction to the courts of the Member State where assets of the deceased are located (Article 10).

The Regulation aims to facilitate the "proper functioning of the internal market… by removing the obstacles to the free movement of persons who currently face difficulties in asserting their rights in the context of a succession having cross-border implications." (Recital 7, Preamble). The Regulation therefore clearly has a European dimension.

The Succession Regulation does not include a rule specifically dealing with its geographical scope of application, as do other Regulations[3]. There is therefore not a single element which would constitute the required connection with the European Union, ensuring that the Regulation is applicable.

In order for the Regulation to apply, one should make reference to its rules of jurisdiction, i.e. Articles 4 to 10. As soon as the authorities of one Member State have jurisdiction, the Regulation applies. One should therefore first verify whether the Regulation grants jurisdiction to the authorities of one Member State.

The *nationality* of the deceased is in any case not relevant. The application of the Regulation is not reserved to the succession of nationals of Member State.

Likewise, the Regulation may be applied even if the succession includes assets located in *third States*.

- **Temporal scope of application**

According to Article 83, the Regulation applies "to the succession of persons who die on or after 17 August 2015".

If the deceased passed away before this cut-off date, the Regulation cannot be applied. This means that notaries and authorities dealing with cross-border successions will continue to apply the national rules of private international law dealing with successions for some years to come. It is not possible for the notary or the heirs of the deceased to 'opt in' to the Regulation.

If the deceased passed away on or after 17 August 2015, the Succession Regulation is fully applicable. It displaces entirely the national rules of private international law.

Article 83 introduces further rules which may make it possible to take into account the provisions of the Regulation in relation to choices made by the deceased before the cut-off date of 17 August

3 See *e.g.* the Articles 4 to 6 of the Brussels Ia Regulation.

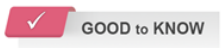
2015. It may therefore be possible to refer to the Regulation even though the question relates to a will or another disposition made before that date.

Answer Q1:
In the present case, the Regulation is applicable. Mr Hewitson passed away in 2017, i.e. after 17 August 2015. Therefore, the case falls within the temporal scope of the Regulation. The litigation directly relates to his succession, as defined in the Regulation. The case, therefore, falls squarely within the subject matter scope of the Regulation. Finally, Jeanne has introduced proceedings before the courts of Paris, France. As the Regulation has fully replaced the private international law rules of France dealing with succession, the Court should refer to the Regulation when addressing Jeanne's claim.

Question 2
Do the courts in Paris have jurisdiction to hear the claim made by Jeanne?

The Succession Regulation includes detailed rules of jurisdiction. Those rules are applicable whenever court proceedings are started before the courts of a Member State bound by the Regulation in relation to a cross-border succession.

The basic principle under the Regulation is that jurisdiction goes to the courts of the Member State where the deceased *habitually resided* before his death (Art. 4). The courts of that Member State have jurisdiction over the whole of the assets, including assets which may be located in third States. The concept of 'habitual residence' should receive the same interpretation when applying Article 4 than when applying the conflict of laws rules of the Regulation.



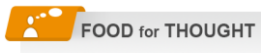
The Regulation does not make it possible for a person to determine beforehand the courts having jurisdiction to deal with his/her estate. A choice of court included in a will or other disposition of property upon death is not valid under the Regulation. Article 5 of the Regulation, however, makes it possible for the heirs and other beneficiaries to agree upon the court having jurisdiction to hear disputes. This may be done before or after the person concerned has passed away. A choice of court may, however, only be agreed upon provided the person concerned has designated the law applicable to his succession. The choice must further be made for the court or the courts of the Member State whose law has been designated.

The Regulation includes other rules of jurisdiction:

- ***Article 10*** makes it possible to bring proceedings before the courts of the Member State where assets of the deceased are located. This rule may only be triggered when the deceased habitually resided in a third State. Under the Regulation, this is referred to as 'subsidiary jurisdiction';
- ***Article 7*** of the Regulation allows a court to exercise jurisdiction if the deceased had chosen the law of that Member State to govern the succession and all parties to the proceedings have expressly accepted the jurisdiction of the court seised;
- ***Article 9*** grants jurisdiction to the courts of the Member State in which proceedings are brought, provided that the deceased had chosen the law of that Member State to govern his succession and some of the parties concerned concluded an agreement to grant jurisdiction to the courts of that Member State. If the parties to the proceedings who were not party to

the agreement do not challenge the jurisdiction of the court, this court may exercise jurisdiction;

- ***Article 11*** allows a court of a Member State to exercise jurisdiction in exceptional cases, when no court of another Member State has jurisdiction and it appears that proceedings cannot be brought or conducted in a third State with which the case is closely connected;
- ***Article 19*** makes it possible for the courts of Member State to grant provisional and protective relief, even if the courts of another State have jurisdiction as to the substance of the matter.



The Regulation does not mention the possibility to arbitrate succession disputes. Whether disputes in relation to succession may be submitted to arbitration depends on the criteria which is used in the State concerned to define arbitrability. In some Member States, such as Germany and Austria, there is a long tradition to refer succession disputes to arbitration. An arbitration agreement may provide an interesting substitute for a choice of court clause in a testament or a succession agreement.


Which court has jurisdiction under the Succession Regulation?
Deceased not habitually resident in MS bound by Regulation
Deceased habitually resident in MS bound by the Regulation
Deceased leaves no asset in a MS
MS may only exercise jurisdiction in exceptional cases (Art. 11)
Deceased had not chosen law applicable to his succession
Courts of MS where deceased last habitually resided have jurisdiction
Deceased had chosen law applicable to his succession
No choice of court under Art. 7
Courts of MS where deceased last habitually resided has jurisdiction
Beneficiaries have chosen court of MS of deceased's nationality (Art. 7)
Court chosen has jurisdiction
Deceased leaves assets in a MS
In other scenarios : MS only has jurisdiction over local assets
Deceased had previous habitual residence in MS where assets left for period of no more than 5 years before court seized
MS has full jurisdiction over succession
Deceased is a national of MS where assets left
MS has full jurisdiction over succession

In the present case, 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 Hewitson's habitual residence was situated.

As with other private international law instruments, the Regulation does not include a definition of the concept of 'habitual residence'.

Two recitals provide, however, some guidance on the concept of 'habitual residence' and how it should be construed.

> *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."

The present case does not seem to fall neatly in the various cases listed in Recital 24. Mr Hewitson lived mainly in Portugal but he kept very strong links with France. He was not a national neither of France, nor of Portugal.

One should therefore attempt to collect additional facts to find out where Mr Hewitson habitually resided. One could look at any religious institution attended by Mr Hewitson, the place where his physician was established, where his bank account was kept, etc. The fact that Mr Hewitson may have been a tax resident in France or Portugal could be an indication, but is as such not conclusive.

The concept of habitual residence is used widely in other EU private international law instruments (see *e.g.* Articles 5 and 8 of the Rome III Regulation and Articles 3 and 8 of the Brussels IIa Regulation). The CJEU has been called upon to offer guidance on the interpretation of this concept. In a case concerning parental responsibility, the CJEU has indicated that the habitual residence corresponded to "a place which reflects some degree of integration in a social and family environment" (CJEU, 2 April 2009, Case C-523/07, § 44). While the Succession Regulation pursues its own objectives and is not necessarily based on the same principles as the Brussels IIa

Regulation, inspiration may be found in this definition for the purpose of interpreting the Succession Regulation. In any case, the concept of habitual residence should receive an *autonomous definition*, i.e. a definition which is specific to the Succession Regulation and is not directly inspired by concepts of national law.

GOOD to KNOW

What are the decisive criteria in order to determine the habitual residence under the Succession Regulation? If one takes into account the indications provided in the Preamble, the following list of criteria may be used:

- how long the deceased has actually been residing in a given country and whether this residence is a stable residence;
- the reasons why the deceased has been residing in a given country;
- where is the center of interests of his family and his social life located;
- where are the assets of the deceased located, in particular the physical assets;
- where is the professional life of the deceased located (giving more weight to current professional activity than to former activity) and other economic activities;
- what is the deceased's nationality or nationalities;
- whether the deceased mastered the local language;
- whether anything is known about the deceased's intention and mindset.

In most cases, localising a person's habitual residence will prove not difficult. Experience has shown, however, that in a minority of cases, it may prove more challenging to determine where a person is habitually resident.

FOOD for THOUGHT

In some situations, it may prove difficult to determine where a person is habitually resident. The following cases may raise some difficulties:

- 'Sun seeking' retirees who may spend 6 months a year in a sunny place, and the rest of the year in the country of origin;
- Cross-border commuters, who live in country A but work in country B;
- Persons who live in a country against their will (such as persons kept in jail in a foreign country) or without having expressed the intention of moving out (old age nursing care patients moved out to a country where such care is more affordable);
- Persons who have only very recently moved to another country – *e.g.* a person who has lived all his life in France and died just one week after moving out to Germany;
- Persons who have settled in a country only on a temporary basis, for a limited time such as researchers or students, but who overstay.

In the present case, Mr Hewitson divided his life between Portugal and France. He had strong ties with these two countries, as witnessed by his involvement with clubs both in France and in Portugal. The facts reveal that Mr Hewitson's involvement in Paris is linked to his past there, whereas his connection with Portugal is more recent and quite dynamic. The fact that he has bought a house in Portugal, which is his biggest asset, and founded a club there, may indicate that Mr Hewitson has moved the center of interests from France to Portugal. However, Mr Hewitson has kept strong links with France, where he keeps spending much time. His life companion is still based in Paris and does not seem to consider Portugal as anything else than a holiday destination. On top of this, Mr Hewitson's involvement in Portugal is more recent and more limited as he does not speak the local language and only mingles with the expatriate community. Although this is far from a clear cut case, one may conclude that Mr Hewitson has not moved the centre of interests from France to Portugal and that Mr Hewitson's habitual residence is still located in France.

Answer Q2:
In the present case, the answer depends on where Mr Hewitson was lastly habitually resident. The facts of the case reveal that identifying the habitual residence may prove a very thorny issue. However, considering all the facts, one may conclude that Mr Hewitson's last habitual residence was situated in France. The courts of Paris may therefore exercise jurisdiction. They should do so after reviewing *ex officio* the issue of jurisdiction, as Article 15 requires the courts of a Member State to examine its jurisdiction on its own.

Note to the instructor: as the case may leave some hesitation on the place where Mr Hewitson has established the centre of his interests, you may ask participants what it would take to tilt the balance towards Portugal as the place where the habitual residence is located.

Question 3
Assuming the courts of Paris have jurisdiction to hear the case, is the will drafted by Mr Hewitson valid?

Mr Hewitson has drafted a will. The will was drafted in rather peculiar circumstances. The question of the validity of the will must be addressed.

The first question to be addressed in this respect is whether the Regulation applies. The will was drafted in 2014, i.e. before the Regulation became fully applicable.

Given that Mr Hewitson passed away in 2017, the Regulation applies to his succession. The Regulation applies to the whole succession, including the will. The fact that the will was drafted before the actual entry into force of the Regulation, does not mean the will is not covered by the Regulation.

Article 83 includes specific rules in relation to dispositions of property upon deaths (DOPUD) concluded before 17 August 2015. These rules aim to guarantee that 'old' DOPUD's remain valid even though they were drafted before the Regulation became applicable. This confirms that the Regulation may be applied even though a will was drafted before it became fully applicable.

In order to find out whether it is valid, one should verify whether it complies with the applicable *formal requirements*. These requirements are in the first place to be found in the 1961 Hague Convention (Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions). This Convention is in force in 42 countries, among which France. It is not in force in Portugal.

Article 75(1) of the Regulation gives this Convention precedence over the provisions of the Regulation. Accordingly, the Convention of 1961 applies if the Courts of Paris are seised of proceedings in relation to the succession. The Convention would *not* apply if the succession is handled in Portugal. In the latter case, Article 27 of this Regulation with regard to the formal validity of wills and joint wills will apply. Article 27 has taken over the various requirements to be found in the 1961 Convention so that there are no substantial differences between the two.

When is a will valid under the 1961 Hague Convention? The 1961 Hague Convention is based on the idea that testamentary freedom should be extended to the maximum possible. To that end, the Convention does not prescribe the application of a single law, nor does it impose a particular form of will. Rather, it provides that a will is valid if it complies with one of several alternatives. A will is valid if it complies with the formal requirements set out in:
i) the law of the place where the testator made it, or
ii) the law of a nationality possessed by the testator, either at either at the time when he made the disposition, or at the time of his death, or
iii) of a place in which the testator had his domicile either at the time when he made the disposition, or at the time of his death, or
iv) of the place in which the testator had his habitual residence either at the time when he made the disposition, or at the time of his death, or
v) so far as immovables are concerned, of the place where they are situated.

In the present case, applying either the 1961 Hague Convention (if the matter is brought before a French court) or Article 27 of the Regulation (if the matter is brought before a court in Portugal), one may take into account the law of the following countries: England & Wales (because Mr Hewitson is a British citizen), Russia (because the will was drafted in Russia), France (because Mr Hewitson resided in France) and Portugal (because the will concerns an immovable situated in Portugal).

- Under French law, a *holographic will* must be entirely hand-written, dated and signed by the testator (Article 970 Civil Code). Holographic wills may be filed with a notary, who will record it in the French Central Register of Wills.

- Under Portuguese law, a testator may draw a *public* or a *closed* will. In both cases, a notary must intervene, either to draw up the will (public will) or to register the will (closed will). There does not seem to be any room for a holographic will under Portuguese law. Portugal is also party to the Uniform Act on the Form of an International Testament, introduced by the Washington Convention of 26 October 1973. A person may therefore make an international testament, which must be written by the testator or by a third party, in any language, by hand or by other means and prepared under articles 2-6 of the Uniform Act, and duly approved as such by a notary.

- Under Russian law, a person may in extraordinary circumstances, draft a will "in a simple written form". Article 1129 of the Russian Civil Code provides that: "A citizen who is in a situation that obviously threatens his/her life and who, by the virtue of prevailing extraordinary circumstances, is deprived of an opportunity to create a will under the rules of Articles 1124 – 1128 of the present Code may make his/her last wishes as to the disposition of his/her property in a simple written form. The citizen's last wishes set out in simple written form shall be deemed his/her will, if the testator has written a document in his/her own hand in the presence of two witnesses the content whereof evidences that it is a will."

Pending further examination of the scope and content of Article 1129 under Russian law, it appears that the will drafted by Mr Hewitson is valid, as it was drafted in extraordinary circumstances.

It may be difficult to identify with precision the formal requirements applicable in one given law in relation to wills and other testaments. It is useful to verify whether the country concerned has acceded to the Washington Convention providing a Uniform Law on the Form of an International Will (1973). This Convention is in force in 21 Contracting States.

Answer Q3:
In the present case, applying the 1961 Hague Convention (if the matter is presented to a French court) or Article 27 of the Regulation (if the dispute is settled by a Portuguese court), one should come to the conclusion that the will is valid, as it complies with the formal requirements set out by Russian law.

Question 4
Will the courts in Paris grant Jeanne's claim and hold that Mr Hewitson's will must be put aside or will these courts rule in favour of Michael Johnson?

In the present case, the outcome of the case depends on the effect to be given to Mr Hewitson's will. In order to assess these effects, several questions need to be addressed:

- Which law applies to Mr Hewitson's succession?
- Whether the existence of a will modifies the reasoning.
- Whether the fact that the will was drafted before 17 August 2015 affect the reasoning.

- Which law applies to Mr Hewitson's succession?

The Regulation attempts to have each succession governed by *one and only one law*. Recital 37 of the Regulation indicates that the law applicable to the succession "should govern the succession as a whole, that is to say, all of the property forming part of the estate, irrespective of the nature of the assets and regardless of whether the assets are located in another Member State or in a third State". In practice, there may be some cases where more than one law will apply to the succession. The principle, however, is that of the unitary treatment of a succession. The law declared applicable to the succession applies whether it is the law of a Member State (bound or not by the Regulation) or of a third State. This follows from Article 20.

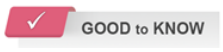
In order to determine which law applies to a succession, the Regulation follows two tracks:

> i) The first track is that a person's succession is governed by the law of the country in which this person *habitually resided* before his death (Art. 4). The Succession Regulation introduces an important nuance to the application of the law of the deceased's last habitual residence. Article 21(2) of the Regulation allows to deviate from the normal result if the succession presents a manifestly closer connection with the law of another State. Recital 25 provides further clarification on the operation of this **escape clause**. According to this Recital, the escape clause may be used when "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". According to Recital 25, the "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."

ii) the second track is that the Regulation also allows parties to make a *choice of law*: one may decide to submit his/her succession to the law of his/her nationality (Art. 22). As underlined by Recital 38 of the Preamble, the possibility to choose the law makes it possible for citizens "to organise their succession in advance". The choice of law can only be made in favour of the law of the nationality of the person making the choice. This limitation is justified, according to Recital 38, "in order to ensure a connection between the deceased and the law chosen and to avoid a law being chosen with the intention of frustrating the legitimate expectations of persons entitled to a reserved share". Nevertheless, a person having two nationalities may freely choose to submit his/her succession to the law of the nationality of his/her choice. According to Art. 22, paragraph 2, such a choice of law may be made "expressly in a declaration in the form of a disposition of property upon death" or "be demonstrated by the terms of such a disposition".

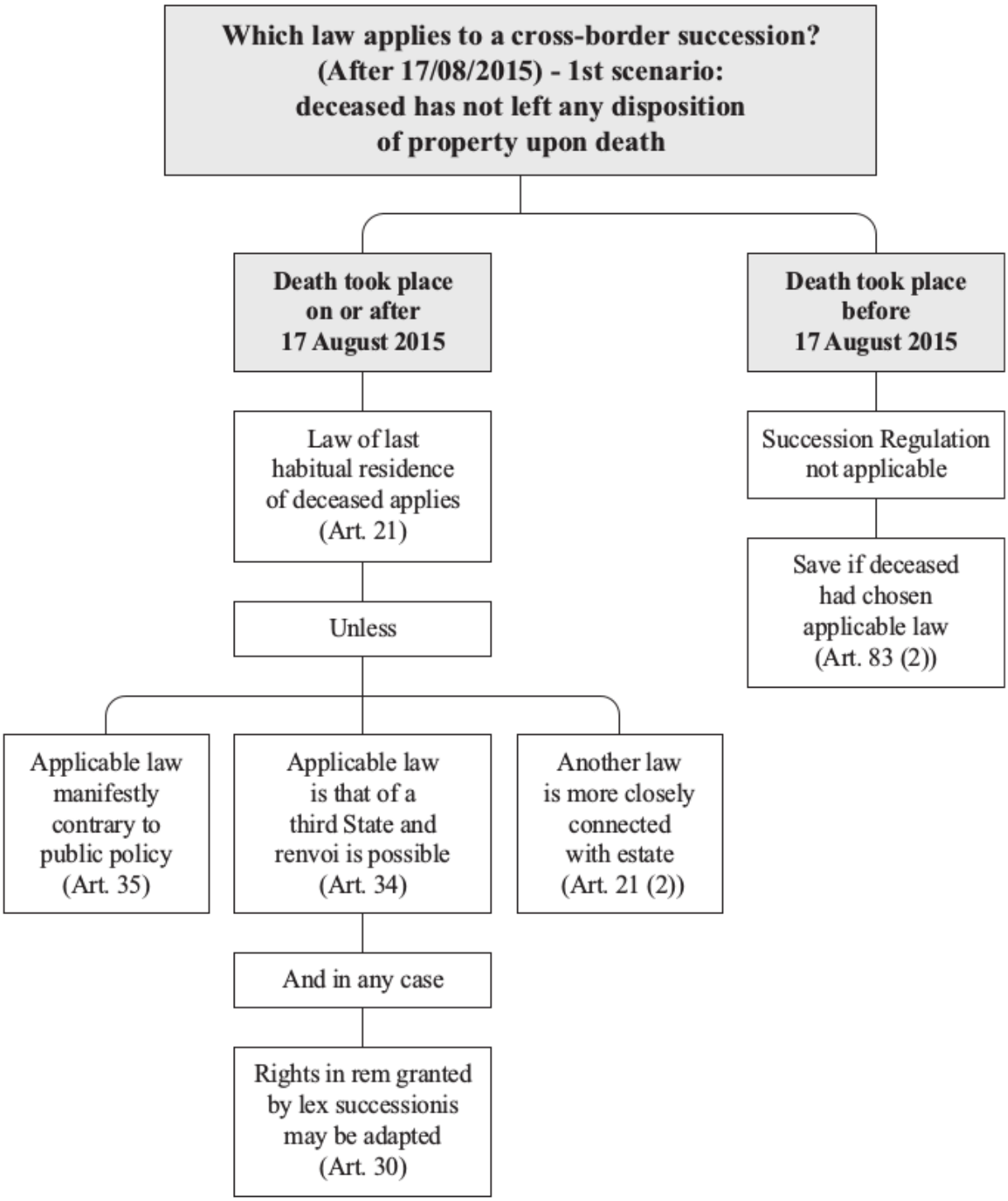
In the present case, the habitual residence of Mr Hewitson is most probably located in France. As a consequence, and failing any choice of law made by Mr Hewitson, *French law* applies to his succession. Mr Hewitson has built up an extensive network in Portugal and his succession therefore also presents a close connection with this country. It is doubtful, however, that the succession presents a manifestly closer connection with Portugal than with France.



It is not always easy to find information on the succession law of a country. Next to the classic tools which may be found in most university libraries, such as books offering a comparative treatment of succession law (see *e.g.* Louis Garb & John Wood, *International Succession*, 4th ed., OUP, 992 p. and CAE-IRENE-CNUE, *Les successions en Europe. Le droit national de 42 pays européens*, 2016), online tools may also offer helpful guidance on the law of certain countries.
Within the EU, two online platforms offer access to the law of succession:

- the CNUE has set up a platform including information on the law of 22 Member States (*www.successions-europe.eu*)
- the European E-Justice Portal also offers access to basic information on the succession law of 26 Member States (*https://e-justice.europa.eu/content_successions-166-en.do*).

A court may also make use of the European Judicial Network to obtain information on the law of another Member State. In order to find judges in other EU Member States, judges can use the contact point: *https://e-justice.europa.eu/contactPoint.do*.


Which law applies to a cross-border succession? (After 17/08/2015) - 1st scenario: deceased has not left any disposition of property upon death
Death took place on or after 17 August 2015
Death took place before 17 August 2015
Law of last habitual residence of deceased applies (Art. 21)
Succession Regulation not applicable
Save if deceased had chosen applicable law (Art. 83 (2))
Unless
Applicable law manifestly contrary to public policy (Art. 35)
Applicable law is that of a third State and renvoi is possible (Art. 34)
Another law is more closely connected with estate (Art. 21 (2))
And in any case
Rights in rem granted by lex successionis may be adapted (Art. 30)

- Whether the existence of a will modifies the reasoning.

The Regulation introduces special rules in relation to DOPUD's. Article 24 includes a rule in relation to dispositions of property upon death other than an agreement as to succession. Article 25 aims at agreements as to succession.

Under these provisions, application should be made of the law which would have applied if the person concerned had died on the day on which the will was drafted or the agreement was concluded. In other words, one must *anticipate* on the opening of the succession and do as if the succession opened on the day the agreement was signed.

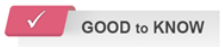
Recital 51 clarifies the operation of this rule:

> "Where reference is made in this Regulation to the law which would have been applicable to the succession of the person making a disposition of property upon death if he had died on the day on which the disposition was, as the case may be, made, modified or revoked, such reference should be understood as a reference to either the law of the State of the habitual residence of the person concerned on that day or, if he had made a choice of law under this Regulation, the law of the State of his nationality on that day."

This means that one should go back to the moment Mr Hewitson drafted his will in order to determine which law would have applied to his succession at that time.

Article 24 only pertains to the "admissibility and substantive validity" of the will. Those issues are governed by the law which would have applied if Mr Hewitson had passed away on the day he drafted the will. Other issues remain subject to the succession law declared applicable by the general rules (art. 21 and 22).

Recital 50 of the Preamble gives an example of the division of role between the two laws: it provides that the law governing "the admissibility and substantive validity of a disposition of property upon death […] should be without prejudice to the rights of any person who, under the law applicable to the succession, has a right to a reserved share or another right of which he cannot be deprived by the person whose estate is involved".



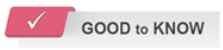
The concept of 'admissibility' does not play an important role in relation to wills. It has much more weight when the deceased had concluded an agreement relating to his succession, as many jurisdictions are traditionally rather reluctant to allow parties to conclude agreements relating to a succession. In jurisdictions inspired by the French Civil Code, the principle has been for a long time that an inheritance is transmitted by law and will and not by a contract. While it is true that this principle has been softened to some extent in many jurisdictions, it is still necessary to verify whether the law of a given country recognises the possibility to agree on a future succession. In some countries, succession agreements are accepted, whether they aim to have one party renouncing his rights that will arise from a future estate or to modify those rights. In other countries, succession agreements are only possible among well-defined categories of persons, such as spouses or parents and children. In yet other countries, parties may only conclude a succession

agreement in respect of certain assets, such as businesses[4]. All these issues fall under the concept of 'admissibility'.

In the present case, Mr Hewitson resided habitually in France when he was trapped in a snow storm in Russia and drafted his will. As a consequence, French law should in principle apply under Article 24 to the admissibility and substantial validity of Mr Hewitson's will.

However, one should further examine whether Mr Hewitson has made a choice of law. Under Article 22, a choice of law may be made *expressly* or be *implied* in the terms of a DOPUD. According to Recital 39 of the Preamble, a choice of law could be regarded as demonstrated by a disposition of property upon death where, for instance, the deceased had referred in his disposition to specific provisions of the law of the State of his nationality or where he had otherwise mentioned that law".

One should therefore determine whether Mr Hewitson has made an express or implicit choice of law in their agreement.
It would be very unlikely for Mr Hewitson to have included an ***express choice of law*** in his will, given the extreme circumstances in which his will was drafted.
As far as an ***implicit choice*** is concerned, there are not enough indications in the case to infer that Mr Hewitson wanted his will to be subject to English law, the law of his nationality law. The fact that he appointed his life companion as the sole executor of his will is not sufficient to indicate that he intended English law to apply to his estate. He could indeed have included a similar provision under French law (art. 1025 ff. French Civil Code). The will includes only generic provisions, which are not as such sufficient to infer that the testator wanted to subject it to his national law.



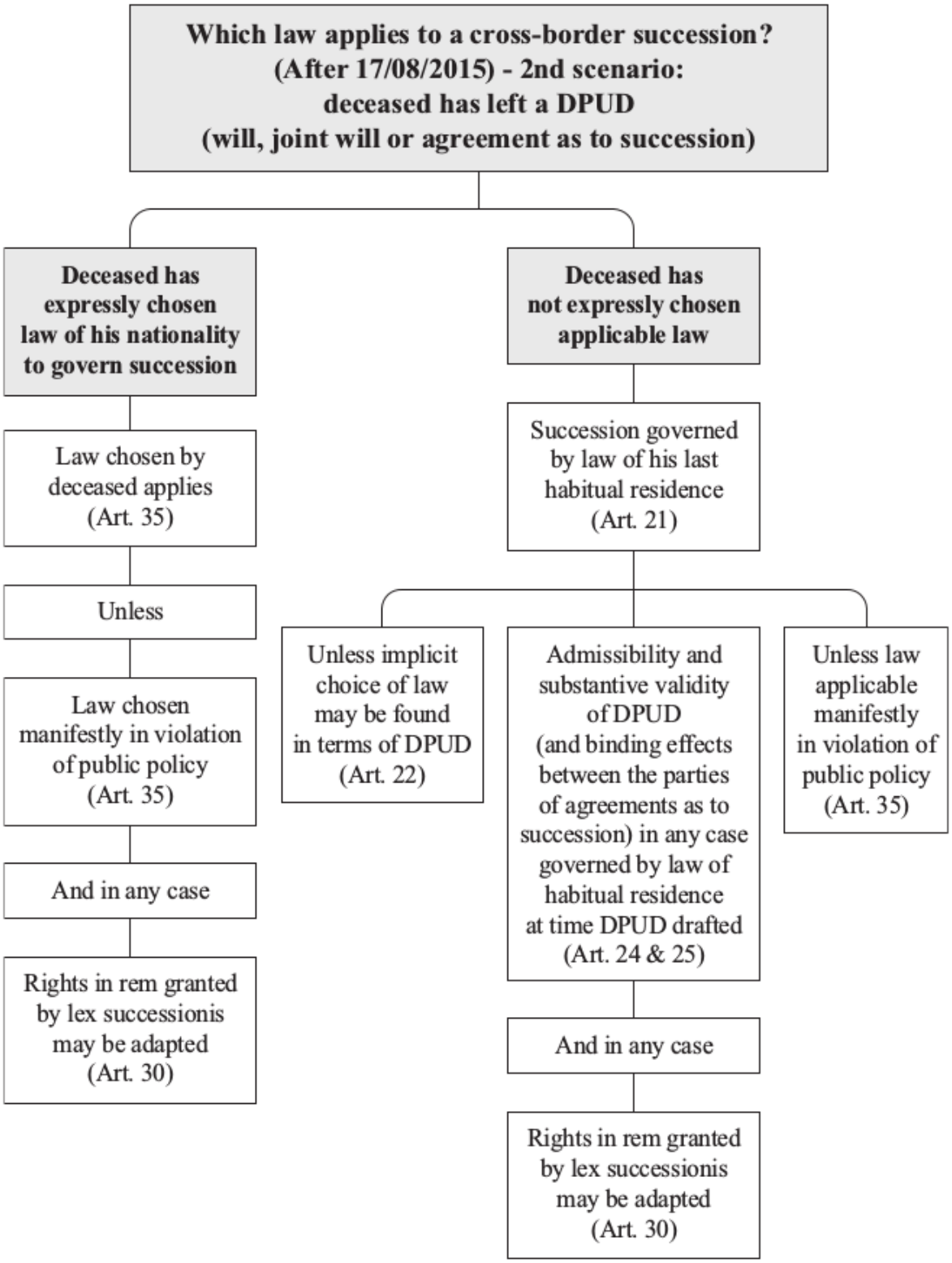
In which circumstances may one conclude that a person has implicitly chosen to submit his succession to the law of his nationality? This requires an assessment of all the circumstances of a case and a detailed examination of the various provisions of a will or succession agreement. If Mr Hewitson had requested the advice of a solicitor in England and referred to a mechanism peculiar to English law, such as the trust while making a reference to one or the other provisions peculiar to the English legal system, this could be interpreted as indicating a willingness to choose English law.

It must therefore be concluded that Mr Hewitson has not made a choice of law. As a consequence, one should apply *French law* in order to assess the admissibility and substantive validity of the will drafted by Mr Hewitson.

The application of Article 22 to succession agreements may give rise to difficulties if the parties to the agreement do not share the same nationality. In that case, there is no possibility for parties to be bound by a single choice for one, unique law. In the absence of a common nationality, parties are barred from exercising the possibility offered by Article 22. They are left to the application of the general rule which submits their succession to the law of the habitual residence. Article 25, par. 3 of the Regulation may offer a solution for this problem. This provision makes it possible for parties to an agreement as to succession to choose a

4 Under Italian law, succession agreements are generally not allowed. The only exception relates to the possibility to conclude a 'family pact' dealing with a business or qualifying interest in a trading company. The business or interest may be transferred to descendants under an agreement concluded between all living forced heirs. It is possible to agree that some of the heirs will receive a cash amount or other assets instead of a share in the business.

law to govern the admissibility, substantive validity and binding effects between the parties of their agreement. Although Article 25, par. 3 makes reference to Article 22, the provision makes it clear that parties may choose a single law, i.e. the law "which the person or one of the persons whose estate is involved could have chosen in accordance with Article 22". Hence, parties may elect the law of the nationality of one of them. This choice of law is, however, slightly different from that contemplated by Article 22. A choice made under Article 25, par. 3 does not apply to the whole succession of the persons concerned. Rather, it only covers the issues of admissibility, substantive validity and binding effects between the parties of the agreement.


Which law applies to a cross-border succession?
(After 17/08/2015) - 2nd scenario:
deceased has left a DPUD
(will, joint will or agreement as to succession)
Deceased has expressly chosen law of his nationality to govern succession
Law chosen by deceased applies (Art. 35)
Unless
Law chosen manifestly in violation of public policy (Art. 35)
And in any case
Rights in rem granted by lex successionis may be adapted (Art. 30)
Deceased has not expressly chosen applicable law
Succession governed by law of his last habitual residence (Art. 21)
Unless implicit choice of law may be found in terms of DPUD (Art. 22)
Admissibility and substantive validity of DPUD (and binding effects between the parties of agreements as to succession) in any case governed by law of habitual residence at time DPUD drafted (Art. 24 & 25)
Unless law applicable manifestly in violation of public policy (Art. 35)
And in any case
Rights in rem granted by lex successionis may be adapted (Art. 30)

- Whether the fact that the will was drafted before 17 August 2015 affects the reasoning.

Article 83 of the Regulation includes specific rules in relation to DOPUD concluded before 17 August 2015. These rules aim to guarantee that 'old' DOPUD remain valid even though they were drafted before the Regulation became applicable. In order to achieve this result, Article 83 includes rules which open up the possibilities to validate the DOPUD. These rules are as follows:

- One should first inquire whether a choice of law had been included in the DOPUD. Under Article 83, par. 2, a choice of law made before 17 August 2015 is valid if it meets the conditions of the Regulation. It also remains valid if it is valid according to the private international law rules of the State where the deceased habitually resided or the State whose nationality he possessed;

- If the DOPUD does not include a choice of law, it may be admissible and valid if it meets the requirements of the Regulation (Art. 83, paragraph 3). If the DOPUD does not meet the requirements of the Regulation it is nonetheless valid if it meets the requirements of the private international law which were in force, at the time the disposition was made. Article 83 refers to the private international law of various countries: the State in which the deceased had his habitual residence or any of the States whose nationality he possessed or in the Member State of the authority dealing with the succession.

In the present case, the will drafted by Mr Hewitson does not include a choice of law. One should therefore examine whether the will is admissible and valid in substantive terms using the standard of Article 24.

Article 26 defines what is to be understood with "substantive validity": this concept covers the following issues:

- the capacity of the person making the disposition of property upon death to make such a disposition;
- the particular causes which bar the person making the disposition from disposing in favour of certain persons or which bar a person from receiving succession property from the person making the disposition;
- the admissibility of representation for the purposes of making a disposition of property upon death;
- the interpretation of the disposition;
- fraud, duress, mistake and any other questions relating to the consent or intention of the person making the disposition.

Answer Q4:
In the present case, Mr Hewitson's succession is governed by French law. There does not seem to be sufficient reason to retain the application of Portuguese law using the exception clause, nor are there sufficient indications to conclude that Mr Hewitson chose English law to govern his succession. The law applicable under Article 21 therefore coincides with the law declared applicable under Article 24. As a consequence, 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 Hewitson in his will are valid and enforceable. French law applies in particular to

find out whether Jeanne, as a sister of Mr Hewitson, benefits from a reserved portion which Mr Hewitson should have respected.

If Mr Hewitson had habitually resided in another Member State when drafting his will, the law of the other Member State would have governed the admissibility and substantive validity of the will. French law would have remained relevant for other succession issues. This will for example be the case for the rights of any person to claim a reserved share or another right of which he cannot be deprived by the person whose estate is involved.

Question 5
After the claim made by Jeanne has been rejected and Michael has been found to be the beneficiary of most of Mr Hewitson's estate, what rights could Michael exercise vis-à-vis the limited partnership founded by the late Mr Hewitson?

The Succession Regulation indicates which law applies to the estate of a person who passed away. The applicable law determines among other how the assets of the deceased are transferred to the heirs and legatees, the powers of the heirs, the executors of the wills and other administrators of the estate and how the assets must be distributed among the various beneficiaries.

In the present case, one should therefore refer to French law to find out whether and how Michael becomes the owner of the interest owned by Mr Hewitson in the limited liability partnership.

Article 1, paragraph 2, letter h of the Regulation provides however, that the Regulation does not apply to "questions governed by the law of companies and other bodies, corporate or unincorporated". This exclusion covers in particular the existence and effects of "clauses in the memoranda of association and articles of association of companies and other bodies, corporate or unincorporated, which determine what will happen to the shares upon the death of the members".

It follows from this exclusion that the legal consequences of the death of a company member for the company itself and the surviving members as well as the legal conditions under which the shares can be transferred to the beneficiaries (heirs and legatees) are not governed by the law governing the succession under the Regulation.

It does not fall upon the law applicable to the succession to determine whether heirs and other beneficiaries may inherit shares or other interests in a company. Likewise, the law applicable to the succession does not govern possible prerequisites regarding beneficiaries and under which conditions the death of a company member establishes a right of entry or a direct succession in rem. All these questions should be examined on the basis of the law applicable to the corporation.

Answer Q5:
The law applicable to the succession of Mr Hewitson does not apply to determine whether Michael may claim rights as a shareholder of the company. This question must be answered using the law applicable to the company.

Question 6
Alternative scenario: assume paragraphs 3 and 4 of the facts are modified as follows.
Shortly after 2000, Peter and Michael started spending more and more of their days off in Morocco. Mr Hewitson liked it very much there. In anticipation of his retirement and longing for peace and

sun, he bought a magnificent *riad* in the Medina in Marrakech. After his retirement in 2007, Mr Hewitson started to build a new network of friends, mainly among expatriate retirees living in Marrakech. Michael, who is ten years younger than Peter, continued to work from Paris and frequently flew in for the week-end when his companion was in Marrakech. While Mr Hewitson has kept his apartment in Paris, he spends most of his time in Marrakech where he has built a close circle of friends. The *riad* is also Mr Hewitson's most expensive asset. Inspired by the rich cultural tradition of Marrakech, Mr Hewitson has started writing poetry. He also formed a club where expatriates living in Marrakech invite prominent Moroccan intellectuals to discuss current events. Occasionally, Mr Hewitson, who has learned a great deal about the history of the city, serves as unofficial tour guide for high ranking British officials visiting Morocco.

In this alternative scenario, some of the facts have been changed. This may have an impact on the answers to the various questions. We will come back to questions 2 and 4, as they are more likely to be affected by the alternative facts. It is useful to underline that if the succession were to be liquidated in Morocco, the Succession Regulation would not be applicable, as it is not binding in Morocco. One would have to look at the rules of private international law of Morocco.

- Jurisdiction (Question 2)

As already underlined, the Regulation first grants jurisdiction to the courts of the country in which the deceased habitually resided before his death (Art. 4). If Mr Hewitson's habitual residence was located in Morocco, Article 4 cannot apply. However, the authorities of the Member State in which Mr Hewitson left some assets could have jurisdiction under Article 10.
In this case, as Mr Hewitson owned an apartment in Paris, the courts in France would enjoy jurisdiction under Article 10. This jurisdiction would be limited to the French assets, unless Mr Hewitson had still been habitually resident in France less than five years before his death (Article 10, par. 2). In the latter case, French courts would have jurisdiction over the entire estate.

- Applicable law (Question 4)

As already explained, the habitual residence of the deceased is key in determining the applicable law (Art. 21). As Mr Hewitson moved his habitual residence to Morocco, the law of the Kingdom of Morocco applies.
Since the law of a third country applies to the succession, it should be examined whether renvoi is possible under Article 34. One should take into account the private international law of Morocco to see if these rules refer to the law of a Member State (or the law of another third State which would apply its own law).
Under the private international law of Morocco, the succession of a person who is not a Moroccan citizen, is governed by his national law. Hence, reference should be made to the law of the nationality if Mr Hewitson was a British citizen. The court should therefore apply the private international law of England and Wales to find out which law applies to the succession. Under the private international law rules in force in England & Wales, the movables of a person who dies intestate are governed by the law of his domicile at the date of his death and the succession to the immovables of a person who dies intestate is governed by the law of the state in which the immovables are situated. One should therefore find out where Mr Hewitson's domicile is located.

Applying the standards of Article 34, renvoi could therefore only be accepted for the immovable located in France: application will be made of French law. The rest of Mr Hewitson's succession will be governed by English law.