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THE IMPACT OF THE EU SUCCESSION REGULATION ON NON-EU COUNTRIES

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EU Regulation Overview

- 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



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The EU: 500 MILLION PEOPLE- 28 COUNTRIES

(before Brexit becomes effective)



Member States of the European Union



Candidate countries and potential candidates



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EU Regulation Overview

- Common jurisdiction and Conflict of Laws rules for international successions in 28 European Countries
- When death occurred after 16 August 2015
- Common construction of the Regulation under the European Court of Justice.
- One Law to apply to the whole Estate
- *Professio juris*



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EU Regulation Overview

- 83 non binding recitals and 84 binding articles
- <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32012R0650> in 24 languages
- Vocabulary tips:

EU VOCABULARY	US VOCABULARY
Private international Law =	Conflict of Laws rules
Choice of Law	Does not mean applicable Law Means ability to choose the Law



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EU Regulation Overview

JURISDICTION

- Last habitual residence is in a Member State:
 - Principle: courts of the Member State of the **last habitual residence**
 - Exception: Courts of the Member State which Law has been chosen by deceased to govern the Estate.



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EU Regulation Overview

JURISDICTION

- Last habitual residence is not in a Member State:
 - Courts of a Member State have jurisdiction on whole estate:
 - if assets located in that Member State AND
 - the deceased was a national of that Member State at the time of death or, failing that
 - previous habitual residence in that Member State (but less than 5 years)

EU Regulation Overview

JURISDICTION

- When no Court of a Member State has jurisdiction on the whole Estate, Courts of a Member State in which assets of the Estate are located has jurisdiction on these assets.
- BUT when the Law of a Member State has been chosen by the deceased, the Courts of that Member State have jurisdiction (with some conditions).



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EU Regulation Overview

JURISDICTION

- Forum necessitatis
- Limitation of proceedings



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EU Regulation Overview

Conflict of Law rules

- The principle: the whole succession is governed by the Law of the State in which the deceased had his habitual residence at the time of death.
- Two exceptions:
 - More closely connected other State
 - Professio juris (but only in favour of the Law of nationality)



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EU Regulation Overview

Conflict of Law rules

- Correcting factors:
 - Renvoi:
 - No renvoi when Law of more closely connected State
 - No renvoi when there is a professio juris
 - No renvoi when the Law of the habitual residence is in Member State
 - Renvoi only when the last habitual residence is in a Third State and its Law including its Choice of Laws rule make a renvoi to:
 - the Law of a Member State, or
 - the Law of another Member State which would apply its own Law



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EU Regulation Overview

Conflict of Law rules

- Correcting factors:
 - Public Policy of the forum and fraud



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EU Regulation Overview

Conflict of Laws rules

- 83.4 If a disposition of property upon death was made prior to 17 August 2015 in accordance with the law which the deceased could have chosen in accordance with this regulation, that law shall be deemed to have been chosen as the law applicable to the succession.



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EU Regulation Overview

Strengths

- A unique connecting factor : no distinction between categories of assets, Estate treated as a whole (except in certain renvoi situations)
- Same connecting factor (last habitual residence) to determine jurisdiction and applicable Law
- Consequence: in most cases jurisdiction and applicable Law will concur. The court having jurisdiction will apply its own Law
- Tool for planning : profession juris and giving maximum effects to succession agreements
- New instrument: European Certificate of Succession



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EU Regulation Overview

why bother if I am not an EU Lawyer?

- Can my client use professio juris to choose where to pay inheritance tax?
- Is it really useful for my practice?



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Case Study # 1

John and Samantha:
Habitual Residence



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Case Study #1

- John, a UK citizen, has worked for a US company throughout Europe and South America for all of his working life and owns an apartment in Washington DC. His wife Samantha, a US citizen, is a retired teacher and has taught in different international schools as she followed her husband when he was an expat in different European or South American countries. They decide to retire in Munich (Germany) where they own a country house where they spent many vacations.
- They have both spent the last six months in their Munich country house. Samantha receives a pension into her US account, John now works part time from Munich and made a few trips back to Washington during those last six months in order to meet his colleagues and prepare for his departure from the US company. He has recently rented his Washington flat to a young couple, the rent is wired every month to his US account and from which he frequently transfers cash to his Munich bank in order to pay for all their expenses in Munich.
- John and Samantha's children, aged 25 and 27, both live in the US.
- John died from a sudden heart attack last week.
- His assets are the Washington apartment, the Munich country house, bank accounts in Washington DC, Munich, London and Buenos Aires.
- John left a Will executed in Washington DC leaving everything he owned to his wife. There is no provision in the Will regarding a Choice of Law.
- In your jurisdiction, which Law is applicable to John's Estate?
- In your jurisdiction, which courts have jurisdiction over John's Estate?
- Where is the IHT or Estate Tax to be paid



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Case Study #1 - USA



- General rule:
 - Law of situs controls succession of real property,
 - Law of the decedent's domicile controls the succession of personal property.
 - Citizenship of the deceased irrelevant.
- Domicile:
 - physical presence, and
 - intent to remain for an indefinite period of time



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Case Study #1 - USA



- DC law will apply to apartment in DC
- DC law will look to the law of John's domicile regarding the bank account.
- DC probate court is the court that has jurisdiction.
- US and DC estate tax on DC real estate
- US and DC estate tax on DC accounts if accounts US sited asset



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Case Study #1 - UK



- Domicile for moveable; Situs for immovable
- Domicile can change: domicile of origin or domicile of choice
- Regardless of jurisdiction UK “grant of probate” needed to access bank account
- Non-domiciles only pay inheritance tax on UK assets at death
- Any powers of attorney cease on death



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Case Study #1 - Argentina



- Under Argentine Private International Law, John's Estate is regulated by the laws of John's last domicile. Domicile, according to Argentine law, is the State where the individual resides with the intention of establishing permanently. Therefore, German law would apply to his Estate, including specifically, the Buenos Aires bank account.
- On the basis of the above, the courts of Munich would have jurisdiction on John's Estate.

Case Study #1 - Germany

1. Law applicable to the estate



General rule:

Habitual residence at the time of death
art. 21 (1)

Exception:

Closer connection with another state
art. 21 (2)

overall consideration of all circumstances (see recital 23):

deceased spent the last six months in
Germany and had moved to Munich
with the intention to retire there

deceased worked for an US corporation
all his life

many privately motivated stays in
Germany in the past (vacations)

wife and children are US citizens and
children live permanently in the US
property and bank accounts in the US

Manifestly closer connection to the US despite habitual residence in Germany ?
(see recital 25)



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Case Study #1 - Germany



2. Jurisdiction over the estate

- General rule: habitual residence of the deceased at the time of death in a Member State (art. 4) = Germany
- Possibility to limit its jurisdiction for assets in a Third State (article 12)
 - the estate of the deceased comprises assets located in a third State (= bank accounts in the UK/US/ARG; apartment in Washington DC) and
 - it may be expected that the decision of the court of the EU-Member will not be recognized and be declared non-enforceable in that third State



Case Study #1 - Germany



3. Scope of liability to German inheritance tax

- The Regulation does not apply to revenue, customs or administrative matters - art. 1 (1) 2° (see also recital 10)
- Liability to German inheritance tax on worldwide assets due to domicile (concept ≠ UK, US, ARG !) and habitual abode of the deceased in Germany at the time of his death
- In relation to the US: Application of the Double Tax Convention regarding Taxes on Estates, Inheritances and Gifts dated 03/12/1980 as amended by the Protocol dated 14/12/1998

Case Study #1

TIPS FROM THE PANEL

- Insist on reviewing tax and planning situation regularly and always before leaving a country for another
- When reviewing seek the help of lawyers in each country involved.
- Consider structuring to transfer outside the Estate.



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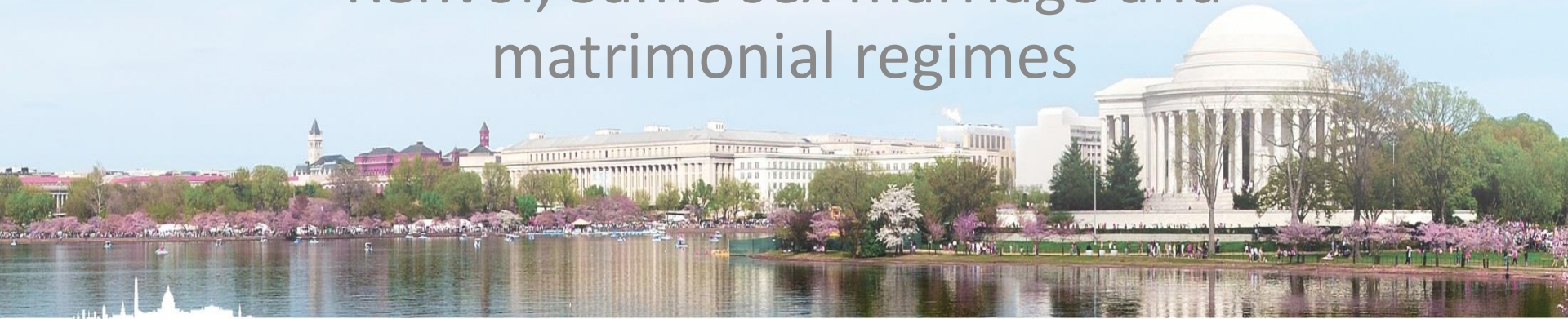
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Case Study # 2

Peter and Pablo:
Renvoi, Same sex marriage and
matrimonial regimes



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Case Study #2

- Peter is a German engineer. He was born in Germany and worked there until he met Pablo. He is married (since 2015) to Pablo, an Argentinean citizen, whom he met in Washington. Peter has a child Alex born from a first marriage, who resides in Germany. Together, Pablo and Peter own an apartment in Buenos Aires. They have lived in the UK for the last 5 years where Peter owns an apartment.
- Peter also owns a substantial participation in the shares of a German manufacturing company created by his father and managed by his brother which he received through the Estate of his father and which provides for most of his income.
- Pablo and Peter have a joint account in Washington DC. Peter succeeded in obtaining his Argentinean citizenship a few months ago.
- 1/ Peter died last month. He left a Will which was drafted in Argentina 6 years ago when he and Pablo bought their apartment in Buenos Aires. In his Will he leaves everything he owns to Pablo. Alex is extremely unhappy about this Will and feels he should be entitled to at least a share of his father's Estate. Will Alex's claim be successful? Which courts have jurisdiction?
- 2/ It appears that Peter's Will refers to article 3593 of the Argentinean Civil code (then in force) to ask Alex not to exercise forced heirship rights. Does that amount to a choice of Law for Argentinean Law? If so, what does it change?



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Case Study #2 - Argentina



- Real estate located in Argentina determines ARG LAW and ARG COURTS
- Alex is a forceful heir that CANNOT be excluded from Peter's Estate. Is entitled to TWO THIRDS of the 50% of the marriage partnership. Surviving spouse does not concur to this portion.
- Disposable portion of Estate: One Third. Pablo could claim this portion.
- Alex would own 33,333% and Pablo 66,667%.



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Case Study #2 - USA



- **USA:** Alex most likely has no claim under DC laws:
 1. Jointly owned bank accounts are non-probate assets, i.e., they are not part of the estate but pass directly to the joint owner outside the estate proceeding.
 2. Even if the bank account would be a probate asset, DC would look to the law of Peter's domicile at the time of death (UK) to determine the question of validity of Peter's last will and how it would apply to the bank account.



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Case Study #2 - USA



- Forced heirship not recognized in US (except Louisiana)
- Enforcement of claim in US highly unlikely



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Case Study #2 - UK



- UK property succession determined by situs
- UK recognises same sex marriage: IHT married couples exemptions available
- No forced heirship rules; would apply Argentinian Will provided validly prepared under UK law
- Intestacy: depending on UK property value, Pablo receives legacy and then division of assets between Alex and Pablo
- Other possible claims: IPFDA 1975 or claim in equity against estate by Alex



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Case Study #2 - Germany



1. Law applicable to the estate

- The prospects are dependent on the applicable law and the application of forced heirship rules in Argentina and Germany
- Deemed choice of law under art. 83 (4) ?
- Renvoi since UK is not a Member State (see recital 82):
Argentinean Law applies to Buenos Aires apartment, UK Law applies to UK apartment, German Law applies to shares in GER-Co.
- Fragmentation of the succession with respect to real estate located in UK (multi-territorial unit State - article 36) and ARG



Case Study #2 - Germany



2. Jurisdiction over the estate

- German Courts have jurisdiction over the succession as a whole (subsidiary jurisdiction - art. 10 (1) (a) – German citizenship, shares in the company are “located” in Germany – see wording art. 30) and will have to also apply foreign (= UK and ARG) law
- Exception to full German jurisdiction under art. 12 with respect to real property in UK and ARG possible



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Case Study #2 - Germany



3. Scenario 2: Choice of Argentinean Law

- Choice of ARG law was possible (art 22)
- Art. 22 (2) requires an express or an implied choice
 - A reference to specific provisions of the Argentinean law is sufficient (see recital n° 39)
- **RESULT: ARGENTINEAN LAW** applies to whole Estate. No renvoi: professio juris - art. 34 (2)



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Case Study #2

TIPS FROM THE PANEL

- Review existing will made before Aug 2015 in accordance with nationality as they may end up in a choice of law.
- Do not forget to deal first with matrimonial regimes to assess status of each asset.
- New EU reg to come into effect on matrimonial property regimes and registered partnership.



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Case Study # 3

Klaus:
Choice of Law and Succession
Agreements



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Case Study #3

- Klaus has dual nationalities, German and American. He dies in September 2015 having his last habitual residence and domicile in Charlottesville, Virginia (USA).
- Klaus owns an immovable property situated in Germany and bank accounts in Virginia and in Germany, as well as a joint tenancy account in Miami with right of survivorship in favor of his girlfriend who lives in Miami.
- In 2010 he entered into a succession agreement with his children in Germany where he then had his habitual residence, by virtue of which his children renounced without consideration to any rights they may have under any law to his future succession. The parties designated the law of Germany to govern the agreement.
- He does not expressly designate the law governing his succession.
- His wife and children survive him.
- (i) Would the courts in Virginia or Germany have jurisdiction to decide upon the succession to all or certain of Klaus's assets?
- (ii) In the affirmative which law will the courts or authorities in each of these jurisdictions apply to govern the succession to all or part of the deceased's property?
- (iii) Which law will they apply to determine the validity and effect of the succession agreement?
- (iv) Would a judgment of the German court be recognized and enforced in Virginia or a Virginian judgment recognized and enforced in Germany?



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Case Study #3 - USA



- Virginia will claim jurisdiction over worldwide estate based on Klaus domicile
 - Jurisdiction includes probate and question of validity of will
- Exception: Real estate located outside Virginia
 - Would most likely accept if German will includes choice of Virginia law.



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Case Study #3 - USA



- Enforcement of Agreement in Virginia:
 - If considered contract, choice of law enforceable
 - If considered testamentary instrument, enforceable, if the terms **are** valid and **en**forceable under Virginia law
- Enforcement of Foreign judgments under
 - Virginia's Uniform Enforcement of Foreign Judgments Act, or
 - Uniform Foreign Country Money Judgments Recognition Act



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Case Study #3 - Germany



1. Jurisdiction and its scope

- German courts have full jurisdiction over the succession as a whole under art. 10 (1) (a):
 - Assets of the estate are (partly) located in Germany
 - Deceased had his habitual residence (art. 4) at his time of death in a third State (US) but was (also) a German citizen



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Case Study #3 - Germany



2. Law applicable to the estate

- Deceased had his habitual residence at the time of death in a third state (US) - art. 21 (1)
- The law of Virginia (= “*territorial unit*” - art. 36 (2) (b) – last habitual residence of the deceased) as the law of a third State (art. 20) generally governs the succession
- Renvoi (article 34): German law applies to German immovable property while Virginia Law applies to bank accounts .



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Case Study #3 - Germany



3. Law governing the succession agreement

- The admissibility and substantive validity of the succession agreement (art. 3 (1) (d) and (b)) can be saved under article 83 (3)
- The parties designated the law of Germany to govern the succession agreement – art. 83 (2)
- Its formal validity is governed by article 27 (1) (a): multiple and alternative connecting factors copycat of 1961 Hague Convention on formal validity of Wills (see art. 75 (1) par. 2).
- Under § 2346 of the German Civil Code the children may renounce to any rights they may have under German law to the future succession by an agreement with the testator in a public deed before a German notary public (§ 2276 German Civil Code)



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Case Study #3 - Germany



4. International enforcement of the claim

- There is no international convention regarding the recognition and enforcement of judgments between the US and Germany
- An US judgment can be recognized in Germany only in a so-called “exequatur procedure” (§ 328 German Code of Civil Procedure - ZPO)
- The recognition of a foreign judgment is denied when it is incompatible with the fundamental principles of German law, in particular the constitutional rights (§ 328 (1) no. 4 ZPO)



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Case Study #3 - UK



- Domicile for moveable; Situs for immovable
- Intestacy provisions apply: bank accounts divided between children and wife excluding that in US
- Succession agreements: unavailable in UK and unlikely to be recognised
- Children could disclaim gifts or vary by a deed of variation



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Case Study #3 - Argentina



- Argentine law would apply, and Argentine Courts are competent, as Buenos Aires is the last domicile.
- The will's formalities are dictated by the laws of the place where it was extended.
- Real Property in Germany: Argentine Private International Law does not acknowledge to foreign real estate a principle similar to that dictated by Section 2644 (*lex rei sitae* for real property in Argentina). Therefore, under Argentine law, even such asset would be subject to Argentine law, as regards succession.
- An agreement over future succession rights is not valid. In any event, the legitimate portion of each of the descendants and the wife should be recognized irrespective of the terms of the agreement.

Case Study #3

TIPS FROM THE PANEL

- Review not only wills but all kind of dispositions of property upon death that take multiple forms.
- Might be useful to have a will or codicil clarify choice or not choice of law.
- Be careful because succession agreements not recognized in all jurisdiction.



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Case Study # 4

Derek and Julia:
Choice of Law, administration
Difficulties, and multi-unit territories



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Case Study #4

- Derek and Julia are UK citizens. They were married in London 30 years ago. They spent many years in Luxembourg but retired in Munich. They have a country house in Munich and financial investments in German banks. They have no assets in the UK and have kept no link with the UK. Julia has a child from a first marriage from whom she is estranged. She does not want this child to receive anything from her Estate. She knows that children in German Law have forced heirship rights, and she wants to avoid this.
- She wants her husband to receive her entire Estate and be the executor. She has heard that she can achieve that goal with a Will in which she declares that her whole Estate will be governed by English Law and appointing her husband as executor and only beneficiary of her Estate.
- Is this true? Will that raise difficulties? Which courts (English courts, German courts) will be willing to issue a probate or equivalent?
- Would the German court consider that forced heirship is a public order rule?
- Same case, but Derek and Julia are US citizens?
- Same case but Derek and Julia are Argentinean citizens?



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Case Study #4 - Germany



1. Law applicable to the estate

- Under art. 22 a person may choose as the law to govern his succession as a whole the law of the State whose nationality he possesses at the time of making the choice or at the time of death (no renvoi in case of *professio juris* - art. 34 (2))
- Looking at the wording, the existence of a connection with the UK is not required by the Regulation so that UK law (= its *"territorial units"* in the meaning of art. 36) may be elected also in this case (art. 22 (1)) which would be generally applicable to the whole succession (art. 23 (1))



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Case Study #4 - Germany



2. Jurisdiction over the estate

- German Courts have jurisdiction based on habitual residence (art. 4) and have to apply UK law which does not know the notion of forced heirship
- Is the choice of the law of citizenship prohibited in this case (a) *“to tackle the evasion of law”* (recital 26) or (b) for being incompatible with the public order (art. 35) ?



Case Study #4 - Germany



3. Practical issues of the administration (1)

- Application of the German *lex fori*:

Art. 29 (3) 1°: “[...] the court appointing one or more administrators [...] may, by way of exception, where the law applicable to the succession is the law of a third State, decide to vest in those administrators all the powers of administration provided for by the law of the Member State in which they are appointed.”



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Case Study #4 - Germany



3. Practical issues of the administration (2)

Art. 29 (3) 2: “When exercising such powers, however, the administrators shall respect, in particular, the determination of the beneficiaries and their succession rights, including their rights to a reserved share or claim against the estate or the heirs under the law applicable to the succession.”

- German Act on Proceedings in International Succession Matters (“IntErbRVG”) of 29/06/2015



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Case Study #4 - Germany



3./4. Scenarios 2 and 3: US or Argentinean citizens

- Under art. 22 (1), both US or Argentinean law may be chosen as the law to govern the succession as a whole based on respective citizenship



Case Study #4 - UK



- Domicile; impact of deemed domicile
- Lack of UK habitual residence
- Develop links with UK but;
- Inheritance tax implications; new deemed domicile 15 year rule
- Choice of UK law undermined as contrary to public policy in Germany



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Case Study #4 - USA



- Julia and Derek are not US domiciliaries and have no US assets, their respective estates will have to be probated in accordance to the laws of their domicile.
- No change if they have US citizenship. However, in this case the worldwide estate of Julia and Derek is subject to US estate taxes.



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Case Study #4 - Argentina



- Argentine citizenship of a deceased individual does not imply application of Argentine law to his or her succession. In the absence of the connections : last domicile and location of real property in Argentina, Argentine law would not apply to this case.



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Case Study #4

TIPS FROM THE PANEL

- Not possible to choose law of the last habitual residence.
- Choice of law might have no effect in third state always check.



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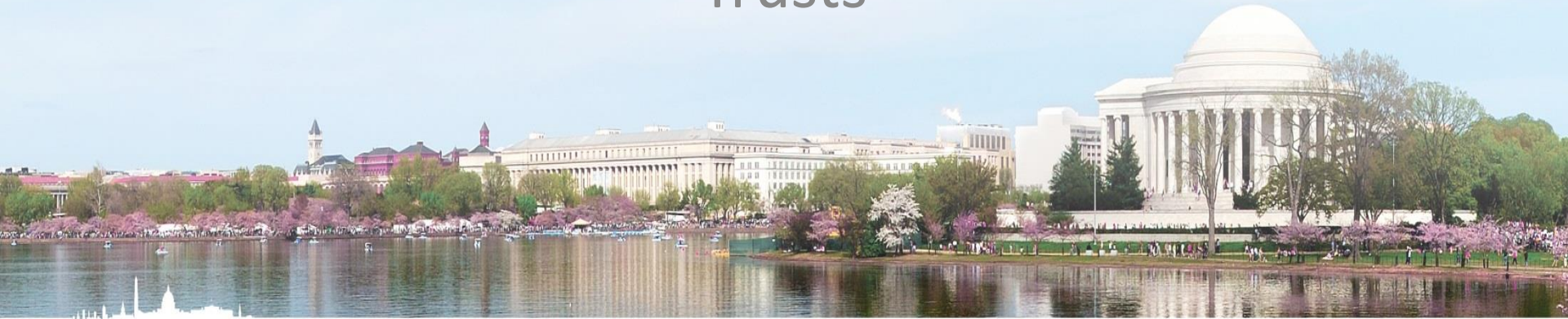
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Case Study # 5

Mary:
Trusts



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Case Study #5

- Mary is a US citizen. She married Helmut in Bonn (Germany) in 1992 where they were then domiciled. Since 2000, they have been habitually resident and domiciled in Germany.
- Mary has two children and is still married to Helmut. Assume that she dies in 2016 and that 25% of her assets are situated in Germany (bank accounts, car, investments and an immovable), whereas 75% of her assets are situated in Virginia (bank accounts, shares of a US private corporation, investments and immovable property).
- Mary intends to make a Will in Virginia wherein she will name her husband executor of her estate, make a certain number of particular bequests and leave the residue in trust for her husband for his lifetime and, upon his death, the capital will devolve to her children. She has designated her husband as the trustee and the law of Virginia as the governing law of the trust.
- Were Mary to choose the law of Virginia to govern her succession pursuant to articles 22 and 36, would this choice be recognized and be given effect in Germany and in Virginia and in the affirmative what law or laws should apply to her succession? If the choice of law is not recognized, what law would apply?
- Does it have an effect on taxes to be paid on the death of Mary?
- Same case but Mary is a UK citizen.
- Same case but Mary is an Argentinean citizen.



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Case Study #5 - USA



- Plan could be implemented as designed under Virginia law
- Mary's citizenship not an issue (except for US estate tax)
- Trust will become foreign trust under US tax law once Helmut is sole trustee
- Not all US states allow non US resident to serve as executor



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Case Study #5 - Germany



1. Recognition of a choice of the law of Virginia (1)

- The appointment of the husband as trustee implies a choice of US law - art. 22 (1) and (2)
- The creation, administration and dissolution of trusts is excluded from the scope of the EU-Regulation under art. 1 (2) (j)
- However, the wording of art. 1 (2) (j) is to be interpreted in the light of the second sentence of recital 13 to the EU-Regulation which reads as follows:



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Case Study #5 - Germany



1. Recognition of a choice of the law of Virginia (2)

“Where a trust is created under a will or under statute in connection with intestate succession the law applicable to the succession under this Regulation should apply with respect to the devolution of the assets and the determination of the beneficiaries.”

- Art. 1 (2) (j) is therefore to be reduced in a teleological way to that only the mentioned specific technical issues of the legal institution of the trust are not governed by the Regulation, the trust may however be used as an instrument of succession planning under the applicable law(s)



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Case Study #5 - Germany



2./3 Scenarios 2 and 3: Mary is a UK / ARG citizen

- Whether Mary may choose the law of Virginia as the governing law of the trust is a question of UK and Argentinean law (laws of citizenship)



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Closing Remarks - Germany



- Since the decisive criteria for the application of succession law in Germany is no longer citizenship (= former § 25 of the Introductory Act to the German Civil Code) but habitual residence (art. 21 (1)), it seems to be possible that even a German citizen, who is habitual resident in a jurisdiction which recognizes the testamentary trust, may utilize this tool for his succession planning.
- Whether this works out in practice for German sited assets remains to be seen yet due to art. 1 (2) (j) and the concepts of German property law.



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Case Study #5 - Argentina



- Argentine citizenship of a deceased individual does not imply application of Argentine law to his or her succession. In the absence of the connections : last domicile and location of real property in Argentina, Argentine law would not apply to this case.



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Case Study #5 - UK



- Choice of law based on nationality
- US multi-jurisdictional country; choose territory with closest connections
- US “third party state” and not bound by Regulation
- Recognition of trust by German courts
- Tax position where assets devolve to spouse and children



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Case Study #5

TIPS FROM THE PANEL

- EU regulation may help in jurisdictions in which domestic Law does not recognize trusts BUT beware of effect on tax.



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