



TRAINING LEGAL LANGUAGES FOR EFFECTIVE FUNCTIONING OF JUDICIAL COOPERATION IN EU

EUROPEAN COOPERATION IN CIVIL AND COMMERCIAL MATTERS

TEXT FOR LEGAL LANGUAGE TRAINING

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FAMILY LAW AND SUCCESSION IN EU

While substantive family law remains under the sole competence of EU countries, the EU is empowered to take measures concerning family law with cross-border implications on the basis of a special legislative procedure which make European rules directly applicable in member states. This has given rise to a variety of EU Regulations on family matters. These regulations include: Brussels IIA (Council Regulation (EC) No 2201/2003) concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters; the Rome III Regulation (Council Regulation (EU) No 1259/2010), implementing enhanced cooperation in the area of the law applicable to divorce and legal separation and the Maintenance Regulation, which is intended to ensure a consistent approach to the jurisdiction and enforcement of maintenance orders.

BRUSSELS IIA REGULATION

Brussels II Regulation (EC) No 2201/2003, also called Brussels IIA or II bis is a European Union Regulation on conflict of law in issues of family law between member states; in particular those related to divorce, child custody and international child abduction. It replaces Convention Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses. The regulation does not apply to Denmark.

WHAT DOES THE BRUSSELS IIA REGULATION DO?

It sets out:

- rules determining which court is responsible for dealing with matrimonial matters and parental responsibility in disputes involving more than one country;
- rules making it easier to recognise and enforce judgments issued in one EU country in another EU country;
- a procedure to settle cases in which a parent abducts a child from one EU country and takes them to another EU country.

It does not deal with substantive family law matters. These are the responsibility of individual EU countries.

The Regulation applies to civil law cases involving more than one EU country in matters of:

- divorce;
- legal separation;
- the annulment of a marriage;



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- any aspect of parental responsibility (such as custody and access rights).

One of its main objectives is to uphold children's rights and to maintain contact with both parents, even if they are separated or live in different EU countries. Each EU country designates a central authority (or more than one) whose duties include:

- helping parents seeking the return of a child abducted by another parent and taken to another EU country;
- promoting information-sharing on national law and procedures;
- helping courts communicate with each other;
- helping parents or guardians seeking to recognise and enforce decisions;
- seeking to resolve disagreements between parents or guardians through alternative means such as mediation.

WHAT IS NOT REGULATED BY THE BRUSSELS II A?

The Regulation does not apply to cases concerning:

- grounds for divorce or the law applicable in divorce cases;
- divorce-related issues such as maintenance;
- establishing and challenging paternity;
- judgments on adoption and the associated preparatory measures;
- annulling or revoking an adoption;
- a child's first and last names;
- the independence of children from their parents or guardians;
- trusts and inheritance;
- measures taken in response to criminal acts committed by children.

EU REGULATION ON CROSS-BORDER SUCCESSIONS

Regulation 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 clarifies which EU country's courts will have jurisdiction to deal with the inheritance and which law the courts will apply. Courts of the EU country where the person usually lived at the time of their death will deal with the inheritance and will apply the law of that country. Judgments or inheritance given in one EU country will be automatically recognized in other EU countries. European Certificate of Succession enables people to prove that they are the heirs, legatees, executors of the will or the administrators of the estate anywhere in the EU.



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EUROPEAN CERTIFICATE OF SUCCESSION – PROBLEM AREAS

Problem 1 - There is no definition of “habitual residence” in the Regulation although guidance can be taken from the European Court of Justice (C-523/07) and recital 23 of the Regulation which states: “Should in order to determine the habitual residence, the authority dealing with the succession 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 reasons for that presence.”

Problem 2 - Different rules for succession in member states, e.g.: who is to inherit and what share (cousin is recognized as an heir in the Czech Republic but not in the Slovak Republic), or existence of the forced heir and forced share or existence of mutual will of spouses.

SUCCESSION CASE STUDY

The facts of the case are as follows:

Mr. Trnka (the name has been modified) was a successful businessman whose parents deceased during his university studies. His wife and son died 12 years ago and he never fully recovered from their tragic loss and never remarried nor established a relationship with another woman. Mr. Trnka was a Slovak national with permanent residence in Bratislava. However, he used to spend most of his time working in Prague, where his small but very successful company was based and used to go to Bratislava only once a month or every five weeks. The only blood relative he stayed in contact with was his cousin Beata who was the only daughter of his mother's sister and who he has always stayed in touch with. Since the death of his family, he maintained the tradition of spending his holiday in Croatia with Beata's family, especially with her three children who Mr. Trnka liked and he enjoyed spending time with them. Apart from the house and a flat in Slovakia he also owned two flats in Slovakia which used to belong to his wife and were passed onto him, a large flat in Prague and a cottage in the Czech Highlands plus three small summer homes in Croatia - his cousin Beata was in charge of maintenance and upkeep of those properties and she was the contact person for the potential holiday makers who rented those homes out on his behalf and managed them. Although Mr. Trnka's intent was his cousin Beata to inherit his assets, he never thought of organizing his estate or drafting a last will. He died during one of his weekend visits to Bratislava in Slovakia, intestate. However, should the testator die intestate in Slovakia, cousins are not recognized as heirs (they are not in any of the statutory heirs groups designated by the law) and thus all of the property would become escheat. The Slovak notary doesn't seem to accept the argument of the cousin that the habitual residence of the deceased was in the Czech Republic, in that case she will inherit automatically all the



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assets (according to new Czech Civil Code, Act number 89/2012 Coll. cousins are recognized as heirs in the sixth class of heirs) and thus the court will have to decide the case.

BREXIT AND CROSS-BORDER PROPERTY INHERITANCE

The vote for Brexit has increased concerns about property inheritance. Although the UK is not a signatory to the EU Succession Regulation it is a beneficiary of it and UK nationals who own property in the EU can specify in their wills that they wish English law to apply to the succession. This allows property owners to avoid the fixed heirship rules imposed by a number of EU member states. Once the UK leaves the EU it will become a “third state” under the Regulation and its position is currently less certain in respect of succession law. The Succession Regulation also envisages the introduction of a European Certificate of Inheritance across all member states, which would prove an individual’s status as a legatee or as an executor. The UK will not now automatically be included in this stream-lining process. It will be interesting to see if the UK decides to opt into the EU succession rules later or remains one of the minority of EU states not to apply these rules. However, UK nationals living in another EU member state (except Ireland or Denmark) should have been able to make use of these new rules since 17 August 2015. So an English national living in France could elect for English law to apply to his or her succession, rather than the laws of France (where he or she is habitually resident). This could be particularly useful for avoiding French forced succession rules, which would otherwise apply, particularly in relation to French property. Thus a French spouse of the above English national might currently be surprised to learn that part of their jointly owned French house will pass to the deceased’s children, rather than automatically going to the surviving spouse.

EU MAINTENANCE REGULATION

The Civil Jurisdiction and Judgment (Maintenance) Regulation 2011 is directly applicable to all Member States of the EU and came into force on 18 June 2011. The goal of the Regulation was to enable a maintenance creditor to obtain easily a decision that will be automatically enforceable in another Member State without formalities. It applies to any foreign maintenance order (i.e. not just those from a Member State). Essentially the Regulation provides:

- rules on obtaining a maintenance decision to include jurisdiction and rules on applicable law;
- rules on modifying a maintenance decision;
- rules on recognition, enforcement and enforceability of a maintenance decision;
- rules on the responsibilities and operation of the Central Authorities;
- rules on access to justice and legal aid;



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- rules on providing up to date information to the public about national laws and procedures concerning maintenance obligations together with a description of how the State will meet its obligations under the Regulation.

Its aims are to limit conflicting decisions in different jurisdictions and encourage private agreements. The Regulation includes administrative authorities in its definition of "court". A "decision" refers to a decision made by a "court" as defined. A decision would therefore include a child maintenance assessment. There are two different tracks for recognition and enforcement of a decision under the Regulation. A decision given in a state bound by the protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations ("2007 Hague Protocol") shall be recognised without any possibility of opposing its recognition and no need for a declaration of enforceability. This skips a step that must be taken when enforcing a decision given by a state not bound by the 2007 Hague Protocol. This process is called exequatur and its purpose is to protect the rights of an individual in exceptional circumstances. Focusing on enforcement, under the Regulation a creditor may apply to the Central Authority in their jurisdiction for assistance with the enforcement of a decision.

MAINTENANCE REGULATION CASE STUDY

In an unusual case a wife has been awarded 100% of the family assets, consisting of the home worth £250,000 and savings of over £300,000. Although the usual starting point for dividing assets on divorce is based on equality, this was a case where the husband, Mr Aly, had moved to Bahrain a year after the parties separated, since which time he had paid no maintenance or child support for his son and daughter. A judge found that there was no real prospect of the husband paying maintenance in the future, he had effectively "washed his hands" of his family in the UK and started a new family in Bahrain. He was out of reach of both the Child Support Agency and the British Courts meaning that any order for maintenance would be difficult to enforce. With this in mind, the judge decided that the only way to ensure that the children were properly provided for was to award the wife 100% of the assets. The decision was made in July 2014 and has now been confirmed by the Court of Appeal. Mrs Aly had previously secured a freezing order over the husband's assets so that they could not be dissipated before the hearing.

REGULATION BRUSSELS Ibis

In pursuing the objective of maintaining and developing an area of freedom, security and justice, the EU legislator has undertaken significant action in unifying the rules on jurisdiction, civil procedure and enforcement of judgments. The Regulation 44/2001 (hereinafter: Brussels I), as revised in the Regulation 1215/2012 which has been applied since 10 January 2015 (Regulation Brussels Ibis or Regulation1215/2012) is certainly the



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most important legal instrument in the field of international civil procedure. The Regulation applies to all EU Member States. The provisions of the Regulation are to be interpreted in accordance with its terms, underlying principles and decisions of the ECJ/CJEU. Thereby generally no reference to national laws is to be made. This view has been expressed in a number of CJEU judgments. This Regulation shall apply in civil and commercial matters. It shall not extend, in particular, to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (acta iure imperii).

This Regulation shall not apply to:

- the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship or out of a relationship deemed by the law applicable to such relationship to have comparable effects to marriage;
- bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings;
- social security;
- arbitration;
- maintenance obligations arising from a family relationship, parentage, marriage or affinity;
- wills and succession, including maintenance obligations arising by reason of death.

Regulation Brussels Ibis excludes wills and succession. The text of the Succession Regulation has been adopted and applies from 17 August 2015. It regulates issues of international jurisdiction, applicable law and recognition of decisions concerning wills and succession.

EUROPEAN ENFORCEMENT ORDER

In the EU there are 2 ways to seek to have a judgment enforced in a different EU jurisdiction:

- 1) the European Enforcement Order (EEO) procedure or
- 2) obtain a declaration of enforceability in the Member State where enforcement is sought.

The EEO allows the creditor to avoid the need to obtain a declaration of enforceability in the Member State where enforcement is sought. EC Regulation 805/2004 created the European Enforcement Order mechanism to allow the collection of debts in the EU. This allows the enforcement eg. in Ireland of a judgment obtained in another EU state. It also allows an Irish person or business to obtain European Enforcement Order which will allow its enforcement



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in other EU states. The EEO can only be obtained for uncontested claims. An uncontested claim is regarded as uncontested if:

- the debtor has expressly agreed to it by admission or by means of a settlement which has been approved by a court or concluded before a court in the course of proceedings;
- the debtor has never objected to it in the course of the court proceedings;
- the debtor has not appeared or been represented at a court hearing regarding that claim after having initially objected to the claim in the course of the court proceedings;
- the debtor has expressly agreed to it in an authentic instrument.

The EEO is a certificate which you can obtain from court which enables judgments, court settlements and instruments on uncontested claims to be recognised and enforced in another EU State, without the need to bring any additional proceedings in the other EU State. The whole purpose is to simplify access to enforcement of judgments in other EU member states without the need for additional court proceedings. The procedure to have a judgment certified as a European Enforcement Order involves an application to the Court at which the judgment was given. This application must be accompanied by a grounding affidavit. The effect of obtaining a EEO is that the judgment is treated as one which was obtained in the other EU state in which you wish to enforce it. The procedure for enforcement is laid down in the national law of the Member State of enforcement.

If you are seeking to enforce a judgment in the UK for example, you should then contact the local county court if the amount of the order is for less than £600. If the amount of the order is for more than £600 you should contact the local district registry of the High Court to begin enforcement.

CROSS-BORDER DEBT RECOVERY IN CIVIL AND COMMERCIAL MATTERS

The new regime of the Regulation No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast - Brussels I bis)) which abandoned the process of declaration of enforcement of judgements in the Member State has greatly contributed to a faster circulation of judgements and authentic instruments. Due to large freedom of movement, a need for a swift and efficient instrument occurred in cases where the debtor might have accounts in various Member States and there is a need for seizing these accounts in order to secure a fulfilment of the creditor's claim in the future. The creditor has already had a disposal of such instruments based on national law of the Member State of enforcement, but these instruments are limited to the jurisdiction of that



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Member State. Introducing an instrument such as the European Account Preservation Order has given the creditor options to choose whether to use measures by the national law or to apply for the European Account Preservation Order, depending on the circumstances of the case and which instrument seems more appropriate to reach his goal – which is a complete fulfilment of his claim in a reasonable time period. Therefore, by the authority in Article 81 of the Treaty on the Functioning of the European Union, a new Regulation No. 655/2014 was adopted on 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters.

EUROPEAN ACCOUNT PRESERVATION ORDER

On 18 January 2017, the European Account Preservation Order (EAPO) was established by EU Regulation 655/2014. The EAPO is a protective measure which facilitates cross-border debt recovery in civil and commercial matters. It acts as a freezing order allowing creditors to chase debts across the borders of participating EU Member States. The UK and Denmark are the only countries who have not opted into this new Regulation. The EAPO is a protective measure which allows a creditor to apply to the court in another EU Member State to prevent the transfer or withdrawal of funds in a bank account if there is a real risk that, without such a measure, the funds owed to him may dissipate. The aim of the European Commission in creating the Order was to ensure mutual recognition and enforcement of judgments and to prevent the disappearance of assets. The EAPO may be applied for by creditors at any stage of the legal process. A creditor can apply for an EAPO prior to debt recovery proceedings being initiated, during debt recovery proceedings or after obtaining judgment against a debtor. Another benefit of the EAPO is that creditors can apply to the court even if the claim is not yet due but has arisen from a transaction or event that already occurred and so the debt is easily quantified. The application for an EAPO should be made in the EU Member State where substantive matter will be heard or where judgment has been obtained.

HOW CAN A CREDITOR SUCCEED IN AN APPLICATION FOR THE EUROPEAN ACCOUNT PRESERVATION ORDER

In order to succeed in an application, a creditor must prove an urgent need of the courts protection. It must be proved that there is a real risk the debtor will conceal or destroy his assets or have them disposed of under value. Once an EAPO is granted the Bank must freeze the account “without delay”. The court must take a balanced approach before granting an EAPO. The court must consider the debtor’s previous history, the relationship between the parties and the nature of the assets. It would not be sufficient to only show that the debtor is in a poor financial situation. In a situation where an EAPO is being applied for pre-



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judgment, the court may require the creditor provide security as compensation for any damage caused to the debtor from the order.

An application for an EAPO is made without notice to the debtor. While the debtor is not made aware of the application, in order to ensure its effectiveness, the debtor may contest the Order once it is granted. To safeguard the debtor's right to a fair trial and right to an effective remedy, a copy of the Order must be served on the debtor after the implementation of the Order. The EAPO affords a further level of protections for creditors and an additional method to recover debts. An EAPO makes it more difficult for a debtor with various bank accounts to conceal assets in another EU Member State. The effect of the EAPO is to prevent, not only the debtor himself, but any third party authorised by the debtor to make payments through an account, from using the funds. The restrictions on the debtor's bank account won't be such that they will be prevented from dispensing ordinary transactions or family obligations. The Regulation does not apply to debtors in insolvency proceedings. Although the UK have opted out of the Regulation, UK companies may still be subject to an EAPO if they hold bank accounts in participating EU Member States and participate in cross-border trade. The Order ensures the efficient enforcement of a judgment when the debtor has several accounts in different Member States. While national measures to prevent the disappearance of assets exist in all Member States, conditions to grant such orders and effectiveness vary. With Regulation 655/2014, creditors now have an additional and more efficient method with which they are able to recover cross-border debts.

JUDICIAL COOPERATION IN CIVIL AND COMMERCIAL MATTERS - IMPORTANT LEGAL INSTRUMENTS

The Regulation 44/2001 (also called Brussels I), as revised in the Regulation 1215/2012 which has been applied since 10 January 2015

REGULATION (EU) No 1215/2012 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) ;

Council Regulation (EC) No 2201/2003 of 27 November 2003, also called Brussels II A or II bis) concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000

Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims. It has been applied since 21 October 2005.



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Rome III Regulation (Council Regulation (EU) No 1259/2010), implementing enhanced cooperation in the area of the law applicable to divorce and legal separation

Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (came into force on 18 June 2011)

REGULATION (EU) No 650/2012 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL 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

Regulation No 655/2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters



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