Case study:
Cross-border successions (basic level)

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

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Cross-border successions
Case study no 3, basic level
The case of Mike and Waleska

Mr Mike Palmann is a German turnaround consultant who was born in 1962. He has two grown up kids from a first marriage, which ended in 2008. His son, Jan, lives in Prague where he practices as a lawyer. His daughter Julia lives in Berlin where she works as a PR consultant. After a long career with a big player on the market, Mike has created his own turnaround firm, specialised in health care and life sciences.

In 2012, Mike married Waleska, a Polish citizen, whom he met during his frequent business trips to Poland. The couple settled in Poznan where Mike bought a house using a substantial part of his savings. Mike and Waleska have since then lived in this house. Mike works for the largest part of his time for German clients. He has started to seek new clients in Poland, but he has not been very successful at it.

In January 2017, Mike and Waleska split up. Mike's heavy work schedule has strained the relationship between the spouses. After the separation, Mike goes back to Germany, while Waleska stays in the house they own in Poznan. Mike has settled in Berlin to live close to his daughter and grandchild and continues to work as a turnaround consultant, with a clear focus on the German healthcare industry. Mike has given up on the idea of finding new clients in Poland.

Mike dies in June 2017 during a mountain hike in France, shortly after filing divorce proceedings before a court in Germany.

Even though she does not have the means needed to buy it, Waleska has no intention to move out of the house in Poznan. After a few rounds of discussion with Jan and Julia, Waleska realises that she needs to bring court proceedings in order to obtain a decision in her favour.

Question 1
Waleska brings proceedings before a court of first instance in Germany, seeking a decision on the rights she may assert in relation to the house. Does the Succession Regulation apply?

Question 2
Does the court in Germany have jurisdiction to hear the claim made by Waleska regarding Mike's succession?

Question 3
How should the court determine whether the house situated in Poznan falls within Mike's estate?

Question 4
Which law applies to Mike's succession?

Question 5 – alternative scenario
Consider the following alternative scenario: when moving to Poland to live with Waleska, Mike started to expand his customers' base to include companies based in Poland. He was quite successful and after a few months, he spent most of this time working for Polish customers. Mike's work habits, however, seriously damaged his relationship with Waleska. In order to reflect upon the future of their relationship, Mike and Waleska decided in the first weeks of 2017 to take some time out. Mike moved out to Frankfurt

an der Oder, from where he continued to work mostly for his Polish clients. Mike died in a traffic accident in June 2017, shortly before he and Waleska were due to reconsider their relationship. All other elements of the initial case remain identical. Which law applies to Mike's succession?

Question 6 – alternative scenario

Consider the following alternative scenario: during a week-end they spend together in the south of Poland on the occasion of their fourth anniversary, Mike drafts a letter to Waleska, in which he indicates that if he were to pass away, he wants that, whatever happened to their relationship, Waleska should be entitled to live in the house in Poznan as long as she wished and without having to pay anything. The letter was drafted on the letterhead of the hotel in which Mike and Waleska stayed. Mike signed the letter as follows: "With love, Mike" and gave Waleska the original, keeping a copy for his records. Waleska produces the letter in court, arguing that it constitutes a valid will. May Jan and Julia challenge the validity of the will, arguing that it does not comply with the requirements of German law? All other elements of the initial case remain identical.

Question 7

Assume the will drafted by Mike is valid. Does it change the position of Waleska?

Question 8

Go back to the initial case and disregard the alternative scenarios in questions 5 & 6. Assume that the court in Germany, applying Polish law to determine if Waleska may claim rights in the house and applying German law to Mike's succession, decides that Jan and Julia must be considered together with Waleska the owners of the house located in Poznan.

8.1 May Jan and Julia obtain a European Certificate of Succession from the court in order to exercise their rights in Poland?

8.2. May the authorities in Poland refuse to give effect to the ECS arguing that, as the deceased habitually resided in Poland when he passed away, the authorities in Germany did not have jurisdiction to issue an ECS?

Question 1
Waleska brings proceedings before a court of first instance in Germany, seeking a decision on the rights she may assert in relation to the house. Does the Succession Regulation apply?

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

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].

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.

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*;
- 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;

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, OJ L 201/07 of 27 July 2012.

- 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.

- **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.

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.

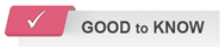
Further issues which are expressly excluded from the subject matter scope are questions relating to the status of natural persons and family relationships, the legal capacity of persons, questions relating to the disappearance or absence of a natural person and questions relating to the matrimonial property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

- **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.



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

2 See below (Footnote 4).

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 cutoff date of 17 August 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:

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

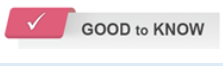
In the present case, the question raised falls squarely within the scope of application of the Regulation. Mike passed away after the Regulation came into force and became applicable. Further, the questions clearly concern succession issues, as defined in Article 23 and clarified in Recital 9. Finally, the question is raised in the court of a Member State bound by the Regulation. The fact that Mike, a German citizen, died while living in Germany, does not prevent the application of the Regulation. Mike has lived in two different Member States. He is married with a national of another Member State and owns assets in that other Member State. His succession therefore presents a sufficient cross-border dimension.

Question 2

Does the court in Germany have jurisdiction to hear the claim made by Waleska regarding Mike's succession?

The Succession Regulation includes rules defining when the courts of a Member State have jurisdiction. These rules may be found in Articles 4 to 19 of the Regulation.

The main rule grants jurisdiction to the courts of the Member State where the deceased was habitually resident before passing away (Art. 4). Other rules make it possible for Member States other than that of last habitual residence of the deceased to exercise jurisdiction.



Succession Regulation – Rules of jurisdiction

• Habitual residence (Art. 4) → jurisdiction over entire estate
◦ Assessed at time of death
◦ Only relevant if located in a Member State
• If the deceased chose applicable law: parties concerned may elect court of MS whose law was chosen (Art. 5)
• Location of assets (Art 10)
◦ Only if habitual residence of deceased in a third State
◦ Deceased was a national of the MS: jurisdiction over the whole estate
◦ Deceased not a national of the MS: jurisdiction over whole estate if deceased had previously habitually resided in that State, less than 5 years ago.
◦ In all other cases, jurisdiction limited to the local assets
• *Forum necessitatis* (Art. 11)
• Provisional and protective measures (Art. 19)

In the present case, Mike passed away after moving out of Poznan and going back to Germany. He settled in Germany and focused exclusively on German clients. As Mike does not seem to have made a choice of law, the only possibility for German courts to establish their jurisdiction is Article 4, which makes it possible for the courts of the Member State where the deceased habitually resided to take jurisdiction over the whole estate.

The Regulation does not provide a definition of the concept of 'habitual residence'. Some guidance may be found in the recitals of the Preamble (Recitals 23 and 24). Note that there is no certainty on the legal effects of recitals included in the Preamble of a Regulation. When dealing with other private international law Regulations, the CJEU has made reference to recitals (see e.g. in relation to the EU Insolvency Regulation, CJEU, 20 October 2011, *Interedil Srl v Fallimento Interedil Srl, Intesa Gestione Crediti SpA*, Case C-396/09, par. 47).

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."

GOOD to KNOW The concept of habitual residence is often used in the various European private international law Regulations. In most of these Regulations, there is no requirement that a person should have resided for a minimum period of time in a country in order to be considered to be habitually resident. As a consequence, a person could in some circumstances be considered to reside habitually in a country in which she has lived only for a short period of time. The only exception may be found in the Brussels IIa Regulation: Article 3(1)(a) provides that the courts of the Member State of the plaintiff's habitual residence have jurisdiction if he/she resided there for at least one year before the application. This period may be brought to six months if the applicant is a national of that Member State.

The Regulation does not include an exception clause allowing the court to deviate from the normal application of Article 4, as is the case when finding out which law applies to a case (see Article 21(2)).

Answer Q2:
In the present case, Mike decided to live in Berlin after he and Waleska split up. He never stopped working in Germany, even when he lived in Poland. He chose to live in Berlin to be close to his daughter and grandchild. He also filed for divorce in Germany. These elements, coupled with the facts that Mike is a German citizen and that his only remaining connection with Poland is the ownership of real estate in that country, point in the direction of Germany as the country where Mike established his habitual residence. The German courts have jurisdiction to hear the claim. Which German court has jurisdiction should be determined on the basis of German civil procedure.

GOOD to KNOW The rules of jurisdiction included in the Regulation only apply to "courts". This concept is defined in Article 3(2) of the Regulation. As Member States are free to define the role and competence of those called to intervene in succession matters (see Recital 20), the

task of collecting the assets of the deceased and distributing them to the beneficiaries may be attributed to different authorities. In some Member States, courts will perform this mission. In other countries, administrative authorities will be called to perform this mission. In many Member States, notaries are called upon to assist in the tasks to be performed once a succession is opened. The notary could perform these tasks upon request from the beneficiaries or be appointed to do so by a court. Although in most Member States, notaries may not be deemed to act as court when performing this task, it may be different in other Member States (Recital 21). This appears to be the case in Hungary, the Czech Republic and the Slovak Republic, where civil law notaries exercise judicial functions in succession proceedings. In these countries, the notaries are therefore bound by the rules of jurisdiction.

Question 3
How should the court determine whether the house situated in Poznan falls within Mike's estate?

Mike and Waleska have been married. Before tackling the issue of Mike's assets, one should determine with precision which assets are included in Mike's estate. This implies finding out whether the assets held by the deceased were his own assets or assets jointly owned with the surviving spouse. As marriage may, in some legal systems, have a direct effect on the patrimonial relationships between spouses, one should first find out how to deal with these relationships.

The EU has adopted two Regulations dealing with the patrimonial relationships between spouses and partners[4]. These Regulations will, however, only apply to spouses married or partners registered after 29 January 2019 (Art. 69).

For spouses married before 29 January 2019, application should be made of the national rules of private international law. These rules may vary: in some Member States, spouses may choose the law applicable to their relationships. In other Member States, such choice is not possible, or may only be made in favour of certain laws. Failing a choice of law, the law applicable to the patrimonial relations between spouses may also vary: in some Member States, reference will be made to the law of the common nationality of spouses. In other Member States, the default rules subject spouses to the law of their first habitual residence after marriage.

GOOD to KNOW **Which law applies to cross-border matrimonial issues in 2017?**

In the absence of choice of law:
i) Common nationality (*eg* D, IT, E, NL)
ii) First common residence of the spouses (*eg* BEL, FR, LX)
iii) Current common residence (*eg* CH)
iv) Silent change or not (*eg* 1978 Hague Convention)

If spouses have made a choice of law

4 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).

i) Choice of law allowed (*eg* FR, NL, BEL)
a) Option among various choices, single law (*eg* BEL, DE, IT)
b) Option among various choices, single or partial choice (*eg* 1978 Hague Convention)
ii) No choice possible (*eg* GR)

As the question is referred to a German court, it shall apply its own rules of private international law to determine which law applies to the matrimonial property regime between Mike and Waleska.

The relevant rule of German private international law (Articles 14 & 15 EGBGB – Einführungsgesetz zum Bürgerlichen Gesetzbuch) provides that (in the absence of a choice by the spouses and if the spouses have no common nationality) the matrimonial property regime of spouses is governed by the law of the common habitual residence of the spouses at the time of their marriage.

Applying this standard, it is most likely that application should be made of *Polish law*, as the spouses chose to live in in Poland after their marriage.

Polish law provides that failing a choice by the spouses for another regime, the relevant regime is that of the community of assets (Art. 31 1964 Polish Family and Guardianship Code of 1964 – Act of 23 April 1964, with subsequent amendments).

Note to the instructor: you may ask participant to figure out which law would apply to the patrimonial relationships of Mike and Waleska if one applied the rules of private international law of their Member State.

Answer Q3:
In the present case, Polish law applies to the patrimonial relationships between the spouses. It should therefore be determined under Polish law whether Waleska may claim any rights on the house in Poznan.

Question 4
Which law applies to Mike's succession?

Under Article 21 of the Succession Regulation, a person's succession is governed by the law of the country in which the person last habitually resided.

In Q2, we discussed where Mike was habitually resident before passing away. We concluded that Mike resided habitually in Germany. As a consequence, *German law* is applicable to his succession.

GOOD to KNOW It is not always easy to find information on the succession law of a foreign country. Next to the classic tools which may be found in some law 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 of a number of countries:
i) the CNUE has set up a platform including information on the law of 22 Member States (*www.successions-europe.eu*)

ii) 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*).
iii) 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*.

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."

The Succession Regulation is not the only Regulation including an exception clause. The Rome I (Article 4 [3]) and Rome II Regulations (Article 4 [3]) also provide exception clauses. The CJEU has held, in relation to the exception clause included in the Rome I Regulation, that it is not necessary to first verify whether the law declared applicable presents a strong connection with the situation at hand; rather the judge may immediately verify whether the relation is more closely connected with another country. It remains to be seen whether the CJEU will extend this rather liberal interpretation of exception clauses to the Succession Regulation (CJEU, 6 October 2009, *Intercontainer Interfrigo SC (ICF) v Balkenende Oosthuizen BV*, Case C-133/08).

In the present case, it is unlikely that the exception clause could be used. Mike moved to Germany and settled there. He has always worked in Germany and his daughter lives in Germany. His only remaining link with Poland is that he owns real estate in that country. It is difficult to conceive that Mike kept a manifestly closer connection with Poland.

Answer Q4:
In the present case, German law is applicable to Mike's succession since Mike resided habitually in Germany. One should therefore examine under German law whether Waleska may claim any right in Mike's succession. The fact that the house is located in Poland is of no relevance to determine whether Waleska may claim any right in relation to the house.

Question 5 – alternative scenario
Consider the following alternative scenario: when moving to Poland to live with Waleska, Mike started to expand his customers' base to include companies based in Poland. He was quite successful and after a few months, he spent most of this time working for Polish customers. Mike's work habits, however, seriously damaged his relationship with Waleska. In order to reflect upon the future of their relationship, Mike and Waleska decided in the first weeks of 2017 to take some time out. Mike moved out to Frankfurt an der Oder, from where he continued to work mostly for his Polish clients. Mike died in a traffic accident in June 2017, shortly before he and Waleska were due to reconsider their relationship. All other elements of the initial case remain identical. Which law applies to Mike's succession?

In this alternative scenario, things are less clear: Mike moved to Germany but this was only a time out, a temporary break in the relationship. Parties had agreed to try to resume their relationship later on. While he continued to work for Polish clients, he no longer lived in Poland. It was also very uncertain whether Mike and Waleska would resume their life together in Poland. In this case, it is more difficult to determine where the last habitual residence of Mike was located.

It is important to note that under the Succession Regulation, a person may only have one habitual residence. It may be difficult to locate this habitual residence, but this should not be used as argument either to avoid finding out where the habitual residence is located, or to conclude that the deceased had several habitual residences.

The exception clause to be found in Article 21(2) of the Succession Regulation may offer a way out. If one assumes that Mike's habitual residence was located in Germany at the time of his death, one could decide to trigger the exception clause, arguing that Mike kept stronger links with Poland, given his intention to come back to Poland after the time out, the fact that he continued to work mainly in Poland and the fact that he chose to settle at the German-Polish border.

Answer Q5:
In this alternative scenario, German law is applicable to Mike's succession, as Mike had moved since several months to Germany and it was unsure whether he would in the future resume his life with Waleska. One should therefore examine under German law whether Waleska may claim any right in Mike's succession. If one finds sufficient elements to trigger the application of the exception clause, Waleska's claim should be examined under Polish law instead.

Question 6 – alternative scenario
Consider the following alternative scenario: during a week-end they spend together in the south of Poland on the occasion of their first anniversary, Mike drafts a letter to Waleska, in which he indicates that if he were to pass away, he wants that, whatever happened to their relationship, Waleska should be entitled to live in the house in Poznan as long as she wished and without having to pay anything. The letter was drafted on the letterhead of the hotel in which Mike and Waleska stayed. Mike signed the letter as follows: "With love, Mike" and gave Waleska the original, keeping a copy for his records. Waleska produces the letter in court, arguing that it constitutes a valid will. May Jan and Julia challenge the validity of the will, arguing that it does not comply with the requirements of German law? All other elements of the initial case remain identical.

Mike has drafted a will, which Waleska intends to use. The will was drafted without the help of a professional. The question of the validity of the will must be addressed.

In order to find out whether the will is valid, one should first 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 Germany and Poland. The 1961 Hague Convention is based on the idea that testamentary freedom should be extended to the maximum possible.

Article 75(1) of the Regulation gives this Convention precedence over the provisions of the Regulation. Accordingly, the Convention of 1961 applies if the succession is handled in Germany or Poland. If the Convention is not in force, 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 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 the 1961 Hague Convention, one may take into account the law of *Germany* (country of the nationality of the testator) and *Poland* (where the will was drafted and the testator habitually resided when the will was drafted).

In order to find out what are the requirements for a will to be valid under Polish or German law, one may refer to the online resources already referred to (see under Q 4).

Under German and Polish law, a will drafted by the testator is valid if it is written entirely in his or her own handwriting and signed and dated (§ 2247 BGB and Art. 949 Polish Civil Code).

Pending a more thorough examination under German and Polish law, it appears that the will drafted by Mike is valid.

Answer Q6:
In the present case, applying the 1961 Hague Convention, one should come to the conclusion that the will is valid, as it complies with the formal requirements set out by Polish or German law.

Question 7
Assume the will drafted by Mike is valid. Does it change the position of Waleska?

We have already seen that the will is valid from a formal point of view. It should now be explored whether the existence of the will may also have an impact on the applicable law and as a consequence on Waleska's position.

The Regulation includes specific rules in relation to wills and other dispositions of assets upon death. These rules are also based on the habitual residence of the deceased. However, there are two important differences when comparing Article 24 of the Regulation with the main rule (i.e. the application of the law of the country where the deceased habitually resided before his death – Art. 21(1)) :

- the first difference is that the habitual residence should be assessed not on the day the person passed away, but rather on the day the will (or another disposition or property upon death)

was drafted. One should therefore take this moment into consideration and determine where the testator habitually resided;

- the second difference is that the law of the testator's habitual residence at the time the will was drafted does not fully displace the law of the deceased's last habitual residence. This law referred is only relevant for the 'admissibility' and 'substantive validity' of the will.

GOOD to KNOW 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.

In the present case, Mike resided in Poland when he wrote the letter to Walenska. Reference should therefore be made to Polish law to determine whether the will is admissible and substantially valid. Article 24 therefore leads to the application of another law than the main rule of Article 21.

The operation of Article 24 means that one succession will be governed by different laws. This is an important exception to the principle which has been retained under the Regulation, according to which one single law should govern each succession. Recital 37 of the Regulation indeed 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". The mechanism of Article 24 may lead to one estate governed by several laws.

GOOD to KNOW The Regulation makes it possible for a person to choose the law applicable to his succession (Art. 22). The law chosen by the testator governs his entire succession. When a will includes a valid choice of law, the law chosen applies to the whole succession. There is in other words no splitting up of the estate.

Answer Q7:
In the present case, the existence of a will has an impact on the succession:

- in principle Mike's succession remains governed by German law, as he habitually resided in Germany when he died;
- however, the admissibility and substantive validity of the will are governed by Polish law.

In other words, if the will is admissible and substantially valid under Polish law, the court should take it into account to determine the rights Waleska may claim in Mike's estate.

Question 8

Go back to the initial facts of the case (disregarding the alternative scenarios in questions 5 & 6). Assume that the court in Germany, applying Polish law to determine if Waleska may claim rights in the house and applying German law to Mike's succession, decides that Jan and Julia must be considered together with Waleska, the owners of the house located in Poznan.

8.1 May Jan and Julia obtain a European Certificate of Succession from the court in order to exercise their rights in Poland?

8.2. May the authorities in Poland refuse to give effect to the ECS arguing that, as the deceased habitually resided in Poland when he passed away, the authorities in Germany did not have jurisdiction to issue an ECS?

The Succession Regulation introduces a new instrument: the European Certificate of Succession (ECS). The ECS is a document prepared by the authorities of a Member State, which may be used in other Member States to demonstrate the status and /or rights of an heir, legatee, executors of a will or administrators of an estate (Art. 63).

- The ECS is an *optional* system (Art. 62[2]). The use of the ECS is not mandatory. An heir or legatee may opt to use another system to demonstrate his rights / status. Many Member States have created ad hoc instruments to allow heirs and legatees to demonstrate their rights. In accordance with the principle of subsidiarity, citizens may continue to opt for these certificates.

- The ECS is a *uniform* instrument: its existence and effects are governed entirely by the provisions of the Regulation. When issuing a certificate or considering its effects, the authorities of a Member State should only look at the Regulation and not at their national law.

- Member States are free to decide *who is competent* to issue European Certificates of Succession in their legal order. Article 64(b) only requires Member States to appoint an authority which "under national law has competence to deal with matters of succession". Some Member States have granted this power to courts; in other Member States, notaries have received the power to issue certificates. In yet other Member States, a mixed system has been put in place, which allows both courts and notaries to issue certificates.

- A European Certificate of Succession can only be issued using a *specially designed form* which is available in all European languages. The use of a form eases the circulation of the certificate among Member States.

- Article 69 of the Regulation explains the *effects of the Certificate*. In substance, the authorities of all Member States must give credit to the information included in the certificate in relation to the status and rights of the heirs and legatees. Recital 71 indicates in that respect that the Certificate "should not be an enforceable title in its own right but should have an evidentiary effect and should be presumed to demonstrate accurately elements which have been established under the law applicable to the succession or under any other law applicable to specific elements, such as the substantive validity of dispositions of property upon death". Specific rules are included in order to protect the legitimate expectations of third parties dealing with a party whose status and rights are demonstrated by a European Certificate.

- The Certificate does not circulate as such. It should remain with the authority which issued it. Parties who wish to rely on the ECS, should request a certified copy of the ECS. Certified copies are valid during six months (Art. 71[3]).

8.1. May Jan and Julia obtain a European Certificate of Succession from the court?

Each Member State decides freely who has competence to issue European Certificates of Succession. Recital 70 explains in that respect that: "It should be for each Member State to determine in its internal legislation which authorities are to have competence to issue the Certificate, whether they be courts as defined for the purposes of this Regulation or other authorities with competence in matters of succession, such as, for instance, notaries".

The information on the official notifications made by the Member States is available on the European E-Justice Portal (Art. 78[1]c)).

In ***Germany***, the competence to issue ECS has been granted to the local court ('Amtsgericht'), save in Baden-Württemberg where the notary has received this competence, at least until the end of 2017.

Before issuing an ECS, the authority should verify whether it has jurisdiction to do so. According to Article 64, an authority may only issue an ECS provided it has jurisdiction under Article 4, 7, 10 or 11 of the Regulation.

In the present case, as Mike resided habitually in Germany when he passed away, German courts have jurisdiction to issue an ECS (Art. 4).

In order to identify the court having local jurisdiction, one should refer to the relevant rules of internal jurisdiction of the Member State concerned.

8.2. May the Polish authorities question the jurisdiction of the German court which issued the ECS?

According to Article 69(1) of the Regulation, "The Certificate shall produce its effects in all Member States, without any special procedure being required."

The Regulation adopts the system of the recognition *de plano*: a European Certificate of Succession produces its effects in all Member States, without any need to first submit the certificate to a local authority for verification. In this respect, the system adopted by the Regulation is identical to that adopted for foreign judgments (Art. 39[1] Regulation).

This means that once an ECS is issued by the authorities of one Member State, its effects must be accepted at once in all other Member States bound by the Regulation.

Contrary to what is provided for judgments (Art. 40), the Regulation does not enumerate grounds of non-recognition (such as violation of public policy or breach of the rights of the defendant) which could be used to oppose recognition of the effects of an ECS.

Under the Regulation, recognition of the ECS may not be opposed by the Member State where the ECS is relied upon. This Member State may not oppose its public policy or any other obstacle to deny

any effect to the ECS. This also applies to the jurisdiction of the authority which delivered the ECS: it may not be questioned in the Member State where the ECS is used.

The Regulation provides, however, two possibilities to modify, correct or withdraw an ECS. These possibilities are available in the Member State where the ECS was issued, and not in the Member State where the ECS is used:

- The issuing authority has the possibility to revisit an ECS which it has issued. It may do so in two situations: if it appears that there has been a clarical error, the authority may modify the ECS. If the ECS includes information which appears to be inaccurate or erroneous, the authority may modify or withdraw the certificate (Art. 71).

- Article 72 also makes it possible to seek redress from a judicial authority in the Member State where the ECS has been issued. A court may be requested to overrule a decision whereby the issuing authority has refused to modify or withdraw a certificate.

In all these cases, it is also possible to request that the effects of a certificate be suspended (Art. 73).

Answer Q8:

- Jan and Julia may request the issuance of an ECS from the competent court in Germany;
- The ECS issued by a German authority should be accepted as such by the authorities in Poland. These authorities may not question the jurisdiction of the German issuing authority.