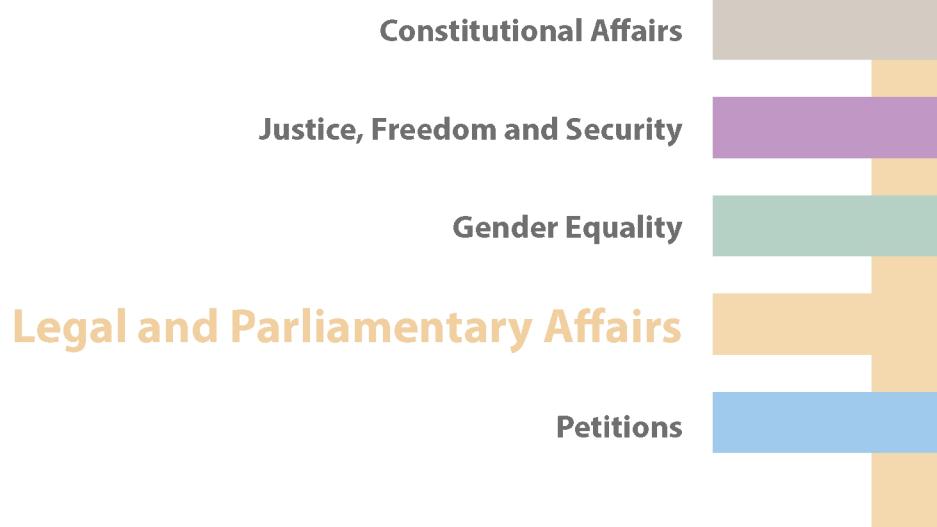


DIRECTORATE-GENERAL FOR INTERNAL POLICIES
POLICY DEPARTMENT
CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS 



**The evidentiary effects
of authentic acts
in the Member States
of the European Union,
in the context of successions**

Study for the JURI Committee



**DIRECTORATE GENERAL FOR INTERNAL POLICIES
POLICY DEPARTMENT C: CITIZENS' RIGHTS AND
CONSTITUTIONAL AFFAIRS**

LEGAL AFFAIRS

**The evidentiary effects of authentic acts
in the Member States of the European
Union, in the context of successions**

STUDY

Abstract

The EU Succession Regulation (Regulation 650/2012) allows for cross-border circulation of authentic instruments in a matter of succession. Authentic instruments are documents created by authorised authorities which benefit from certain evidential advantages. As this Regulation does not harmonise Member State substantive laws or procedures concerning succession the laws relating to the domestic evidentiary effects of succession authentic instruments remain diverse. Article 59 of the Succession Regulation requires the Member States party to the Regulation to give succession authentic instruments the evidentiary effects they would enjoy in their Member State of origin. The only limits on this obligation being public policy or the irreconcilability of the authentic instrument with a court decision, court settlement or another authentic instrument. This study, which was commissioned by the Policy Department for Citizen's Rights and Constitutional Affairs of the European Parliament upon request of the Committee on Legal Affairs, provides an information resource for legal practitioners concerning the evidentiary effects of succession authentic instruments in the 25 Member States bound by the Succession Regulation. It also makes recommendations for best practice.

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LIST OF ABBREVIATIONS

"Brussels Ia Regulation"	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 [2012] OJ L351/1
"European Enforcement Order Regulation"	Regulation (EC) No <u>805/2004</u> of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims [2004] OJ L143/15
"Implementing Regulation"	Commission Implementing Regulation (EU) No 1329/2014 of 9 December 2014 establishing the Forms referred to in 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 [2014] OJ L359/30
"Rome I Regulation"	Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177/1
"Rome II Regulation"	Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L199/1.
"Succession Regulation"	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 [2012] OJ L201/107

EXECUTIVE SUMMARY

This study was requested by the European Parliament's Committee on Legal Affairs (JURI) in order to provide practitioners with reliable and comprehensive information concerning the domestic evidentiary effects of authentic instruments in the Member States of the European Union, in the context of successions.

At present the way authentic instruments are used in the context of succession, along with their evidentiary effects, differ between the Member States. This has the potential to cause misapplication of the EU Succession Regulation.

The study aims to provide authorities in the Member States with guidance as to what constitutes an authentic instrument for the purpose of succession as well as guidance as to the evidentiary effects of the authentic instrument in the Member State of origin so that Article 59 of the Succession Regulation and Annex 2 Form II of the Implementing Regulation can be applied correctly.

Background

Authentic instruments are documents created by a public authority (e.g. a notary) or other authority (e.g. a court) which have been empowered for that purpose by the Member State in which the instrument originated. An authentic instrument, typically benefits from evidential advantages compared to other documents. For example it may be necessary for a party who would rely on any matter contained in another kind of document to prove the truth of every matter in it, whereas the holder of an authentic instrument may rely on a legal presumption that the matters certified and verified by the authority who drew up the authentic instrument actually took place as the instrument records. The holder of an authentic instrument benefits from the reversal of the normal burden of proof as concerns the evidence in that authentic instrument. He may also benefit from restrictions on how the evidence can be challenged (e.g. that the evidence in an authentic instrument is a particularly strong form of civil evidence that can only be challenged via formal rebuttal proceedings).

Authentic instruments are used in a variety of contexts in the legal systems of 22 (Cyprus, Finland and Sweden do not use authentic instruments at all) of the 25 EU Member States considered by this study: one such context is succession law. In the context of succession, authentic instruments may be created by notaries or other officials during the life of the testator (e.g. if a notary or consular official draws up a public will) and also may be created after the testator's death by an official (such as a notary) while he carries out his duties and issues documents concerning administration of the estate proceedings in accordance with the domestic succession law of his Member State. The domestic functions of, and uses for, an authentic instrument in a succession vary quite markedly across the EU's Member States as a consequence of material differences in the substantive and procedural succession laws in these Member States.

The Succession Regulation represents a partial response to the diversity of Member State succession laws. Since 17 August 2015 the Succession Regulation has provided uniform Private International Law rules concerning succession in the 25 EU Member States that are party to it: Denmark, Ireland, and the United Kingdom are not party to it. Other than in connection with its Private International Law rules however, the Succession Regulation does not attempt to regulate the substantive or procedural laws of succession found in the Member States. Accordingly, despite the Succession Regulation, there are still material differences between the substantive succession laws and the administration of estates procedures that apply in the legal systems of the 25 EU Member States concerned by this study. This diversity extends to include succession authentic instruments in 22 Member States.

In the context of authentic instruments, the Succession Regulation provides Private International Law rules for the cross-border circulation of succession authentic instruments. It envisages that, in principle, a succession authentic instrument created in a Member State of origin must be allowed to reproduce its domestic evidentiary effects (and its domestic enforceability if any) in the legal systems of the other 24 Member States subject to the Succession Regulation. The cross-border evidentiary effects of a succession authentic instrument in the Member State addressed are governed by Article 59 of the Succession Regulation and explained by its associated recitals.

Article 59 of the Succession Regulation requires that any Member State addressed must 'accept' an incoming succession authentic instrument from a Member State of origin by according to it the same (or most comparable) evidentiary effects that it would have enjoyed in its Member State of origin. This obligation is subject to an exception if such acceptance would be manifestly contrary to the public policy of the Member State addressed or if the authentic instrument is irreconcilable with a court decision, court settlement or, in certain circumstances, with another authentic instrument.

For Article 59 of the Succession Regulation to operate as intended it is necessary for the authorities in the Member State addressed to appreciate not only that they are in receipt of an authentic instrument within the scope of and definition provided by the Regulation, but also to appreciate the nature and extent of the evidentiary effects of that authentic instrument in its Member State of origin. **Such appreciations are however complicated by not only the different possibilities and uses for authentic instruments in successions across the 22 Member State legal systems that employ them, but also by differences concerning the evidentiary effects of authentic instruments across these legal systems.**

Aim of the project

The aim of this project is to assist the authorities in the Member State addressed in understanding the nature of the evidentiary effects that may be associated with the succession authentic instruments that they may receive. The European Union has provided a special standard form for such authentic instruments: Annex 2 Form II of Implementing Regulation 1329/2014. The Implementing Regulation is intended to facilitate the effective operation of the Private International Law principles introduced by the Succession Regulation. It is envisaged that whomsoever wishes to produce a succession authentic instrument outside its Member State of origin *may*, as use of the standard form is not compulsory, request that the authority who drew it up will also complete an accompanying Annex 2 form to inform the authorities in the Member State addressed of the nature and extent of the domestic evidentiary effects of the authentic instrument in question.

When a succession authentic instrument is produced in the Member State addressed – with or without an Annex 2 standard form – the difficulty that faces both the authorities and especially the legal practitioners in that Member State will be to appreciate accurately its domestic evidentiary effects in such a manner as to allow proper compliance with the obligation of acceptance imposed by Article 59 of the Succession Regulation. **If the evidentiary effect of the foreign authentic instrument is misunderstood in the Member State addressed this will lead to the misapplication of the Succession Regulation and may also potentially prejudice other interests concerned in the succession.**

This study is designed to attempt to resolve the difficulty faced by a legal practitioner (or authority) in the Member State addressed who is attempting to understand the evidentiary effects of a succession authentic instrument from one of the 22 EU Member States that domestically employ authentic instruments in their legal systems.

To meet this challenge this study provides 25 country profiles – one for each EU Member State bound by the Succession Regulation – that will also be freely provided via the webpages of the University of Aberdeen’s Centre for Private International Law.

Each country profile sets out:

- a) the use and domestic evidentiary effects of authentic instruments in the law of the Member State in question.
- b) the use of authentic instruments in the domestic succession law of the Member State in question.
- c) the main types of succession authentic instruments in the law of the Member State in question.
- d) the likely answers (and where necessary the meaning of those answers) for the relevant Member State concerning question 4. of Annex 2 Form II of Implementing Regulation 1329/2014 on the specific domestic evidentiary effects of a succession authentic instrument.
- e) the Private International Law obligations of the country profiled considered both as a Member State of origin (where possible) and also as a Member State addressed.

The study also includes a comparative report drawn up in light of our research findings and our conclusions as to the various practical and legal challenges facing legal practitioners in quickly and accurately appreciating the evidentiary effects of authentic instruments in matters of succession.

Recommendations

As well as a general recommendation to further publicise the existence and availability of the country profiles other than by the publication of this study on the European Parliament study website a number of further recommendations are put forward aimed at the EU, its Member States and relevant professionals working with succession authentic instruments. These recommendations include:

- changes to the text of Article 59 of the Succession Regulation to allow a court in the Member State addressed the option of either requiring the production of a completed Annex 2 Form II form concerning any succession authentic instrument unaccompanied by this form, and/or allowing such a court the option of directly consulting the completing authority as to the meaning of its entries on the Annex 2 form provided;
- a change to the text of Article 59 of the Succession Regulation to allow an authority or court in the Member State addressed an option to request a translation of the authentic instrument and/or the accompanying Annex 2 Form II when necessary. At the moment the possibility of requesting a translation seems to be restricted to cases where the applicant is trying to enforce an authentic instrument (see Articles 60(1) and 47(2) of the Succession Regulation);
- the encouragement, as a matter of good professional practice, of the use of a fully completed and legally referenced Annex 2 Form II form whenever the issuing authority is aware that an authentic instrument in a matter of succession is to be sent abroad;
- the encouragement of accuracy and clarity at the Member State and professional levels concerning the technical terminology of ‘acceptance’ employed in the Succession Regulation by Article 59;
- and also encouraging publicity at all professional levels concerning the abolition of legalisation requirements by Article 74 of the Succession Regulation.

1. GENERAL INFORMATION

1.1. The scope and operation of the Succession Regulation

The Succession Regulation became fully operational within 25 EU Member States (the United Kingdom, Ireland and Denmark are not parties to this Regulation) as of 17 August 2015. The Regulation contains, *inter alia*, two provisions concerning succession authentic instruments that confer an obligation on the Member State addressed to accept (Article 59) and to 'enforce' (Article 60) succession authentic instruments received from a qualifying Member State of origin.¹ This is an important Regulation provision as the legal systems in many EU Member States make extensive use of authentic instruments in their succession laws. The aim of Article 59 of the Succession Regulation is clarified by Recital 61. Authentic instruments "... should have the same evidentiary effects in another Member State as they have in the Member State of origin, or the most comparable effects".² In order to be able to achieve this goal it is first necessary for a practitioner working in the Member State addressed to know which foreign documents can fall within the definition of an authentic instrument under Article 3(1)(i) of the Succession Regulation. The definition of an "authentic instrument" in Article 3(1)(i) provides that:

Art. 3(1)(i), 'authentic instrument' means a document in a matter of succession which has been formally drawn up or registered as an authentic instrument in a Member State and the authenticity of which:

- (i) relates to the signature and the content of the authentic instrument; and
- (ii) has been established by a public authority or other authority empowered for that purpose by the Member State of origin."³

Providing that the meaning of authentic instrument is clear, the question which immediately arises from this definition is what is meant by a document '*in a matter of succession*'. Many documents drawn up in the form of an authentic instrument could be argued to be *relevant to* a matter of succession. Whether this relevance will suffice for a valid authentic instrument to fall within the Regulation (what we sometimes describe in this report as 'a succession authentic instrument') is presently unclear. Though the clarification of the class of authentic instruments that are within the scope of this definition in the Succession Regulation is outside the remit of this study, and must await elucidation from EU courts and legislators, we have tended to adopt a reasonably wide approach to the authentic instruments that might fall within this definition. This decision was motivated both by the diversity of authentic instruments that can be created in the legal systems we have considered and by the seeming need to take a broad and inclusive view of the nature of a succession authentic instrument to also include those authentic instruments issued by notaries in the course of probate proceedings (e.g. succession certificates). We were reluctant to draw the definition too narrowly at this early point in the history of the operation of the Succession Regulation.

¹ This study is not directed towards enforcement under Article 60 but it is worth noting that this provision of the Succession Regulation concerns the grant of a declaration of enforceability in a court in the Member State addressed (the Regulation requires an *exequatur* application) but does not regulate the actual enforcement thereafter provided by that Member State concerning the foreign succession authentic instrument in receipt of such a grant of *exequatur*: actual enforcement is subject to national enforcement provisions.

² Recital 61, Succession Regulation.

³ The Court of Justice of the European Union (CJEU) has provided an autonomous definition of the minimum requirements for a document to be considered to be an authentic instrument for the purposes of applying Article 50 of the Brussels Convention of 1968 in Case C-260/97 *Unibank v Christensen* [1999] ECR I-3715 at paragraph 17. This 'definition' has since served (*mutatis mutandis*) as the basis of subsequent definitions of authentic instruments in European Union Regulations.

Assuming the document received to be a qualifying authentic instrument under the Succession Regulation, it is then necessary to accurately appreciate the nature of the evidentiary effects that that authentic instrument would produce in the Member State of origin. Finally it is necessary to determine whether and if so how, to give the incoming authentic instrument the same (or the most comparable) evidentiary effects it would enjoy in the Member State of origin in the Member State addressed.

For a succession practitioner to be able to carry out these steps it is necessary for him to be able to access and understand aspects of the domestic law of evidence of the other Member State. The purpose of this study is to define the scope of these evidentiary effects for succession authentic instruments in all 25 participating Member States and to provide a compilation of this information for direct and easy use by practitioners. As well as presenting this information in the form of the country profiles included in this report we additionally propose to present this information via the web-pages of the Centre for Private International Law of the University of Aberdeen. We have made this additional suggestion in response to and compliance with an earlier suggestion from the European Parliament concerning the maximisation of accessibility concerning the information in the country profiles for legal practitioners.

1.2. The legal nature and operation of an authentic instrument in the context of succession

The legal institution of the authentic instrument is commonly found in those 'Civil Law' legal systems that are based on a Roman Law tradition: it may sometimes also be found (in various forms) in 'Mixed' legal systems that possess some form of Roman Law heritage. The legal institution of authentic instruments is absent from those legal systems that were not constructed in accordance with aspects of the Roman Law tradition. Thus, as well as being absent from any Common Law legal system, the legal institution of the authentic instrument is also absent from the laws of three of the EU Member States that are subject to the Succession Regulation (Finland, Sweden and Cyprus). **Consequently, though Succession Regulation authentic instruments can be received in all participating EU Member States, it is not possible for such authentic instruments to be created in Finland, Sweden or Cyprus.**

An authentic instrument is a document, created in accordance with domestic law by a public authority or other authority who has received the legal power to create such a document from and in that legal system. In the context of succession the creator of such authentic instruments is usually, *but not always*, a notary. For the purposes of this study it will be assumed that, unless the contrary is indicated, the authentic instrument at issue has been created by a notary. It must however be noted that it is not unusual, depending upon the legislation in the Member State of origin, for courts and or officials other than notaries to *also* be empowered to create authentic instruments. Some of these authentic instruments could also relate to a succession. This report however reflects the fact that the predominant creators of succession authentic instruments in the majority of competent Member States will be notaries.

It is however important to resist the assumption that because most succession authentic instruments are created by notaries it follows that therefore all notaries can create authentic instruments. A notary can only create an authentic instrument if the legal system in which he is admitted as a notary allows this power to its notaries. Notaries are present as part of the domestic legal profession in every Member State legal system subject to the Succession Regulation but the notaries in Cyprus, Finland and Sweden are not able to create authentic instruments as they have not been expressly empowered to do so by the laws of their respective Member States.⁴ As the power to create an

⁴ The office of notary is not confined to those EU Member State legal systems that feature the authentic instrument. Notaries also work in the legal systems of those EU Member States that do not feature authentic

authentic instrument is one that has to be granted by the State this creative power is subject to territorial limits. It is thus not possible for a notary from a Member State such as Germany (in which the notary does have the power to create authentic instruments) to visit Sweden (where there is no such power) and to create a German or a Swedish authentic instrument in Sweden. **This is why Cyprus, Finland and Sweden can never be the Member State of origin for an authentic instrument.**

Succession authentic instruments may be created at the instigation of the *de cuius* during his life and or at the instigation of others after the *de cuius's* death. The Succession Regulation does not distinguish between the two possibilities and thus each must be considered. The most common *inter vivos* succession authentic instrument created by a notary at the instance of the *de cuius* is a notarial will (there are other possibilities such as succession agreements). *Inter vivos* succession authentic instruments formally evidence and authoritatively record facts about the *de cuius* and about the circumstances of their creation. They also provide evidence concerning any declarations made by the *de cuius* in the presence of the notary. For those authentic instruments created after the *de cuius's* death, notaries act in connection with their succession law duties as laid down by the domestic succession law of the Member State in which they are entitled to practice. Their post-mortem authentic instruments will thus authoritatively evidence and record important matters concerning those aspects of the operation of probate proceedings in the succession law of the legal system in which they operate as notaries. **In either case, because the authentic instrument records the information provided by the *de cuius* (or concerning the probate proceedings concerning his estate) in a document authentic instrument created by an authorised person it has a higher evidential status and evidential value than if identical information were to be presented by the *de cuius* or another person via privately created documents that did not amount to authentic instruments.**

In the context of succession the evidential advantage is usually the most obvious *legal* advantage⁵ conferred by the use of an authentic instrument. The notarially verified facts recorded within the authentic instrument can be relied upon as whatever is regarded as a conclusive form of evidence in that Member State and are presumed – until this strong presumption is rebutted – to be correct by and potentially binding upon any individual, official body or court in that legal system. The authentic instrument is effective upon the simple production of an official copy of the original authentic instrument. For example, an *inter vivos* authentic instrument could contain evidence pertaining to the following matters:

- (a) that a given party actually personally visited the notary – the notary will verify the identity of the party; and,
- (b) that the party visited the notary in connection with the creation of an authentic instrument on a particular day – the notary will verify the fact of the visit and also the date of his creation of the authentic instrument; and,
- (c) that the party actually made the declaration(s) contained within the authentic instrument – the notary will verify the fact that the declarations were made in his presence by the party (*note that this verification does NOT necessarily mean that the declarations made were true – see (d) below*). If the transaction is an *inter vivos* one,

instruments (and hence do not allow the notarial creation of such authentic instruments). If compared to the notaries of legal systems that do allow the notarial creation of authentic instruments, these notaries have a much reduced role and one that will not feature materially in the context of the Succession Regulation. These notaries carry out such domestic duties as their State allows and also typically have an important role in facilitating due compliance of parties based in their State with the laws of other States that do require the involvement of a notary in connection with certain legal acts or declarations. Thus an English notary may assist a German company that is acting in England, to comply with German legal requirements when it so acts.

⁵ There are of course important practical advantages that can also flow from the involvement of a notary or other lawyer in the context of a succession.

the notary will also verify that he advised and read the content of the authentic instrument to the party who made the declarations and also verify the making of the signature by that party.

(d) Depending on the circumstances, a notarial authentic instrument may go further than (c). If the notary can be sufficiently persuaded of the truth of a given declaration by a party he may not only record the making of the declaration by the party (as in (c) above) but also may record *the truth* of the declaration as a fact that he has also formally verified.

In the legal system of its creation, the authentic instrument may not only benefit from the enhanced evidential status and admissibility of an authentic instrument, but may also benefit from other enhanced evidential effects. Thus it is commonly the case in most Member States (e.g. France, Belgium, Luxembourg, Germany, etc.) that some types of authentic instruments can be created in such a way as to allow their immediate enforcement if parties do not comply with their declarations contained within them. Other EU Member States have a different approach to enforceability, e.g. Lithuania allows only a restricted form of this and in Hungary and Romania the court must assist in granting enforceability. Such an 'enforcement' possibility effectively treats the authentic instrument as if it is *already* an enforceable order and removes the need for the 'creditor' to first visit the court for a preliminary declaration of enforceability. Equally, in the context of post-mortem succession proceedings, an authentic instrument created by a notary in the course of that succession could produce evidentiary effects that prove that a named person is the heir and or has ownership rights over property that was previously vested in the *de cuius*.

Although the legal systems that feature authentic instruments treat them as public documents, and usually accord what are presumed to be conclusive but rebuttable evidential effects to each of the notarially verified facts that they contain, it is still possible to challenge different aspects of an authentic instrument before the courts of the place in which that authentic instrument was drawn-up. The types of challenge can be grouped into three categories:-

(1) a challenge based upon a defect in the *formalities* required to create an authentic instrument. Such a technical challenge is sometimes described as a challenge to the formal validity or the *instrumentum* of the authentic instrument.

(2) a challenge based upon a defect in the evidential *content* of the authentic instrument. Such a challenge to the material validity of the authentic instrument is sometimes described as a challenge to its *negotium*.

(3) depending upon how the legal system of creation allows for such a possibility, the enforcement of an authentic instrument may also (effectively) be 'challenged' in the course of judicial proceedings whether by convincing a court hearing an incidental matter not to follow the evidence contained in the authentic instrument on that occasion, or, by way of any possibilities allowed by that legal system to challenge the actual enforcement of that authentic instrument.

Considered in functional terms, a notarially created authentic instrument is therefore a means of formally and officially recording, preserving and then communicating conclusive evidence concerning notarially verified facts and aspects of party declarations in a convenient form and manner within the legal system of creation.

In some circumstances however the evidence contained in an authentic instrument created in one State may also be used in another State. There are three possible ways in which this could happen but **this study is only concerned with the third** possibility:-

- 1) The authentic instrument from State 1 could be produced and received in State 2 merely as a foreign document containing ordinary documentary evidence but not benefitting from any enhanced evidential status concerning that documentary evidence.
- 2) The authentic instrument from State 1 could be produced and received in State 2 as a foreign authentic instrument under a bilateral treaty between State 1 and State 2 that treats such foreign authentic instruments more favourably than mere foreign documentary evidence. N.B. This possibility is not relevant for this study and is only included for completeness.
- 3) The authentic instrument created in one EU Member State could be produced and received in another EU Member State as a foreign authentic instrument under an EU Regulation such as the Succession Regulation that expressly allows a 'foreign' authentic instrument as defined by that Regulation (e.g. see Article 3(1)(i) of the Succession Regulation) to benefit from one or more of the following:

- a) cross-border acceptance⁶ – e.g. Article 59 of the Succession Regulation,
- b) cross-border enforcement⁷ – e.g. Article 60 of the Succession Regulation,

It must be noted that in all cases concerned with EU Regulations allowing cross-border effects to authentic instruments, any attempt to challenge either the formal validity (*instrumentum*) or the material validity (*negotium*) of the foreign authentic instrument can **only** proceed in the Member State in which the authentic instrument was originally drawn up. **Thus, though under the Succession Regulation the Member State addressed may, exceptionally, refuse to 'accept' or to 'enforce' a foreign succession authentic instrument because to do so would violate public policy, they cannot accept challenges that question the formal validity or the material validity of a foreign authentic instrument.** Such issues can only be raised in the Member State of origin. This does not of course mean that the evidence transmitted by the authentic instrument to another Member State will necessarily be conclusive in effect in that other State if other conflicting evidence (e.g. a later will) is produced.

1.3. The role of the authentic instrument in the transmission of evidence via Article 59 of the Succession Regulation

The European Parliament commissioned the University of Aberdeen to undertake this research with a view to establishing and understanding the domestic evidentiary effects of authentic instruments created by notaries that concern successions. This is because under Article 59 of the Succession Regulation there is a duty on the 25 EU Member States concerned to domestically reproduce, as far as possible, the domestic evidentiary effects that a foreign authentic instrument concerning a succession would have in the Member State of origin. The only exception to this duty is in the exceptional circumstance that the reproduction of such evidentiary effects would be manifestly contrary to public policy (*ordre public*) in the Member State addressed.

The information that we provide in this report and in the country profiles should make it simpler for a lawyer or official in the Member State addressed who receives such an authentic instrument to appreciate what its domestic evidential effects could be.

⁶ Cross-border 'recognition' for authentic instruments (as opposed to judgments) is not possible under the Succession Regulation. This matter is discussed in detail later in this report (see below under 4.8(4)).

⁷ It should be noted that the cross-border enforcement regulated by the Succession Regulation for authentic instruments is actually the right for an authentic instrument from the Member State of origin to be presented for a declaration of enforceability in an *exequatur* heard in the Member State addressed. The Succession Regulation does not regulate the actual enforcement of the authentic instrument: this matter is left to the domestic law of the Member State addressed subject to the need of the Member State to comply with the general principles of EU law relating to the equivalence and effectiveness of their actual enforcement system.

2. METHODOLOGY

Acting in accordance with the research requirements set by the European Parliament, it was decided to split the study into three successive phases: first, drawing up the information and questionnaire to be supplied to the National Reporters; second, allowing the National Reporters to complete and return the questionnaires; third, processing the information received to create the final report and the resource of the country profiles that it contains. The three phases of the study are set out below in more detail.

2.1. Phase One

This phase was designed to ensure the production of introductory information and also an appropriate questionnaire that would ultimately be sent to the National Reporters to be completed by them. The introductory information for the National Reporters was drafted by Dr Fitchen with the assistance of Ms Holliday and was reviewed prior to sending, along with the questionnaire, by Professor Beaumont and two of our National Reporters (Professor Patrick Wautelet of the University of Liege and Dr Eva Lein of the British Institute of International and Comparative Law).

The questionnaire included and elaborated upon the four basic requirements outlined in the terms of reference established by the European Parliament for this study. The 25 national reports that underpin this study must set out:

- a) The legal regime(s) operating in the Member State;
- b) The concept(s) of authentic instruments in that State;
- c) Remarks concerning the Private International Law rules operating in that State; and
- d) Enable the Aberdeen Team to provide a country profile for the relevant Member State.

The questionnaire was designed and structured to allow each National Reporter to indicate or highlight any actual or anticipated problems with the law or the procedure concerning the evidentiary effects of authentic instruments under Article 59 of the Succession Regulation in the legal system under investigation.

The questionnaire also addressed the meaning and definition of the evidentiary effects of authentic instruments in the context of Article 59 of the Succession Regulation by drawing upon the provisions of the Implementing Regulation (in particular upon parts 4.2 and 4.3 of Form II). Part 4 of Form II of the Implementing Regulation was designed to align with Article 59 of the Succession Regulation and thus indicates the extent and limitations of the evidentiary effects that the drafters of the Implementing Regulation were willing to contemplate. This indication of the possible evidentiary effects of an authentic instrument originating from the Member State under examination is useful as the Succession Regulation itself does not provide a definition of the phrase 'evidentiary effects'.

2.2. Phase Two

This phase of the study was intended to allow the National Reporters the time to complete and then return their questionnaires to the Aberdeen Team. The National Reporters had been chosen for their experience and familiarity with European Union Private International Law and the law of succession in the Member State under investigation. In four cases, one expert covered two Member States. Overall, we worked with 21 National Reporters, some working with colleagues, to report upon the 25 Member States under investigation.

Country	National Reporter
Austria	Dr Eva Lein
Belgium	Professor Patrick Wautelet
Bulgaria	Dr Boriana Musseva
Croatia	Professor Ales Galic
Cyprus	Professor Nikitas Hatzimhail
Czech Republic	Professor Monika Pauknerova and Magdelene Pfeiffer
Estonia	Maarja Torga
Finland	Katja Karjalainen
France	Celine Camara
Germany	Dr Eva Lein
Greece	Aimilios Koronaios
Hungary	Professor Csorong Nagy
Italy	Professor Costanza Honorati and Paolo Pasqualis
Latvia	Gatis Litvins
Lithuania	Dr Dalia Perkumiene
Luxembourg	Celine Camara
Malta	Dr Clement Mifsud Bonnici
Netherlands	Professor Xandra Kramer
Poland	Dr Monika Drela
Portugal	Raquel Ferreira Correia
Romania	Professor Csorong Nagy
Slovakia	Dr Katarina Trimmings
Slovenia	Professor Ales Galic
Spain	Professor Maria Font and Professor Miriam Anderson
Sweden	Jayne Holliday

The questionnaires were sent to the National Reporters in mid July 2015. The Succession Regulation entered into full legal operation as of 17 August 2015 and the deadline for the National Reporters to submit completed questionnaires was 30 September 2015.

Acting on the European Parliament's recommendation contained in their response to our detailed outline of the proposed Study, that our study should take into account the views of practitioners, the Aberdeen Team accepted the generous offer made by the Council of the Notariats of the European Union (CNEU) to send the questionnaire to their Members and delegates on the CNUE working group on succession. The CNUE circulated the questionnaire on a pro bono basis to their members and delegates in their working group on succession in August 2015. In due course questionnaires from 15 notaries representing 15 of the 25 EU Member States subject to the Succession Regulation were returned to us. We were and are grateful to all of the notaries who took the time to complete the questionnaire or to otherwise assist us in the completion of this study.

2.3. Phase Three

Beginning in October 2015 the Aberdeen Team started to consider the comprehensive data as supplied by the National Reporters and Notaries. We also requested additional explanations where necessary and appropriate.

During this period, in accordance with the terms of reference set by the European Parliament, the Aberdeen Team also worked to produce an interim report and, after receiving feedback upon it, have reflected upon the comments of the European Parliament and also those of the CNUE. Since this time the Aberdeen Team has worked to complete the country profiles (see Appendix II) and to compile a comparative report to establish and reveal the points at which continuities and discontinuities in the operation of the Succession Regulation concerning the transmission of evidence by authentic instruments appear most likely to occur in practice. This comparative analysis has allowed the study to identify areas in which the likely evidentiary effects of authentic instruments might be improved and has also allowed the authors of the study to offer recommendations to improve the implementation of the Succession Regulation.

The report of the study also includes recommendations concerning the issue of how accurate and up to date information pertaining to the domestic evidentiary effects of authentic instruments in the Member State of origin may best be provided to legal practitioners and citizens within the European Union. Dr Fitchen took the lead in preparing the comparative report and both sets of recommendations supported by Ms Holliday, with Professor Beaumont reviewing the draft work.

3. THE DEVELOPMENT OF THE RESEARCH

The Study has proceeded rapidly from the identification of expert national reporters for the 25 Member States under consideration to the creation and supply of a detailed questionnaire concerning the nature and operation of succession law, including the domestic role of authentic instruments in such succession law, in these Member States. The questionnaires have generated a great deal of detailed information.

A very positive development for the breadth and practical relevance of this Study has been that the national reports generated by the academic experts that we selected have, in most cases, been supplemented by additional national reports, also based on our questionnaire, as completed by Notaries (i.e. succession law practitioners) from many of the Member States that are under investigation. This most welcome additional input has been offered generously to us (free of charge) by the CNUE and its members. The combination of academic and practical viewpoints concerning our questionnaire has enriched the representative quality of the data received and revealed certain practical issues.

Despite the final text of the Succession Regulation and its August 17 2015 deadline having been public since mid-2012, just over one third of the 25 Member States involved in this study had not released implementing and amending laws and procedures to facilitate the general operation of the Succession Regulation by February 2016. It should further be noted that even in the Member States that have released such domestic implementing and amending provisions, these provisions are usually silent, or nearly silent, upon the subject of authentic instruments: the most common matter featuring in domestic updating or implementing legislation concerns the identity of the authority who is competent to issue the new European Certificate of Succession.

3.1. Comparative analysis

The study was directed towards the objective of compiling a reliable and comprehensive information resource for practitioners concerning the evidentiary effects of authentic instruments in the 25 EU Member States that are bound by the Succession Regulation. This resource now takes the form of 25 Country Profiles that will allow a legal practitioner faced with a cross-border succession in which a foreign authentic instrument has been produced to quickly and simply understand the evidentiary effects that an authentic instrument could potentially enjoy in its Member State of origin. This resource is necessary because Article 59 of the Succession Regulation requires that any Member State addressed shall 'accept' and reproduce in its own legal system the domestic evidentiary effects enjoyed by an authentic instrument in the course of a succession from any other Member State of origin to the extent that such acceptance is not contrary to the public policy of the Member State addressed.

The general difficulties posed by the Succession Regulation to the Member States and their succession practitioners begin with the fact that **the Succession Regulation itself is a new and a very comprehensive intervention by the European Union into different areas of Private International Law⁸ that were all previously excluded from earlier European Union Regulations.** This means that many succession practitioners are now, for the first time, confronted with the need to understand and to apply European Union Private International Law in the context of the cross-border

⁸ The Succession Regulation covers: jurisdiction; applicable law; recognition and enforcement of judgments; and, acceptance and enforcement of authentic instruments. It can thus be considered to be equivalent, in terms of succession law, to the simultaneous introduction of the Brussels Ia Regulation on jurisdiction and recognition and enforcement of judgments in civil and commercial matters) and the Rome II Regulation on applicable law for non-contractual obligations or the Rome I Regulation on applicable law for contractual obligations.

successions in which they are professionally concerned. Though attempting to resolve these general issues is outside the scope of this Study, their existence must be appreciated to put in context the questions arising for succession practitioners concerning the cross-border evidentiary effects of such authentic instruments.

In order for *a citizen* in a given EU Member State to be able to exploit the cross-border possibilities offered by Article 59 of the Succession Regulation to domestic succession authentic instruments he must first have been able to secure an official copy of that authentic instrument. It must not however be forgotten that the notary who creates such authentic instruments is not free to make them available to the general public at large. Domestic laws and notarial practice regulations concerning confidentiality frequently restrict the freedom of the notary to provide an official copy of the authentic instrument.

In the event that the applicant in the relevant Member State of origin cannot either convince a notary that he is entitled to receive an official copy of the authentic instrument or cannot secure such a copy by other means, he will be unable to make use of the liberty granted by Article 59 of the Succession Regulation. We will however merely note this issue and proceed to consider those circumstances in which the applicant has secured a copy of the succession authentic instrument and is then able to proceed to try to exploit the possibilities offered by Article 59 of the Succession Regulation.

In order for *the practitioners* in a given Member State addressed to be able to comply with Article 59 they must understand:-

- a) Whether the document they have been presented with is an authentic instrument falling under the Succession Regulation; and if so
- b) Understand the evidentiary effects of that authentic instrument in its Member State of origin in order to understand the evidentiary implications of Article 59 of the Succession Regulation that require that the authentic instrument shall benefit from the same or most comparable evidentiary effects in the Member State addressed as it would enjoy in the Member State of origin; and
- c) Whether the granting of such equivalent evidentiary effects to the foreign authentic instrument is likely to be contrary to the public policy of the Member State addressed.

Compliance with Article 59 via (a) – (c) above immediately poses difficulties for the succession practitioners in the Member State addressed because, other than at a high level of abstraction, there is no uniform legal concept of an authentic instrument, nor is there a universal notion of its evidential effect(s) in EU Member State legal systems.⁹ Further, three Member States within the Succession Regulation (Finland; Sweden; and Cyprus) do not use the legal institution of the authentic instrument at all in their domestic laws.¹⁰ For the succession practitioners in these Member States it is particularly important that authentic instruments relating to matters of succession are correctly understood if Article 59 of the Succession Regulation is to be correctly implemented.

Though the presumed lack of familiarity with authentic instruments in the three Member States that lack the authentic instrument as a legal institution is the most obvious issue, it must not be assumed that the legal practitioners in the other Member States are necessarily entirely and accurately *au fait* with the domestic evidentiary effects of succession authentic instruments from all other Member States. Though it may be that a succession practitioner has a very high level of legal knowledge and expertise,

⁹ The European Court of Justice provided an autonomous definition of an authentic instrument for the purposes of applying Article 50 of the Brussels Convention, see *supra* n 3.

¹⁰ Ireland, Denmark and the United Kingdom are not part of the Succession Regulation. Ireland and Denmark do not feature any domestic role for authentic instruments. The United Kingdom is unusual in that although there are authentic instruments in the Scottish legal system, albeit of a particular type created not by notaries but by entry of agreements in the Books of Council and Session of Scottish courts, the other two UK legal systems (England & Wales and Northern Ireland) do not use or feature authentic instruments at all.

potentially even including the evidentiary effects of authentic instruments from those legal systems that are closely related to his own, it would be unusual for a single practitioner to also be as familiar with the domestic evidentiary effects of all of the different types of succession authentic instruments in *all* of the legal systems of the other Member States bound by the Succession Regulation. This provides a compelling reason for the publication of an information resource relating to the subject of the evidentiary effect of domestic authentic instruments in successions across the 25 EU Member States that are subject to the Succession Regulation.

Further potential difficulties for the proper implementation of a foreign authentic instrument produced in the Member State addressed concern both the novelty of the requirement of 'acceptance' contained in Article 59 of the Succession Regulation and also because of differences between authentic instruments, their evidentiary effects and their uses in Member State succession laws. These differences, whether considered separately or cumulatively, may lead those in the Member State addressed to misjudge the evidentiary effect that Article 59 of the Succession Regulation requires. This may happen due to incorrectly assuming an exact equivalence between domestic and foreign use of authentic instruments or between their respective evidentiary effects. It is clear from the information we have received in the course of undertaking this Study that, despite key points of similarity, there are also important divergences concerning the domestic creation, usage, evidentiary effects and the legal consequences of succession authentic instruments across the 22 EU Member States in which they may be created.

This is partly a reflection of the legal and procedural diversity concerning authentic instruments in EU Member States. Though this diversity should be noted, it cannot be resolved by this Study and will not be addressed further by it. Specific diversity will however be addressed in this study. **It will though be restricted in two senses in this report: a) by only considering those authentic instruments that fall within the scope of the Succession Regulation; and b) by focussing on notarially created authentic instruments¹¹ in those Member States that feature the authentic instrument – rather than merely the public office of notary – as a legal institution.**

3.2. Comparative Findings

As indicated above (under 3.1), the study is based upon a detailed questionnaire that concerned:

- a) the legal systems, laws of succession and domestic implementation of the Succession Regulation in each Member State;
- b) the domestic use of authentic instruments within those legal systems both in general and also in the specific context of the law of succession;
- c) the Private International Law of each legal system as it may concern judicial decisions and authentic instruments generally and in the context of international successions.

¹¹ Though predominantly created by notaries, authentic instruments may also, subject to the particular legal rules in the legal system considered, be created by other public officials or public offices that (just like notaries) are explicitly given this power by the State in question. It follows that as different officials and public bodies than merely notaries may potentially create authentic instruments, the matters that such authentic instruments concern may be quite diverse. A European firearms pass was described as an authentic instrument under Slovak law in Case C-543/12, *Zeman v Krajské riadiel'stvo Policajného zboru v Ziline* EU:C:2014:2143, para 24, judgment of the Court (First Chamber) of 4 September 2014.

3.3. Convergences and Divergences

Though Recital 7 of the Succession Regulation could be read to suggest the existence of a broadly drawn common goal of harmonisation,¹² the Succession Regulation did not set out to harmonise the *domestic* succession laws of the participating EU Member States¹³ and nor has it done so. The Succession Regulation has only harmonised the Private International Law rules of succession of the 25 participating Member States.

Any ‘convergence’ of law and practice in succession in the participating Member States other than that effected specifically by the provisions of the Succession Regulation itself is speculative. There are differences concerning the uses in domestic succession law of authentic instruments and the consequentially variable evidentiary effects relating thereunto in the domestic laws of any relevant EU Member State. There has been very little opportunity for actual practice to develop concerning the Succession Regulation. It is possible, however, to set out points of commonality that are suggestive of what may, in the fullness of time, prove to be indications of a tendency towards convergence.

It is clear that the legal institution of the authentic instrument is widely used by 22 of the 25 Member States that are subject to the Succession Regulation. Equally, in each of these 22 Member States there is some form of a domestic role for the notary in connection with the operation of its succession law. The nature of this role differs from one legal system to another and will now be explored to reveal such deeper similarities as are apparent.

3.4. Similarities of notarial role

In nearly all of the legal systems of the 22 Member States that domestically employ authentic instruments there is at least the possibility of a notary being instructed by the testator to create a will that possesses practical and, usually, evidential advantages over a mere holograph will.¹⁴ The practical advantages of a notarial will flow from the accurate legal advice that the notary gives to the client to ensure that a formally and materially valid will is drafted that accurately carries out the client’s lawful wishes. In addition it may include the safekeeping and/or deposit of the original copy of the said will in whatever archive is specified by that legal system and/or the registration of either the will itself or details relating thereunto concerning the making and existence of the will in whatever official Register is provided for this purpose.¹⁵ By these means the client’s will is evidentially presumed to be wholly valid and to accurately represent the testamentary intentions of the *de cuius*. The will is also protected from either tampering or from being overlooked during any subsequent domestic succession proceedings.

¹² “The proper functioning of the internal market should be facilitated 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. In the European area of justice, citizens must be able to organise their succession in advance. The rights of heirs and legatees, of other persons close to the deceased and of creditors of the succession must be effectively guaranteed.”

¹³ See eg Recital 20 of the Succession Regulation, “This Regulation should respect the different systems for dealing with matters of succession applied in the Member States.” and Article 2, “**Competence in matters of succession within the Member States** This Regulation shall not affect the competence of the authorities of the Member States to deal with matters of succession.”.

¹⁴ Slovenia is unusual in featuring authentic instruments but not featuring a special form of notarial or public will. The will created with the assistance of a notary in Slovenia is an ordinary authentic instrument and not a special form of public will.

¹⁵ It should be noted that it is also common that the notary can receive into his custody a sealed will already drafted by the client (or less commonly drafted by another person on the instructions of the client). The notary can then often enter the fact of his receipt of the alleged will into his notarial archive and or a register. The effect of receiving and noting/registering the closed will on receipt varies from Member State to Member State but may involve the creation of an authentic instrument. In some Member States (e.g. France) a formal process by the notary in receipt takes place on the death of the testator to generate an authentic instrument at this point in time from the earlier deposited will.

Though such a notarial will is commonly domestically regarded as an authentic instrument in its own right, the further practical and evidential advantages that flow from that will being an authentic instrument vary to some extent within the legal systems of the 22 Member States in which the creation of such a notarial will is possible. In general, the notarial will usually benefits from a higher level of domestic evidential effect by reason of the fact that it was created by a notary (a public official).¹⁶ The wider implications of this enhanced level of evidentiary effect depend upon the legal system under consideration and detail on this point is set out in the country profiles included within this report.

As well as such a notarial will domestically understood to be an authentic instrument, the notary may, subject to the Member State legal system in question, also create other types of authentic instrument that are relevant to a domestic succession. These other authentic instruments may best be considered according to whether or not they were created during the life of the *de cuius*.

Assuming that it is allowed under the domestic succession law of the Member State of origin, a notary may create additional types of authentic instrument during the life of the *de cuius* that are relevant to the succession to his estate. These *inter vivos* succession authentic instruments typically include:-

- notarial wills;
- mystic wills;
- *inter vivos* agreements as to succession/variations of such agreements;
- the renunciation of an inheritance prior to the death of the testator.

If the domestic succession law of a given Member State allows a legal role to the notary in the operation of the probate following the death of the *de cuius*, a notary may have a further opportunity in the course of these probate activities to create post mortem authentic instruments of relevance to the successions that fall within the scope of the Succession Regulation. These post mortem authentic instruments could include:-

- the renunciation of an inheritance
- the renunciation of the status of heir;
- an inventory of the estate
- an *acte de notoriété*, or other equivalent domestic document by which the status of heir is certified by a notary or other public official;
- a partition agreement involving the notary or other public official.

The domestic role of the notary in the probate proceeding after the testator has died varies from one Member State to another. In some Member States, e.g. those following something similar to the French approach to succession, a notary is entrusted by the State to act post mortem to ensure that the succession progresses in accordance with the succession law and rules of that State.¹⁷ In other Member States, e.g. those following something more like the Germanic approach to succession, the notary will act to assist the judge who sits in the court charged with matters of probate. In the course of carrying out either of the two abovementioned possibilities the notary may create further post-mortem authentic instruments in connection with his facilitation of the probate proceedings concerning the succession.

¹⁶ The Slovenian legal system is unusual in that it currently restricts the evidential effects of a notarially created will to the notary's identification of the parties involved and the certification of their signatures. Apparently there have been two legislative proposals to extend further evidential effects to notarially created wills but each has failed.

¹⁷ In some, but certainly not in all, legal systems the notary who acts in the probate must not be the notary who drew up the will.

A somewhat different approach to probate is taken in a smaller number of EU Member States (including Austria, Croatia, the Czech Republic, Hungary and Slovakia) in which the notary performs various duties for the State as an appointed court commissioner. The notary does so via a specific appointment made by a court to manage or to otherwise assist the probate proceedings and potentially – though not necessarily – to reach certain probate decisions either as if acting as a judge in the court charged with matters of probate, or, as a day to day manager of the probate proceedings for the court. The judicial and quasi-judicial functions – but seemingly not all of the ‘managerial’ functions – feature variously in the Succession Regulation¹⁸ including in one of its notification provisions (Article 79). Article 79 obliges the Member States to identify “Authorities and legal professionals with competence in matters of succession, other than a judicial authority, as defined in Article 3(2)”. Assuming that the Member States have correctly understood and then correctly answered the Article 79 question, it appears that in seven of the 25 Member States subject to the Succession Regulation that also possess authentic instruments, a notary may have some form of judicial or quasi-judicial competence in the conduct of probate proceedings concerning a succession.¹⁹

The precise nature of this judicial/notarial and managerial competence varies across the affected Member States. It has accordingly raised various questions as to the completion of the Annex 2 standard form of the Implementing Regulation. In the course of some of the reports it was suggested to us that a notary appointed to act in a probate proceeding in a judicial or quasi-judicial capacity would, by reason of the fact that he then acts as an agent of the court, therefore produce probate decisions (falling under Annex 1) rather than authentic instruments (falling under Annex 2) in the course of discharging his responsibilities in probate matters. This view instinctively seems uncontroversial and correct but, as will be seen below under point 5 of ‘Differences’, it has managed to pose certain problems for what appears to be the unusual position of Austrian notaries.

In some of the reports we received from notaries we were however surprised by the further, and with respect unconvincing, suggestion that because of the appointment of the notary to such a judicial, quasi-judicial or managerial role, he would not be able to fill out *any* Annex 2 standard form for *any* succession authentic instrument and would instead be restricted to the Annex 1 Form I standard form concerning judicial decisions. Were this true it would have negative implications for the communication of the evidentiary effects of succession authentic instruments completed during the life of the *de cuius*. Such authentic instruments are unlikely to fit within the Annex 1 standard form and further there is no part of the Annex 1 standard form that encourages the authority to list or explain such evidentiary effects when completing the form.

With the help of the CNUE we sought and received clarifications on this issue from the notaries in the relevant Member States: in all cases it was conceded by the notary authors that their answers had **not** sought to exclude the possibility of the notary who had drawn up a succession authentic instrument during the life of the *de cuius* (or, presumably, had created an authentic instrument after the death of the *de cuius*) from making use of the Annex 2 standard form. Though this uncertainty was in most cases relatively swiftly resolved, it demonstrates that the novelty and scale of the European Union’s intervention into the realm of the Private International Law of succession has a potential to mislead even expert practitioners.

As is suggested below, it seems to be useful to bear in mind the principle that if a notary can lawfully draw up a succession authentic instrument in the Member State of origin he

¹⁸ See also Article 3(2) of Regulation 650/2012.

¹⁹ The seven Member States allowing such judicial competence to their notaries according to the Article 79 notification are: Belgium; Croatia; Czech Republic; Hungary; Greece; Portugal and Spain. Additionally, Finland and Sweden – which each lack a succession role for the notary – each allow an “Estate Distributor” such a quasi-judicial power. The remaining EU Member States have all answered “not applicable” in their Article 79 notifications.

must also be able to complete an Annex 2 standard form relating thereunto when this is requested by a person with an appropriate interest. Article 59 of the Succession Regulation allows the export of the evidentiary effects of succession authentic instruments and the Annex 2 standard form of the Implementing Regulation is the appropriate form for this purpose regardless of any actual or potential appointment of that notary (or any other notary) to a judicial, quasi-judicial or management capacity in accordance with a domestic probate procedure.

3.5. Similarities of law: evidential presumptions concerning authentic instruments

Within the 22 EU Member States that allow the creation of authentic instruments concerning a succession there are a range of basic legal similarities especially concerning notarially created authentic instruments and the legal issues that could arise from their domestic use.

Thus it is clear that, by reason of the involvement of the notary (or other public official), authentic instruments domestically benefit from a higher evidential standing and evidential effect than any textually equivalent private document concluded without the involvement of a public official. The evidentiary function of the authentic instrument is to provide private individuals and official bodies (e.g. a land registry) with a high quality and very reliable form of evidence concerning the authenticity and the veracity of the facts that the notary, as a public official, has specifically verified and recorded in the course of drawing up the authentic instrument. This function is achieved domestically by the Member State in question granting the notarially verified facts and notarial actions recorded by the notary in an authentic instrument a higher evidential standard and significance than would apply to facts and actions recorded without the involvement of a public official in a private document. Though the precise nature of this evidential advantage varies from State to State, as a consequence of differences in their legal systems, it may be said with accuracy that the notarially established evidence contained in an authentic instrument benefits from an evidential presumption that it has already been proven as at the point at which the authentic instrument was officially drawn up. There is therefore usually no further need for the party who would rely upon the evidence contained in the authentic instrument to do more than to produce an official copy of that authentic instrument in order for him to enjoy and exploit the evidential advantage that it confers upon him. The matters contained in the authentic instrument are presumed to have already been proven.

In court proceedings the evidentiary advantage possessed by a typical notarial will (taking the form of an authentic instrument) over a purely private will may immediately be appreciated. With a private will (or any other legal claim based on a private document) it is usually necessary to prove every fact upon which the claim is based. With a notarial will, in the form of an authentic instrument, there is no need to prove that the document contains a will, nor that it was correctly drawn up by a notary to reflect the intentions of the *de cuius* at a given time and place, nor that he made the declarations that it contains, nor that the actions performed by the notary actually occurred.

In all of the 22 legal systems considered by this study that feature the legal institution of an authentic instrument, an authentic instrument usually enjoys the highest evidential status of any documentary form of evidence and also, by reason of the involvement of the notary, it also enjoys a very strong (if rebuttable) presumption of truthful accuracy concerning the matters within the competence of the notary and in fact certified as true by him. Considered in the terms of the previous sentence there is thus a significant similarity between the evidential presumption of authentic instruments across the 22 EU Member States that domestically employ them. This commonality amongst the evidential presumptions concerning authentic instruments must however be qualified.

Though authentic instruments generally benefit from a rebuttable evidentiary presumption of authenticity and truth concerning the notarial verification of the facts that they contain, the nature and extent of that presumption, including the options for its rebuttal, differ across the legal systems in question. If considered in terms of rebuttal, the evidentiary presumption is effectively the 'strongest' (or possibly the most dauntingly defended) in the Member States that protect the legal institution of the authentic instrument by requiring that the rebuttal of the evidential presumption must involve a special, usually separate, legal procedure alleging forgery or falsity and that also require a formal finding of such in the course of that proceeding before the rebuttal can be given legal effect in other legal proceedings (e.g. France, Belgium, Luxembourg, etc.). A different approach to rebuttal is taken in those Member States that allow their courts generally to address attempts at rebuttal in the course of the same general legal proceedings in which the disputed authentic instrument is produced (e.g. Germany, Spain, Portugal, etc.). It is important to notice that it does not follow that because it may be 'easier' to **attempt** to rebut the evidentiary presumption in one Member State compared to another, it therefore also follows that the attempt is more likely to **succeed** in the 'easier' Member State than in the 'harder' Member State. Absent compelling and admissible evidence to the contrary, it is unlikely that the evidence contained in an authentic instrument will be rebutted in *any* of the 22 EU Member States that domestically employ this legal institution.

Despite the foregoing, it must be noted that though an authentic instrument presents evidence enjoying the highest domestic standing, it must not be forgotten that all evidence is capable of being disputed directly, whether by demonstrating formal defects or forgery, or indirectly by the production of appropriate forms of conflicting evidence. For example, in the context of the Succession Regulation the most properly drawn up notarial will could still, despite all of the evidential advantages it may otherwise possess in the Member State of origin, be rendered of no practical relevance at all by the production of a later created and appropriately drafted holograph will (where such a will is permitted by the applicable law). Though the authentic instrument is a durable means of recording and conveying evidence it must not therefore be assumed that merely because an authentic instrument is employed, the effect of the evidence it contains is so strong as to present a foregone conclusion to any dispute. Quite apart from the ever present need to read carefully what the notary actually has verified to be true, it is also important to remember that as well as challenges to the formal or material validity directed at the authentic instrument and its contents, it is always possible that other conflicting and decisive evidence could still be produced.²⁰

There are further similarities of law concerning the role of the notary in the 22 Member States that allow the creation of authentic instruments. Such a notary has an important custodial function in permanently safekeeping the original of any authentic instrument that he has drawn up and also a related function in issuing exact copies of the original to those with a legitimate interest in the matter. The involvement of the notary, a neutral party who, as a representative of the State, is able to advise and act for all parties to the creation of the authentic instrument, notionally ensures that every party is represented and also that the consent of every party is informed consent. Equally, the notary can ensure, as appropriate, that the identity of any party to the authentic instrument is accurately verified and recorded together with the time and place at which that party took part in the declarations that are recorded in the authentic instrument. These practical and evidential advantages, which may be further explored by the reader in the country profiles appended to this report, are commonly preserved by necessarily strict

²⁰ This is particularly an issue for successions with an international character: the most diligent of succession practitioners can still be surprised by the arrival of an unknown illegitimate child of the *de cuius* a week after what was supposed to be the conclusion of the probate proceedings.

regulation of the possibilities for directly challenging the authentic instrument and also those aspects of a legal transaction it records.

The Member States that feature the legal institution of the authentic instrument allow, but can hardly be said to encourage, the possibility of legally challenging different aspects of these authentic instruments. Such challenges to an authentic instrument cannot be regarded as routine in nature. In the Member States in question it is the use of the authentic instrument that is 'routine' and a challenge, especially if the challenge succeeds, is to a greater or lesser extent exceptional.²¹ As outlined above, the challenges that concern authentic instruments may be theoretically differentiated into three categories. First, a challenge to the formal validity (or *instrumentum*) of the authentic instrument itself; second, a challenge to the material validity (or *negotium*) of the transaction or legal act contained within (or evidenced by) that authentic instrument; and third, any other challenge possibility provided by the law of the Member State of origin to a particular use of that authentic instrument in given domestic legal proceedings (e.g. a challenge against actual enforcement of a debt recorded in an authentic instrument). Though the last challenge option will probably rarely be of relevance in the context of successions, the potential to bring other challenges going to the formal validity of the authentic instrument and to its material validity is probably greater. If the formal validity of an authentic instrument is successfully challenged this has, at the least, the effect of demoting the document from the status of a public document to the status of a private document. The precise legal consequences of this demotion will depend upon the legal system in question: such a demotion would however be fatal to the evidential presumption contained in the document with probable knock-on effects as to the formal validity of the legal transaction recorded in the document. If the material validity of an authentic instrument is challenged, this affects the validity of the legal transaction that it purports to contain and proceeds as per the possibilities for such challenges in the relevant legal system. Defects in the transaction recorded in the authentic instrument may obviously be fatal to the legal utility of that transaction even if they notionally leave the authentic instrument intact. Depending on the circumstances it may be necessary to challenge more than one aspect of a given authentic instrument.

3.6. On the location of challenges to the succession authentic instrument and incidental proceedings provided by the Succession Regulation

As with all other EU Regulations containing provisions concerning authentic instruments, attempts to challenge the formal validity (*instrumentum*)/authenticity or the material validity (*negotium*) of a foreign succession authentic instrument must proceed exclusively in the Member State of origin.²² The Member State addressed *cannot* accept challenges to the formal validity or the material validity of an incoming authentic instrument. This is not to say that when an authentic instrument is produced in another Member State that no aspect of it can be disputed. It is rather to emphasise that the validity issues guaranteed by the public document drawn up by the public official in the Member State of origin can only be addressed – as issues relating to a public document of the Member State of origin – in that Member State. In the event that such a challenge is brought in the Member State of origin, Recital 65 explains that the cross-border evidentiary effects of the challenged authentic instrument are suspended until the

²¹ It would for example be utterly mistaken to assume that a challenge may routinely be deployed as a means of re-opening a given transaction completed by the drawing up and creation of an authentic instrument. Indeed in a number of legal systems (especially those following the French legal tradition concerning authentic instruments) it is possible for the court before which certain domestic challenges may be brought to impose a fine upon a claimant who is deemed to have improperly domestically questioned the validity of an authentic instrument.

²² Recital 62 directs that a challenge to the authenticity of an authentic instrument must proceed in the Member State of origin and subject to the law of that Member State.

challenge is resolved and the authentic instrument is either once again deemed to be effective or is finally declared to be void and of no effect.²³

Equally, though it is possible for the Member State addressed to refuse to 'accept' or to 'enforce' a foreign succession authentic instrument, because to do either would trigger the relevant public policy exception, these public policy exceptions are drafted narrowly and they are clearly intended only to operate in exceptional circumstances. Despite these two important caveats, the evidence contained within the incoming authentic instrument will not necessarily always be of conclusive effect in proceedings when the authentic instrument in which it is contained is produced in the Member State addressed.

Article 59 of the Succession Regulation seeks to allow the cross-border transmission of the evidentiary effects of the authentic instrument into the Member State addressed. This does not mean however that the foreign succession authentic instrument necessarily conclusively resolves all future legal proceedings in which it could be presented that are foreign to its Member State of origin. It is certainly true that Article 59 of the Succession Regulation ensures that the incoming succession authentic instrument arrives in the Member State addressed together with its domestic evidentiary effects, however such evidence may be vulnerable to other, more compelling, conflicting evidence that is also adduced in the course of succession proceedings in the Member State addressed. The Succession Regulation expressly contemplates, in Recital 63, the possibility of challenges to either the legal acts or the legal relationships contained in the succession authentic instrument and records that such challenges shall proceed in a Member State possessing jurisdiction via the provisions of the Succession Regulation and shall be conducted in accordance with the applicable law as, again, determined by the provisions of that Regulation.²⁴ Such challenges are also subject to the suspensions of evidentiary effect as contemplated by Recital 65.

For example, the evidentiary effects of an entirely valid notarial will as drawn up in one Member State on 1 December 2015 may, despite all proper compliance and Article 59 of the Succession Regulation, still be deemed wholly or partly ineffective by a court in the Member State addressed that is also presented with a legally valid and conflicting authentic instrument (or even a holograph will) drawn up for the *de cuius* in another Member State on 15 January 2016.²⁵

3.7. Public Policy a similar or dissimilar concept?

When responding to our questions on public policy, the 25 Member States surveyed for this Study all initially appear to possess a narrow conception of domestic and international public policy (*ordre public*) in relation to matters of succession arising before 17 August 2015. We have been able to discover very few actual cases where an alleged violation of either domestic or international public policy has been raised and then also sustained in a succession law dispute anywhere in the Member States surveyed for this Study. Given that it represents the only explicit exception to the operation of Article 59, we made a particular point of asking our national reporters about the **former** domestic uses of public policy in matters of succession in the legal system that they were surveying. We were concerned to establish whether or not domestic public policy was routinely employed in that legal system to wholly or partially defeat the legal effects that might otherwise be expected to be produced by foreign decisions and/or foreign authentic instruments concerning matters of succession prior to 17 August 2015. What

²³ Recital 65 also contemplates the possibility of only a specific issue relating to the authentic instrument being challenged. In this circumstance the suspension envisaged by Recital 65 would be particular to that issue and the authentic instrument would otherwise function normally.

²⁴ Incidental issues concerning the legal acts or relationships described in an authentic instrument are also contemplated by Recital 64 of the Succession Regulation which asserts that the Member State court in which such incidental issues are raised has jurisdiction over those issues.

²⁵ See Recital 66 of the Succession Regulation on conflicting authentic instruments.

emerged from this exercise was an overwhelming absence of any such reported use of domestic or international public policy as a means of depriving foreign decisions of their effect in matters of succession. If there were few examples of foreign decisions being successfully challenged via a public policy exception there were no reported examples at all of a foreign authentic instrument being so challenged.²⁶

It is important to immediately explain that this conclusion only indicates that prior to the advent of the Succession Regulation it would be very unusual in the majority of the relevant Member States to attempt to use public policy as a tool to defeat an incoming decision or authentic instrument. This conclusion indicates the infrequency of the circumstances in which public policy was previously applied in the course of successions to foreign decisions and authentic instruments: it does **not** though indicate that such foreign decisions and authentic instruments could usually be simply produced and thereafter produce their intended legal effects in the context of a domestic succession in what we would now call a Member State addressed. In the pre-Succession Regulation European Union there would often be no practical possibility for a foreign decision or authentic instrument to produce any legal effects in a different Member State because then either successions proceeded exclusively (i.e. in an insular fashion) within each Member State, or, assuming the existence of a possibility of a foreign decision or authentic instrument producing legal effects did abstractly exist, these effects would be limited by domestic *exequatur* provisions and other national restrictions (e.g. a refusal of domestic Registrars and registers to concern themselves with foreign documents) that would render the need for the application of a public policy exception most unusual in the sense that few cases could proceed far enough to trigger such a public policy exception.

Accordingly, the general consensus amongst the majority of the national and notary reporters is that it was unusual for public policy to be raised successfully in the context of a domestic will or succession and rarer still for international public policy to be raised in 'international' cases. It follows that, according to the informed speculation of our reporters, now that the Succession Regulation is fully in force, it would be equally unusual for public policy exceptions to be raised with success in connection with the new facilitation of the domestic evidential effects that would otherwise flow from the acceptance of a foreign authentic instrument via Article 59 of the Succession Regulation.

At this juncture we cannot offer anything more than speculation on the likely operation of the public policy exceptions concerning the authentic instruments that fall under the Succession Regulation.

The reports we have received make it clear that in the law of the Member States surveyed **prior to** 17 August 2015, domestic and international public policy were each mostly confined to exceptionally narrow, sometimes effectively theoretical, ranges of highly unusual circumstances. This is broadly reassuring. In the context of EU Private International Law Regulations, public policy exceptions are always intended to be exceptional and are also intended to be construed narrowly. In the context of our questions inviting speculation as to matters that could trigger the public policy exceptions of the Succession Regulation in the context of foreign authentic instruments, one example that we encountered more than once concerned the possibility of invoking a public policy exception to justify the disapplication of provisions in a will that specifically discriminated against a particular party, to an unacceptable degree, on the basis of sex, race, or religion.²⁷ Even in the numerous Member State legal systems that operate both

²⁶ It must be noted that as authentic instruments are an example of non-contentious justice and as most probate proceedings are also non-contentious, there are unlikely to be large numbers of reported court cases featuring foreign authentic instruments. Despite this limitation none of our returned questionnaires whether from notaries or others, mentioned such a use of public policy in relation to an actual foreign authentic instrument concerning a succession.

²⁷ It was noted by some Reporters that provisions in a domestic or foreign will that were repugnant because they either limited an inheritance or bequest by reason of the sex, race and religion of the beneficiary, or made

a reserved share (legitimate portion) rule in connection with the testator's estate and also feature legal provisions to restrict or to forbid lifetime gifts (or other arrangements that are intended to defeat such reserved shares), it did not appear from most of the national reports that objections to the contents of a foreign decision or document based on an alleged breach of public policy, in even this context, would be anything other than a highly exceptional possibility. **A note of caution must however be sounded here: prior to the entry into force of the EU Succession Regulation in many of the Member States now subject to the Succession Regulation there was no obligation to recognise or enforce a foreign decision on succession matters nor to give evidentiary effect to (or enforce) a foreign authentic instrument in a succession matter. Consequently there was no need to invoke public policy to resist the implications that were incapable of arising from such foreign decisions or documents.**

According to many of the responses received on this point, it seems correct to say that attempts to evade the legitimate portion/reserved share aspects of a *domestic* succession proceeding prior to the advent of the Succession Regulation would routinely have been *domestically* addressed via domestic evasion of law provisions rather than with recourse to domestic public policy exceptions. This suggests a range of domestic distinctions between 'exceptional' public policy interventions and more 'routine' domestic interventions based on a perceived attempt to evade domestic succession law. Such evasion of law interventions were represented to us as including the relevant probate authority either treating the 'offending' provision if contained in the will (or in another domestic document relating thereto) as of no effect, or, as if it was not present in the will (or other document).

Though a narrow scope for public policy is desirable, it must be wondered whether this view of the domestic arrangements prior to the advent of the Succession Regulation is quite accurate as an indicator for the future use of the public policy concept if the Member State legal system considered is one that, though it would eschew the routine use of public policy in the context of reserved shares, would do otherwise by allowing a more liberal use of its evasion of law concept in the course of domestic successions. The domestic distinction between an intervention based upon a public policy violation – which is seemingly very rare – and an intervention designed to prevent an evasion of domestic law – which it seems is less rare – is also one that, as well as varying between the relevant Member States, has a potential to pose a variety of problems for the practical operation of the Succession Regulation that could negatively impact upon the actual effectiveness of the cross-border transmission of evidentiary effects by authentic instruments in matters of succession.

Difficult questions that are outwith the scope of this Study arise as to the extent of the legal and the practical freedom that the authorities in the Member State addressed continue to enjoy to distinguish between public policy interventions under the Succession Regulation and more general evasion of law interventions.²⁸ Further practical issues could flow from the fact that a domestic decision to employ evasion of law to restrict the use of a foreign authentic instrument is likely to condition the attitude of succession practitioners to the future interpretation of similar foreign authentic instruments in the Member State addressed. Resolving such questions may not be simple given the limited

the inheritance conditional upon marrying (or not marrying) a person of a given race or religion could potentially trigger the application of public policy (whether domestic or international).

²⁸ The Succession Regulation contains special mandatory rules in Article 30 but Recital 54 makes it clear that they do not extend to all provisions on reserved shares. This may indicate that the Regulation should not be interpreted as permitting "evasion of law" to be used as a mechanism for avoiding the application of a different reserved share under the applicable law than that applicable in the forum.

routes available to secure a preliminary reference from the CJEU concerning any aspect of the non-contentious legal practice of probate in the Member State addressed.²⁹

As well as the abovementioned uncertainties arising from the extent of the remaining freedom available to the Member States concerning the use of their evasion of law provisions in general under the Succession Regulation, there are further uncertainties concerning the interaction of evasion of law and the Article 59 public policy exception.³⁰ The Succession Regulation explicitly addresses the concept of the public policy exception in an Article and thereby gives legal effect to it. Evasion of law however only features in Recital 26 and does so with the seeming intention of preserving the potential for the Member States to continue to employ this evasion of law concept in matters of Private International Law despite the advent of the Succession Regulation. However, provisions in recitals do not constitute legally binding provisions.

In one sense it is thus presently unclear to what extent a Member State addressed may legitimately conclude that the infringement of its domestic reserved share provisions threatened by an acceptance of the evidentiary effects of a foreign authentic instrument permits it to resort to the Article 59 public policy exception. That said, it is made plain by Recital 58 of the EU Succession Regulation that public policy is not to be applied in a manner that is discriminatory or otherwise contrary to the European Union's Charter of Fundamental Rights. Equally however Recital 26 of Regulation 650/2012 indicates that the Regulation does not prevent a court from applying mechanisms designed to tackle the evasion of the law, such as *fraude à la loi* in the context of Private International Law. However, the substantive provisions of the Regulation do not expressly empower national courts to prevent evasion of the law (including *fraude à la loi*). It would seem that the only positive basis for doing so under the Regulation is to regard such evasion of the law to be contrary to public policy.

As a matter of theory it is clear, according to the tenor of European Union Private International Law, and to the case law of the CJEU concerning other public policy exceptions in related legal Regulations, that a public policy exception is, by its very nature, only to be resorted to in the most exceptional of circumstances that themselves *precisely* satisfy the restrictive interpretation of the relevant exception. In the context of Article 59 of the Succession Regulation this would mean that the exception should only be employed if the acceptance *itself* would manifestly violate the public policy of the Member State addressed. It is most likely that if the matter arises within the context of the public policy exception in Article 59, and the matter is referred to the CJEU, it will apply its orthodox and narrow principles concerning public policy exceptions in other EU Private International Law instruments. It should thus be wrong for the authorities in the Member State addressed to attempt to invoke the public policy exception in Article 59 to disapply the evidentiary effects of the foreign authentic instrument merely because their acceptance would *affect* a domestic succession.

What however will occur if the authorities in the Member State addressed decide to notionally accept the evidentiary effects of the incoming authentic instrument but then to disregard such aspects of that instrument on the basis that it represents an attempted evasion of law? If this matter can ever be brought before the CJEU it must find a way to interpret Recital 26 of the Succession Regulation which explicitly attempts to preserve

²⁹ Somewhat surprisingly, there is no non-contentious route for a preliminary reference in the Succession Regulation. Equally, evasion of law is only dealt with via Recital 26 of the Succession Regulation which seeks to preserve the national conceptions of this legal device without any substantive provision in the Regulation supporting this preservation of national mechanisms to tackle the evasion of law.

³⁰ Though we must await guidance from the CJEU on this matter, it seems odd that though the unusual case of a public policy infringement is regulated by the Regulation via the exception in Article 59, the more usual case of an evasion of law is seemingly not overtly regulated by that Regulation unless an authority in the Member State addressed should take the rather unusual step of attempting to justify its actions concerning an evasion of law with reference to the exception in Article 59.

the potential for a court in the Member State addressed to apply its evasion of law provisions in the context of Private International Law. If the authority in the Member State addressed seeks to exploit this freedom concerning its domestic evasion of law rules it may be difficult to restrain a *de facto* refusal to accept aspects of the content of the foreign authentic instrument with a concomitant denial of the evidentiary effects of certain types of succession authentic instruments within certain Member States in both contentious and non-contentious succession proceedings. The Court of Justice or indeed a national court could take the view that the substantive rules of the Succession Regulation on applicable law and the exceptions to the application of the applicable law (public policy in Article 35 and the special rules applicable irrespective of the law applicable to the succession in Article 30) are a complete system and therefore Recital 26 can only be made to work by giving effect to evasion of law rules if they fall within one of the specific exceptions to the application of the applicable law provided for by the operative provisions of the Regulation.

3.8. Differences

This report has noted a number of examples of potentially problematic differences between the laws of the Member States as concern succession authentic instruments and the effective communication and translation of domestic evidentiary effects to the Member State addressed. These differences are set out in outline below.

- 1) The most notable structural difference between the legal systems considered by this study concerns the quite obvious existence of three Member State legal systems (Finland, Sweden and Cyprus) that do not domestically feature the authentic instrument as a legal institution. Though 22 of the 25 Member States considered in this study do domestically feature authentic instruments in their legal systems, the fact that three Member States that are each subject to the Succession Regulation do not do so indicates an obvious asymmetry that poses equally obvious informational and technical challenges for the implementation of that Regulation as it concerns foreign authentic instruments received by succession practitioners and authorities in Finland, Sweden or Cyprus. Though this challenge to the smooth implementation of the Succession Regulation is a real one, it is also probably a relatively straightforward one to remedy. The problem, if considered narrowly, can only arise in relation to foreign succession authentic instruments that are presented for acceptance or enforcement inside these three Member States. The narrow version of the problem can probably be adequately remedied by providing publicly accessible material, in the appropriate languages, to clearly explain the legal issues arising from incoming foreign authentic instruments to the legal practitioners and citizens of these Member States.³¹ Suggestions concerning such publicity and dissemination are provided in the section below on draft recommendations.
- 2) A recurring issue that we often encountered in the national reports concerned delay in the domestic legislation necessary to implement/integrate the Succession Regulation into existing 'national' laws and procedural rules of Member State legal systems by 17 August 2015. It may be that the Member States were pre-occupied, underestimated the complexity of accommodating the requirements of the Succession Regulation and/or were simply waiting for the final versions of the forms that were to accompany the Succession Regulation to be published in late 2014 (see Regulation 1329/2014). It has however appeared from the reports received that at least ten of the Member States did not have their domestic implementing legislation and/or the new procedural rules associated with successions in place several months after the Succession Regulation became operational on 17 August 2015.³² It should also be noted that even in those

³¹ The problem can be considered more widely as affecting those persons within Finland, Sweden or Cyprus who wish to employ the services of a notary in the creation of an authentic instrument concerning a matter of succession but who are prevented from doing so by reason of the absence of legally competent notaries in the three legal systems at issue.

³² Belgium; Bulgaria; Estonia; France; Greece; Italy Lithuania, Latvia Slovakia; and Slovenia.

legal systems that were not technically 'late', because they introduced domestic implementing provisions on or before 17 August 2015, the implementing legislation and procedural rules that they have actually provided have not necessarily been very comprehensive.³³ Such a minimalist approach to implementing provisions means that many Member States have left the provisions of the Succession Regulation as they concern authentic instruments untouched by their implementing legislation concerning the provisions of the Regulation. Often therefore there are no domestic implementing provisions that address Succession Regulation authentic instruments.

While it is fully appreciated that every Member State has to proceed with due regard and respect for the superior legal status of directly applicable European Union Regulations, it has seemed to us that it would have been a simple matter for the Member States to have each expressly provided in their domestic rules concerning either Succession or the legal regulation of notarial practice, that any notary who has authored an authentic instrument concerning a matter of succession must, when this is requested by a person with a legitimate interest, be willing to fill out the Annex 2 Form II form provided by Regulation 1329/2014. Such a domestic provision would materially assist all of the legal practitioners in the Member State addressed as it would minimise the chances of an authentic instrument being produced in that Member State without what would often be a useful Annex 2 Form II form from the Member State of origin.³⁴

3) The Portuguese national report raised an interesting question concerning the domestic characterisation of the many documents that may be 'authenticated' by a Portuguese notary after first having been prepared by another person or non-notary legal professional. The Portuguese legal system often allows such 'authentication' and comparatively rarely positively requires that a document must be entirely created as an 'authentic' document solely by a Portuguese notary. It is reported to us that despite Article 377 of the Portuguese Civil Code (which accords both types of documents the same evidential value and admissibility) the prevailing opinion amongst Portuguese notaries is that a document that has been subsequently 'authenticated', rather than one that is 'authentic' in the strict sense of having been exclusively created *ab initio* by a notary, is not within the definition of an authentic instrument provided by Article 3(1)(i) of the Succession Regulation.³⁵ In agreement with the Portuguese national report we incline to the view that 'authenticated' as well as purely authentic Portuguese documents should be regarded as falling within the autonomous EU definition of an authentic instrument contained in Article 3(1)(i) of the Succession Regulation. In our opinion it is most likely that the concept of authentic instrument as it appears in the Succession Regulation will be interpreted as being an autonomous European Union legal concept that cannot be restricted by earlier domestic concepts of the classification of an authentic instrument. This argument – in abstract that traditional domestic views of a concept cannot necessarily dictate the meaning and operation of a concept that features in an EU Private International Law Regulation – is one that is bound to occur again in the course

³³ For example in a number of Member States the principal provision of the implementing legislation has been to officially confirm who is entitled to issue a European Certificate of Succession in that Member State.

³⁴ See final recommendations below.

³⁵ See p.5 of the Portuguese National Report which suggests that, despite the opposing formal view of Portuguese notaries, that authenticated documents could fall within the Succession Regulation's definition of an authentic instrument at Article 3(1)(i). "It seems, however, that the definition of the Succession Regulation Article 3(1)(i) may be able to encompass these acts, as they are registered or registered/deposited, the authenticity relates to the content rather than only the signature, the evidentiary and executory effects are the same as the domestic concept of authentic instrument drawn up by notaries, and lawyers, registrars and *solicitadores* have been empowered by law as special notarial bodies for those purposes. These entities are also under disciplinary control of their own professional associations. The issue is that under the Civil Code they are not named authentic instruments, as only acts drawn up by the entity but not acts registered or deposited by the entity can be considered authentic. Even if conformity with the law and all other formalities equivalent to the notarial authentic instrument were to be met, under Portuguese law, the instrument would be called authenticated rather than authentic. This is not however the concept that arises out of the definition in the regulation. The notaries formally consider that authenticated documents, even the ones subject to the Decree-law nr. 116/2008 regime, cannot be considered as authentic, even for the purposes of the Succession Regulation."

of the operation of the Succession Regulation. It can be noted in the operation of all EU Private International Law Regulations and is considered again below concerning the disputed meaning of 'acceptance'.

4) The national reports have also indicated that there are a number of inconsistencies of interpretation and understanding across the Member States as concerns the meaning of the new concept of acceptance (as found in Article 59 of the Succession Regulation) and, in particular, the differences between this new legal concept concerning authentic instruments and the legal concept of 'recognition' (as employed in Article 39 of the Succession Regulation in the context of court decisions). As the issue is a technical one it may be useful to preface our comments with some explanation of its background in the context of the Succession Regulation.

It will be recalled that during the discussions surrounding the drafting of the Succession Regulation the question of the appropriateness of the technical term 'recognition' was frequently debated. For many Member States 'recognition' necessarily and *automatically* entails that the object 'recognised' then produces *res judicata*/preclusion effects on matters of law as would a final binding court judgment. The legal orthodoxy in the Member States that equate 'recognition' only with judgments thus requires that a firm distinction is drawn between the permissible *acceptance* of the evidentiary effects of a foreign authentic instrument concerning a succession and the impermissible *recognition* of such a non-judicial document. For these legal systems the 'recognition' of a foreign authentic instrument concerning succession would entail the questionable outcome that they would have no potential to question the evidence it contained as that evidence would, by reason of the elevation to a *res judicata* status, be deemed equivalent in their Member State with the findings of fact and law contained in a binding court judgment. Of course the authentic instrument that contained the evidence could be challenged in the Member State of origin and would, as is the case for all authentic instruments, still be capable of being challenged – even after it has been enforced.

For other Member States the distinction between 'recognition' and acceptance was less problematic as the pre-Succession Regulation possibility of a 'recognition' of a foreign authentic instrument in their legal system was either a technical misunderstanding of a conclusion dictated by the determination of the applicable law,³⁶ or, was incapable of automatically, or even necessarily, leading to a conclusion that the authentic instrument must produce *res judicata* effects in their legal system. In the Member States taking the first position, e.g. those following the approach of some – but not, it must be said, all French scholars, the technical Private International Law concept of recognition appears to have often been confused with matters arising from the determination of the applicable law.³⁷ The legal orthodoxy in the Member States taking the second position traditionally proceeded via either a bilateral treaty or via a domestic *exequatur* stage

³⁶ For example, 'recognising' a foreign birth certificate from Member State "A" because the applicable law rules of Member State "B" (the forum) have concluded that the applicable law in this matter is that of Member State "A". As a matter of legal principle there is no actual recognition of the foreign document in this example. Member State "B" has merely determined that the applicable law in this case is that of Member State "A" and has accordingly noticed the birth certificate as would the law of Member State "A". No recognition within the technical meaning of that term in Private International Law has actually occurred.

³⁷ The interchangeability of acceptance and recognition in some circumstances is defended by C. Nourissat, *Une révolution copernicienne pour les successions internationales, Entrée en application du règlement (UE) n° 650/2012 le 17 août 2015*, JPC ed. G. n° 26, 31 August 2015, doctr. 935 and the peculiarity of the earlier French position on this issue and under Article 509 Code of Civil Procedure is noted by P Lagarde in the course of observing that not much will change for the French in this position in P Lagarde *Les principes de base du nouveau règlement européen sur successions* Rev.crit DIP 2012 691. It must however be noted that the suggestion that the content of a foreign authentic instrument can be recognised in France has been strongly and consistently rejected by, inter alios, H. Gaudemet-Tallon in *Compétence et exécution de jugements en Europe* 5th ed paragraph 470, and by P Gothon and D Holleaux, *La convention de Bruxelles du 27.9.1968* 1985 at para 407; M Kohler and M Buschbaum *Die Anerkennung öffentlicher Urkunde? – Kritische Gedanken über einen zweifelhaften Ansatz in der EU-Kollisionsrechtsvereinheitlichung* (2010) IPRax 30: 313 are also critical on this point.

that would involve (*inter alia*) a full-blown *exequatur* examination of the legal effects of the document at issue by a national court in receipt of the document prior to a judicial decision to exercise a wide ranging judicial discretion to grant (wholly or partially) or to refuse the legal effects requested in the course of an *exequatur* application. In simple terms this discretionary judicial procedure prevented any unwanted preclusive or *res judicata* effects from affecting a foreign document or decision that was admitted to their legal system.

In the context of the Succession Regulation it should be unnecessary to express any view as to the relative merits of these former legal positions and negotiating positions. In the context of the Succession Regulation it is unarguable that Article 59 refers to the 'acceptance' and not to the 'recognition' of an authentic instrument. It is just as unarguable that the new concept of 'acceptance' was deliberately substituted for 'recognition' in this context and that the earlier term 'recognition' was, again in this context, deleted from earlier versions of what became Article 59 of the Succession Regulation.³⁸ As is plain, we reject the view that in the context of Article 59, 'acceptance' and 'recognition' are interchangeable. We believe that earlier and highly variable domestic concepts that have been superseded by differently worded and differently operating provisions in the Succession Regulation should be treated with caution and should not be consciously or unconsciously invoked in this new context. The type of *exequatur* procedures that might prior to the Succession Regulation have governed the 'recognition' of a foreign authentic instrument touching upon a matter of succession and also the domestic latitude accorded to the domestic courts conducting such *exequatur* proceedings each appear to us to be quite alien to the intended operation of Article 59 of the Succession Regulation. Indeed, in our opinion, were the Court of Justice of the European Union ever faced with a preliminary reference concerning the meaning of 'acceptance' in Article 59 of the Succession Regulation, it would be very likely to treat that term as describing an autonomous European Union concept rather than allowing it to be substituted for variegated domestic, or for that matter European Union, notions of "recognition" that pre-dated the final Succession Regulation and were deliberately abandoned during its drafting whether or not they may be argued to apply in other contexts to other EU legislative instruments. To be blunt, it is wrong to attempt to preserve a role for 'recognition' of any kind in the context of Article 59 of the Succession Regulation. 'Acceptance' in Article 59 has deliberately replaced and discarded all of the earlier national Private International Law concerning 'recognition' in this particular context.

A regrettable consequence of the tendency towards a minimalistic domestic implementation of the Succession Regulation is that most Member States have not included express references in their implementation provisions concerning the meaning of 'acceptance' in Article 59. For some of the Member States that have previously allowed the 'recognition' of foreign authentic instruments this has seemingly perpetuated the unhelpful conflation of 'acceptance' in Article 59 with earlier 'recognition' concepts. A number of the reports we received reported that 'acceptance' and 'recognition' in the context of Article 59 remain as identical or interchangeable concepts in their legal systems.³⁹ Unsurprisingly this view was not shared by all national reporters.⁴⁰ It should

³⁸ The use of the word "recognition" concerning authentic instruments was initially proposed by the Commission for the Succession Regulation (see the Commission Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession COM(2009)154 final, Article 34). This reference to "recognition" in the context of authentic instruments was deliberately removed after profound objections by various Member States who argued, in our view correctly, that "recognition" should be kept as a legal term of art reserved for judgments, e.g. Article 39 of the Succession Regulation concerning the recognition of decisions).

³⁹ The Belgian report by notary p.29; Estonian report by notary at p.27; French report by notary p.26; and Slovakian report p.24 assert that there is no difference between the recognition and the acceptance of an authentic instrument in their laws: with regard to the French position this seems to too wide a conclusion and to be at variance with orthodox French Private International Law doctrine. The Czech and Romanian national reports note that according to their domestic laws, recognition of an authentic instrument is possible if an

also be noted that the view that 'acceptance' under Article 59 of the Succession Regulation is interchangeable with any earlier domestic notion of 'recognition' is not convincingly supported in the academic literature of Private International Law.⁴¹ For the reasons set out above and in our final recommendations below, we suggest that the persistence of this confusion of the meaning and nature of what should probably be considered as an autonomous European Union law concept of 'acceptance' is undesirable both in theory and in practice. Though we recognise the terminological difficulties facing practitioners in those Member States that have not introduced any new domestic law or guidance concerning Article 59 of the Succession Regulation, we hold to this view. Further, we suggest that this conflation of legal concepts indicates a need for European Union authorities, Member State authorities, professional bodies and legal academics to all try to dispel the erroneous view that, for the purposes of the Succession Regulation, 'acceptance' in Article 59 may legitimately be equated with earlier domestic notions of 'recognition' based upon either doctrinal confusion within Private International Law or domestic succession practice that necessarily pre-dates the Succession Regulation and is hostile to its procedures and aims. 'Acceptance' in Article 59 is a new EU legal concept and should be understood and allowed to develop as such in domestic laws.

5) The national reports have also indicated a number of issues associated with the completion of the Annex 2 Form II standard form of the Implementing Regulation concerning authentic instruments. This standard form is intended to be completed in the Member State of origin (at the request of an interested party) by the authority that drew up the authentic instrument.⁴² It is intended to accompany the authentic instrument so that its evidentiary effects and much other relevant information is clearly and accurately explained to anyone to whom the standard form is presented in the Member State addressed. The Implementing Regulation provides other standard forms concerning further aspects of the Succession Regulation (e.g. Annex 1 Form I, concerning judicial decisions relating to a succession and Annex 3 Form III, concerning the European Certificate of Succession).

For both judicial decisions and authentic instruments, the relevant standard form is intended to communicate a range of important information concerning the document that it accompanies. For succession authentic instruments the Annex 2 Form II standard form communicates to the authorities in the Member State addressed information concerning, *inter alia*, the domestic evidentiary effects of that particular authentic instrument. Though the Succession Regulation does not make it mandatory for the party who wishes to use Article 59 to use the Form II standard form, this standard form must still be regarded as an important potential facilitator of the accurate communication of the specific domestic evidentiary effects enjoyed by a succession authentic instrument in the Member State of origin.

As the country profiles included below indicate, we have used an extract from the fourth question on Form II to illustrate the potential domestic evidentiary effects of a

Apostille is affixed or super-legalisation has occurred: given that Article 74 of the Succession Regulation makes all such legalisation unnecessary it is a matter of concern that this view seemingly endures in some Member States. The Polish national reporter was entirely confused by Article 59 and took the view that acceptance should occur in the Member State of origin rather than in the Member State addressed.

⁴⁰ The orthodox position of a distinction between acceptance and recognition is present in the following national reports: Bulgarian report; Czech report by notary; German report by notary; Greek report; Hungarian report by notary; Portuguese report; Spanish report and Spanish report by notary; Romanian report.

⁴¹ See the discussion and orthodox conclusions by Dutta, *Münchener Kommentar zum Bürgerlichen Gesetzbuch Band 10: Internationales Privatrecht I* 6. Auflage Art. 59 nn 4 - 14; and those reached by R Geimer, *Annahme ausländischer öffentlicher Urkunden in Erbsachen gemäß Art.59 EuErb VO 143* in Dutta/Herrler *Die Europäische Erbrechtsverordnung 2014*.and Franzmann/Schwerin Art 59 nn 7 - 8 and nn 13 - 14 in vol 3 of Geimer/Schütze *Internationaler Rechtsverkehr in Zivil und Handelssachen* (Beck) with further references. Concerning the confusion of the term recognition with authentic instruments in EU Private International Law see generally J Fitchen *The Recognition and Enforcement of Authentic Instruments in the Proposed European Succession Regulation*, (2012) *J Priv Int L* 8 323-58.

⁴² Or presumably by his successor(s).

succession authentic instrument for each Member State that is capable of creating such an authentic instrument. The information that we have thus provided represents a theoretical possibility. In actual practice however, as the Annex 2 form will usually be completed by the notary who drew up the authentic instrument, the notary will have the opportunity to precisely set out, *inter alia*, its actual evidentiary effects in the Member State of origin. This more precise information will be of great benefit to those in the Member State addressed to whom the Annex 2 standard form is later presented.

This Study has noted a range of issues arising from the national reports that concern the Annex 2 standard form and its completion:-

- i. The first and most basic question is whether or not the notary in the Member State of origin can fill out Annex 2 Form II at all. In a small but significant number of the reports voluntarily supplied to us by notaries at the request of the CNUE, it was suggested by some notarial reporters that a notary would be unable to fill out an Annex 2 form if his legal system treated notaries such as himself when acting in the course of probate proceedings as an officer or representative of the court. The argument ran that as such a notary was an officer or representative of the court he would therefore act in a judicial capacity or as a 'competent authority' as opposed to acting in a purely notarial capacity. It was suggested to us that therefore the notary in such a situation could not use Annex 2 Form II *at all* and could *only* generate judicial decisions that would instead fall within Annex 1 Form I.

Though we were aware that in some Member States notaries acted in a judicial capacity and also that it was open to some Member States to deem their notaries to be a 'competent authority' under the Succession Regulation, this response surprised us because it extended far beyond our expectations.⁴³ Rejecting the use of the Annex 2 form for all notarially created succession authentic instruments in certain Member States where notaries could also have a judicial function seemed improbable. Accordingly, we entered into consultations via the CNUE with the notaries who had authored the relevant national reports (from Austria, the Czech Republic, Slovakia and Hungary) to clarify our mutual understanding of this issue and to establish its wider implications for the use of the Annex 2 standard form in those Member States and elsewhere. In particular, we were concerned that if the advice we had received on this point was correct it suggested that the notaries of certain EU Member States would be unwilling to complete the Annex 2 form even for those succession authentic instruments created prior to the death of the *de cuius* by a notary who clearly was not at that point acting as an officer of the court in any probate proceedings.

The principle difficulty with accepting such an outcome is that it would obstruct the cross-border transmission of the evidentiary effect of succession authentic instruments from some Member States by creating a gap in the coverage offered by the Annex 1 and Annex 2 standard forms of the Implementing Regulation. The gap would mostly concern what have been referred to above as *inter vivos* succession authentic instruments: these documents could not fall within Annex 1 and, in the event that the Annex 2 form was also barred, would have no applicable standard form to set out their evidentiary effects (and or any other information) in certain Member States or origin. As such *inter vivos* succession authentic instruments would include, *inter alia*, any notarial will or *inter vivos*

⁴³ Our expectations were based on the notifications to the European Commission by the Member States in accordance with Article 79 of the Succession Regulation – see <https://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=0ahUKEwjdvKqg-rrKAhVIvRoKHfPTDIsQFqqqMAE&url=https%3A%2F%2Fjustice.europa.eu%2FfileDownload.do%3Fid%3D92645e67-621a-486f-9907-f2b74fd6377a&usq=AFQjCNHCZDEmsDer21ih7Y8jKloTikm77w>

succession agreement which an interested party wished to be able to transmit, to the Member State addressed together with a completed Annex 2 form setting out the nature of its domestic evidentiary effects, this matter required further clarification.

We were most grateful to the CNUE and to the various notaries and notary chambers who answered our questions on this matter by making clear – despite earlier indications plainly to the contrary – that, as we had always believed, even if a notary were to be prevented from filling out an Annex 2 form concerning a document he generated by reason of his involvement as a court or competent authority in domestic probate procedures (which could of course then benefit from the preceding Annex 1 standard form) he would still be able to complete an Annex 2 form in relation to any other succession authentic instrument that he had created *prior* to becoming involved in the post mortem probate proceedings. This welcome clarification closed the abovementioned technical gap in the standard forms of the Implementing Regulation.

The basic principle that we suggest should be understood to have emerged from this consultation is that a notary who is legally competent under his domestic succession law to create a succession authentic instrument in the Member State of origin is therefore *always* technically able to fill out the standard form provided by Annex 2 Form II of the Implementing Regulation concerning that authentic instrument, and, to thereby assist the cross-border transmission of the evidentiary effects of that succession authentic instrument to any other Member State addressed as per Article 59 of the Succession Regulation.

A further and connected issue arose in the course of considering our Austrian National Report in conjunction with the report of the Austrian notary and in light of advice received from the Austrian Notary Chamber on the ability of the Austrian notary to fill out the Annex 2 standard form. It had been initially suggested by the Austrian notary reporter that an Austrian notary would never fill out the Annex 2 standard form by reason of his appointment in probate proceedings by the Austrian court as a court commissioner (to act as a 'manager' of the probate proceedings and to assist the court in relation thereunto). It was thus suggested to us by the Austrian notary reporter that when an Austrian notary so acts he must fill out the Annex 1 standard form concerning any decision that he makes. The Austrian Notary Chamber clarified this advice by noting that theoretically nothing prevented an Austrian notary from filling out an Annex 2 standard form concerning an authentic instrument that he had created while acting in his notarial capacity. Both the Austrian notary reporter and the Austrian Notary Chamber however advised us that when he is appointed as a court commissioner the Austrian notary would issue Annex 1 forms concerning his probate decisions and that these decisions would not be treated as authentic instruments falling under the Annex 2 form. Our difficulty with this advice was that aspects of it were contradicted by the National Report we had received from our reporter on Austria, who convincingly cited Austrian legislation covering the activities of such court commissioners, comments from Austrian, legal science⁴⁴ and the notification filed by the Austrian State under Article 79 of the Succession Regulation in support of her view.⁴⁵

⁴⁴ Concerning the question of whether the Austrian notary can be included within the Succession Regulation as a court within the meaning of Article 3 of that Regulation see the negative conclusions reached by Frodl/Kiewler in Rechtberger/Zöchl-Jud Die EU Erbrechtsverordnung in Österreich 2015 Verlag Österreich Art. 3 Rn 62 - 72 and also the negative conclusion on this matter by Deixler-Hübner/ Schauer Kommentar zur EU Erbrechtsverordnung 2015 MANZ'sche Verlag Art. 3 Rn 42.

⁴⁵ See appendix.

Accordingly, after considering the evidence we have, for the reasons set out below, come to the conclusion that an Austrian notary is not presently legally capable of completing an Annex 1 form as his decisions as a court commissioner do not technically fall within Article 3(2) of the Succession Regulation and because he has not (alternatively) been placed within the scope of Article 3(2) of the Succession Regulation by the Article 79 notification of the Austrian State. Thus in the admittedly unusual circumstances in which this could ever be requested it seems that Austrian notaries are presently incapable of using either the Annex 1 standard form standard form and possibly also the Annex 2 standard form concerning their probate decisions when acting as court commissioners. It is thus unclear whether such probate decisions can benefit from Article 59 of the Succession Regulation. The Austrian *Gerichtskommissärsgesetz* at § 1 (2) 1 indicates that "judicial decisions" are not included in the catalogue of official notarial acts that can be performed by a court commissioner. If the probate decisions by a notary court commissioner cannot be classified as authentic instruments within the meaning of the Succession Regulation, Austrian notaries will also not be able to fill out an Annex 2 standard form concerning such probate decisions.

It may be simplest to set out our reasoning upon which this conclusion has been based by noting that the Succession Regulation and the first two standard forms provided by the Implementing Regulation each appear to have been drafted on the assumption that there are two possible statuses for a person who acts after the death of the de cuius to effect the operation of the probate procedures of the Member State of origin. According to the above, such a person who can give decisions as defined by Article 3(2) of the Succession Regulation may either be and act as a judge (or be deemed equivalent to a judge as a 'competent authority' for the duration of the proceedings) or, alternatively, he may be and act as a notary and create authentic instruments. The Implementing Regulation accordingly offers one standard form for each possibility: Annex 1 is for decisions from courts and from 'competent authorities' and is only to be completed by such courts or 'competent authorities'; Annex 2 is for authentic instruments and is to be completed by the authority who drew up the authentic instrument (usually the notary). It would, as a matter of logic, appear to follow that, depending on the circumstances of his involvement, a notary must either take one status or the other and hence must fill out one standard form or the other to reflect that status. In fact, as the responses on this point from the Austrian National Reporter and the Austrian Notary Reporter made plain, the matter is not quite as clear-cut as the drafting of the Succession and Implementing Regulations could be understood to indicate.

It is indisputable that an Austrian notary is commonly appointed to act as a court commissioner to assist the Austrian court in the management and conduct of the probate proceedings. It is also indisputable that the Austrian notary so appointed may potentially reach certain 'decisions' in the course of proceedings while he acts to assist the Austrian probate court prior to the court itself making the final '*Einantwortungsbeschluss*' that triggers the transfer of the assets to the heir(s).⁴⁶ It would be reasonable, but wrong, to therefore conclude that Austrian notaries when so appointed by the court act in a full judicial rather than in a notarial capacity during the duration of the probate proceedings, and, that when they make a decision it is, as required by Article 3(2) of the Succession Regulation a decision of equivalent domestic standing to a decision made by an Austrian court. The difficulties with the foregoing assumptions (and with the suggested ability of the Austrian notary to fill out the Annex 1 form) are:

⁴⁶ An '*Einantwortungsbeschluss*' is domestically regarded as a *judicial* authentic instrument: see § 33(1)(d) of the *Grundbuchgesetz* (Land Registry Act).

- a) that under its domestic law the Austrian State explicitly distinguishes the decisions taken by notaries acting as court commissioners in probate proceedings from judicial decisions.⁴⁷ Accordingly a decision by a notary appointed as a court commissioner cannot be deemed equivalent to a decision by an Austrian court.⁴⁸ and
- b) If the Austrian notary was intended by the Austrian State to fill out the Annex 1 standard form of Regulation 1329/2012 it would be necessary for Austrian notaries to either be deemed to be a court generating 'decisions' within the meaning of Article 3(2) of the Succession Regulation – which possibility is discounted by (a) above – or to be classified and notified by the Austrian State as 'competent authorities' of the relevant Austrian court via Article 79 of the Succession Regulation. To qualify as a 'court' under the definition provided by Article 3(2) it is necessary, *inter alia*, that decisions made by the court, '... under the law of the Member State in which they operate: (a) may be made the subject of an appeal to or review by a judicial authority; and (b) *have a similar force and effect as a decision of a judicial authority on the same matter*' (emphasis supplied). In light of the 'lower' domestic standing accorded by the legislation to the decisions of Austrian court commissioners in probate proceedings it does not appear that even if the rest of the requirements of Article 3(2) were met, such notarial probate decisions could be equated with judicial decisions in Austrian law so as to satisfy Article 3(2). Equally, there does not appear to be any alternative route to allow the Austrian notary acting as a court commissioner to be deemed a 'competent authority' under Article 3(2) of the Succession Regulation. Competent authority status would require that the Austrian State, in compliance with its Article 79 obligation, had notified the existence and identity of that 'competent authority' (i.e. the notary acting as court commissioner) to the European Commission. Clearly there has been no such notification: the present response of the Austrian State concerning any competent authority other than its court has been, 'Not Applicable'.⁴⁹

As far as we can establish, the status of Austrian notaries who are appointed to act as court commissioners during probate proceedings is not judicial enough to allow them to complete an Annex 1 standard form and, though their appointments as court commissioners are a consequence of their role as notaries, their actions as court commissioners are not domestically regarded as being examples of a purely notarial nature that obviously indicate that they should (in the admittedly somewhat hypothetical circumstance that this should be requested) complete an Annex 2 standard form concerning any decision they make during probate proceedings. It seems that the decisions of Austrian notaries who act as court commissioners during probate proceedings presently enjoy a somewhat anomalous status that could be understood to prevent the usual operation of either of the first two forms currently provided by

⁴⁷ The tasks of a court commissioner are set out by the Austrian Gerichtskommissärgesetz at § 1 (1) (a – d) which do not include the reaching of judicial decisions that are expressly excluded (together with other judicial functions) from the power of the notary by the Gerichtskommissärgesetz at § 1 (2) 1.

⁴⁸ See comments of by Frodl/Kiewler in Rechtberger/Zöchling-Jud Die EU Erbrechtsverordnung in Österreich 2015 Verlag Österreich Art. 3 Rn 62 - 72 and Deixler-Hübner/ Schauer Kommentar zur EU Erbrechtsverordnung 2015 cited above.

⁴⁹ See the notifications to the European Commission by the Member States in accordance with Article 79 of the Succession Regulation

<https://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=0ahUKEwjdvKqg-rrKAhIVrRoKHfPTDlsQFqqqMAE&url=https%3A%2F%2Fjustice.europa.eu%2FfileDownload.do%3Fid%3D92645e67-621a-486f-9907-f2b74fd6377a&usq=AFQjCNHCZDEmsDer21ih7Y8jKloTikm77w>

Implementing Regulation 1329/2014 in relation to the decisions of such a notary acting as a court commissioner.

The extent to which this issue represents a significant rather than a theoretical and technical problem for the implementation of Article 59 of the Succession Regulation in Austria hinges upon the cross-border evidential utility of the decisions that might be made by the Austrian notary when he acts as a court commissioner. It has been plausibly suggested to us by the Austrian Notary Chamber that the only practically evidentially relevant document to emerge from Austrian probate proceedings will be the 'Einantwortungsbeschluss' (the final judicial authentic instrument order of the Austrian court). As we assume this to be true, there may be no practical need for the decisions of the notary when acting as court commissioner to ever be separately transmitted from the Member State of origin via the Implementing Regulation's Annex 2 standard form.

On the other hand, Article 59 of the Succession Regulation does require that the evidentiary effects of the authentic instruments within its scope shall be allowed to benefit from cross-border transmission and the Implementing Regulation provides the standard forms to support this process. With due respect to all current positions on this complex issue, we suggest that it may be best for Austrian notaries to treat any application that they may receive concerning either a notarially created authentic instrument or any probate decisions of a notary appointed as court commissioner as falling within the Annex 2 Form II of the Implementing Regulation. This suggestion offers the twin advantages of: a) bringing the distinctive Austrian notarial role and its decisions within the existing forms as authentic instruments (whether judicial or notarial) in a manner that is comparable with the majority of other Member State legal systems and also, b) that the form in Annex 2 (unlike the form in Annex 1) expressly invites the authority by which it is completed to explain and expand upon the evidentiary effects of the authentic instrument that it concerns. Given the distinctive nature of Austrian probate practice in this area, such assistance by explanation could be invaluable to the authorities in the Member State addressed.

- ii. We have also considered potential difficulties arising from the fact that under the Succession Regulation it is not mandatory for the party who would produce a succession authentic instrument from the Member State of origin in the Member State addressed to also supply an Annex 2 form⁵⁰ completed by the notary (or any other relevant authority) who drew up that succession authentic instrument.

We accept that the Succession Regulation does not impose such a mandatory requirement because of a legitimate desire to avoid unnecessary costs and delays arising from its routine operation. It would for example be odd to require that every time a succession authentic instrument from France was produced in a closely related legal system, such as Belgium, it should be accompanied by a completed Annex 2 form. Such a requirement would unnecessarily add to the costs and delays facing the claimant that the Succession Regulation is intended to minimise.

On the other hand, it may be wondered whether it is advisable to leave the question of whether or not an Annex 2 form should be provided to the authorities in the Member state addressed solely to the party who would produce the foreign authentic instrument in that Member State. Such a party, who is also likely to be motivated by an understandable desire to save time and what he believes to be 'unnecessary' legal costs, may make the wrong decision by

⁵⁰ See Regulation 1329/2014 Annex 2 Form II.

dispensing with an Annex 2 form and may thus protract proceedings in the Member State addressed. Authorities in Member States with very different succession laws to those of the Member State of origin might well benefit from the availability of the information that could be provided on the Annex 2 form by the notary or other authority who drew up the authentic instrument.

We asked the national reporters and notary reporters to explain how their respective legal systems – if considered as Member States addressed – would react to the presentation of a foreign succession authentic instrument that arrived without an accompanying Annex 2 form. The overwhelming majority of responses indicated that there were no domestic legal provisions at all to indicate how the authorities in the Member State addressed should respond to this eventuality. In a few of the reports from notaries, who of course have, prior to the advent of the Succession Regulation, been required to address such issues in practice, a tentative and qualified suggestion of some sort of legalisation for the incoming authentic instrument was offered. Though this response was always tentative and qualified and though it still represents a reasonable response in many situations outside the EU Succession Regulation, it is of course, now impossible given that Article 74 of the Succession Regulation expressly dispenses with any former requirement for legalisation concerning the documents associated with the operation of the Succession Regulation (including incoming authentic instruments).

If the applicant should chose to dispense with obtaining it, the non-mandatory nature of the Annex 2 form presents a problem if the authorities in the Member State addressed believe that they would benefit from further information concerning the evidentiary effects of the foreign succession authentic instrument. There is presently no solution to this problem included within the EU legislation. Though authorities in the Member State addressed might seek to make use of the European Judicial Network (or its notarial equivalent), it has occurred to us that if the Succession Regulation were expressly to allow the authorities in the Member State addressed the *option* of requiring the applicant to produce a completed Annex 2 form, and the ability to request further information concerning such a completed form directly from its author in the Member State of origin, the abovementioned difficulties could be avoided.

- iii. We have identified an issue of translation concerning both the authentic instrument and also the Annex 2 form. The notary or other authority who draws up an authentic instrument does so in the official language of the legal system in which he operates (i.e. a legal system of the Member State of origin). When the notary completes an Annex 2 form he also does so in the Member State of origin. Though the authentic instrument must be in the official language of the Member State of origin, it may be assumed that the Annex 2 form will also be completed in the same language. How is this authentic instrument and the Annex 2 Form to be understood in the event that they are produced in a Member State addressed that does not share the same language as the Member State of origin? It has seemed to us to be advisable for there to be further consideration at the point of reviewing the Succession Regulation as to whether the text of Article 59 of the Succession Regulation should be amended to allow an option for a translation into the language of the Member State addressed when this is necessary. Such a provision might be modelled upon Article 57 of the Brussels Ia Regulation which seeks to allow only necessary translations so as not to unnecessarily increase costs and delays. At the moment the possibility of requesting a translation seems to be restricted to cases where the applicant is trying to "enforce" an authentic instrument (see Articles 60(1) and 47(2) of the Succession Regulation). The

Implementing Regulation could also be amended to create a provision relating to translation of the Annex 2 Form in appropriate cases.

- iv. We have also identified a potential informational difficulty associated with the notary completing that part of the Annex 2 form that refers to the existence or otherwise of any domestic challenge concerning that authentic instrument. The nature of the difficulty we have identified is purely informational and may arise because it is not the case that in every legal system it will necessarily be simple for the notary who is asked to complete the Annex 2 form to know whether or not the succession authentic instrument is actually under challenge. This problem should not be overstated because in many cases it will be abundantly clear to the notary that such a challenge is underway because, as the author of the disputed authentic instrument, he will have been contacted officially in relation to this matter.

4. FINAL RECOMMENDATIONS

4.1. Publicity

This study has led to the drawing up of a clear explanation of the domestic evidentiary effects of authentic instruments for each EU Member State in matters of succession. **We propose that additionally to their provision in this report, the Country Profiles be provided on, and made freely available from, the website of the Centre for Private International Law of the University of Aberdeen.** We also recommend that **this resource should be linked to by hyperlinks posted by those undertakings and bodies representing the legal professions and citizens of the European Union.** Access to this resource will be of particular importance for those located in the Member States that do not domestically feature the legal institution of the authentic instrument. Such legal systems, and the legal practitioners operating within them, will predominantly know of authentic instruments from other EU Regulations concerning Private International Law in quite different legal contexts (e.g. enforcement of civil and commercial obligations via Brussels Ia Regulation or via the European Enforcement Order Regulation) and will benefit from additional information as to how Article 59 of the Succession Regulation may be complied with.

4.2. Clarifying the meaning of "Acceptance" in Article 59 of the Succession Regulation

In the absence of an autonomous definition of the term 'acceptance' from the Court of Justice, we recommend that such steps as are practical should be taken domestically – whether by legislators or by professional bodies – to indicate that despite any former domestic provisions on 'recognition' that did or could have applied to succession authentic instruments prior to the Succession Regulation, the concept of 'acceptance' in Article 59 should be understood as a new and probably autonomous European Union legal concept. In particular, acceptance should not be conflated with earlier domestic concepts of 'recognition' for authentic instruments, nor within existing EU instruments that seemingly provide for a form of 'recognition' for authentic instruments in other fields, nor with the 'recognition' that is provided by the Succession Regulation for judicial decisions. 'Acceptance' in the Article 59 context should be understood to refer to the cross-border transmission and subsequent facilitation of the evidentiary effects of a succession authentic instrument. In particular it should be noted that the 'acceptance' of the evidence contained by such an authentic instrument should be understood to preserve the legitimate possibilities of challenging or rebutting the effects of that evidence in the Member State addressed if this possibility would also exist in an equivalent sense the legal system of the Member State of origin.

4.3. The Annex 2 Standard Form

The Annex 2 form provided by the Implementing Regulation provides a useful template to concretely set out, for the benefit of the Member State addressed, the nature, use and particular evidentiary effects of a given authentic instrument in a matter of succession in the Member State of origin. **It is essential that the authority that has drawn up a succession authentic instrument in the Member State of origin knows that it is always competent to draft the relevant Annex 2 standard form to accompany this authentic instrument when it is to be sent to the Member State addressed.** We encountered a number of examples of legal practitioners who *initially* assumed that the fact that they would fulfil a judicial function in connection with post mortem probate activities meant that they would therefore be incapable of drafting an Annex 2 standard form concerning even a succession authentic instrument drawn up while the testator was still living (e.g. a will or an *inter vivos* succession agreement).

Further, we note and recommend that the **information provided by the drafting authority on the Annex 2 Standard form should be sufficiently detailed and explicit as to the domestic limits of the evidentiary effects – e.g. that it should indicate the evidentiary effect of each aspect identified on the Annex 2 standard form in the Member State of origin in such a way as to reflect the extent of the freedom (if any) for the court in that Member State of origin to respond to and assess that evidence against other evidence were the proceedings to take place before it.**

4.4. Promoting the widest use of the Annex 2 Standard Form

The voluntary use by a notary (or other public official) of an Annex 2 Form II concerning a succession authentic instrument should be strongly encouraged in every Member State in which such an authentic instrument is capable of being created. With the possible exception of those situations in which the Annex 2 form is clearly unnecessary, by reason of a well-recognised legal similarity between the laws of the Member State of origin and the Member State addressed, the use of the Annex 2 form should be encouraged as it significantly assists the holder of the authentic instrument and the authorities in the Member State addressed in respectively receiving and conferring the proper level of cross-border evidentiary effect in the Member State addressed. Though ensuring such an outcome by the amendment of the Succession Regulation to make the use of the Annex 2 standard form compulsory is probably unrealistic at the present time, it would be comparatively simple for either best practice or for the relevant domestic rules concerning notarial practice to be adjusted to encourage the use of the Annex 2 Form whenever it is possible for a notary to advocate the use of this form.

4.5. The completion of a useful Annex 2 Standard Form

We also recommend that the legal professions representing the legal professionals who may be called upon to fill out an Annex 2 form should emphasise to their members the importance of providing full, clearly supported and legally referenced answers to the questions posed by the Annex 2 form concerning the evidentiary effects of the authentic instrument it is to accompany. Cursory answers such as 'Yes' or 'No' should generally be avoided in this context and particular care should be taken to be precise on the question of what is meant by the 'content' of the declarations by the parties evidenced by the authentic instrument (as this can be easily misunderstood); ideally the completing authority will explain how the evidential effect relating to that content is understood to operate in the Member State of origin. It has occurred to us that brief but clearly drafted standard form answers to the questions concerning the evidentiary effects of authentic instruments could usefully be provided to the notarial professions of each Member State of origin via the professional body representing these legal professionals.

4.6. Reducing unnecessary costs and delay: legalisation

We recommend increased publicity concerning the abolition of all legalisation requirements concerning Succession Regulation documents as brought about by Article 74 of that Regulation as of 17 August 2015 be provided to legal professionals working in the field of succession law. In a number of responses from our reporters (including succession practitioners) it was (wrongly) suggested that legalisation could still be required and/or useful if the foreign authentic instrument was produced without an Annex 2 Standard form.

4.7. Reviewing the Succession Regulation

We also suggest that when, in accordance with Article 82 the Succession Regulation is reviewed, the examination should consider the possibility of introducing an amendment to Article 59 to allow the authorities in the Member State addressed to:

- a) request that the applicant produce a completed Annex 2 form if one has not already been provided and the authorities believe that the production of such a form would expedite the proper acceptance of the foreign succession authentic instrument.

And

- b) for the authorities in the Member State addressed to have an *option* of independently seeking an Annex 2 form from the notary who drew up the authentic instrument, and the option of seeking clarification from that notary concerning the content of any Annex 2 form he has supplied. The option of seeking clarification from the notary is intended to promote understanding and also to remedy the present lack of a direct non-contentious route to make a reference to the European Court of Justice. If the court that must otherwise make a reference to the CJEU is first able to clarify with the notary what was meant by an aspect of the authentic instrument it may be possible to avoid the reference or, at least, to bring all of the relevant issues before the CJEU via that reference.

And

- c) a potential change to the text of Article 59 of the Succession Regulation (potentially with reference to a similar provision in Article 57 of the Brussels Ia Regulation) to allow an authority or court in the Member State addressed an option to request a translation of the authentic instrument and/or the accompanying Annex 2 Form II when this is necessary for "acceptance" of the evidentiary effects of that instrument. At the moment the possibility of requesting a translation seems to be restricted to cases where the applicant is trying to "enforce" an authentic instrument (see Articles 60(1) and 47(2) of the Succession Regulation).

APPENDIX I: AUTHORITIES AND LEGAL PROFESSIONALS WITH COMPETENCE IN MATTERS OF SUCCESSION, OTHER THAN A JUDICIAL AUTHORITY, AS DEFINED IN ARTICLE 3(2)

- in Bulgaria, not applicable,
- in Germany, not applicable,
- in Estonia, not applicable,
- in France, not applicable,
- in Italy, not applicable,
- in Cyprus, not applicable,
- in Latvia, not applicable,
- in Lithuania, not applicable,
- in Luxembourg, not applicable,
- in Malta, not applicable,
- in the Netherlands, not applicable
- in Austria, not applicable,
- in Poland, not applicable,
- in Romania, not applicable,
- in Slovenia, not applicable,
- in Slovakia, not applicable,

- in Portugal, notary,
- in Hungary, notary,
- in Greece, notary,
- in Spain, notary,
- in Croatia, notary,
- in Belgium, notary,
- in the Czech Republic, notary,

- in Finland, estate distributor,
- in Sweden:
 - Swedish Tax Agency (Skatteverket)
 - estate distributor (skiftesman),
 - executor of the will (testamentsexekutor), when in the role of the estate distributor without a special appointment to that effect, special estate administrator (särskild boutredningsman), when in the role of the estate distributor without a special appointment to that effect.

APPENDIX II: COUNTRY PROFILES

AUSTRIA

The Austrian legal system

Austria consists of a single legal system that belongs to the civil law family. The Austrian law concerning succession will undergo a comprehensive reform that will largely take effect as of 1 January 2017.⁵¹ The entry into force of the EU Succession Regulation led to amendments of the Federal Law on Private International Law (Bundesgesetz über das Internationale Privatrecht, IPRG)⁵² and of the relevant procedural regulations; which all entered into force as of 17 August 2015.

The core substantive law concerning Austrian succession law is located in Sections 531 to 858 Austrian General Civil Code (Allgemeines bürgerliches Gesetzbuch, ABGB; JGS 1811/946 as amended,⁵³ The Civil Procedure Code⁵⁴ is also relevant. As are the following Acts - Sec. 143 et seq. of the Act on non-contentious proceedings (Ausserstreitgesetz - AussStrG);⁵⁵ Sec. 292 et seq. of the Act on enforcement proceedings (Exekutionsordnung - EO);⁵⁶ and the Act on the competence of the courts in civil matters (Jurisdiktionsnorm - JN).⁵⁷

The amendments to the IPRG and to the law governing court jurisdiction (Jurisdiktionsnorm, JN) mainly served to consolidate existing law; provisions which had become obsolete in the wake of the EU Succession Regulation were repealed. In order to be able to apply the Regulation within the Austrian legal system, some supplementary regulations had to be adopted: for instance, on local jurisdiction for the adaptation of rights in rem (Article 31, EU Succession Regulation) and on provisional measures, if there is no domestic competence for probate. Moreover, rules had to be laid down on how to proceed if succession to an estate is - by exception - governed by foreign law and the estate is not devolved by a transfer of title ("Einantwortung") as is the case under Austrian law.

The concept of an authentic instrument in Austria

The Austrian legal system makes extensive use of authentic instruments as created by courts, created by officials in public office (e.g. registrars), and created by notaries. Authentic instruments are defined by § 292(1) of the ZPO as an instrument, '... drawn up by **an authority** or by **a person empowered with public authority** within the limits of their powers and in the form prescribed by the law, on paper or in electronic form': a court or registrar is 'an authority, whereas 'a notary is, 'a person empowered with public authority'. § 292(1) ZPO also explains that the relevant aspects of such authentic instruments (e.g. any enactments or declarations made by an issuing authority within

⁵¹ Act modifying the succession law (Erbrechts-Änderungsgesetz, ErbRÄG) of 30 July 2015

https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=ReqV&Dokumentnummer=REGV_CO_2026_100_2_1080_194.

⁵² Bundesgesetz vom 15. Juni 1978 über das internationale Privatrecht (IPR-Gesetz)

<https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10002426>.

⁵³ Austrian General Civil Code (Allgemeines bürgerliches Gesetzbuch, ABGB; JGS 1811/946 as amended;

<https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001622>.

⁵⁴ Austrian Civil Procedure Code ZPO

<https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001699>.

⁵⁵ Federal Law on Court Proceedings in Non-Contentious Matters (Ausserstreitgesetz, AußStrG; Federal Law Gazette BGBl I 2003/111

<https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20003047>.

⁵⁶ Execution law EO

<https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001700>.

⁵⁷ Gesetz vom 1. August 1895, über die Ausübung der Gerichtsbarkeit und die Zuständigkeit der ordentlichen Gerichte in bürgerlichen Rechtssachen (Jurisdiktionsnorm - JN).

<https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001697>.

the authentic instrument and also anything attested by the notary in the course of drawing up and creating that authentic instrument) enjoy a **rebuttable presumption of full proof**.

This presumption is however subject to the second paragraph of § 292(2) ZPO which records that proof to the contrary of the presumption in § 292(1) ZPO **is** admissible to show that a fact or an attested act in the authentic instrument is untrue, or, to show that the authenticity of the authentic instrument is deficient. According to § 293 ZPO other public instruments that Austrian law regards as equivalent to authentic instruments also benefit from the rebuttable evidentiary presumption.

Austrian authentic instruments⁵⁸ also benefit from a **rebuttable presumption of authenticity** via § 310(1) ZPO if they appear on inspection to be authentic in view of their form and content. This presumption of authenticity is also capable of being questioned and challenged before an Austrian court via § 310(2) ZPO.

The enforceability of authentic instruments is addressed by § 1 and § 79 (*et seq*) of the Exekutionsordnung (EO). Further information is provided by the Notariatsaktsgesetz of 25 July 1871 RGBI No.75 (as amended).

Evidentiary effects of domestic authentic instruments in Austrian law

There are a range of transactions or legal acts that must be carried out by means of an authentic instrument. The Austrian Land Registry will only make an entry, or change an existing entry, in its register if it receives an appropriate authentic instrument with the relevant application: see §§ 26 – 28 of Grundbuchgesetz (Land Registry Act). Austrian law also requires the use of authentic instruments in connection with aspects of corporate and company law. There are also numerous aspects of succession law that require, or allow, the use of an authentic instrument (see below).

Disputing the validity of the authentic instrument

If an authentic instrument is successfully challenged as to its formal validity/authenticity/ *instrumentum* it will lose the evidentiary effects associated with authentic instruments as public documents within the meaning of § 292(1) ZPO and § 310(1) ZPO. If this occurs the document is not an authentic instrument and thus the transaction it recorded/evidenced will be void and of no effect if that transaction legally required the use of an authentic instrument for its validity. If a document is not an authentic instrument it could potentially be regarded a private deed/private act within the meaning of § 294 ZPO and hence prove merely that the declarations that it contains originated from its signatories.

§ 310(2) ZPO allows the court faced with a domestic authentic instrument to commence an enquiry into the apparent authenticity of that authentic instrument either acting *ex officio* or in response to a request by an interested party. The court requests that the authority who drew up and created that authentic instrument submits a report to it on the authenticity of the authentic instrument. If the doubts as to the authenticity of the instrument cannot be thus resolved to the satisfaction of the Austrian court, the party who would rely upon the authenticity of the authentic instrument must then prove to the court that it is actually authentic if he is thereafter to continue to rely upon its authenticity.

As is made plain by § 292(2) ZPO both the formal validity and the evidentiary presumptions concerning an Austrian authentic instrument may be challenged before the

⁵⁸ If the authentic instrument is foreign (and not able to benefit from the provisions of a European Union Private International Law Regulation) § 311 ZPO allows the Austrian court to evaluate its authenticity at its own discretion: this may (but need not) involve legalisation (N.B. legalisation cannot be required of a document under the Succession Regulation).

Austrian court by adducing evidence that demonstrates that there was a formal impropriety in the creation of the authentic instrument, or, that an attested act or attested fact contained within that authentic instrument is untrue or false.

If an authentic instrument should be successfully challenged as to the validity of its material validity or *negotium* the instrument itself may, assuming there to be no other challenges, continue as formally and technically valid. The challenge to its material content may however affect its evidentiary meaning according to the material invalidity demonstrated by the challenge. This may well render the evidence still contained in the authentic instrument wholly or partially nugatory.

In practice, challenges to the material validity of an Austrian authentic instrument are most likely to arise during domestic enforcement proceedings, see § 35 et seq of the *Exekutionsordnung* (EO) which sets out the Austrian rules on challenging enforcement titles.

In the event that Austria, as the Member State addressed, has jurisdiction over a foreign authentic instrument under the European Union Succession Regulation, and the Austrian court is faced with a challenge to the legal acts or legal relationships (i.e. material validity) of that authentic instrument under Article 59(3) of that Regulation, the challenge will proceed according to the new procedures specified by § 160 et seq of the AussStrG.

The use of authentic instruments in domestic Austrian succession law

There are a wide range of uses for authentic instruments in Austrian succession law both before and after the death of the testator. As well as featuring the typical opportunities for the use of authentic instruments prior to the death of the testator, Austrian succession law is notable for routinely making use of authentic instruments that originate from a range of different domestic authorities including notaries, registrars and the district court. Probate proceedings are initiated by the Austrian district court in the geographical location of the deceased when it receives a death certificate from the official registry: thereafter **the district court makes the major decisions as to the carrying out of the probate proceedings**. Though the district court formally makes these decisions, it routinely appoints a notary to act as a court commissioner/Gerichtskommissar and to assist in the practical conduct of that probate proceeding: when necessary the notary also acts as a mediator between the persons variously interested in the succession. This is intended to avoid unnecessary litigation over details.

The following list indicates the main documents that are regarded as authentic instruments in Austrian law in matters of succession. It must however be noted that not all of these documents are drawn up by a notary: this is relevant because an application for an attestation of an authentic instrument in a matter of succession must be made to the authority that created or drew up the authentic instrument in question.⁵⁹

- a) Notarial wills § 583 ABGB (via oral or written instructions before two notaries OR via oral or written instructions before one notary plus two witnesses): see also Notariatsordnung Sec. 2, 66 et seq., 70 et seq..
- b) Revocation of a will can (but need not) also be made by an authentic instrument.
- c) Waiver of inheritance by a potential heir BEFORE the testator's death requires the use of an authentic instrument created by either a court or a notary, § 551 ABGB. For renunciation of heirship after the testator has died using an authentic instrument see § 805 AGBG.

⁵⁹ The notary appointed by a court to assist with the probate of an estate may however know of the existence of other authentic instruments as one of his duties is to collect any such relevant instruments so as to facilitate the correct process of probate.

- d) *Inter vivos* contractual agreements as to succession between spouses § 1249 or fiancés or registered partners: § 602 ABGB.
- e) A donation made in view of a succession, see § 603 ABGB.
- f) The decision of the Austrian probate court that triggers the transfer of the assets to the heir(s), 'Einantwortungsbeschluss' is a *judicial* authentic instrument. This status is confirmed by § 33(1)(d) of the Grundbuchgesetz (Land Registry Act).
- g) The death certificate is an authentic instrument issued by the Civil Register § 143 Ausserstreitgesetz (AussStrG). It is an *official* authentic instrument.
- h) A partition agreement, if drawn up by a notary, must be by authentic instrument, see § 181 AussStrG.
- i) An inventory drawn up by a notary will also be by authentic instrument, see § 183 AussStrG.

The Private International Law implications of the European Union's Succession Regulation 650/2012 and Implementing Regulation 1329/2014

The European Union Succession Regulation and its Implementing Regulation raise two distinct Private International Law issues for Austria as an EU Member State: first, the extent of the obligations imposed by these Regulations on Austria as a Member State of origin concerning its domestically created succession authentic instruments; and, second, the extent of the obligations these Regulations impose on Austria as a Member State addressed concerning its duties relating to incoming foreign succession authentic instruments. The comments that follow consider each position.

Austria is the Member State of origin: obligations concerning domestic succession authentic instruments

N.B. The comments below concerning Austria as the Member State of origin must be read subject to caveats expressed in this paragraph arising from uncertainties concerning the role of the Austrian notary concerning probate **decisions** on the succession. As already mentioned, the conduct of probate proceedings following the death of the testator involves the Austrian court appointing an Austrian notary to act for it as a court commissioner (Gerichtskommissar). It would therefore seem reasonable to assume that, when so acting, this notary will fall within Article 3(2) of the Succession Regulation and produce **decisions** concerning that estate: hence it would be reasonable to assume that the notary may attest such **decisions** via the **Annex 1 Form I** form, of Regulation 1329/2014, to allow their use abroad. The last sentence summarises the perspective of the Austrian notaries on this issue. The Austrian notaries hold the view that they will only rarely attest succession authentic instruments during probate proceedings via Annex 2 Form II of Regulation 1329/2014 as they will usually produce and attest decisions falling under Annex 1 Form I. The actual position is complicated by reason of the fact that the Austrian State has responded to the notification requirement of Article 79 of the European Union Succession Regulation, concerning the notification of the identity of 'Authorities and legal professionals with competence in matters of succession, other than a judicial authority as defined by Article 3(2)', by stating, "**Not Applicable**".⁶⁰ This response from the Austrian State indicates that only an Austrian **court**, and **no other** authority or legal professional (including an Austrian notary) can issue a **decision** within the meaning of Article 3(2) of the Succession Regulation via Annex 1 Form I of Implementing Regulation 1329/2014. Accordingly, an Austrian notary can only issue an attestation, concerning an authentic instrument (using the Annex 2 Form II form of Implementing Regulation 1329/2014). Again however this matter is complicated by the view of the Austrian notaries that few, if any, succession authentic instruments will ever be sent from Austria using the Annex 2 Form II form. The Chamber of Austrian Notaries has pointed out to the authors of this study that very few of the succession authentic instruments existing in Austria would ever be likely to be sent

⁶⁰<https://e-justice.europa.eu/fileDownload.do?id=92645e67-621a-486f-9907-f2b74fd6377a>

abroad given that they would have little or no evidential effect or potential for enforceability in Austria as the Member State of origin.

Article 59(1) of the European Union Succession Regulation allows, but does not require, 'a person' who wishes to use a succession authentic instrument in another Member State to ask the authority who established it, i.e. the notary who drew it up or his substitute/successor, to issue an attestation concerning that authentic instrument on the standard form provided by Annex 2 Form II of Implementing Regulation 1329/2014. It is unclear whether or not such a request must be complied with if it is received from a person not deemed by the notary to be 'an interested party'. The substitution of the phrase 'a person' in Article 59 for 'interested party' in Article 60 could be understood to indicate that there is no requirement in the Succession Regulation for the applicant seeking only cross-border acceptance to demonstrate what would otherwise be domestically regarded as a 'legitimate interest' when requesting the attestation from the notary. For the reasons set out above in the opening paragraph of this section, it is not yet clear whether or not this will be a problem in Austria. It is however plausible that the notary will be willing to assist a range of applicants if he is satisfied of the legitimacy of their interest in the matter. The EU Succession Regulation and Implementing Regulation do not expressly contemplate the possibility that a request under Article 59 may be refused. It is however possible to contrast the applicant 'may ask' of Article 59 with 'the authority shall' in Article 60(2) and to infer from the different wording that the notary (or other public authority) is only actually obliged to accede to the applicant's request when it concerns enforcement under Article 60. This result however seems inconsistent with Recitals 22, 59 and 60 of the EU Succession Regulation and with one of its underlying purposes, i.e. to facilitate the cross-border transmission of authentic instruments and their legal effects. In circumstances where both the acceptance and the enforcement of the authentic instrument may be sought the problem may be avoided, assuming the notary to be willing to provide information concerning both Article 59 and Article 60, by the applicant routinely requesting an attestation concerning *both* enforcement and acceptance.

Article 60 of Regulation 650/2012 requires that, provided that to so declare would not be manifestly contrary to its public policy, the authorities in the Member State addressed *must* on application by an interested person declare a foreign succession authentic instrument that is enforceable in its Member State of origin to also be enforceable in their Member State. Although it may be an unusual occurrence an Austrian notary may theoretically be in receipt of a request for such an attestation, again under Annex 2 Form II of Implementing Regulation 1329/2014. This standard form allows for an attestation that concerns only 'acceptance', via Article 59, or only 'enforcement' via Article 60, or a joint attestation concerning both acceptance and enforcement of the authentic instrument depending upon the boxes ticked by the Austrian notary.

The Austrian notary in receipt of a request to provide a completed Annex 2 Form II attestation concerning a domestic succession authentic instrument is asked to indicate at points 4.2 to 4.2.1.1.7 of the standard form what he believes its domestic evidentiary effects to be. Though the answers will vary depending upon the specific verifications contained in the succession authentic instrument at issue, it is broadly conceivable that points 4.2.1.1.1 to 4.2.1.1.7 could be expected to be completed as follows:

4.2.1.1.1 - The date the authentic instrument was drawn up:

The authentic instrument would produce an evidential effect of a presumption of full proof on this point. See §292 and § 310(1) ZPO.

4.2.1.1.2 - The place where the authentic instrument was drawn up:

The authentic instrument would produce an evidential effect of a presumption of full proof on this point. See §292 and § 310(1) ZPO.

4.2.1.1.3 - The origin of the signatures from the parties of the authentic instrument:

The authentic instrument would produce an evidential effect of a presumption of full proof on this point. See §292 and § 310(1) ZPO.

4.2.1.1.4 - The content of the declarations of the parties:

The authentic instrument would produce evidential effects of presumed full proof via §292 ZPO and § 310(1) but only to the following extent: the authentic instrument demonstrates and proves the fact that the parties to the authentic instrument *did* actually make the declarations included in that authentic instrument AND also that the parties made those declarations in the manner and on the terms recorded within the authentic instrument.

N.B. The authentic instrument does NOT produce any further evidential effect concerning the CORRECTNESS of the declarations by the parties included in the authentic instrument.

4.2.1.1.5 - The facts that the authority declares as having been verified in its presence:

The authentic instrument would produce an evidential effect of a presumption of full proof on this point. See §292 and § 310(1) ZPO.

4.2.1.1.6 - The actions which the authority declares to have carried out:

The authentic instrument would produce an evidential effect of a presumption of full proof on this point. See §292 and § 310(1) ZPO.

4.2.1.1.7 - Other: (please indicate any other evidentiary effect that a domestic authentic instrument could produce)

According to the advice received there are no further evidentiary effects not already covered by points 4.2.1.1.1 - 4.2.1.1.6: it is however conceivable that additional information could be presented in this box.

Austria is the Member State addressed: foreign succession authentic instruments

The EU Succession Regulation requires that, subject to public policy exceptions, Austrian authorities must **accept** and, or, **enforce** foreign authentic instruments in matters of succession received from other EU Member States bound by the Succession Regulation.

The **acceptance** of a foreign succession authentic instrument in Austria is governed by Article 59 of the EU Succession Regulation and its enforcement is governed by Article 60 of that Regulation. Acceptance requires that, provided that to do so would not be manifestly contrary to Austrian public policy, the authorities in Austria (as the Member State addressed) *must* grant the foreign succession authentic instrument the same (or most comparable) evidentiary effects as it would enjoy in its own Member State of origin.

To determine the nature of the evidentiary effects that would be associated with that authentic instrument in the Member State of origin, reference should be made to any Annex 2 Form II form that may accompany the foreign authentic instrument, especially to parts 4.2.1.1.1 – 4.2.1.1.7 of any such form. It must however be noted that the use of the Implementing Regulation's Annex 2 form does not appear to be obligatory. The obligation of acceptance imposed by Article 59 of the Succession Regulation does not require or depend upon the use or supply of the Annex 2 form. A succession authentic instrument received from a Member State of origin in accordance with the provisions of the Succession Regulation must still be accepted, within the meaning of Article 59 of Regulation 650/2012, even if no Annex 2 Form II form is provided or if the Annex 2 form provided is not fully or properly completed.

The **enforcement** of a foreign authentic instrument via Article 60 of Regulation 650/2012 requires that, provided that to do so would not be manifestly contrary to

Austrian public policy, the Austrian authorities must on application by an interested person declare enforceable a foreign succession authentic instrument that is enforceable in its Member State of origin. We are not aware of any special provision in the law of Austria that specifically deals with the actual enforcement of a foreign authentic instrument after it has been declared enforceable (differently from the actual enforcement of a foreign judgment that has been declared enforceable) in accordance with the procedure laid down in Articles 45 to 58 of the EU Succession Regulation as required by Article 60 thereof.

Austrian public policy

The Succession Regulation allows a public policy defence in various contexts including with reference to authentic instruments under Articles 59 and 60. To invoke the public policy exception in the context of Article 59, and by so doing to justify a refusal of acceptance for that foreign authentic instrument, it must be the case that the *granting of the same or most comparable evidentiary effects* to the foreign authentic instrument would be manifestly contrary to Austrian public policy. To invoke the public policy exception in the context of Article 60, to justify a refusal of a declaration of enforceability for the foreign authentic instrument, it must be that the *granting of the declaration of enforceability* for the foreign authentic instrument would be manifestly contrary to Austrian public policy. Of course this European Union public policy exception should be construed narrowly and it is envisaged that it will rarely apply. As is made plain by Recital 58 of the Succession Regulation, public policy is not to be applied in a manner that is discriminatory or otherwise contrary to the European Union's Charter of Fundamental Rights. Equally however Recital 26 of Regulation 650/2012 indicates that the Regulation does not prevent a court from applying mechanisms designed to tackle the evasion of the law, such as *fraude à la loi* in the context of Private International Law. However, the substantive provisions of the Regulation do not expressly empower national courts to prevent evasion of the law (including *fraude à la loi*). It would seem that the only positive basis for doing so under the Regulation is to regard such evasion of the law to be contrary to public policy unless the law being evaded is one of the "special rules" of the forum concerning certain assets that is applicable irrespective of the law applicable to the succession (see Article 30 of the EU Succession Regulation).

There seem to be no reported cases in which Austrian public policy has ever been used to prevent a foreign authentic instrument (or anything equivalent thereunto) from being received into the Austrian legal system and/or then from potentially producing legal effects in Austria. This should not be understood to indicate that prior to the EU Succession Regulation there were no obstacles to the cross-border transmission of the legal effects of succession authentic instruments in Austrian law. It merely indicates that Austrian public policy was not the problem facing such instruments.⁶¹

Incompatible Authentic instruments

Recital 66 of the EU Succession Regulation envisages the possibility of 'an authority' being presented with incompatible authentic instruments.⁶² The solutions suggested by

⁶¹ Before the European Union Succession Regulation came into force, though §292 (et seq) ZPO would allow proof to flow from a foreign authentic instrument, e.g. a German Certificate of Succession (Erbschein), it did not follow that such a foreign authentic instrument would then have entitled the appropriation of property held in Austria. At that time the Austrian Land Registry would not accept that a German Erbschein/certificate of succession should cause it to change entries in the Austrian register. Now See Article 33(1)(d) of the Austrian Grundbuchgesetz (Land Registry Act).

⁶² Recital 66: Should an authority, in the application of this Regulation, be presented with two incompatible authentic instruments, it should assess the question as to which authentic instrument, if any, should be given priority, taking into account the circumstances of the particular case. Where it is not clear from those circumstances which authentic instrument, if any, should be given priority, the question should be determined by the courts having jurisdiction under this Regulation, or, where the question is raised as an incidental question in the course of proceedings, by the court seised of those proceedings. In the event of incompatibility

the Recital are to consider priority and the circumstances of the particular case and then, if this has not resolved the incompatibility, to resort to a court with direct or incidental jurisdiction under the Succession Regulation. There are no independent Austrian provisions (actual or planned) which address the possibility of conflicting authentic instruments as envisaged by Recital 66. A reference to an Austrian court would therefore be required to resolve the conflict.

between an authentic instrument and a decision, regard should be had to the grounds of non-recognition of decisions under this Regulation.

BELGIUM

The Belgian Legal System

For the purpose of the civil aspects of succession, Belgium may be considered a unitary legal system as the federal legislator has exclusive competence in this area. However, the Regions have competence to levy taxes in succession matters. The Belgian legal system belongs to the civil law family. The rules regarding succession are in the first place to be found in the Civil Code, which was adopted in 1804 in France (and remained law of the country when Belgium became independent in 1830). More precisely, the Civil Code includes 3 'Books' ('livre'), the third of which is concerned with rules on acquisition of property. It is within this Book 3 that the main rules on the law of succession may be found. The first title of this Book is entirely devoted to the rules on succession. The Civil Code must be supplemented with a number of specific provisions, adopted in various Acts of Parliament. These Acts include the Act of 16 May 1900 relating so-called "small" estates and the Act of 29 August 1988 in relation to succession estates including agricultural land or farms.⁶³

Unfortunately, no official translation of the Civil Code in English has ever been published. The Code of Civil Procedure also includes a number of legal provisions relevant in case of succession. This applies in particular for Articles 1205 to 1225 of this Code, which provides detailed rules on the sharing out of the estate. Belgium is also a party to several international conventions which may have an impact on succession matters. This applies in particular to the Washington Convention of 26 October 1973 providing a Uniform Law on the Form of an International Will, which has been implemented in Belgium with the Act of 2 February 1983.

Belgium is preparing to adopt specific legislation which will serve to ease out the implementation of the Succession Regulation. At this stage, this legislation has not yet finally been adopted. In a nutshell, the legislation will include various provisions enabling notaries to issue European certificates of succession. It will also abolish several provisions included in the Code of Private International Law (Act of 16 July 2004), which provided until now a legal framework for cross-border successions.

The Concept of an Authentic Instrument in Belgium

The Belgian legal system makes extensive use of authentic instruments which it refers to as 'authentic acts'. The basic legal provision concerning Belgian authentic instruments is Article 1317 of the Civil Code. This provision is located in a part of the Code dealing with evidence and the evidentiary value of different documents. Article 1317 is almost identical to the provision found in the French Civil Code. It provides that "An authentic act is one that has been received by public legal officers who have the authority to draw up such acts at the place where the act was written and with the requisite formalities". Other details in relation to authentic instruments may be found in Articles 1318, 1319, 1320 and 1321 of the Civil Code. There are other provisions dealing with specific authentic instruments e.g. Article 35 of the Civil Code deals with authentic instruments drafted by civil status officers.

According to Belgian law, all transactions concerning rights *in rem* in immovable property must be recorded via an authentic instrument. This follows from Article 1 of the '*Loi hypothécaire*' (Act of 16 December 1851 on mortgages and other security mechanisms), which provides that every transaction in relation to an immovable must be duly recorded

⁶³ All legislation in force in Belgium may be found, free of charge, on the Juridat platform (<http://www.ejustice.just.fgov.be/loi/loi.htm>). This is an official web-site which is regularly updated. Please note, however, that when a statute is updated, a consolidated version of the statute may not always be available.

in the registers of the so-called 'mortgage registry' ("conservation des hypothèques"/"hypothekbewaarder"). According to Article 2 of the same Act, registration is only allowed provided the transaction is recorded in an authentic instrument, a judgment or a non authentic act/instrument that has been duly recognized by the parties to that act/instrument before a court or before a notary. Authentic instruments are also required in other contexts, such as e.g. to draw up an authentic Will. Outside of the context of succession, many other documents must be drawn up using an authentic instrument.

In Belgium, notaries are primarily entrusted with the task of drawing up authentic instruments: this follows from Article 1 of the so-called 'Ventose Act' (Act of 25 Ventose Year XI in relation to the organisation of public notaries) which appoints notaries as public servants who may receive all acts and contracts that the parties must or wish to give an authentic character. As well as notaries, Belgian courts also create/deliver authentic acts/instruments. The rulings, decisions and judgments handed down by a Belgian court are delivered in the form of an authentic act (Article 780 Code of Civil Procedure). Courts are also empowered to register agreements made by the parties and confer an authentic value on such agreements. Court clerks ('greffiers'/'griffiers') and bailiffs ('huissier de justice'/'gerechtsdeurwaarder') are also each empowered to deliver authentic instruments. The same applies for other public authorities who may also deliver authentic instruments, outside the context of succession, e.g. civil status officers ('officiers d'état civil'/'ambtenaar van de burgerlijke stand'), who are charged with drafting civil status documents (such as marriage acts, birth certificates etc).⁶⁴

Evidentiary effects of domestic authentic instruments in Belgian law

According to Article 1319 of the Civil Code (which is an exact copy of the same provision of the French Civil Code), authentic instruments serve as conclusive evidence of the agreements they contain between the contracting parties and their heirs and assignees. This provision has the effect of elevating **some** of the elements included in the authentic instrument to allow them to benefit from a higher evidential value than they would enjoy were they not contained in such an authentic instrument.

The special evidential value conferred by an authentic instrument only applies to those elements which have been duly recorded by the notary ('ex propriis sensibus'). This special evidential value can, depending on the actual content of the authentic instrument as it is drawn up, include:

- the fact that a given party has been present at the notary's office on a given day;
- the fact that that person solicited the notary's assistance with a given matter;
- the fact that that person has made certain declarations in relation to the creation of an authentic instrument;
- the signature(s) of the party or parties to the authentic instrument;
- the signature of the notary;
- the fact that certain actions, which may have legal consequences, were undertaken by a party to the authentic instrument before the notary (e.g. the fact that one party has paid a certain amount of money to another party).

Legal issues as such can never benefit from this special evidential value: this is because they are not directly recorded by the notary but, instead, are based on a process of reasoning that was followed by the notary: e.g. when immovable property is sold, the authentic instrument employed in this transaction **does not** possess a special evidential value in respect of the question of *whether or not the seller was its true owner*.⁶⁵

⁶⁴ Mayors, Governors of provinces and certain other civil servants who buy land for the State also have roles concerning authentic instruments. These roles are not explored in this profile.

⁶⁵ Equally, the authentic instrument would *not* possess any special evidential value on the question of whether or not the money paid by one party to the other actually belonged to a third party.

The special evidential value attached to authentic instruments does not mean that the information covered cannot be challenged. In every case a challenge *always* remains possible. The special evidential value only means that the information covered benefits from a statutory **presumption of truthfulness**, which can only be overturned in specific circumstances, following a particular procedure which is quite cumbersome to activate, i.e. the '*procédure d'inscription de faux*' ('*betichting van valsheid*'). Failing such a challenge, the information benefitting from the higher evidential status can be used as conclusive evidence in any court proceedings or before any other authority. The mere production of the authentic instrument triggers the application of the special presumption, without any need for an additional verification process.

The evidential effects of authentic instruments apply fully between the parties to the instrument. Vis-à-vis third parties, the special evidential effect of an authentic instrument is more limited. Authentic instruments do have evidential value vis-à-vis third parties (meaning that a third party must also activate the '*procédure d'inscription de faux*' ('*betichting van valsheid*') to challenge the effect of the authentic instrument. A third party who brings such a challenge is not however bound by the more stringent Belgian evidence rules, such as the rule that one can only challenge written evidence with another written form of evidence.

Depending on how it has been drawn up, a Belgian *notarial* authentic instrument may also be directly enforceable. A creditor may therefore enforce a promise made in such an authentic instrument, without having to first obtain authorisation to do so from a court or tribunal (Article 19 of the Ventose Act). A suitably drafted authentic instrument is enforceable per se. This only applies to authentic instruments if they have been: a) drawn up **by a notary** to be enforceable,⁶⁶ and, b) if the 'creditor' has obtained an authentic copy of the authentic instrument (called an '*expédition*' or '*grosse*') from the notary.⁶⁷ The authentic copy will include a general statement explaining that the instrument is directly enforceable (the so-called '*formule exécutoire*'/'*uitvoeringsclausule*') – see Article 25 of the Ventose Act.

It should however be noted that the direct enforceability of a notarial authentic instrument is not quite equivalent with the enforceability granted to judgments and other court decisions. In contradistinction to the enforcement of a judgment, a court may grant the debtor of an enforceable authentic instrument the right to pay in several instalments (Article 1244 Civil Code). This is why a creditor of an enforceable authentic instrument may still go to court and obtain a judgment ordering payment of his claim.

Disputing the validity of an authentic instrument

If an authentic instrument is successfully challenged as to its formal validity/authenticity/*instrumentum* it will lose the evidentiary effects associated with public documents. If an authentic instrument is successfully challenged as to the validity of its *negotium*/material validity the instrument itself may still be technically valid but its evidentiary meaning will change accordingly and may well be rendered nugatory in practice.

Belgian law provides a special procedure that must be followed if a party wishes to challenge the *instrumentum* of an authentic instrument. This is the so-called "*procédure d'inscription en faux*"/'*betichting van valsheid*' (special forgery proceedings). There are two different ways of bringing these forgery proceedings to challenge the authenticity of

⁶⁶ The Belgian courts have broadened the concept of enforceability as it concerns notarial authentic instruments: it is not necessary that the authentic instrument contains an explicit promise to pay a fixed amount of money as long as it contains a promise to so perform.

⁶⁷ The original is retained by the notary in his records.

an authentic instrument: each procedure is deemed to concern public policy and so no further possibility exists to challenge the *authenticity/instrumentum* or formal validity of a Belgian authentic instrument. The first method of challenge is to launch proceedings before a criminal court. These criminal proceedings are launched by the public prosecutor and are conducted against the notary himself (or any other public official that drew up the disputed authentic instrument).⁶⁸ As soon as this special forgery procedure is launched, **the enforceability of the authentic instrument is provisionally stayed**. The second method of challenge is to raise the forgery issue as an incidental issue during the course of civil proceedings on the merits before an ordinary jurisdiction called upon to decide an issue on which the authentic instrument has a bearing. Article 895 of the Code of Civil Procedure makes it plain that in the second incidental challenge the authentic instrument itself is the target of the proceedings, rather than the notary (or other public official). When an incidental civil procedure is launched against an authentic instrument, its special evidential value and enforceability **are not ipso facto stayed**. The court must decide whether or not the authentic instrument will keep its evidential status and potential for enforceability during the challenge procedures.

The material content or *negotium* of an authentic instrument does not benefit from the special evidential value referred to above. As a consequence, the *negotium* of an authentic instrument may be challenged **without** having recourse to the special forgery proceedings. The ordinary rules of civil procedure apply. This includes the special evidentiary provisions set out in Article 1341 of the Civil Code such that the oral or sworn evidence of witnesses may not be used to challenge the *negotium*. According to Article 1341 of the Civil Code written evidence is required to successfully challenge the *negotium* of a document such as an authentic instrument. The material validity of an authentic instrument is not automatically affected by the initiation of proceedings against that instrument: during such proceedings the authentic instrument retains its evidential value and effects.

There is no special procedure governing a challenge to the actual enforcement of an authentic instrument. A challenge may however be attempted before the enforcement court ('*juge des saisies/beslagrechter*') as would any challenge against an enforcement measure. Equally, if no enforcement measure has yet been taken by the creditor, a challenge may be brought before the ordinary court (court of first instance).

The use of authentic instruments in domestic Belgian succession law

The authentic instruments employed in Belgian succession law are subject to the same rules and legal provisions that are set out above: though there are special provisions for some authentic instruments⁶⁹ that arise in the context of succession law. Belgian law does not domestically provide a special regime for authentic instruments arising in the course of a succession. Domestic succession authentic instruments are subject to the same provisions as any other authentic instruments.

There are a wide range of uses for authentic instruments in Belgian succession law. The following list indicates the documents that are regarded in Belgium as authentic instruments in matters of succession:

- a) An authentic will is an authentic instrument. Article 971 of the Civil Code provides that "A testament by public act shall be received by one notary attended by two witnesses or by two notaries".
- b) An international will under the Treaty of Washington (The Convention Providing a Uniform Law on the Form of an International Will, see <http://www.unidroit.org/instruments/succession>) consists of a hand-written

⁶⁸ For specific rules see Articles 193 to 197 of the Criminal Code.

⁶⁹ See Article 973 ff of the Civil Code.

private will document given by the testator to the notary and two witnesses which is then given proof of validity by the drawing up of an authentic instrument.

- c) The death certificate is an authentic instrument: Article 78 Civil Code.
- d) Article 976 of the Civil Code requires that once the testator has died, any holograph will⁷⁰ made by him must be presented to a notary who is then required to draft a document called a *process-verbal*. This document is an authentic instrument that signifies that the succession has been opened.
- e) A renunciation of the status of heir made to a notary is via an authentic instrument: Article 784 Civil Code.
- f) A waiver of rights by one spouse (or both spouses) in the estate of the other spouse at the point of marriage (a *Valkeniers-pact*) must be effected by authentic instrument: Article 1388 Civil Code.
- g) An authentic instrument may be used to record that a potential heir with a reserved share in the estate has consented to the testator making a lifetime gift to another heir on the terms set out in Article 918 Civil Code.
- h) If the heir accepts the succession with the benefit of an inventory, this inventory must be by authentic instrument: see Articles 794 Civil Code and 1177 of the Code of Civil Procedure.
- i) In the event that a notary is required to identify an heir and to specify the rights of that heir (please note that such a use of a notary is not the only way to achieve these ends in Belgian law) he must do so via an authentic instrument: Article 1240bis Civil Code.
- j) If an act of partition (*acte de partage/verdelingsakte*) is proposed and it is to be drawn up under Article 1207 Code of Civil Procedure and the parties agree with the partition proposed by the appointed notary, the division of the assets will be recorded in an authentic instrument. Also, if there should be a partition before a notary and one of the parties entitled is a minor, an authentic instrument is required for this document: Article 1206 Code of Civil Procedure. Equally, if the partition is of immovable property requiring registration when transferred *inter vivos* amongst the heirs, an authentic instrument will be required.

The Private International Law implications of the European Union's Succession Regulation 650/2012 and Implementing Regulation 1329/2014

The European Union Succession Regulation and its Implementing Regulation raise two distinct Private International Law issues for Belgium as an EU Member State: first, the extent of the obligations imposed by these Regulations on Belgium as a Member State of origin concerning its domestically created succession authentic instruments; and, second, the extent of the obligations these Regulations impose on Belgium as a Member State addressed concerning its duties relating to incoming foreign succession authentic instruments. The comments that follow consider each position.

Belgium is the Member State of origin: obligations concerning domestic succession authentic instruments

Article 59(1) of the European Union Succession Regulation allows, but does not require, 'a person' who wishes to use a succession authentic instrument in another Member State to ask the authority who established it, i.e. the notary who drew it up⁷¹ or his substitute/successor, to issue an attestation concerning that authentic instrument on the standard form provided by Annex 2 Form II of Implementing Regulation 1329/2014. It is unclear whether or not such a request must be complied with if it is received from a person not deemed by the notary to be 'an interested party'. The substitution of the phrase 'a person' in Article 59 for 'interested party' in Article 60 could be understood to indicate that there is no requirement in the EU Succession Regulation for the applicant

⁷⁰ Since 1983 Belgian law has not allowed mystic wills. Although Belgian law allows certain forms of privileged will, these wills are equivalent to holograph wills; no privileged will is equivalent to an authentic will.

⁷¹ There is no implementing legislation on this point in Belgium.

seeking only cross-border acceptance to demonstrate what would otherwise be domestically regarded as a 'legitimate interest' when requesting the attestation from the notary. The exact composition of the class of those who may apply for such an attestation is, in the absence of any specific provisions, currently unclear. It is assumed that the parties to an authentic instrument, those deriving rights from that instrument and those interested in the succession may apply to the notary. The EU Succession Regulation and its Implementing Regulation do not expressly contemplate the possibility that a request under Article 59 may be refused. It is however possible to contrast the applicant 'may ask' of Article 59 with 'the authority shall' in Article 60(2) and to infer from the different wording that the notary (or other public authority) is only actually obliged to accede to the applicant's request when it concerns enforcement under Article 60. This result however seems inconsistent with Recitals 22, 59 and 60 of the EU Succession Regulation and with one of its underlying purposes, i.e. to facilitate the cross-border transmission of authentic instruments and their legal effects. In circumstances where both the acceptance and the enforcement of the authentic instrument may be sought the problem may be avoided, assuming the notary to be willing to provide information concerning both Article 59 and Article 60, by the applicant routinely requesting an attestation concerning *both* enforcement and acceptance.

Article 60 of Regulation 650/2012 requires that, provided that to so declare would not be manifestly contrary to its public policy, the authorities in the Member State addressed *must* on application by an interested person declare a foreign succession authentic instrument that is enforceable in its Member State of origin to also be enforceable in their Member State. A Belgian notary may thus be in receipt of a request for such an attestation, again under Annex 2 Form II of Implementing Regulation 1329/2014. This standard form allows for an attestation that concerns only 'acceptance', via Article 59, or 'enforcement' via Article 60, or an attestation that jointly concerns acceptance and enforcement of the authentic instrument depending upon the boxes ticked by the Belgian notary.

The Belgian notary in receipt of the request to provide a completed Annex 2 Form II attestation concerning a domestic succession authentic instrument is asked to indicate at points 4.2 to 4.2.1.1.7 of the standard form what he believes its domestic evidentiary effects to be. Though the answers will vary depending upon the specific verifications contained in the succession authentic instrument at issue, it is broadly conceivable that points 4.2.1.1.1 to 4.2.1.1.7 could be expected to be completed as follows:

4.2.1.1.1 - The date the authentic instrument was drawn up:

Article 1319 Code Civil - specific evidentiary effects are produced in relation to all authentic recordings of verified facts by the notary or other public official who drafts the authentic instrument (e.g. all information the public official has verified to draw up and issue the authentic instrument, such as the place and date of the instrument, the appearance of parties to the instrument, their identities, etc).

4.2.1.1.2 - The place where the authentic instrument was drawn up:

Article 1319 Code Civil - specific evidentiary effects are produced in relation to all authentic recordings of verified fact by the notary or other public official who drafts the authentic instrument.

4.2.1.1.3 - The origin of the signatures from the parties of the authentic instrument:

Article 1319 Code Civil - specific evidentiary effects are produced in relation to all authentic recordings of verified fact by the notary or other public official who drafts the authentic instrument.

4.2.1.1.4 - The content of the declarations of the parties:

Article 1319 Code Civil - Yes, but only in the sense that it proves that the parties actually made the declarations recorded in the authentic instrument in the presence of the notary who drew up that authentic instrument.

N.B. Not however in the sense that the authentic instrument *therefore* and without more proves that the declarations by the parties are true and nor that the event (concerning which the declaration was made) necessarily actually occurred.

4.2.1.1.5 - The facts that the authority declares as having been verified in its presence:
Article 1319 Code Civil - specific evidentiary effects are produced in relation to all authentic recordings of verified facts by the notary or other public official who drafts the authentic instrument.

4.2.1.1.6 - The actions which the authority declares to have carried out:
Article 1319 Code Civil - specific evidentiary effects are produced in relation to all authentic recordings of verified facts by the notary or other public official who drafts the authentic instrument.

4.2.1.1.7 - Other: (please indicate any other evidentiary effect that a domestic authentic instrument could produce)

Under Article 1319 Code Civil certain actions undertaken by parties, which may have legal consequences (e.g. the fact that one party has paid a certain amount of money to another party) are also covered by the special evidentiary value afforded to authentic instruments, provided they have been witnessed directly by the notary. It is conceivable that additional information concerning such actions could be presented in this box.

It should also be noted that if the authenticity of a Belgian authentic instrument is challenged by the civil incidental route (*inscription en faux/betichting van valsheid* - see explanation above) the staying of evidential effect/enforceability is NOT prior to the final determination automatic on the bringing of the challenge. Instead any stay of evidential effect depends on the decision of the Belgian court on this question: Article 1319 Civil Code; Article 19 Ventose Act. Equally, the final determination of the court concerning the challenged authentic instrument has to be written onto the authentic instrument. Such information might feature in this box.

Belgium is the Member State addressed: foreign succession authentic instruments

The EU Succession Regulation requires that, subject to very narrow public policy exceptions, Belgian authorities must **accept** and, or, **enforce** foreign authentic instruments in matters of succession received from other EU Member States bound by the Succession Regulation.

The **acceptance** of a foreign succession authentic instrument is governed by Article 59 and the enforcement of such an authentic instrument is governed by Article 60 of the EU Succession Regulation. Acceptance requires that, provided that to do so would not be manifestly contrary to Belgian domestic public policy, the authorities in Belgium (as the Member State addressed) *must* grant the foreign succession authentic instrument the same (or most comparable) evidentiary effects as it would enjoy in its own Member State of origin.

To determine the nature of the evidentiary effects that would be associated with that authentic instrument in the Member State of origin, reference should be made to any Annex 2 Form II form that may accompany the foreign authentic instrument, especially to parts 4.2.1.1.1 – 4.2.1.1.7 of any such form. It must however be noted that the use of the Implementing Regulation's Annex 2 form does not appear to be obligatory. The obligation imposed by Article 59 of the EU Succession Regulation on the Member State addressed to accept a succession authentic instrument does not require or depend upon the use or supply of the Annex 2 form. A succession authentic instrument received from a Member State of origin in accordance with the provisions of the EU Succession Regulation must still be accepted, within the meaning of Article 59 of Regulation 650/2012, even if no Annex 2 Form II form is provided or if the Annex 2 form provided is not fully or properly completed. At present there are no provisions in Belgian law that

specifically deal with the acceptance of a foreign authentic instrument concerning a matter of succession under the EU Succession Regulation.

The **enforcement** of a foreign authentic instrument via Article 60 of Regulation 650/2012 requires that, provided that to do so would not be manifestly contrary to its public policy, the authorities in the Member State addressed (Belgium) must on application by an interested person declare enforceable a foreign succession authentic instrument that is enforceable in its Member State of origin. We are not aware of any special provision in the law of Belgium that specifically deals with the actual enforcement of a foreign authentic instrument after it has been declared enforceable (differently from the actual enforcement of a foreign judgment that has been declared enforceable) in accordance with the procedure laid down in Articles 45 to 58 of the EU Succession Regulation as required by Article 60 thereof..

Belgian public policy

The EU Succession Regulation allows a public policy defence in various contexts including with reference to authentic instruments under Articles 59 and 60. To invoke the public policy exception in the context of Article 59, and by so doing to justify a refusal of acceptance of that foreign authentic instrument, it must be the case that the *granting of the same or most comparable evidentiary effects* to the foreign authentic instrument would be manifestly contrary to Belgian public policy. To invoke the public policy exception in the context of Article 60, to justify a refusal of a declaration of enforceability of the foreign authentic instrument, it must be that the *granting of the declaration of enforceability* of the foreign authentic instrument would be manifestly contrary to Belgian public policy. Of course this public policy exception should be construed narrowly and it is envisaged that it will rarely apply. As is made plain by Recital 58 of the EU Succession Regulation, public policy is not to be applied in a manner that is discriminatory or otherwise contrary to the European Union's Charter of Fundamental Rights. Equally however Recital 26 of Regulation 650/2012 indicates that the Regulation does not prevent a court from applying mechanisms designed to tackle the evasion of the law, such as *fraude à la loi* in the context of Private International Law. However, the substantive provisions of the Regulation do not expressly empower national courts to prevent evasion of the law (including *fraude à la loi*). It would seem that the only positive basis for doing so under the Regulation is to regard such evasion of the law to be contrary to public policy unless the law being evaded is one of the "special rules" of the forum concerning certain assets that is applicable irrespective of the law applicable to the succession (see Article 30 of the EU Succession Regulation).

No case can be found in recent decades where a foreign authentic instrument (in succession matters) had been denied effect in Belgium on account of a violation of Belgian public policy. Commentators have suggested hypothetical examples of situations in which a foreign authentic instrument would be denied effect. Professor Weyts for example has argued that a foreign authentic instrument which would have an effect of depriving heirs of their reserved share should be denied effect in Belgium.⁷² This suggestion has not however been tested in court and therefore cannot be confirmed.

Outside succession law, authentic instruments have been denied effect quite frequently on public policy grounds. One of the most frequent examples concerns marriages celebrated abroad. Belgian courts have regularly refused to take into account such a marriage after having found that it was a marriage of convenience or a sham marriage.

⁷² L. Weyts, "Wat is de waarde van mijn notariële akte in het buitenland, en vice versa? Over de circulation van notariële akten binnen de Europese Unie", Tijdschrift voor notarissen, 2014, at p. 534.

Incompatible Authentic instruments

Recital 66 of the EU Succession Regulation envisages the possibility of 'an authority' being presented with incompatible authentic instruments.⁷³ The solutions suggested by the Recital are to consider priority and the circumstances of the particular case and then, if this has not resolved the incompatibility, to resort to a court with direct or incidental jurisdiction under the EU Succession Regulation. At present there are no provisions in Belgian law that specifically deal with the possibility of incompatible succession authentic instruments.

⁷³Recital 66: Should an authority, in the application of this Regulation, be presented with two incompatible authentic instruments, it should assess the question as to which authentic instrument, if any, should be given priority, taking into account the circumstances of the particular case. Where it is not clear from those circumstances which authentic instrument, if any, should be given priority, the question should be determined by the courts having jurisdiction under this Regulation, or, where the question is raised as an incidental question in the course of proceedings, by the court seised of those proceedings. In the event of incompatibility between an authentic instrument and a decision, regard should be had to the grounds of non-recognition of decisions under this Regulation.

BULGARIA

The Bulgarian legal system

Bulgaria consists of a single legal system that belongs to the civil law family. The substantive law concerning Bulgarian succession law is located in the Inheritance Act 1949. The relevant procedural law relating to succession is found within the Code of Civil Procedure. The Bulgarian law concerning succession is in the process of being updated to implement the European Union Succession Regulation.

The concept of an authentic instrument in Bulgaria

The Bulgarian legal system makes extensive use of public documentary evidence including authentic instruments created by notaries. Public documents may also be created by official bodies of state and also, in certain circumstances, by Bulgarian consuls and by the captains of Bulgarian registered ships. The Bulgarian Code of Civil Procedure provides for the evidentiary effect of these authentic instruments and other official public documents as follows:

- Article 179, (1) An official document, drafted by an official within the scope of his duties in the established form and under the established procedure, shall be evidence of the statements made before him, as well as of the performed actions before him.
(2) Officially certified copies or extracts of official documents shall have the same evidentiary effect.

The substantive Bulgarian law concerning authentic instruments is variously located in the following Bulgarian legislation: the Obligation and Contracts Act; the Inheritance Act; the Special Pledges Act. The Commercial Act; and the Property Act.⁷⁴ These provisions cover authentic instruments involved in the following transactions:

- 1) Any contract transferring property or other rights *in rem* of immovables, including a mortgage or hypothec, has to be executed via an authentic instrument drawn up by a notary.
- 2) Any contract for partition of immovable property is required to be in a written form as an authentic instrument with notarial verification of the signatures of the parties.
- 3) The type of authentic instrument created above in point 2 also has to be established for contracts transferring establishment, for contracts for special pledge of establishment, for contracts transferring ownership of a motor vehicle, etc.
- 4) A notary will and also the announcement of a holograph will on the death of the testator - see below – are both authentic instruments.
- 5) an authentic instrument is also required to create a power of attorney that allows the transfer of immovable property;

It should however be noted that though the Bulgarian legal system allows the creation of domestically enforceable authentic instruments in appropriate circumstances, these authentic instruments cannot be enforced without seeking and receiving the permission of the Bulgarian court. A Bulgarian authentic instrument is not inherently domestically enforceable without receiving the necessary permission to enforce from the court. This is the case even if a potential for enforceability is appropriate in the circumstances and is also reflected in the drafting of the authentic instrument.

⁷⁴ The former Inheritance Act is available in English at <http://www.bulgaria-inheritance-law.bg/law.html>. For the pre 2015 version of the Code of Civil Procedure (amendments reflecting adjustments required by Regulation 650/2012 are still in the process of being passed into law) and legislation relating to notaries – with original, English and French language options – see the website of the Bulgarian Chamber of Notaries: http://www.notary-chamber.org/en/normativna_uredba.html. For other legal materials in English see the Supreme Court website http://www.vks.bg/english/vksen_p04_02.htm.

Evidentiary effects of domestic authentic instruments in Bulgarian law

It follows from the provisions of Article 179 of the Bulgarian Code of Civil Procedure (above) that a Bulgarian authentic instrument may, depending upon how it is drawn up, produce evidential effects that authoritatively establish: the date of the authentic instrument; the place where the authentic instrument was drawn up; the identity of the notary; the identity and ages of the parties and the appending of their signatures to the document; the content of the authentic instrument including notarially verified facts (including *ownership* if the authentic instrument concerns the transfer of immovable property or *in rem* rights in such immovables) and notarially verified actions; and also statements made by the parties before the notary and recorded by him in the authentic instrument. Article 580 of the Code of Civil procedure sets out the general matters required to be present in a notarial authentic instrument.⁷⁵

Article 580 Code of Civil Procedure

The notary act shall contain:

1. the year, month, day and where it is necessary - also the hour and the place of its execution;
2. the name of the notary public, executing it;
3. the full name and the unified civil number of the persons who participated in the procedure, as well as the number, the date, the place and the body that issued their identity documents
4. the substance of the act;
5. short denotation of the documents, certifying the presence of the requirements under Article 586;
6. signature and full name of the parties or their attorneys and a signature of the notary public.

Disputing the validity of the authentic instrument

If an authentic instrument is successfully challenged as to its formal validity/authenticity/*instrumentum* it will lose the evidentiary effects associated with authentic instruments as a type of public document. If an authentic instrument is successfully challenged as to the validity of its *negotium*/material validity the instrument itself is still valid but its evidentiary meaning may well be rendered nugatory by the challenge.

The authenticity and the material content of a Bulgarian authentic instrument may each be challenged by lodging a claim with the court under the relevant sub paragraphs of Article 124 of the Code of Civil Procedure. For a dispute as to the authenticity or *instrumentum* the claim is governed by Article 124(4); 'A claim to ascertain the truthfulness or untruthfulness of a document may be submitted. A claim to ascertain the existence or non-existence of other facts of legal importance shall be admitted only in the cases provided by law'. If the challenge is successful, the court will declare the authentic instrument to be untruthful and it will cease to be a public document and hence will lose its evidential value and effect.

For a dispute as to the material content or *negotium* of an authentic instrument, the claim is governed by either Article 124 (1) or (3) of the Code of Civil Procedure. Article 124(1) concerns a general legal process to recover a right of the claimant, if it is violated, or to ascertain the existence or non-existence of a legal relationship or of a right, if he has an interest in this. Article 124(3) of the Code of Civil Procedure allows the lodging of a claim for forming, amending or terminating civil legal relationships in situations where this is provided for by law. There may also be a special claim where the authentic instrument affects the rights of third persons, arising from this dispute, and if

⁷⁵ Additional information may be required by the law in certain specific circumstances.

this is for the infringement of a civil right it shall be settled under the claim procedure. The claim shall be lodged against the person who benefits from the act (Article 537 Code of Civil Procedure). The claim is subject to general contentious proceedings rules and can lead to a judicial decision establishing the material invalidity of the authentic instrument or its revocation or amendment. If invalidity or revocation of the material content of the authentic instrument is ordered it will lose its evidential value and effect on these issues.

As noted above, there is no inherent enforceability for Bulgarian authentic instruments unless and until a court authorises the enforcement of an enforceable authentic instrument. Thus if there is a challenge to the enforcement of the authentic instrument this challenge is actually a challenge to the decision of the court that allowed the enforcement. The challenge to enforceability may, depending on the circumstances, arise as follows:

- 1) as an issue decided jointly with the substance of the matter (under the so called procedure for issuance of an enforcement order Article 417 of the Code of Civil Procedure);
- 2) as a separate issue concerning events occurring after the court's decision to allow enforcement subject to a special claim (Article 439 of the Code of Civil Procedure);
- 3) as an issue leading to revocation of the decision based on defects in the authentic instrument (such as evidence emerging in court proceedings indicating either the falsehood of a document or of the testimony of the witnesses see Article 303(2) of the Code of Civil Procedure).

Any of these three types of proceeding may result in the termination of the earlier enforcement decision and thus may prevent the domestic enforceability of the authentic instrument.

The use of authentic instruments in domestic Bulgarian succession law

There is a narrow range of notarially created authentic instruments in Bulgarian succession law: in many cases the post mortem operation of Bulgarian succession law involves the municipality and the court rather than the notary. The following list indicates the documents that are likely to be regarded as notarially created authentic instruments in matters of succession:

- a) **A notarial will** is one written by a notary in accordance with Article 25 of the Inheritance Act: the testator verbally expresses his will to the notary, who shall write it as it has been expressed, after which he shall read the will to the testator in the presence of two witnesses. The notary shall note these formalities in the will, marking also the place and the date of compiling. After this the will shall be signed by the testator, the witnesses and the notary;
- b) The obligatory notarial **announcement** of a holograph will. NB The holograph will itself is a private and NOT a public document.⁷⁶
- c) A **voluntary** partition⁷⁷ contract also requires notarial verification of the signatures of all co-owners prior to compulsory registration at the Registry Agency.
- d) Lastly, although NOT issued by a notary, a Bulgarian **inheritance certificate**: issued to any heir by the appropriate municipality is *also* considered to be an

⁷⁶ A holograph will must be written entirely by hand by the testator himself, contain the date, when it has been compiled and it must be signed by him after his testamentary dispositions. If the will is given to the notary for safekeeping it must be in a closed envelope: the notary will compile a record of the details of the matter on the very envelope containing the holograph will. This record must be signed by the person, who has presented the will and by the notary and it shall be registered in a special register.

⁷⁷ In contrast to judicial partition proceedings, which occur when a consensus cannot be reached among the co-owners.

authentic instrument and thus also benefits from the enhanced evidentiary effects contemplated by Article 179 of the Civil Procedure Code.

The Private International Law implications of the European Union's Succession Regulation 650/2012 and Implementing Regulation 1329/2014

The European Union Succession Regulation and its Implementing Regulation raise two distinct Private International Law issues for Bulgaria as an EU Member State: first, the extent of the obligations imposed by these Regulations on Bulgaria as a Member State of origin concerning its domestically created succession authentic instruments; and, second, the extent of the obligations these Regulations impose on Bulgaria as a Member State addressed concerning its duties relating to incoming foreign succession authentic instruments. The comments that follow consider each position.

Bulgaria is the Member State of origin: obligations concerning domestic succession authentic instruments

Article 59(1) of the European Union Succession Regulation allows, but does not require, '*a person*' who wishes to use a succession authentic instrument in another Member State to ask the authority who established it, i.e. the notary who drew it up or his substitute / successor, to issue an attestation concerning that authentic instrument on the standard form provided by Annex 2 Form II of Implementing Regulation 1329/2014. It is unclear whether or not such a request must be complied with if it is received from a person not deemed by the notary to be '*an interested party*'. The substitution of the phrase '*a person*' in Article 59 for '*interested party*' in Article 60 could be understood to indicate that there is no requirement in the Succession Regulation for the applicant seeking only cross-border acceptance to demonstrate what would otherwise be domestically regarded as a '*legitimate interest*' when requesting the attestation from the notary.

It seems that this issue will only be a problem in Bulgaria if applicants deemed by a notary to lack the necessary legitimate interest, wish to have access to a notarial will. The European Union Succession Regulation and its Implementing Regulation do not expressly contemplate the possibility that a request under Article 59 may be refused. It is however possible to contrast the applicant '*may ask*' of Article 59 with '*the authority shall*' in Article 60(2) and to infer from the different wording that the notary (or other public authority) is only actually obliged to accede to the applicant's request when it concerns enforcement under Article 60. This result however seems inconsistent with Recitals 22, 59 and 60 of the EU Succession Regulation and with one of its underlying purposes, i.e. to facilitate the cross-border transmission of authentic instruments and their legal effects.

The '*obvious*' way to avoid the abovementioned difficulty (by applying for both acceptance and enforcement of the Bulgarian authentic instrument) is actually problematic given that Bulgarian law only allows the enforceability of domestic authentic instruments that are drawn up to contemplate such enforcement (which a will may well not be) and that also receive judicial permission for their enforcement. Without an authentic instrument drafted for enforceability that has then been judicially declared enforceable there is seemingly no possibility of domestically complying with the requirements of Article 60 of the European Union Succession Regulation or for the notary who drew up the authentic instrument from completing those parts of the Annex 2 Form II form that concern enforcement under Article 60. Whether a Bulgarian notary may ever properly be requested to complete an Annex 2 Form II attestation concerning Article 60 of the EU Succession Regulation is presently unclear. The judicial permission required to allow the domestic enforceability of an authentic instrument does not clearly indicate whether Annex 1 Form I or Annex 2 Form II of European Implementing Regulation 1329/2014 should be completed.

It should however be remembered that a Bulgarian certificate of inheritance – issued by the relevant municipality – is also regarded as a domestic authentic instrument and further that it is available to any heir. In the event that it was desired to send this authentic instrument from Bulgaria to another participating Member State Article 59 of the European Union Succession Regulation would allow it to produce its evidentiary effects, as detailed on the Annex 2 Form II attestation form completed by an officer of the relevant municipality that had issued the certificate of inheritance.

A Bulgarian notary in receipt of the request to provide a completed Annex 2 Form II attestation concerning a domestic succession authentic instrument is asked to indicate at points 4.2 to 4.2.1.1.7 of the standard form what he believes its domestic evidentiary effects to be. Though the answers will vary depending upon the specific verifications contained in the succession authentic instrument at issue, it is broadly conceivable that an authentic instrument from Bulgaria could produce the evidentiary effects set out at points 4.2.1.1.1 to 4.2.1.1.7 of the Annex 2 Form II form so that it could be expected to be completed as follows:

4.2.1.1.1 - The date the authentic instrument was drawn up:

This fact is included within the evidentiary effect of Articles 179 and 580 of the Code of Civil Procedure.

4.2.1.1.2 - The place where the authentic instrument was drawn up:

This fact is included within the evidentiary effect of Articles 179 and 580 of the Code of Civil Procedure.

4.2.1.1.3 - The origin of the signatures from the parties of the authentic instrument:

This fact is included within the evidentiary effect of Articles 179 and 580 of the Code of Civil Procedure.

4.2.1.1.4 - The content of the declarations of the parties:

The fact that the parties made their declarations before the notary will be included within the evidentiary effect of Articles 179 and 580 of the Code of Civil Procedure.

4.2.1.1.5 - The facts that the authority declares as having been verified in its presence:

These facts are included within the evidentiary effect of Articles 179 and 580 of the Code of Civil Procedure.

4.2.1.1.6 - The actions which the authority declares to have carried out:

These actions are included within the evidentiary effect of Articles 179 and 580 of the Code of Civil Procedure: e.g. drafting a notary Will, making a notarial announcement of a holograph Will.

4.2.1.1.7 - Other: (please indicate any other evidentiary effect that a domestic authentic instrument could produce)

Bulgaria reserves a particular role to its notaries in connection with the accurate establishment of the owners of immovable Bulgarian property and contracts relating thereto prior to registration. Thus notarially created authentic instruments concerning contracts transferring immovable property can authoritatively indicate the identity of current and former owners of that property.

Bulgaria is the Member State addressed: foreign succession authentic instruments

The Succession Regulation requires that, subject to public policy exceptions, Bulgarian authorities must **accept** and, or, **enforce** foreign authentic instruments in matters of succession received from other EU Member States bound by the EU Succession Regulation.

The **acceptance** of a foreign succession authentic instrument produced in Bulgaria is governed by Article 59 and the enforcement of such an authentic instrument is governed by Article 60 of the Succession Regulation. Acceptance requires that, provided that to do so would not be manifestly contrary to Bulgarian domestic public policy, the authorities in Bulgaria (as the Member State addressed) *must* grant the foreign succession authentic instrument the same (or most comparable) evidentiary effects as it would enjoy in its own Member State of origin.

To determine the nature of the evidentiary effects that would be associated with that authentic instrument in the Member State of origin, reference should be made to any Annex 2 Form II form that may accompany the foreign authentic instrument, especially to parts 4.2.1.1.1 – 4.2.1.1.7 of any such form. It must however be noted that the use of the Implementing Regulation's Annex 2 form does not appear to be obligatory. The obligation imposed by Article 59 of the EU Succession Regulation on the Member State addressed to accept a succession authentic instrument does not require or depend upon the use or supply of the Annex 2 form. A succession authentic instrument received from a Member State of origin in accordance with the provisions of the EU Succession Regulation must still be accepted, within the meaning of Article 59 of Regulation 650/2012, even if no Annex 2 Form II form is provided or if the Annex 2 form provided is not fully or properly completed.

At present there are no provisions in Bulgarian law that specifically deal with the acceptance of a foreign authentic instrument concerning a matter of succession under the EU Succession Regulation.

The **enforcement** of a foreign authentic instrument via Article 60 of Regulation 650/2012 requires that, provided that to do so would not be manifestly contrary to Bulgarian public policy, the authorities in the Member State addressed (Bulgaria) must on application by an interested person declare enforceable a foreign succession authentic instrument that is enforceable in its Member State of origin. As there is no independent inherent enforceability of Bulgarian authentic instruments, Article 60 of the EU Succession Regulation notionally requires the Bulgarian legal system to give foreign succession authentic instruments greater effect than a comparable domestic authentic instrument. This observation should however be qualified by referring to two points. First, the procedure required by Article 60 involves a domestic declaration of enforceability that is close to the existing Bulgarian approach to the grant of enforceability. Second, the discontinuity between the inherent enforceability of domestic and foreign authentic instruments has also arisen, seemingly without leading to difficulties, in relation to other provisions of European Union Private International Law. Accordingly it is suggested that the Bulgarian legal system will not face undue problems in relation to acting as a Member State addressed in the context of Article 60 of the Succession Regulation. We are not aware of any special provision in the law of Bulgaria that specifically deals with the actual enforcement of a foreign authentic instrument after it has been declared enforceable (differently from the actual enforcement of a foreign judgment that has been declared enforceable) in accordance with the procedure laid down in Articles 45 to 58 of the EU Succession Regulation as required by Article 60 thereof.

Bulgarian public policy

The EU Succession Regulation allows a public policy defence in various contexts including with reference to authentic instruments under Articles 59 and 60. To invoke the public policy exception in the context of Article 59, and by so doing to justify a refusal of acceptance for that foreign authentic instrument, it must be the case that the *granting of the same or most comparable evidentiary effects* to the foreign authentic instrument would be manifestly contrary to Bulgarian public policy. To invoke the public policy exception in the context of Article 60, to justify a refusal of a declaration of enforceability

for the foreign authentic instrument, it must be that the *granting of the declaration of enforceability* for the foreign authentic instrument would be manifestly contrary to Bulgarian public policy. Of course all public policy exceptions should be construed narrowly and it is envisaged that it will rarely apply. As is made plain by Recital 58 of the EU Succession Regulation, public policy is not to be applied in a manner that is discriminatory or otherwise contrary to the European Union's Charter of Fundamental Rights. Equally however Recital 26 of Regulation 650/2012 indicates that the Regulation does not prevent a court from applying mechanisms designed to tackle the evasion of the law, such as *fraude à la loi* in the context of Private International Law. However, the substantive provisions of the Regulation do not expressly empower national courts to prevent evasion of the law (including *fraude à la loi*). It would seem that the only positive basis for doing so under the Regulation is to regard such evasion of the law to be contrary to public policy unless the law being evaded is one of the "special rules" of the forum concerning certain assets that is applicable irrespective of the law applicable to the succession (see Article 30 of the EU Succession Regulation).

Bulgarian public policy is already a narrowly construed legal exception. Bulgaria under its pre-EU Succession Regulation law was willing to allow foreign judgments, decisions⁷⁸ and authentic instruments⁷⁹ to produce legal effects in the context of succession law in its legal system.⁸⁰ It has, according to our Bulgarian National Reporter, been suggested by some in the Bulgarian academic literature that a foreign decision that conflicted with the Bulgarian concept of a legitimate portion of an inheritance could be contrary to Bulgarian public policy but there does not appear to be any case law on this point. It seems reasonable to conclude that the Bulgarian approach to the application of public policy exceptions in the EU Succession Regulation will be similar to its restrictive approach to the use of public policy under the prior law.

Incompatible Authentic instruments

Recital 66 of the EU Succession Regulation envisages the possibility of 'an authority' being presented with incompatible authentic instruments.⁸¹ The solutions suggested by the Recital are to consider priority and the circumstances of the particular case and then, if this has not resolved the incompatibility, to resort to a court with direct or incidental jurisdiction under the Succession Regulation. At the time of writing there are no provisions in Bulgarian law or practice that address this point.

⁷⁸ A German decision establishing the heirs of a deceased Bulgarian may be recognised by the notary when a notary deed is created. The same decision may be recognised in a Bulgarian judicial partition procedure.

⁷⁹ A Dutch inheritance certificate issued by a notary in Amsterdam of a Dutch citizen living in Bulgaria could be accepted in Bulgaria as evidencing the heirs. The heirs may rely on this authentic instrument and request the bank to pay them the amounts deposited by the deceased Dutch citizen.

⁸⁰ Article 179 of the Bulgarian Code of Civil Procedure does not distinguish between domestic and foreign authentic instruments/official public documents. Article 31 of the Code of Private International Law directs that the validity of foreign official documents is to be determined by the law of the State of origin.

⁸¹ Recital 66: Should an authority, in the application of this Regulation, be presented with two incompatible authentic instruments, it should assess the question as to which authentic instrument, if any, should be given priority, taking into account the circumstances of the particular case. Where it is not clear from those circumstances which authentic instrument, if any, should be given priority, the question should be determined by the courts having jurisdiction under this Regulation, or, where the question is raised as an incidental question in the course of proceedings, by the court seised of those proceedings. In the event of incompatibility between an authentic instrument and a decision, regard should be had to the grounds of non-recognition of decisions under this Regulation.

CROATIA

The Croatian legal system

Croatia consists of a single legal system that belongs to the civil law family. The Croatian law concerning succession has, in general, been updated to implement the European Union Succession Regulation via the various legislative provisions and amendments described and set out below.

The Croatian Parliament has adopted EU Succession Regulation Implementation Act (Official Gazette no.152/14) which entered into force on August 17, 2015. The Ministry of Justice also brought in an Ordinance on the amount of remuneration and reimbursement of costs of civil notaries as court commissioners in issuing, correcting, amending, revoking or granting a temporary suspension of the European Certificate of Succession.⁸²

Other relevant Croatian legislation consists of the Inheritance Act,⁸³ the Croatian Civil Procedure Act,⁸⁴ the Notaries Act,⁸⁵ and the Execution of Civil Judgments Act.⁸⁶

The concept of an authentic instrument in Croatia

The Croatian legal system makes use of public documents and authentic instruments in all areas of private law.

Concerning authentic instruments: Croatian notaries and courts are competent to create authentic instruments. According to Article 230 of the Code of Civil Procedure, every document issued by a public body, within the limits of its powers and competences, is considered to be a "public document" that establishes a rebuttable presumption that the facts, verified therein by the public body, are true. The vast majority of authentic instruments are created by notaries.

Authentic instruments are required to be used for certain types of contract that must be drawn up in the form of a notarial record. When creating an authentic instrument in these circumstances the Croatian notary is obliged to ensure that the notarial record will not contravene mandatory provisions of law. The use of the authentic instrument/notarial record does not however constitute conclusive evidence as to the material validity of the contract. It can still be invoked that the contract is null and void or voidable, however notaries public can be held liable for breaches of their obligation of diligence. As well as the uses of authentic instruments mentioned above, the Croatian Notarial Act provides for agreements on disposition of assets of minors and wards; agreements on conveyance of property without conveyance of direct possession; agreements between deaf persons who cannot read or mute persons who cannot write (Article 53). Additionally there are a range of matters that require an authentic instrument in Croatian company and commercial law (see the Companies Act - Official Gazette no. 111/93, 34/99, 121/99 52/00, 118/03, 107/07, 146/08, 137/09, 125/11, 111/12, 68/13 and 110/15 - Articles 94a, 387, 412, 454, etc.) and the Civil Obligations Act (Official Gazette no. 35/05, 41/08, 125/11, 78/15) concerning lifelong support agreements, support until death agreements and certain types of donation agreements

⁸² Croatian version available at: <http://narodne-novine.nn.hr>.

⁸³ Official Gazette no. 48/03, 163/03, 35/05, 127/13. Only available in current form in Croatian at: <http://narodne-novine.nn.hr> and at <http://www.zakon.hr/z/87/Zakon-o-naslje%C4%91ivanju>.

⁸⁴ Official Gazette no. 53/91., 91/92., 112/99., 88/01., 117/03., 88/05., 2/07., 84/08., 96/08., 123/08., 57/11. 148/11, 25/13. Only available in current form in Croatian at: <http://narodne-novine.nn.hr>.

⁸⁵ 78/93, 29/94, 162/98, 16/07, 75/09 Zakon o javnom bilježništvu, see Narodne novine <http://www.zakon.hr/z/188/Zakon-o-javnom-bilje%C5%BEen%C5%A1tvu>.

⁸⁶ 112/12, 25/13, 93/14 Zakon o ovršnom postupku, see Narodne novine <http://www.zakon.hr/z/74/Ovr%C5%ACA1ni-zakon>.

that have to be created in the form of an authentic instrument or by an authenticated private deed (Articles 482, 491, 580, 589). Additionally see the Act on Protection of Persons Suffering From Mental Incapacity (Official Gazette no. 76/14) concerning an anticipated power of attorney (Articles 68 and 71).

Concerning authenticated documents: According to Article 230 of the Code of Civil Procedure, other private documents may also be converted to an evidentiary equivalence with public documents by due compliance by a public officer with specified legal processes e.g. notarial authentication. Thus Croatian notaries, where appropriate and provided for by law, may authenticate private deeds.

Though it may, of course, go further, the authentication of a private document by a notary frequently will only concern that notary acting to verify the signatures of the parties. There are numerous contracts (e.g. sale of real estate) and legal operations (e.g. an application to record a right *in rem* in a property register) where it is required that the signature must be so 'notarised'. In such circumstances the notary is not obliged to officially control the contents of the contract and in such a situation his authentication of the signature does *not* extend to certify that the contract is valid. His activity is strictly limited to verifying the identity of the person or persons who has signed the document.

Evidentiary effects of domestic authentic instruments in Croatian law

The evidential effects of authentic instruments (and authenticated private deeds) consist of a rebuttable presumption of veracity of their factual content and what they certify as having occurred as per Article 230 of the Code of Civil Procedure. An authentic instrument establishes full proof with regard to the facts and notarial actions that are recorded within it (e.g. place and time of authentication, identification of parties who personally appeared before the notary, declarations contained in the authentic instrument have been made by the parties indicated, that the document was read aloud to the parties by the notary before it was signed, that the party signing the document confirmed that it corresponds to his true will, that no duress or incapacity was apparent at that moment and that the notary public considered whether the document contravenes mandatory rules of law and was of the opinion that this is not the case (although concerning the latter, there is no conclusive evidence or even a presumption that the document is indeed valid).

In case of a document with only a notarised signature the authentication constitutes full proof of only the identity of the person signing the document and of the fact that the document was signed in the presence of the notary.

Disputing the validity of the authentic instrument

If an authentic instrument is successfully challenged as to its formal validity/authenticity/*instrumentum* it will lose the evidentiary effects associated with authentic or authenticated documents as public documents. If an authentic instrument is successfully challenged as to the validity of its *negotium*/material validity the instrument itself is valid but its evidentiary meaning will change accordingly and may well be rendered nugatory.

As Article 230 of the Code of Civil Procedure makes plain, the authenticity of a public document, an authentic instrument or an authenticated document may be challenged to rebut the normal evidential presumptions associated therewith. Such a challenge can proceed in the normal process of litigation and does not necessarily involve a special

challenge procedure.⁸⁷ Evidence is thus always admissible to prove that facts in the public document / authentic instrument are false or to prove that the public document / authentic instrument was not correctly drawn up (i.e. was composed with errors). The burden of proving that the authenticity or material content of the authentic instrument is defective lies upon the party who makes the allegation, however, Article 230 of the Code of Civil Procedure also provides that if a court independently has misgivings as to the authenticity of a public document or an authentic instrument that is before it in the course of proceedings, it may, of its own motion, seek an explanation concerning its authenticity from the notary (or other authority) who drew it up.

The Croatian Enforcement Act (Official Gazette no-112/12, 93/14) sets out the procedural rules for actual enforcement and enforceability of agreements assembled in the form of an authentic instrument. If the authentic instrument contains an enforcement clause stipulating conditions for its activation (enforcement), the authentic instrument is enforceable. In this case, upon the fulfilment of the stipulated conditions for enforcement, the creditor submits a request to the notary asking him to issue an enforceability clause, after filing evidence of the fulfilment of the abovementioned stipulated conditions. If the conditions are met, the notary will issue the enforceability clause allowing the interested party to request an enforcement order from a municipal court. The issued enforcement order allows enforcement without further litigation. It is important to note that it is not possible to challenge the authenticity of the authentic instrument concerning its material content in the course of such enforcement proceedings.

The use of authentic instruments in domestic Croatian succession law

Though there are a range of potential uses for authentic instruments in Croatian succession law, it is not common and nor is it obligatory for notarially created authentic instruments to feature in successions in Croatia. Indeed holographic wills are the most common in practice.

It should also be noted that though the conclusion of non-contentious succession proceedings will result in an order of devolution of property (issued by a notary who has been appointed by the court to act as a court commissioner in that particular succession case: Article 176 of the Inheritance Act⁸⁸), this order is treated as a **judgment** by the court commissioner and does not represent an authentic instrument in the sense in which that phrase is otherwise employed in the Notarial Act.⁸⁹ The legal nature of the order of devolution of property is domestically equivalent to that of a court decision. Croatia has notified the EU Commission, pursuant to Article 79 of the Succession Regulation, that its notaries are additionally competent to its courts under Article 3(2) of that Regulation. Thus municipal courts and civil law notaries are competent for attestation of decisions falling under the Annex 1 Form I form of Regulation 1329/2014 in the sense of Art 39(2) of the EU Succession Regulation as regards a Croatian order of devolution of property (See Article 5(1)(1) of the Croatian EU Succession Regulation Implementation Act).

Subject to the comments above, the following list indicates the documents that would be regarded as authentic instruments in matters of succession in Croatia:

⁸⁷ There are however also special legal remedies in Croatian criminal and civil law that can arise concerning challenges to the material validity/*negotium* of an authentic instrument. (e.g. adulteration Article 278 of the Criminal Code (125/11, 144/12, 56/15) and lack of will Articles 279-285 of the Civil Obligations Act).

⁸⁸ If notaries conduct probate proceedings as trustees of a court under Article 176 of the Inheritance Act they have the ability to appoint an administrator of the estate or an executor of the will. The certificates of such appointments could be considered to be authentic instruments rather than decisions - but this matter has not yet been confirmed by Croatian law.

⁸⁹ Any decision, rendered by a notary during probate proceedings, including the decision on inheritance, can be challenged by way of objection (Article 185 of the Inheritance Act). The objection is decided by a municipal court and the court will then make a final and binding decision.

- a) Public wills written by a notary in the form of a notarial record are authentic instruments (Article 147 of the Inheritance Act).
- b) Public wills that are authentic instruments may also be drawn up by a municipal court, by a Croatian notary under the terms of the 1973 Washington Convention Providing a Uniform Law on the Form of an International Will or by a Croatian consular authority.
- c) An agreement on assignment and distribution of assets during a lifetime must be drawn up as an authentic instrument (or authenticated as such) according to Article 106 of the Inheritance Act.
- d) A lifelong support agreement and a support until death agreement (each of which remove property from the testator's estate that would otherwise be available for the succession) must each be drawn up as an authentic instrument (or authenticated as such).
- e) A descendant with capacity to autonomously dispose of his rights may conclude an agreement with an ancestor to waive in advance the inheritance to which he (the descendant) would be entitled upon the ancestor's death. The same possibility is open to one spouse as against another spouse. In either case the agreement must be drawn up in a public document created either by a competent court or by a notary as an authentic instrument (or a certified/authenticated document): see Articles 133 and 134 of the Inheritance Act.

N.B. A waiver of an inheritance does *not* proceed by means of an authentic instrument but, if it is given in writing rather than oral form, any signature appended to the document in which it is included could, but need not, be certified/authenticated as genuine. Also, a partition is usually agreed between the parties (without the need for an authentic instrument) as the agreement will be noted by the notary in the order of devolution of property. If there is no agreement the issue of partition will be raised before the court and addressed in its final order.

The Private International Law implications of the European Union's Succession Regulation 650/2012 and Implementing Regulation 1329/2014

The European Union Succession Regulation and its Implementing Regulation raise two distinct Private International Law issues for Croatia as an EU Member State: first, the extent of the obligations imposed by these Regulations on Croatia as a Member State of origin concerning its domestically created succession authentic instruments; and, second, the extent of the obligations these Regulations impose on Croatia as a Member State addressed concerning its duties relating to incoming foreign succession authentic instruments. The comments that follow consider each position.

Croatia is the Member State of origin: obligations concerning domestic succession authentic instruments

Article 59(1) of the European Union Succession Regulation allows, but does not require, 'a person' who wishes to use a succession authentic instrument in another Member State to ask the authority who established it, i.e. the notary who drew it up or his substitute/successor, to issue an attestation concerning that authentic instrument on the standard form provided by Annex 2 Form II of Implementing Regulation 1329/2014. It is unclear whether or not such a request must be complied with if it is received from a person not deemed by the notary to be 'an interested party'. The substitution of the phrase 'a person' in Article 59 for 'interested party' in Article 60 could be understood to indicate that there is no requirement in the EU Succession Regulation for the applicant seeking only cross-border acceptance to demonstrate what would otherwise be domestically regarded as a 'legitimate interest' when requesting the attestation from the notary. It is unclear whether this will be a problem in Croatia, the prevailing view appears to be that in contradistinction to the position concerning the applicants for an

Annex 1 Form I attestation,⁹⁰ the class of eligible applicants for the Annex 2 Form II is likely to be restricted to those who were parties to the authentic instrument at issue and those who wish to demonstrate their legal status deriving from such an authentic instrument.⁹¹ In a practical sense this may not be very problematic given the reduced range of circumstances in which a succession authentic instrument may be created and need be relied upon in Croatia. In theory however, the EU Succession Regulation and Implementing Regulation do not expressly contemplate the possibility that a request under Article 59 may be refused. It is however possible to contrast the applicant 'may ask' of Article 59 with 'the authority shall' in Article 60(2) and to infer from the different wording that the notary (or other public authority) is only actually obliged to accede to the applicant's request when it concerns enforcement under Article 60. This result seems inconsistent with Recitals 22, 59 and 60 of the EU Succession Regulation and with one of its underlying purposes, i.e. to facilitate the cross-border transmission of authentic instruments and their legal effects. In circumstances where both the acceptance and the enforcement of the authentic instrument may be sought the problem may be avoided, assuming the notary to be willing to provide information concerning both Article 59 and Article 60, by the applicant routinely requesting an attestation concerning *both* enforcement and acceptance.

Article 60 of Regulation 650/2012 requires that, provided that to so declare would not be manifestly contrary to public policy in the Member State addressed it *must* on application by an interested person declare a foreign succession authentic instrument that is enforceable in its Member State of origin to also be enforceable in their Member State. A Croatian notary may thus be in receipt of a request for such an attestation, again under Annex 2 Form II of Implementing Regulation 1329/2014. This standard form allows for an attestation that concerns only 'acceptance', via Article 59, or 'enforcement' via Article 60, or an attestation that jointly concerns acceptance and enforcement of the authentic instrument depending upon the boxes ticked by the Croatian notary.⁹²

The Croatian notary in receipt of the request to provide a completed Annex 2 Form II attestation concerning a domestic succession authentic instrument is asked to indicate at points 4.2 to 4.2.1.1.7 of the standard form what he believes its domestic evidentiary effects to be. Though the answers will vary depending upon the specific verifications contained in the succession authentic instrument at issue, it is broadly conceivable that points 4.2.1.1.1 to 4.2.1.1.7 could be expected to be completed as follows:

4.2.1.1.1 - The date the authentic instrument was drawn up:

According to Article 230 of the Code of Civil Procedure an authentic instrument establishes full proof with regard to this fact.

4.2.1.1.2 - The place where the authentic instrument was drawn up:

According to Article 230 of the Code of Civil Procedure an authentic instrument establishes full proof with regard to this fact.

4.2.1.1.3 - The origin of the signatures from the parties of the authentic instrument:

According to Article 230 of the Code of Civil Procedure an authentic instrument will establish full proof of this fact and the identity of the parties who signed.

⁹⁰ EU Succession Regulation Implementation Act Article 7(2) redirects the reader to Article 63(1) of the EU Succession Regulation (heirs and legatees having direct rights in the succession). Perhaps this will also include parties having a legitimate interest as this is understood in national succession proceedings e.g. banks may apply to get a decision in order to establish who are the heirs and who would be responsible for the deceased's debts.

⁹¹ For example, an heir or legatee relying on a public will; an executor of the will; an administrator of the estate.

⁹² For Article 59 acceptance tick 'yes' in box 4.1.1; for Article 60 enforcement tick 'yes' in box 6.1.1. To dispense with either option tick 'no' in box 4.1.2. or 6.1.2 as appropriate.

4.2.1.1.4 - The content of the declarations of the parties:

According to Article 230 of the Code of Civil Procedure an authentic instrument will establish full proof that the parties made the declarations that were recorded by the notary.

4.2.1.1.5 - The facts that the authority declares as having been verified in its presence:

According to Article 230 of the Code of Civil Procedure an authentic instrument establishes full proof with regard to the facts so verified.

4.2.1.1.6 - The actions which the authority declares to have carried out:

According to Article 230 of the Code of Civil Procedure an authentic instrument establishes full proof with regard to the actions that the notary states that he undertook.

4.2.1.1.7 - Other: (please indicate any other evidentiary effect that a domestic authentic instrument could produce)

According to the advice received, it is possible that the attestation might also refer to the fact that according to the Croatian Notary no incapacity or duress was apparent at the time of signing of the document and also a verification of the origin of the signatures of the two identified witnesses required for the creation of a public will. It is conceivable that additional information could also be presented in this box.

Croatia is the Member State addressed: foreign succession authentic instruments

The EU Succession Regulation requires that, subject to public policy exceptions, Croatian authorities must **accept** and, or, **enforce** foreign authentic instruments in matters of succession received from other EU Member States bound by the Succession Regulation.

The **acceptance** of a foreign succession authentic instrument presented by an applicant in Croatia is governed by Article 59 and the enforcement of such an authentic instrument is governed by Article 60 of the EU Succession Regulation. Acceptance requires that, provided that to do so would not be manifestly contrary to Croatian domestic public policy, the authorities in Croatia (as the Member State addressed) *must* grant the foreign succession authentic instrument the same (or most comparable) evidentiary effects as it would enjoy in its own Member State of origin.

To determine the nature of the evidentiary effects that would be associated with that authentic instrument in the Member State of origin, reference should be made to any Annex 2 Form II form that may accompany the foreign authentic instrument, especially to parts 4.2.1.1.1 – 4.2.1.1.7 of any such form. It must however be noted that the use of the Implementing Regulation's Annex 2 form does not appear to be obligatory. The obligation imposed by Article 59 of the Succession Regulation on the Member State addressed to accept a succession authentic instrument does not require or depend upon the use or supply of the Annex 2 form. A succession authentic instrument received from a Member State of origin in accordance with the provisions of the EU Succession Regulation must still be accepted, within the meaning of Article 59 of Regulation 650/2012, even if no Annex 2 Form II form is provided or if the Annex 2 form provided is not fully or properly completed.

At present there are no provisions in Croatian law that specifically deal with the acceptance of a foreign authentic instrument concerning a matter of succession under the Succession Regulation.

The **enforcement** of a foreign authentic instrument via Article 60 of Regulation 650/2012 requires that, provided that to do so would not be manifestly contrary to Croatian public policy, the authorities in the Member State addressed (Croatia) must on application by an interested person declare enforceable a foreign succession authentic instrument that is enforceable in its Member State of origin. We are not aware of any special provision in the law of Croatia that specifically deals with the actual enforcement

of a foreign authentic instrument after it has been declared enforceable (differently from the actual enforcement of a foreign judgment that has been declared enforceable) in accordance with the procedure laid down in Articles 45 to 58 of the EU Succession Regulation as required by Article 60 thereof.

Croatian public policy

The EU Succession Regulation allows a public policy defence in various contexts including with reference to authentic instruments under Articles 59 and 60. To invoke the public policy exception in the context of Article 59, and by so doing to justify a refusal of acceptance for that foreign authentic instrument, it must be the case that the *granting of the same or most comparable evidentiary effects* to the foreign authentic instrument would be manifestly contrary to Croatian public policy. To invoke the public policy exception in the context of Article 60, to justify a refusal of a declaration of enforceability for the foreign authentic instrument, it must be that the *granting of the declaration of enforceability* for the foreign authentic instrument would be manifestly contrary to Croatian public policy. Of course this public policy exception should be construed narrowly and it is envisaged that it will rarely apply. As is made plain by Recital 58 of the EU Succession Regulation, public policy is not to be applied in a manner that is discriminatory or otherwise contrary to the European Union's Charter of Fundamental Rights. Equally however Recital 26 of Regulation 650/2012 indicates that the Regulation does not prevent a court from applying mechanisms designed to tackle the evasion of the law, such as *fraude à la loi* in the context of Private International Law. However, the substantive provisions of the Regulation do not expressly empower national courts to prevent evasion of the law (including *fraude à la loi*). It would seem that the only positive basis for doing so under the Regulation is to regard such evasion of the law to be contrary to public policy unless the law being evaded is one of the "special rules" of the forum concerning certain assets that is applicable irrespective of the law applicable to the succession (see Article 30 of the EU Succession Regulation).

We were not able to find any case in which a foreign authentic instrument had not been given evidentiary effects or had not been enforced by the Croatian Republic by reason of an actual or threatened violation of Croatian public policy.

Incompatible Authentic instruments

Recital 66 of the EU Succession Regulation envisages the possibility of 'an authority' being presented with incompatible authentic instruments.⁹³ The solutions suggested by the Recital are to consider priority and the circumstances of the particular case and then, if this has not resolved the incompatibility, to resort to a court with direct or incidental jurisdiction under the Succession Regulation. There are presently no provisions on this point in Croatian law.

⁹³ Recital 66: Should an authority, in the application of this Regulation, be presented with two incompatible authentic instruments, it should assess the question as to which authentic instrument, if any, should be given priority, taking into account the circumstances of the particular case. Where it is not clear from those circumstances which authentic instrument, if any, should be given priority, the question should be determined by the courts having jurisdiction under this Regulation, or, where the question is raised as an incidental question in the course of proceedings, by the court seized of those proceedings. In the event of incompatibility between an authentic instrument and a decision, regard should be had to the grounds of non-recognition of decisions under this Regulation.

CYPRUS

The legal system in Cyprus

The Republic of Cyprus is a unitary legal system. In terms of comparative law, it is generally classified as a mixed legal system.⁹⁴

(a) The substantive law of succession is in principle codified in the Wills and Succession Law (Cap. 195).⁹⁵

(b) Procedural law is governed by the Administration of Estates Law (Cap. 189), originally promulgated in 1954.⁹⁶

Further procedural rules may be issued in accordance with Article 52 of the Wills and Succession Law and Article 57 of the Administration of Estates Law. The Rules in question date back to the colonial period and have not been officially translated into Greek (even though amendments since 1960 have been issued in Greek).

Under the former Law, see:

Wills and Succession (Declaration of Death and Legitimation) Rules.⁹⁷

Under the latter Law see:

- the Probates (Resealing) Rules, 1936 (as subsequently amended; in Greek: ο περὶ Επικυρώσεως Διαθηκών (Επανασφράγιση) Διαδικαστικός Κανονισμός)⁹⁸

- the Administration of Estates Rules, 1955 (as subsequently amended; referred to in Greek as περὶ Διαχειρίσεως Περιουσιών Αποβωσιάντων Διαδικαστικός Κανονισμός)⁹⁹

- the Guardianship of Infants' Properties Rules, 1957 (as subsequently amended; in Greek: ο περὶ Διαχειρίσεως Περιουσιών Ανηλίκων Διαδικαστικός Κανονισμός)¹⁰⁰

Moreover, Article 58 of the Law refers to "the practice and procedure of the Probate Division of the High Court of Justice in England" for any matter of practice or procedure for which no provision has been made.

There has been no amendment to the statutory legislation directly pursuant to the EU Succession Regulation. On the other hand, L. 96(I)/2015, E.E.I(I), No 4518, 3/7/2015 has led to the first amendment of the Wills and Succession Law since 1989, with the

⁹⁴ Nikitas E. Hatzimihail, "Republic of Cyprus as a Mixed Legal System," *Journal of Civil Law Studies* 6 (2013): 37-96. Contrary to paradigmatic mixed legal systems, in the case of the Republic of Cyprus the core of private law and criminal law follows the English common law, whereas public law has a Continental orientation. Remarkably, almost all subjects are covered by comprehensive legislative instruments: colonial-era "codifications" of the common law, transplants of English statutes but also transplants of Greek law in the continental enclaves. Procedural law is purely - if often somewhat old-fashioned - common law. Succession law epitomizes the mixed or hybrid nature of the country's legal system. The law on Wills and testate succession follows fully English law (at least as it stood in the mid-twentieth century). The law on intestate succession and forced heirship has been primarily influenced by Continental, namely Roman-Byzantine and modern Greek law. The procedural law of succession, is clearly influenced by English law, with certain mutations that account for the small size of the country and its unitary legal profession.

The principal source of Cyprus succession law is colonial-era legislation. The legislation was originally promulgated in English. It was eventually translated into Greek, being the official language of the Republic. The English original should still be consulted in case of interpretive difficulties. This Report draws on the English original where possible (while taking account of the Greek-language version and the evolution in practice over decades).

⁹⁵ <http://www.cylaw.org/nomoi/arith/CAP195.pdf>.

In the Greek language: περὶ Διαθηκών και Κληρονομικής Διαδοχής Νόμος (Κεφ. 195)

<http://www.cylaw.org/nomoi/indexes/195.html>.

⁹⁶ <http://www.cylaw.org/nomoi/arith/CAP189.pdf>.

In the Greek language: περὶ Διαχειρίσεις Κληρονομιών Αποθανόντων Νόμος (Κεφ. 189).

<http://www.cylaw.org/nomoi/indexes/189.html>.

⁹⁷ http://www.cylaw.org/nomoi/kanon/non-ind/1953_447/full.html.

⁹⁸ http://www.cylaw.org/nomoi/kanon/non-ind/1936_248/full.html.

⁹⁹ http://www.cylaw.org/nomoi/kanon/non-ind/1955_1/full.html.

¹⁰⁰ http://www.cylaw.org/nomoi/kanon/non-ind/1957_490/full.html.

addition of Article 23A (providing for a correction process for grammatical and numerical mistakes) and the repeal of Article 42. Given that Article 42 had excused from the legitimate-portion regime provided for in the Law any wills by: (a) persons born in the United Kingdom or whose father (sic) had been born in the United Kingdom or any other Commonwealth member state; and (b) foreigners as to their disposal of movable property, the repeal of Article 42 may be seen as contributing to the reorganisation and mainstreaming of Cyprus applicable law with regard to succession.

There has so far been no amendment of procedural rules in the light of the entry into force of Regulation 650/2012 or 1329/2014.

The concept of an authentic instrument in the Republic of Cyprus

The Republic of Cyprus legal system does feature public documents (usually in the form of registers) but does not feature the legal institution of the authentic instrument. It is commonly accepted that there are no authentic instruments (*δημόσια έγγραφα*) in Cyprus. The only function equivalent to those of authentic instruments in other jurisdictions may be the certification of signatures or seals affixed to documents by designated certifying officers. See the Certifying Officers Law 2012, which has replaced the Certifying Officers Law (Cap. 39) that went back to the late nineteenth century.

An additional factor against considering certificates by certifying officers as authentic instruments may be the fact that certifying officers do not keep an archive of these documents.

Evidentiary effects of domestic authentic instruments in Republic of Cyprus law

According to Article 9 of the Certifying Officers Law, certifications duly conducted are admissible as evidence in all courts in respect of proving what is certified -- that is, the signature which appears on a document and the date on which the person signed the document appeared before the certifying officer (and, in some cases, the presence of two witnesses that assure the certifying officer of that person's identity). Rebuttal of this evidence is possible in accordance with the Evidence Law (Cap. 9).

Certifying officers expressly refuse in all certifications any responsibility as to the content of the document.

The use of authentic instruments in domestic Republic of Cyprus succession law

The Republic of Cyprus legal system does not use authentic instruments in any part of its domestic law. Further a Republic of Cyprus notary has no domestic role in the creation of any kind of will. There are no rules in the Republic of Cyprus Inheritance Code concerning the deposit or registration of wills. There is no public depository for wills and nor is there any kind of Wills Registry in the Republic of Cyprus.

Republic of Cyprus law provides for one type of will only - a private written will signed by the testator in the presence of two witnesses who then "attest and ... subscribe the will" in the presence of each other (as well as the testator), see Article 23 of the Succession Law (Cap. 195). No lawyer or other official is required to take part in the making of the will and it should be enough for the testator to make use of a standard-form. However, Cyprus law and court practice bears a certain amount of risk for testators and particular care must be paid in matters such as where the signatures must be placed and to the text of the witnesses' attestation. For example, even though the Law expressly states

that "no form of attestation shall be necessary", in practice witnesses must use a particular wording in their attestation, as developed in the light of Cyprus court practice.

The Private International Law implications of the European Union Succession Regulation 650/2012 and Implementing Regulation 1329/2014

As the legal institution of the authentic instrument is absent from the law of the Republic of Cyprus, the Republic of Cyprus can never be a Member State of origin in connection with an authentic instrument concerning succession.

The comments that follow therefore only address the position of Republic of Cyprus as a Member State addressed.

Republic of Cyprus is the Member State addressed – foreign succession authentic instruments

The EU Succession Regulation requires that, subject to public policy exceptions, Republic of Cyprus authorities must accept and, or, enforce foreign authentic instruments in matters of succession received from other EU Member States bound by the Succession Regulation.

The acceptance of a foreign succession authentic instrument produced by a holder in Republic of Cyprus is governed by Article 59 of the EU Succession Regulation and the enforcement of such an authentic instrument is governed by Article 60 of that Regulation. Acceptance requires that, provided that to do so would not be manifestly contrary to Republic of Cyprus public policy, the authorities in Republic of Cyprus (as the Member State addressed) must grant the foreign succession authentic instrument the same (or most comparable) evidentiary effects it would enjoy in its own Member State of origin.

To determine the nature of the evidentiary effects that would be associated with that authentic instrument in the Member State of origin, reference should be made to any Annex 2 Form II form that may accompany the foreign authentic instrument, especially to parts 4.2.1.1.1 – 4.2.1.1.7 of any such form. It must however be noted that the use of the Implementing Regulation's Annex 2 form does not appear to be obligatory. The obligation imposed by Article 59 of the EU Succession Regulation on the Member State addressed to accept a succession authentic instrument does not require or depend upon the use or supply of the Annex 2 form. A succession authentic instrument received from a Member State of origin in accordance with the provisions of the EU Succession Regulation must still be accepted, within the meaning of Article 59 of Regulation 650/2012, even if no Annex 2 Form II form is provided or if the Annex 2 form provided is not fully or properly completed.

The enforcement of a foreign succession authentic instrument via Article 60 of Regulation 650/2012 requires that, provided that to do so would not be manifestly contrary to Republic of Cyprus public policy, the Republic of Cyprus authorities must, on application by an interested person, declare enforceable a foreign succession authentic instrument that is itself enforceable in its Member State of origin. We are not aware of any special provision in the law of the Republic of Cyprus that specifically deals with the actual enforcement of a foreign authentic instrument after it has been declared enforceable (differently from the actual enforcement of a foreign judgment that has been declared enforceable) in accordance with the procedure laid down in Articles 45 to 58 of the EU Succession Regulation as required by Article 60 thereof.

Republic of Cyprus Public Policy

The EU Succession Regulation allows a public policy defence in various contexts including with reference to authentic instruments under Articles 59 and 60. To invoke the public policy exception in the context of Article 59, and by so doing to justify a refusal of

acceptance for that foreign authentic instrument, it must be the case that the granting of the same or most comparable evidentiary effects to the foreign authentic instrument would be manifestly contrary to the Republic of Cyprus public policy. To invoke the public policy exception in the context of Article 60, to justify a refusal of a declaration of enforceability for the foreign authentic instrument, it must be that the granting of the declaration of enforceability for the foreign authentic instrument would be manifestly contrary to Republic of Cyprus public policy. Of course this public policy exception should be construed narrowly and it is envisaged that it should rarely apply. As is made plain by Recital 58 of the EU Succession Regulation, public policy is not to be applied in a manner that is discriminatory or otherwise contrary to the European Union's Charter of Fundamental Rights. Equally however Recital 26 of Regulation 650/2012 indicates that the Regulation does not prevent a court from applying mechanisms designed to tackle the evasion of the law, such as *fraude à la loi* in the context of Private International Law. However, the substantive provisions of the Regulation do not expressly empower national courts to prevent evasion of the law (including *fraude à la loi*). It would seem that the only positive basis for doing so under the Regulation is to regard such evasion of the law to be contrary to public policy unless the law being evaded is one of the "special rules" of the forum concerning certain assets that is applicable irrespective of the law applicable to the succession (see Article 30 of the EU Succession Regulation).

Our national reporters were not able to find any case in which public policy had been invoked to deny the reception of a foreign authentic instrument in the context of a Cypriot succession proceeding.

Incompatible Authentic Instruments

Recital 66 of the EU Succession Regulation envisages the possibility of 'an authority' being presented with incompatible authentic instruments.¹⁰¹ The solutions suggested by this Recital are to consider priority and the circumstances of the particular case and then, if this has not resolved the incompatibility, to resort to a court with direct or incidental jurisdiction under the EU Succession Regulation.

There are no domestic or Private International Law provisions concerning authentic instruments in general or concerning this issue in Republic of Cyprus law.

¹⁰¹Recital 66: Should an authority, in the application of this Regulation, be presented with two incompatible authentic instruments, it should assess the question as to which authentic instrument, if any, should be given priority, taking into account the circumstances of the particular case. Where it is not clear from those circumstances which authentic instrument, if any, should be given priority, the question should be determined by the courts having jurisdiction under this Regulation, or, where the question is raised as an incidental question in the course of proceedings, by the court seised of those proceedings. In the event of incompatibility between an authentic instrument and a decision, regard should be had to the grounds of non-recognition of decisions under this Regulation.

CZECH REPUBLIC

The legal system in the Czech Republic

The Czech Republic consists of a single legal system that belongs to the civil law family. The Czech law concerning succession has, in general, been updated to implement the European Union Succession Regulation via the various legislative provisions and amendments described and set out below: the Civil Code;¹⁰² the Special Judicial Proceedings law;¹⁰³ the Code of Civil Procedure;¹⁰⁴ the Notarial Code of Procedure;¹⁰⁵ the Private International Law Code.¹⁰⁶

Procedural law:

There is currently a Bill to amend the Act on Special Judicial Proceedings, Act on Private International Law and Act on Court Fees which is expected to be approved by the Czech Parliament before the end of 2015.¹⁰⁷

The concept of an authentic instrument in the Czech Republic

The Czech legal system makes very extensive use of authentic instruments as created by notaries. Article 6 of the Czech Notarial Code of Procedure declares that notarial deeds, transcripts of such deeds, excerpts from such deeds and certifications of documents that comply with the requirements of the Notarial Code of Procedure to be authentic instruments. Article 62(1) of the Notarial Code of Procedure indicates that notarial deeds must be drawn up by notaries and that Czech notaries must only draw up notarial deeds in the Czech language. Many of the circumstances in which authentic instruments drawn up by notaries are domestically required in the Czech Republic concern matters of company and commercial law that will not be considered here.

The Czech Republic also treats documents issued by the courts of the Czech Republic (or by other State bodies within the scope of their legal powers) as authentic instruments pursuant to Article 134 of the Czech Code of Civil Procedure (e.g. the 'judicial' authentic instrument finally issued by a Czech notary who has been appointed as court commissioner by the Czech court seised with a probate case). Furthermore, Article 79(2) of the Czech Code of Executory Procedure also treats an Executor's deed as an authentic instrument.

¹⁰² Zákon č. 89/2012 Sb., občanský zákoník (Act No. 89/2012 Coll., Civil Code)

http://aplikace.mvcr.cz/sbirka-zakonu/SearchResult.aspx?q=89/2012&typeLaw=zakon&what=Cislo_zakona_smlouvy

English language version:

<http://obcanskyzakonik.justice.cz/home/zakony-a-stanoviska/preklady/english>.

¹⁰³ Zákon č. 292/2013 Sb., o zvláštních řízeních soudních (Act. No. 292/2013 Coll., on Special Judicial Proceedings)

http://aplikace.mvcr.cz/sbirka-zakonu/SearchResult.aspx?q=292/2013&typeLaw=zakon&what=Cislo_zakona_smlouvy.

¹⁰⁴ Zákon č. 99/1963 Sb., občanský soudní řád (Act No. 99/1963 Coll., Code of Civil Procedure).

http://aplikace.mvcr.cz/sbirka-zakonu/SearchResult.aspx?q=99/1963&typeLaw=zakon&what=Cislo_zakona_smlouvy.

¹⁰⁵ Zákon č. 358/1992 Sb., o notářích a jejich činnosti (notářský řád) (Act No. 358/1992 Coll., on Notaries and their Activities (Notarial Code of Procedure)).

http://aplikace.mvcr.cz/sbirka-zakonu/SearchResult.aspx?q=358/1992&typeLaw=zakon&what=Cislo_zakona_smlouvy

English language version:

http://www.nkcr.cz/lang/EN/doc/notarsky_rad_en.pdf.

¹⁰⁶ Zákon č. 91/2012 Sb., o mezinárodním právu soukromém (Act No. 91/2012 Coll., on Private International Law).

http://aplikace.mvcr.cz/sbirka-zakonu/SearchResult.aspx?q=91/2012&typeLaw=zakon&what=Cislo_zakona_smlouvy

English language version:

<http://obcanskyzakonik.justice.cz/home/zakony-a-stanoviska/preklady/english>.

¹⁰⁷ The process of the legislative changes can be followed at:

<http://www.psp.cz/sqw/historie.sqw?o=7&t=497&snp=1>.

Evidentiary effects of domestic authentic instruments in Czech law

In the Czech Republic authentic instruments enjoy enhanced evidential effects consisting of presumptions of authenticity and correctness: unless and until proof to the contrary is submitted these presumptions will prevail. An authentic instrument, whose correctness is not contested in the course of legal proceedings, can only be deprived of its evidential effects if a party can rebut the presumed evidential effect with other facts and evidence that prove the contrary to that which is asserted by the authentic instrument.

Pursuant to Article 568(1) of the Civil Code, "where a fact is confirmed in an authentic instrument, this constitutes, with respect to any person, a full proof that the instrument originates from the body or person that created it, a full proof of the time of drafting the instrument, as well as of the fact that the person or body creating the public instrument confirmed as having occurred or having been performed in his presence, until the contrary is proved."

Pursuant to Article 134 of the Code of Civil Procedure, authentic instruments certify that the document in question is an order or statement of the authority, that issued the instrument, and unless the contrary is proved, they also certify the truthfulness of the fact that has been certified.

Pursuant to Article 568(2) of the Civil Code: "Where a public instrument contains the expression of will of a person making a juridical act and is signed by the acting person, it constitutes full proof of such expression of will with respect to any person. This also applies when the signature of an acting person has been substituted in a manner provided by a statute." An authentic instrument containing an expression of will constitutes full evidence of such an expression of will with respect to any person.

Although this would not occur in the context of a succession, a notary may draw up a notarial deed containing a consent of the debtor to enforceability (Articles 71a-c of the Notarial Code of Procedure). In accordance with Article 2741(1)(e) of the Code of Civil Procedure such a notarial deed is an execution title and it is possible to file a petition for its enforcement. The enforceability of such notarial deeds with consent to enforceability is derived directly from their content and commences on the day following the expiry of the period of time in which the debtor should have performed.¹⁰⁸

Disputing the validity of the authentic instrument

If an authentic instrument is successfully challenged as to its formal validity/authenticity/*instrumentum* it will lose the evidentiary effects associated with authentic or authenticated documents as public documents. If an authentic instrument is successfully challenged as to the validity of its *negotium*/material validity the instrument itself is valid but its evidentiary meaning will change accordingly and may well be rendered nugatory.

As the evidential advantage of the Czech authentic instrument consists of rebuttable presumptions, it is possible to challenge such an authentic instrument by rebutting the relevant presumption(s): the Czech legal system is quite liberal in allowing such challenges to be brought before its courts. Thus the authenticity and the material validity of an authentic instrument drawn up in the Czech Republic may each be challenged by the filing of a petition by the person who would contest its authenticity in accordance with the Code of Civil Procedure.

¹⁰⁸ Since 2013 it has no longer been possible for an executor to draw up an execution deed with consent to enforceability that can be considered as an execution title: see amendment to the Code of Executory Procedure (Act No. 396/2012 Coll.).

If it is desired to challenge the actual domestic enforcement of an already enforceable authentic instrument the debtor must bring an appeal against a resolution on execution pursuant to Article 254 of the Code of Civil Procedure (or if appealing against a decision of an executor via Article 55c of the Executory Code of Procedure).

As Article 568(2) of the Civil Code stipulates that where an authentic instrument contains an expression of will of a person making a juridical act and where it is signed by the acting person, it constitutes full proof of such expression of will with respect to any person. Any party that contests the authentic instrument will have the burden of proving its invalidity.

A challenge to an authentic instrument during the course of non-contentious succession proceedings being carried out by a notary appointed to the role of court commissioner can be addressed either by the notary acting as court commissioner or by the court. If the challenge relates to a question of law, the Notary/court commissioner is competent to decide this matter by rendering a resolution on this point (see Article 169(1) of the Act on Special Judicial Proceedings). If the challenge requires the assessment of disputed factual circumstances, the notary issues a resolution pursuant to Article 170(1) of the Act on Special Judicial Proceedings, in which he refers and directs the heir contesting the disputed authentic instrument to approach a court in regular contentious proceedings according to the Code of Civil Procedure and within a specified time.

The use of authentic instruments in domestic Czech succession law

There is a range of uses for authentic and authenticated documents in Czech succession law. In some circumstances it is obligatory to use an authentic instrument: in these cases failure to use such an authentic instrument will lead to invalidity of the transaction. Otherwise, it remains possible for many dispositions and arrangements to be concluded using an authentic instrument and thus to benefit from the evidentiary and practical advantages associated with such instruments. The following list indicates the main documents that can or must be effected in the form of authentic instruments in matters of succession subject to Czech law:

- a) A notarial will completed for the *de cuius* by a notary (Article 1537 Civil Code).¹⁰⁹
- b) A notarial will is obligatory under Czech law for certain classes of person and arrangements. Invalidity is the consequence of not complying with this requirement see:
 - i. Article 1493(1) of the Civil Code requires the use of a notarial will if the *de cuius* would make a disposition upon death made while he is in the care of a facility providing health or social services, or while he otherwise accepts its services, if he would be designating as an heir or a legatee a person who administers such a facility or is employed in it or is otherwise engaged in such a facility
 - ii. Article 563(3) of the Civil Code requires the use of a notarial will concerning a juridical act in writing of a person, who cannot read or write and is not capable of familiarising himself with the content of a juridical act by means of devices or special tools or through another person that he chooses.
 - iii. Article 1526 of the Civil Code requires a notarial will for minors between 15 and 18 years of age.
 - iv. Article 1528(1) of the Civil Code requires a notarial will for persons with limited legal capacity if this is part of the limitation imposed.

¹⁰⁹ Although it is possible to deposit a will drawn up by the *de cuius* (or by another party for him) with a Czech notary, that deposited will does not become and is not subsequently converted into an authentic instrument. It remains as a private will, albeit one that has been safely deposited.

- c) A privileged will under Articles 1543–1545 of the Civil Code that also complies with the requirements set out in Article 1547(1) of the Civil Code is an authentic instrument.
- d) It is obligatory in Czech law to use an authentic instrument in the following circumstances:
 - a. Article 1484(3) of the Civil Code - contract concluded with the testator on renunciation of a succession right
 - b. Article 1522(1) of the Civil Code - consent of a fideicommissary granted to an heir to alienate or encumber the inheritance
 - c. Article 1556 of the Civil Code - appointment of an administrator of the estate by the testator
 - d. Article 1582(2) of the Civil Code - conclusion of an agreement on succession
 - e. Article 1590 of the Civil Code - consent of a contractual heir to the testator's cancellation of his duties under an agreement on succession by a testamentary disposition
 - f. Article 1714(3) of the Civil Code - conclusion of an agreement on alienation of inheritance after the *de cuius*'s death.
- e) It is possible, but not obligatory, in all other circumstances to opt to record an act or disposition using an authentic instrument.

It must also be borne in mind that the succession law of the Czech Republic requires the appropriate Czech court to appoint a notary to act as its court commissioner for each non-contentious probate case with which it is seised. The notary appointed as court commissioner acts as a competent authority (notified to the European Commission pursuant to Article 79 of Regulation 650/2012) within the meaning of Article 3(2) of the EU Succession Regulation for that succession: he is accordingly entrusted with the operation of the probate in that case. As this notary is, for as long as the succession remains non-contentious, of equivalent authority with a court, he can and will issue 'decisions' in the course of his probate activities that even though otherwise potentially regarded as authentic instruments falling under the Annex 2 Form II form of Implementing Regulation 1329/2014 actually will fall within the Annex 1 Form I form of that Implementing Regulation.

The Private International Law implications of the European Union's Succession Regulation 650/2012 and Implementing Regulation 1329/2014

The European Union Succession Regulation and its Implementing Regulation raise two distinct Private International Law issues for the Czech Republic as an EU Member State: first, the extent of the obligations imposed by these Regulations on the Czech Republic as a Member State of origin concerning its domestically created succession authentic instruments; and, second, the extent of the obligations these Regulations impose on the Czech Republic as a Member State addressed concerning its duties relating to incoming foreign succession authentic instruments. The comments that follow consider each position.

The Czech Republic is the Member State of origin: obligations concerning domestic succession authentic instrumentsA preliminary issue is that as non-contentious probate proceedings in the Czech Republic proceed by the appropriate court appointing a notary to act as a court commissioner, it must not be forgotten that the Annex 1 Form I form of Implementing Regulation 1329/2014 is often the appropriate application. As will be seen, applications concerning the Annex 2 Form II form when the Czech Republic is the Member State of origin are less usual.

It must also be noted that in the Czech Republic it may be more difficult to secure access to the authentic instrument than to the Annex 2 form that is intended to accompany it. Section 101 of the Czech Notarial Code of Procedure restricts the potential for a Czech notary to hand out a notarial will or other authentic instrument to those persons who took part in the juridical act recorded in the authentic instrument or to an appropriately seised court. Thus a notarial will can usually only be produced to the *de cuius* during his life or, after his death, to the court conducting the probate proceedings. If however there had been a succession agreement, each living party may request the authentic instrument from the notary.

Article 59(1) of the European Union Succession Regulation allows, but does not require, 'a person' who wishes to use a succession authentic instrument in another Member State to ask the authority who established it, i.e. the notary who drew it up or his substitute/successor, to issue an attestation concerning that authentic instrument on the standard form provided by Annex 2 Form II of Implementing Regulation 1329/2014. It is unclear whether or not such a request must be complied with if it is received from a person not deemed by the notary to be 'an interested party'. The substitution of the phrase 'a person' in Article 59 for 'interested party' in Article 60 could be understood to indicate that there is no requirement in the EU Succession Regulation for the applicant seeking only cross-border acceptance to demonstrate what would otherwise be domestically regarded as a 'legitimate interest' when requesting the attestation from the notary. In most cases it seems unlikely that securing the Annex 2 Form II form – in contradistinction to securing access to the authentic instrument – will be a problem in the Czech Republic.¹¹⁰ The EU Succession Regulation and its Implementing Regulation do not expressly contemplate the possibility that a request under Article 59 may be refused: it is however possible to contrast the applicant 'may ask' of Article 59 with 'the authority shall' in Article 60(2) and to infer from the different wording that the notary (or other public authority) is only actually obliged to accede to the applicant's request when it concerns enforcement under Article 60. This result however seems inconsistent with Recitals 22, 59 and 60 of the EU Succession Regulation and with one of its underlying purposes, i.e. to facilitate the cross-border transmission of authentic instruments and their legal effects. In theory, if circumstances are such as to allow a request for both the acceptance and the enforcement of the authentic instrument the potential problem could be avoided by the applicant requesting an attestation concerning *both* enforcement and acceptance. This option is however unlikely to be available in the Czech Republic because no Czech succession authentic instrument is drafted to be capable of such enforcement under Article 60 of Regulation 650/2012 or otherwise.

Although Article 60 of Regulation 650/2012 allows cross-border enforceability to succession authentic instruments it only does so to the extent that the said authentic instruments possess domestic enforceability in the Member State of origin. As noted above, Czech succession authentic instruments do not possess the domestic potential for enforcement and therefore there can be no succession authentic instruments sent from the Czech Republic (considered as a Member State of origin) via Annex 2 Form II of Implementing Regulation 1329/2014.

If a Czech notary is in receipt of a request for an attestation under Annex 2 Form II of Implementing Regulation 1329/2014 he will only be able to comply with this request as it concerns Article 59 'acceptance' and will signify this via the boxes he ticks on the Annex 2 Form II form.¹¹¹ The Czech notary requested to provide a completed Annex 2 Form II attestation concerning a domestic succession authentic instrument is asked to indicate at points 4.2 to 4.2.1.1.7 of the standard form what he believes its domestic

¹¹⁰ Assuming that the relevant authentic instrument can be procured, it is likely that the persons listed by Annex 1 Form I of Implementing Regulation 1329/2014 at 4.3.1.7., creditors of the estate and persons who have refused the inheritance will have a legitimate interest to apply for an attestation under either Annex 1 Form I or Annex 2 Form II.

¹¹¹ For Article 59 acceptance tick 'yes' in box 4.1.1; for Article 60 enforcement tick 'no' in box 6.1.2..

evidentiary effects to be. Though the answers will vary depending upon the specific verifications contained in the succession authentic instrument at issue, it is broadly conceivable that points 4.2.1.1.1 to 4.2.1.1.7 could be expected to be completed as follows:

4.2.1.1.1 - The date the authentic instrument was drawn up:

According to Article 568(1) of the Czech Civil Code the authentic instrument as a public document constitutes full proof of the date and time of creation until the contrary is proved.

4.2.1.1.2 - The place where the authentic instrument was drawn up:

According to Article 568(1) of the Czech Civil Code the authentic instrument as a public document constitutes full proof of this matter until the contrary is proved.

4.2.1.1.3 - The origin of the signatures from the parties of the authentic instrument:

According to Article 568(2) of the Czech Civil Code the authentic instrument as a public document constitutes full proof of this matter. N.B. Article 568(2) also applies if the signature of the acting person has been substituted in a manner provided by a statute (see 4.2.1.1.7).

4.2.1.1.4 - The content of the declarations of the parties:

According to Article 568(2) of the Czech Civil Code, if the authentic instrument contains an expression of will of the person making a juridical act and is signed by the acting person it constitutes full proof of the making of that expression of will with respect to any person.

4.2.1.1.5 - The facts that the authority declares as having been verified in its presence:

According to Article 568(1) of the Czech Civil Code a fact confirmed in an authentic instrument constitutes, with respect to any person, full proof of the facts that the notary declares have occurred or have been performed in his presence (until the contrary is proved). Also Article 134 of the Czech Code of Civil Procedure provides that authentic instruments certify that the document in question is an order or statement of the authority that issued the authentic instrument and, unless the contrary is proved, also prove the truthfulness of the facts that have been certified.

4.2.1.1.6 - The actions which the authority declares to have carried out:

According to Article 568(1) of the Czech Civil Code a fact confirmed in an authentic instrument constitutes, with respect to any person, full proof of the facts that the notary declares have occurred or have been performed in his presence (until the contrary is proved). Also Article 134 of the Czech Code of Civil Procedure provides that authentic instruments certify that the document in question is an order or statement of the authority that issued the authentic instrument and, unless the contrary is proven, also proves the truthfulness of the facts that have been certified.

4.2.1.1.7 - Other: (please indicate any other evidentiary effect that a domestic authentic instrument could produce)

According to the advice received it could be that the notary may provide details as to the legal capacity of the person who is entering into the juridical act evidenced in the authentic instrument and or explain why an official signs for certain classes of 'disabled' persons see 4.2.1.1.3. It remains conceivable that additional information could also be presented in this box.

The Czech Republic is the Member State addressed: foreign succession authentic instruments

The EU Succession Regulation requires that, subject to very narrow public policy exceptions, Czech authorities must **accept** and, or, **enforce** foreign authentic

instruments in matters of succession received from other EU Member States bound by the Succession Regulation.

The **acceptance** of a foreign succession authentic instrument produced in the Czech Republic is governed by Article 59 and the enforcement of such an authentic instrument is governed by Article 60 of the EU Succession Regulation. Acceptance requires that, provided that to do so would not be manifestly contrary to Czech public policy, the Czech authorities (as the Member State addressed) *must* grant the foreign succession authentic instrument the same (or most comparable) evidentiary effects as it would enjoy in its own Member State of origin.

To determine the nature of the evidentiary effects that would be associated with that authentic instrument in the Member State of origin, reference should be made to any Annex 2 Form II form that may accompany the foreign authentic instrument, especially to parts 4.2.1.1.1 – 4.2.1.1.7 of any such form. It must however be noted that the provision of the Member State addressed with a completed Annex 2 form from Regulation 1329/2014 does not appear to be obligatory. The obligation imposed by Article 59 of the EU Succession Regulation on the Member State addressed to accept a succession authentic instrument does not require or depend upon the use or supply of the Annex 2 form. A succession authentic instrument received from a Member State of origin in accordance with the provisions of the EU Succession Regulation must still be accepted, within the meaning of Article 59 of Regulation 650/2012, even if no Annex 2 Form II form is provided or if the Annex 2 form that is provided is not fully or properly completed.

We are not aware of any provisions in the law of the Czech Republic that specifically deal with the acceptance of a foreign authentic instrument via Article 59 of the EU Succession Regulation.

The **enforcement** of a foreign authentic instrument via Article 60 of Regulation 650/2012 requires that, provided that to do so would not be manifestly contrary to the public policy of the Member State addressed, the authorities of the Czech Republic must, on the application of an interested person, declare enforceable a foreign succession authentic instrument that is enforceable in its Member State of origin. We are not aware of any provision in the law of the Czech Republic that specifically deals with the actual enforcement of a foreign authentic instrument after it has been declared enforceable in accordance with the procedure laid down in Articles 45 to 58 of the EU Succession Regulation as required by Article 60 thereof.

The public policy of the Czech Republic

The EU Succession Regulation allows a public policy defence to the Member State addressed in various contexts including with reference to authentic instruments under Articles 59 and 60. To invoke the public policy exception in the context of Article 59, and by so doing to justify a refusal of acceptance for that foreign authentic instrument, it must be the case that the *granting of the same or most comparable evidentiary effects* to the foreign authentic instrument would be manifestly contrary to Czech public policy. To invoke the public policy exception in the context of Article 60, to justify a refusal of a declaration of enforceability for the foreign authentic instrument, it must be that the *granting of the declaration of enforceability* for the foreign authentic instrument would be manifestly contrary to Czech public policy. Of course this public policy exception should be construed narrowly and it is envisaged that it will rarely apply. As is made plain by Recital 58 of the EU Succession Regulation, public policy is not to be applied in a manner that is discriminatory or otherwise contrary to the European Union's Charter of Fundamental Rights. Equally however Recital 26 of Regulation 650/2012 indicates that the Regulation does not prevent a court from applying mechanisms designed to tackle the evasion of the law, such as *fraude à la loi* in the context of Private International Law. However, the substantive provisions of the Regulation do not expressly empower

national courts to prevent evasion of the law (including *fraude à la loi*). It would seem that the only positive basis for doing so under the Regulation is to regard such evasion of the law to be contrary to public policy unless the law being evaded is one of the “special rules” of the forum concerning certain assets that is applicable irrespective of the law applicable to the succession (see Article 30 of the EU Succession Regulation).

Our national reporters were not able to find any case in which public policy had been invoked to deny the reception of a foreign authentic instrument in the context of an Czech succession proceeding.

Incompatible Authentic instruments

Recital 66 of the EU Succession Regulation envisages the possibility of ‘an authority’ being presented with incompatible authentic instruments.¹¹² The solutions suggested by the Recital are to consider priority and the circumstances of the particular case and then, if this has not resolved the incompatibility, to resort to a court with direct or incidental jurisdiction under the EU Succession Regulation. There are no provisions in the law of the Czech Republic that address this issue.

¹¹² Recital 66: Should an authority, in the application of this Regulation, be presented with two incompatible authentic instruments, it should assess the question as to which authentic instrument, if any, should be given priority, taking into account the circumstances of the particular case. Where it is not clear from those circumstances which authentic instrument, if any, should be given priority, the question should be determined by the courts having jurisdiction under this Regulation, or, where the question is raised as an incidental question in the course of proceedings, by the court seised of those proceedings. In the event of incompatibility between an authentic instrument and a decision, regard should be had to the grounds of non-recognition of decisions under this Regulation.

ESTONIA

The Estonian legal system

Estonia consists of a single legal system that belongs to the civil law family. The Estonian law concerning succession has, in general, been updated to implement the European Union Succession Regulation via the various legislative provisions and amendments described and set out below.

The substantive rules are contained (mainly) in the Law of Succession Act (Pärimisseadus).¹¹³

The procedural rules are contained mainly in the Code of Civil Procedure¹¹⁴ and in the Notarisation Act.¹¹⁵

The Estonian Ministry of Justice proposed some amendments to the existing legislation.¹¹⁶ The amendments which the proposal foresees are in brief the following:

- 1) The new rules specify the tasks of the Estonian notaries when applying the EU Succession Regulation (for example the new rules state that Estonian notaries can issue the European Certificates of Succession; the new rules also limit the competence of the Estonian notaries to handle international succession cases depending on whether Estonian courts would have competence in a particular case under the EU Succession Regulation);
- 2) The new rules amend the Estonian provisions on notaries' fees. These amendments reflect the tasks that the Estonian notaries will have when the EU Succession Regulation becomes applicable;
- 3) The rules on the Estonian Succession Registry are amended (for example the new rules specify that the information relating to the European Certificates of Succession issued in Estonia has to be included in the registry);
- 4) The references to the EU Succession Regulation are added to the Estonian Private International Law Act and to the Code of Civil Procedure Act.

The concept of an authentic instrument in Estonia

The Estonian legal system makes extensive use of authentic instruments. §82 of the General Part of the Civil Code Act allows notarial certification via the creation of an authentic instrument of any 'transaction' if this is either required by law or by the agreement of the parties: the creation of an authentic instrument may also be preferred as an alternative means of complying with any requirement for the notarial authentication of signatures on a given document.¹¹⁷ According to Estonian legal theory the word 'transactions' as used in §82 above is understood to also include unilateral expressions of will, e.g. testamentary dispositions.

¹¹³ The official version of the act is available here: <https://www.riigiteataja.ee/akt/129062014010>. The act is available in English here: <https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/520012015004/consolide>.

- in the General Part of the Civil Code Act (Tsiviilseadustiku üldosa seadus). The official version of this act is available here: <https://www.riigiteataja.ee/akt/112032015105>. This act is available in English here: <https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/528032014002/consolide>.

¹¹⁴ (Tsiviilkohtumenetluse seadustik). The official version of this act is available here: <https://www.riigiteataja.ee/akt/119032015027>. This act is available in English here: <https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/516062015009/consolide>.

¹¹⁵ (Tõestamisseadus). The official version of this act is available here: <https://www.riigiteataja.ee/akt/121062014064>. This act is available in English here: <https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/523012015013/consolide>.

¹¹⁶ This proposal is available here: <http://eelnoud.valitsus.ee/main#6stXu1AL>.

¹¹⁷ §81 of the General Part of the Civil Code concerns notarial authentication of signatures on documents and notes in paragraph 2 that notarial certification (as per §82) may replace notarial authentication.

Estonian law positively requires the use of an authentic instrument in many circumstances which include: the sale of immovable property; a joint will created between spouses; marital property contracts; and various documents and transactions in company law (for example, memoranda of association of private limited companies and public limited companies, merger agreements, division plan agreements). The other examples are scattered throughout the Estonian legal system and are not listed here.

Estonian authentic instruments are usually drawn up by notaries. In some circumstances a suitably legally qualified Estonian consular employee could also draw up an authentic instrument. The Estonian Notarisation Act and the Estonian Notaries Act explain precisely what the notary must do and how he must act to create an authentic instrument.¹¹⁸

It should be noted that, despite the wide use of authentic instruments made by the Estonian legal system, the majority of Estonian authentic instruments are **not** domestically enforceable without the subsequent involvement of an Estonian court to, in appropriate circumstances, establish such enforceability. Otherwise, only those authentic instruments listed by §2(18–19.2) of the Estonian Code of Enforcement Procedure are enforceable directly by the Bailiff without any other application to the court. The 'enforceable' authentic instruments are as follows:

- §2(18) agreements concerning financial claims authenticated by a notary according to which a debtor has consented to be subject to immediate compulsory enforcement after the claim falls due;
- §2(18) agreements concerning claims for support authenticated by a notary according to which a debtor has consented to be subject to immediate compulsory enforcement;
- §2(19) agreements authenticated by a notary which prescribe the obligation of the owner of an immovable or a ship entered in the register of ships or an object encumbered with a registered security over movables to be subject to immediate compulsory enforcement for the satisfaction of a claim secured by the mortgage, maritime mortgage or registered security over movables;
- §2 (19) agreements authenticated by a notary which prescribe the obligation of the owner of a structure as a movable or a part thereof to be subject to immediate compulsory enforcement for the satisfaction of a claim secured by a pledge contract of a structure or a part thereof;
- §2 (19) agreements authenticated by a notary which prescribe the obligation of the owner of an immovable to be subject to immediate compulsory enforcement for the satisfaction of a financial claim secured by a real encumbrance.

For all other types of authentic instruments – including all or very nearly all authentic instruments arising in the course of succession – an Estonian authentic instrument is **not** domestically enforceable without further court proceedings. Whether further court proceedings concerning an 'unenforceable' authentic instrument can convert it into a *de facto* 'enforceable' authentic instrument will depend upon the nature of the instant authentic instrument. The absence of general enforceability for Estonian authentic instruments clearly affects the potential for an application to be made in Estonia for an attestation under Annex 2 Form II of European Regulation 1329/2014 concerning Article 60 of European Regulation 650/2012.

Evidentiary effects of domestic authentic instruments in Estonian law

Although Estonian law makes minute and careful provision for the way in which an Estonian notary must draw up an authentic instrument, so as to ensure the creation of a

¹¹⁸ Notarisation Act <https://www.riigiteataja.ee/en/eli/511112013005/consolidate>:
Notaries Act <https://www.riigiteataja.ee/en/eli/511112013002/consolidate>.

proper and valid authentic instrument, it does not contain any express provision that defines or otherwise states the evidentiary effect of such a domestic authentic instrument. According to the national reporter employed by this study, Estonian authentic instruments enjoy a high authority among other forms of evidence. That said, it is possible for the parties to the authentic instrument to dispute this evidentiary effect by challenging either the way in which the authentic instrument was created or challenging its content via domestic civil proceedings before an Estonian court.

Disputing the formal or material validity of the authentic instrument.

If an authentic instrument is successfully challenged as to its formal validity/authenticity/*instrumentum* it will lose the evidentiary effects associated with an authentic instrument. If an authentic instrument is successfully challenged as to the validity of its *negotium*/material validity the instrument itself may still be formally valid but its evidentiary meaning, at least as concerns the matter disputed, will change accordingly and may well be rendered wholly or partially nugatory.

The authenticity of an authentic or authenticated instrument may be challenged by alleging falsification via a general civil procedure: §277 of the Code of Civil Procedure. If the court finds that the instrument is false and not authentic, the instrument will not have any evidential value or evidential effect in these civil proceedings.¹¹⁹ The material validity of an authentic instrument can also be challenged via general civil procedure: §277 of the Code of Civil Procedure. If the court finds that the content of the instrument is not authentic, the instrument will not have any evidential value or evidential effect in these civil proceedings on the points successfully disputed.

The actual domestic enforcement of an Estonian authentic instrument can also be challenged by filing an action to declare the compulsory enforcement to be inadmissible under §221 of the Code of Enforcement Procedure. If the challenge succeeds the authentic instrument cannot be enforced and any enforcement proceedings must be terminated. It must however be noted that technically this challenge to enforcement does not itself affect the validity or legal force of the authentic instrument.

The use of authentic instruments in domestic Estonian succession law

There are a range of uses for authentic instruments in Estonian succession law as succession proceedings in Estonia have to be conducted by an Estonian notary: §165(2) Law of Succession Act. Thus the notary conducting the succession has a significant role in the conduct and facilitation of successions in Estonia.¹²⁰ The following list indicates the main documents that Estonian law regards as (usually unenforceable) authentic instruments in matters of succession:

- a) A notarial will written by a notary, §21 of the Law of Succession Act.
- b) A holographic will deposited with a notary in a sealed envelope is also treated as a notarial will: §24 and §22 of the Law of Succession Act requires the notary to create an authentic instrument at the point of receipt to confirm the details and also again if the will is ever later retrieved by the testator.
- c) A joint will between spouses must be drawn up as an authentic instrument, §89(3) of the Law of Succession Act. It may be revoked by either spouse while both are living via an authentic instrument, §93 of the Law of Succession Act.
- d) A succession contract must be by an authentic instrument, §100 of the Law of Succession Act. If the succession contract is later cancelled while the parties to it are living this must be by authentic instrument, §102 of the Law of Succession

¹¹⁹ The Court is entitled by §276 Code of Civil Procedure to request verification of the document from the Estonian notary who created it.

¹²⁰ See §§165 – 175 of the Law of Succession Act.

- Act. If a party withdraws from the contract this must be by authentic instrument, §103(2) of the Law of Succession Act.
- e) To accept or to renounce the succession involves the notary creating an authentic instrument to record this fact, §118 of the Law of Succession Act.
 - f) A successor's claim for inventory is submitted by a notarial authentic instrument, §137(2) of the Law of Succession Act.
 - g) A transaction by which a co-successor undertakes to acquire or dispose of a share of the community of the estate or by which a co-successor disposes of the share of the community of the estate belonging to him or her must be notarially authenticated, §148(4) of the Law of Succession Act.
 - h) The Estonian succession certificate, §171(1) of the Law of Succession Act.
 - i) The Estonian certificate of legatees, §172 of the Law of Succession Act.
 - j) An Estonian certificate concerning the claim arising from a compulsory share of the estate, §173 of the Law of Succession Act.

The Private International Law implications of the European Union's Succession Regulation 650/2012 and Implementing Regulation 1329/2014

The European Union Succession Regulation and its Implementing Regulation raise two distinct Private International Law issues for Estonia as an EU Member State: first, the extent of the obligations imposed by these Regulations on Estonia as a Member State of origin concerning its domestically created succession authentic instruments; and, second, the extent of the obligations these Regulations impose on Estonia as a Member State addressed concerning its duties relating to incoming foreign succession authentic instruments. The comments that follow consider each position.

Estonia is the Member State of origin: obligations concerning domestic succession authentic instruments

Article 59(1) of the European Union Succession Regulation allows, but does not require, '*a person*' who wishes to use a succession authentic instrument in another Member State to ask the authority who established it, i.e. the notary who drew it up or his substitute/successor, to issue an attestation concerning that authentic instrument on the standard form provided by Annex 2 Form II of Implementing Regulation 1329/2014. It is unclear whether or not such a request must be complied with if it is received from a person not deemed by the notary to be '*an interested party*'. The substitution of the phrase '*a person*' in Article 59 for '*interested party*' in Article 60 could be understood to indicate that there is no requirement in the Succession Regulation for the applicant seeking only cross-border acceptance to demonstrate what would otherwise be domestically regarded as a '*legitimate interest*' when requesting the attestation from the notary. It seems unlikely that this will be a problem in Estonia, as the prevailing view appears to be that a wide range of potential and legitimate applicants is already possible. The Succession Regulation and Implementing Regulation do not expressly contemplate the possibility that a request under Article 59 may be refused. It is however possible to contrast the applicant '*may ask*' of Article 59 with '*the authority shall*' in Article 60(2) and to infer from the different wording that the notary (or other public authority) is only actually obliged to do accede to the applicant's request when it concerns enforcement under Article 60.¹²¹ This result however seems inconsistent with Recitals 22, 59 and 60 of the Succession Regulation and with one of its underlying purposes, i.e. to facilitate the cross-border transmission of authentic instruments and their legal effects. In circumstances where both the acceptance and the enforcement of the authentic instrument may be sought the problem may be avoided, assuming the notary to be willing to provide information concerning both Article 59 and Article 60, by

¹²¹ It must be remembered that in Estonian law it will very rarely be the case that a domestic succession authentic instrument will be enforceable.

the applicant routinely requesting an attestation concerning *both* enforcement and acceptance.

Article 60 of Regulation 650/2012 requires that, provided that to do so declare would not be manifestly contrary to its public policy, the authorities in the Member State addressed *must* on application by an interested person declare a foreign succession authentic instrument that is enforceable in its Member State of origin to also be enforceable in their Member State. An Estonian notary may theoretically be in receipt of a request for such an attestation concerning a succession authentic instrument, again via Annex 2 Form II of Implementing Regulation 1329/2014. This standard form allows for an attestation that concerns only 'acceptance', via Article 59, which will be usual, or only 'enforcement' via Article 60, which (in Estonia) will be unusual. It is theoretically possible for an authority to provide an attestation that jointly concerns acceptance and enforcement of the authentic instrument depending upon the boxes ticked by the Estonian notary, for the reasons set out above it is unlikely that attestations concerning Article 60 will often be made.¹²²

The Estonian notary in receipt of the request to provide a completed Annex 2 Form II attestation concerning a domestic succession authentic instrument is asked to indicate at points 4.2 to 4.2.1.1.7 of the standard form what he believes its domestic evidentiary effects to be. Given that there is no specific Estonian legislative provision that states or otherwise establishes the evidentiary effect of an Estonian authentic instrument (whether or not that instrument should be enforceable) the Estonian notary will have to refer to his own estimation and evaluation of the evidentiary effect and force of an authentic instrument in Estonia. Though the answers provided by the notary will vary depending upon the specific verifications contained in the succession authentic instrument at issue, it is broadly conceivable that points 4.2.1.1.1 to 4.2.1.1.7 could be expected to be completed as follows:

4.2.1.1.1 - The date the authentic instrument was drawn up:

Yes – the authentic instrument will have evidentiary force and effect on this point.

4.2.1.1.2 - The place where the authentic instrument was drawn up:

Yes – the authentic instrument will have evidentiary force and effect on this point.

4.2.1.1.3 - The origin of the signatures from the parties of the authentic instrument:

Yes – the authentic instrument will have evidentiary force and effect on this point.

4.2.1.1.4 - The content of the declarations of the parties:

Yes – the authentic instrument will have evidentiary force and effect on this point but only if the parties made such declarations (there will be no declarations in an Estonian succession certificate).

4.2.1.1.5 - The facts that the authority declares as having been verified in its presence:

Yes – the authentic instrument will have evidentiary force and effect on this point.

4.2.1.1.6 - The actions which the authority declares to have carried out:

Yes – the authentic instrument will have evidentiary force and effect on this point.

4.2.1.1.7 - Other: (please indicate any other evidentiary effect that a domestic authentic instrument could produce)

An Estonian succession certificate can be used as evidence that succession proceedings are being carried out and also to indicate the identity of the successors. It is thus conceivable that additional information of a similar nature could be presented in this box.

¹²² Theoretical and speculative examples of such enforceable documents tentatively suggested by one reporter were: a) a contract authenticated by a notary containing an agreement between the successors to sell the estate and to agree to surrender to immediate execution; b) a contract between the successors (authenticated by a notary) in which they agree to divide the estate in a certain way and to surrender to immediate execution.

Estonia is the Member State addressed: foreign succession authentic instruments

The EU Succession Regulation requires that, subject to public policy exceptions, Estonian authorities must **accept** and, or, **enforce** foreign authentic instruments in matters of succession received from other EU Member States bound by the Succession Regulation.

The **acceptance** of a foreign succession authentic instrument produced in Estonia is governed by Article 59 of the EU Succession Regulation and the enforcement of such an authentic instrument is governed by Article 60 of that Regulation. Article 59 requires that, provided that to do so would not be manifestly contrary to Estonian public policy, the authorities in Estonia (as the Member State addressed) *must* grant the foreign succession authentic instrument the same (or most comparable) evidentiary effects as it would enjoy in its own Member State of origin.

To determine the nature of the evidentiary effects that would be associated with that authentic instrument in the Member State of origin, reference should be made to any Annex 2 Form II form that may accompany the foreign authentic instrument, especially to parts 4.2.1.1.1 – 4.2.1.1.7 of any such form. It must however be noted that the use of the Implementing Regulation's Annex 2 form does not appear to be obligatory: the obligation imposed by Article 59 of the Succession Regulation on the Member State addressed to accept a succession authentic instrument does not require or depend upon the use or supply of the Annex 2 form. A succession authentic instrument received from a Member State of origin in accordance with the provisions of the Succession Regulation must still be accepted, within the meaning of Article 59 of Regulation 650/2012, even if no Annex 2 Form II form is provided or if the Annex 2 form provided is not fully or properly completed.

The **enforcement** of a foreign authentic instrument via Article 60 of Regulation 650/2012 requires that, provided that to do so would not be manifestly contrary to Estonian public policy, the authorities in the Member State addressed (Estonia) must on application by an interested person declare enforceable in Estonia a foreign succession authentic instrument that is enforceable in its Member State of origin. Though for the reasons already explained it will very rarely be the case in Estonian law that a domestic succession authentic instrument could be regarded as enforceable, Article 60 of the European Union Succession Regulation means that it will be necessary for the Estonian authorities to declare foreign succession authentic instruments that are enforceable in their Member State of origin to also be enforceable in Estonia: this possibility was already provided for before the advent of the Succession Regulation by § 627 of the Code of Civil Procedure which continues in force and deals with the recognition and enforcement of enforceable foreign authentic instruments. Assuming there to be no challenge to the foreign authentic instrument in the Member State of origin, the only permitted exception to the Article 60 obligation is if the declaration of enforcement would violate Estonian public policy. We are not aware of any special provision in the law of Estonia that specifically deals with the actual enforcement of a foreign authentic instrument after it has been declared enforceable (differently from the actual enforcement of a foreign judgment that has been declared enforceable) in accordance with the procedure laid down in Articles 45 to 58 of the EU Succession Regulation as required by Article 60 thereof.

Estonian public policy

The EU Succession Regulation allows a public policy defence in various contexts including with reference to authentic instruments under Articles 59 and 60. To invoke the public policy exception in the context of Article 59, and by so doing to justify a refusal of acceptance for that foreign authentic instrument, it must be the case that the *granting of the same or most comparable evidentiary effects* to the foreign authentic instrument would be manifestly contrary to Estonian public policy. To invoke the public policy exception in the context of Article 60, to justify a refusal of a declaration of enforceability

for the foreign authentic instrument, it must be that the *granting of the declaration of enforceability* for the foreign authentic instrument would be manifestly contrary to Estonian public policy. Of course this public policy exception should be construed narrowly and it is envisaged that it will rarely apply. As is made plain by Recital 58 of the Succession Regulation, public policy is not to be applied in a manner that is discriminatory or otherwise contrary to the European Union's Charter of Fundamental Rights. Equally however Recital 26 of Regulation 650/2012 indicates that the Regulation does not prevent a court from applying mechanisms designed to tackle the evasion of the law, such as *fraude à la loi* in the context of Private International Law. However, the substantive provisions of the Regulation do not expressly empower national courts to prevent evasion of the law (including *fraude à la loi*). It would seem that the only positive basis for doing so under the Regulation is to regard such evasion of the law to be contrary to public policy unless the law being evaded is one of the "special rules" of the forum concerning certain assets that is applicable irrespective of the law applicable to the succession (see Article 30 of the EU Succession Regulation).

Our national reporters were not able to find any case in which public policy had been invoked to deny the reception of a foreign authentic instrument in the context of an Estonian succession proceeding.

Incompatible Authentic instruments

Under Estonian law, a court could refuse to recognise a foreign (enforceable) authentic instrument if it conflicted with an earlier recognisable (and enforceable) authentic instrument: §620(1)5 and §627 of the Code of Civil Procedure. It is, however, very doubtful that a court considering a matter to which the EU Succession Regulation applies would resort to this provision as Recital 66 already deals with this problem sufficiently. Recital 66 of the EU Succession Regulation envisages the possibility of 'an authority' being presented with incompatible authentic instruments.¹²³ The solutions suggested by the Recital are to consider priority and the circumstances of the particular case and then, if this has not resolved the incompatibility, to resort to a court with direct or incidental jurisdiction under the Succession Regulation.

¹²³ Recital 66: Should an authority, in the application of this Regulation, be presented with two incompatible authentic instruments, it should assess the question as to which authentic instrument, if any, should be given priority, taking into account the circumstances of the particular case. Where it is not clear from those circumstances which authentic instrument, if any, should be given priority, the question should be determined by the courts having jurisdiction under this Regulation, or, where the question is raised as an incidental question in the course of proceedings, by the court seized of those proceedings. In the event of incompatibility between an authentic instrument and a decision, regard should be had to the grounds of non-recognition of decisions under this Regulation.

FINLAND

The Finnish legal system

Finland consists of a single legal system that belongs to the civil law family. The Finnish law concerning succession has been updated to implement the EU Succession Regulation via the various legislative provisions and amendments described and set out below.

All the rules regarding succession are located in the Code of Inheritance (Perintökaari 5.2.1965/40).¹²⁴

First, Laki perintöasioista annetun Euroopan parlamentin ja neuvoston asetuksen soveltamisesta (682/2015) was given. It has three Sections which determine the national courts and authorities competent in the EU Succession Regulation related matters. Secondly, Laki perintökaaren 26 luvun 20 §:n muuttamisesta (683/2015), mostly for informational reasons, was given. It modifies Section 20 of the Code of Inheritance's Chapter on Private International Law. According to Section 20 provisions of the Chapter are only applicable if the EU Succession Regulation or binding international obligation does not stipulate otherwise. Furthermore, due to the EU Succession Regulation Nordic countries updated the Convention between Finland, Denmark, Iceland, Norway and Sweden on Inheritance Testaments and Estate Administration. Finland accepted the changes via law (681/2015). The Convention applies if the deceased was a citizen of one of the Contracting States and if he or she was habitually resident in one of the Contracting States. The updated Convention entered into force 1.9.2015. Explanations related to the new legislation were given in the Government proposal (HE 361/2014). Available in Finnish and Swedish: www.finlex.fi. Article 75(3) of the EU Succession Regulation preserves the continued application of the Nordic Convention of 19 November 1934, as amended by the intergovernmental agreement of 1 June 2012, in certain matters.

The concept of an authentic instrument in Finland

The Finnish legal system *does* feature public documents (usually in the form of registers) but **does not feature the legal institution of the authentic instrument**.

There are notaries in the Finnish legal system but they have no domestic role in relation to Finnish succession law. If compared to notaries in many other EU Member States, Finnish notaries have a reduced domestic role in their legal system. A Finnish notary cannot create an authentic instrument and instead provides legal assistance for natural and legal persons based in Finland in connection with compliance with the notarial and documentary requirements of *other* legal systems.

It should be stressed that there is no domestic legal competence at all for a Finnish notary to ever be professionally involved in a succession conducted in Finland. Even the European Certificate of Succession is issued by the Local Register Office of Helsinki: a Finnish notary cannot issue this document.

Evidentiary effects of domestic authentic instruments in Finnish law

As the Finnish legal system does not feature authentic instruments it follows that there are no such domestic evidentiary effects in Finnish law.

¹²⁴ Available in Finnish: <http://www.finlex.fi/fi/laki/ajantasa/1965/19650040> (updated).
Available in Swedish: <http://www.finlex.fi/sv/laki/ajantasa/1965/19650040> (updated).
Available in English: <http://www.finlex.fi/fi/laki/kaannokset/1965/en19650040.pdf> (amendments up to 1228/2001 included).

The use of authentic instruments in domestic Finnish succession law

The Finnish legal system does not use authentic instruments in any part of its domestic law. Further, a Finnish notary has no domestic role in the creation of any kind of will. There are no rules in the Finnish Code of Inheritance concerning the deposit or registration of wills: there is no public depository for wills and nor is there any kind of Wills Registry in Finland.

A Finnish will must be a holograph will and it is usually kept by the testator himself. It is possible, if unusual, for a lawyer/advocate who advised the testator on how he should draft his will, to then hold that will for the testator. The lawyer cannot however draft the will for the testator.

The Private International Law implications of the European Union's Succession Regulation 650/2012 and Implementing Regulation 1329/2014

The European Union Succession Regulation and its Implementing Regulation raise only one Private International Law issue for Finland in this context: the extent of the obligations imposed on Finland as a Member State addressed when it is in receipt of a foreign succession authentic instrument. As the legal institution of the authentic instrument is absent from Finnish law, Finland can never be a Member State of origin in connection with an authentic instrument concerning succession. Equally, it must be noted that prior to the EU Succession Regulation there were no provisions apart from the Nordic Inheritance Convention 1934¹²⁵ concerning recognition and enforcement of foreign succession decisions in the Finnish legal system.

Finland is the Member State addressed: foreign succession authentic instruments

The EU Succession Regulation requires that, subject to public policy exceptions, Finnish authorities must **accept** and, or, **enforce** foreign authentic instruments in matters of succession received from other EU Member States bound by the Succession Regulation.

The **acceptance** of a foreign succession authentic instrument produced by a holder in Finland is governed by Article 59 of the EU Succession Regulation and the enforcement of such an authentic instrument is governed by Article 60 of that Regulation. Acceptance requires that, provided that to do so would not be manifestly contrary to Finnish public policy, the authorities in Finland (as the Member State addressed) *must* grant the foreign succession authentic instrument the same (or most comparable) evidentiary effects it would enjoy in its own Member State of origin.

To determine the nature of the evidentiary effects that would be associated with that authentic instrument in the Member State of origin, reference should be made to any Annex 2 Form II form that may accompany the foreign authentic instrument, especially to parts 4.2.1.1.1 – 4.2.1.1.7 of any such form. It must however be noted that the use of the Implementing Regulation's Annex 2 form does not appear to be obligatory. The obligation imposed by Article 59 of the EU Succession Regulation on the Member State addressed to accept a succession authentic instrument does not require or depend upon the use or supply of the Annex 2 form. A succession authentic instrument received from a Member State of origin in accordance with the provisions of the EU Succession Regulation must still be accepted, within the meaning of Article 59 of Regulation 650/2012, even if no Annex 2 Form II form is provided or if the Annex 2 form provided is not fully or properly completed.

¹²⁵ In so far as that Convention provides for simplified and more expeditious procedures for the recognition and enforcement of decisions in matters of succession that Convention still applies between Denmark, Finland, Iceland, Norway and Sweden. (See Article 75(3) of the EU Succession Regulation) Such 'decisions' are those given by a court and do not include authentic instruments.

The **enforcement** of a foreign succession authentic instrument via Article 60 of Regulation 650/2012 requires that, provided that to do so would not be manifestly contrary to Finnish public policy, the Finnish authorities must, on application by an interested person, declare enforceable a foreign succession authentic instrument that is itself enforceable in its Member State of origin. We are not aware of any special provision in the law of Finland that specifically deals with the actual enforcement of a foreign authentic instrument after it has been declared enforceable (differently from the actual enforcement of a foreign judgment that has been declared enforceable) in accordance with the procedure laid down in Articles 45 to 58 of the EU Succession Regulation as required by Article 60 thereof.

Finnish public policy

The EU Succession Regulation allows a public policy defence in various contexts including with reference to authentic instruments under Articles 59 and 60. To invoke the public policy exception in the context of Article 59, and by so doing to justify a refusal of acceptance for that foreign authentic instrument, it must be the case that the *granting of the same or most comparable evidentiary effects* to the foreign authentic instrument would be manifestly contrary to Finnish public policy. To invoke the public policy exception in the context of Article 60, to justify a refusal of a declaration of enforceability for the foreign authentic instrument, it must be that the *granting of the declaration of enforceability* for the foreign authentic instrument would be manifestly contrary to Finnish public policy. Of course this public policy exception should be construed narrowly and it is envisaged that it should rarely apply. As is made plain by Recital 58 of the EU Succession Regulation, public policy is not to be applied in a manner that is discriminatory or otherwise contrary to the European Union's Charter of Fundamental Rights. Equally however Recital 26 of Regulation 650/2012 indicates that the Regulation does not prevent a court from applying mechanisms designed to tackle the evasion of the law, such as *fraude à la loi* in the context of Private International Law. However, the substantive provisions of the Regulation do not expressly empower national courts to prevent evasion of the law (including *fraude à la loi*). It would seem that the only positive basis for doing so under the Regulation is to regard such evasion of the law to be contrary to public policy unless the law being evaded is one of the "special rules" of the forum concerning certain assets that is applicable irrespective of the law applicable to the succession (see Article 30 of the EU Succession Regulation).

Our national reporters were not able to find any case in which public policy had been invoked to deny the reception of a foreign authentic instrument in the context of a Finnish succession proceeding.

Incompatible Authentic instruments

Recital 66 of the EU Succession Regulation envisages the possibility of 'an authority' being presented with incompatible authentic instruments.¹²⁶ The solutions suggested by this Recital are to consider priority and the circumstances of the particular case and then, if this has not resolved the incompatibility, to resort to a court with direct or incidental jurisdiction under the EU Succession Regulation.

There are no domestic or Private International Law provisions concerning authentic instruments in general or concerning this issue in Finnish law.

¹²⁶ Recital 66: Should an authority, in the application of this Regulation, be presented with two incompatible authentic instruments, it should assess the question as to which authentic instrument, if any, should be given priority, taking into account the circumstances of the particular case. Where it is not clear from those circumstances which authentic instrument, if any, should be given priority, the question should be determined by the courts having jurisdiction under this Regulation, or, where the question is raised as an incidental question in the course of proceedings, by the court seized of those proceedings. In the event of incompatibility between an authentic instrument and a decision, regard should be had to the grounds of non-recognition of decisions under this Regulation.

FRANCE

The French legal system

France consists of a single legal system that belongs to the civil law family. The succession rules can be found in the French Civil Code, Articles 720 and following.¹²⁷

The French law concerning succession has, in general, been updated by a decree relating to the implementation of the EU Succession Regulation made on 2 November 2015: Décret n° 2015-1395 du 2 novembre 2015 portant diverses dispositions d'adaptation au droit de l'Union européenne en matière de successions transfrontalières. Pursuant to this decree, some new Articles have been inserted in the Civil Procedure Code. According to this implementing decree, notaries have jurisdiction to deliver a European Certificate of Succession.¹²⁸

The concept of an authentic instrument in the French legal system

The French legal system makes extensive use of authentic instruments defined in Articles 1317-1321 of the French Civil Code. Such authentic instruments can be issued in the form of judgments, writs or acts/instruments by judges, bailiffs and notaries respectively. Further, all documents issued by public authorities/public officials can also be authentic instruments following Articles 1317-1321. Articles 1317-1321 of the Civil Code are located in a part of the Code dealing with evidence and the evidentiary value of different documents. Article 1317, provides that "An authentic act is one that has been received by public legal officers who have the authority to draw up such acts at the place where the act was written and with the requisite formalities". The enforceability of an authentic instrument is set out by Article 19 of Loi du 25 ventôse an XI contenant organization du notariat, (Act of 25 Ventose Year XI in relation to the organisation of public notaries) which ensures that an authentic instrument is enforceable throughout France and appoints notaries as public servants who may receive all acts and contracts that the parties must or wish to give an authentic character. Other provisions concerning authentic instruments may be found located in the Civil Code and elsewhere in amending provisions of French law.

According to French law, some transactions must be recorded via an authentic instrument if they are to be valid, e.g. the sale or purchase of immovables, certain forms of donation and any variation of the usual marital property regime (or a subsequent modification of such an arrangement) require an authentic instrument. Authentic instruments are also required in the context of succession (as discussed below).

Evidentiary effects of domestic authentic instruments in French law

The evidential value ("force probante" or probative force) of an authentic instrument is regulated in Article 1319 of the Civil Code. An authentic instrument produces full proof and a conclusive but rebuttable evidential value as concerns the agreement it contains as among the contracting parties to that instrument, and also their heirs or assignees. It is important to bear in mind that this high evidential value only relates to the authentic recordings made by the drafter of the authentic instrument (i.e. the recordings that the notary or other public official can or has to verify to issue the authentic instrument, such

¹²⁷ Civil Code in French

<http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070721&dateTexte=20151014>

For an official English version and for other French legislation see:

<http://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations>

¹²⁸ French Civil Procedure Code, Article 1381-1.

as the place and date of the act, the appearance of parties to the act, their identity, etc.).¹²⁹

The special evidential value attached to authentic instruments does not mean that the information covered cannot be challenged. In every case a challenge *always* remains possible. The special evidential value only means that the information covered benefits from a statutory **presumption of truthfulness**, which can only be overturned in specific circumstances, following a particular procedure which is quite cumbersome to activate, i.e. the '*procédure d'inscription de faux*'. Assuming that there is no such challenge (or that such a challenge fails), the information benefitting from the higher evidential status can be used as conclusive evidence in any court proceedings or before any other authority. The mere production of the authentic instrument triggers the application of the special presumption, without any need for an additional verification process.

The enforceability of authentic instruments, including notarial acts, is regulated in Article 1317 of the French Civil Code and Article 19 of the French Law concerning the office of notary (Loi du 25 ventôse an XI contenant organisation du notariat). The enforceability of such an instrument depends upon (1) its authenticity by respecting the required formalities and the statute of the notary who draws it up as a public official, (2) the agreement between the parties to the act monitored by the notary who draws up the authentic instrument and who also ensures the effective consent of the parties to the agreement in clear and unequivocal terms, and (3) the kind of obligation contained in that agreement.

Disputing the validity of an authentic instrument

If an authentic instrument is successfully challenged as to its formal validity/authenticity/*instrumentum* it will lose the evidentiary effects associated with public documents. If an authentic instrument is successfully challenged as to the validity of its *negotium*/material validity the instrument itself may still be technically valid but its evidentiary meaning will change accordingly and may well be rendered nugatory in practice.

French law provides a special procedure that must be followed if a party wishes to challenge the formal validity/authenticity/*instrumentum* of an authentic instrument. This is the so-called "*procédure d'inscription de faux*" (special proceedings for forgery) regulated by Articles 303-316 of the Civil Procedure Code. To bring such forgery proceedings to challenge the authenticity of an authentic instrument in its most serious form will involve the public prosecutor bringing proceedings before a criminal court in a claim against the notary himself (or any other public official that drew up the disputed authentic instrument). It is also possible to bring proceedings where the allegation of forgery does not include misconduct as such by the notary (or other public official) but merely involves an allegation of falsification or forgery in the writing of the authentic instrument. Depending upon the nature of the forgery allegation and its bearing on any given legal procedure, the evidentiary effect and the enforceability of the authentic instrument may be stayed/suspended by the court.

The material content or *negotium* of an authentic instrument does not benefit from the special evidential value referred to above. As a consequence, the material validity of the transaction contained within the authentic instrument (its *negotium*) may be challenged

¹²⁹The special evidential value of an authentic instrument only applies to matters which have been duly recorded by the notary ('*ex propriis sensibus*') it does not include or extend to legal issues that are *not* directly recorded by the notary but, instead, are based on a process of reasoning that he followed: e.g. when immovable property is sold, the authentic instrument employed in this transaction **does not** possess a special evidential value in respect of the question of whether or not the seller was its true owner nor as to who owns the purchase money.

without having recourse to the special forgery proceedings. The ordinary rules of civil procedure will apply to the potential challenges which are themselves dependent upon what possibilities are allowed by the Civil Code concerning such legal transactions, e.g. claims for fraud or force (duress), or lack of cause may be possible.

The validity of an authentic instrument is not automatically or necessarily affected by the commencement of proceedings directed against its *instrumentum*. An authentic instrument will retain its evidential value and effects during such proceedings.

There is no special procedure governing a challenge to the actual enforcement of an authentic instrument but in the event that a challenge to the *instrumentum/authenticity* of the authentic instrument or its *negotium* is commenced this may induce the court to suspend the enforceability of that authentic instrument until the challenge has been resolved.

The use of authentic instruments in domestic French succession law

The authentic instruments employed in French succession law are subject to the same rules and legal provisions that are set out above. There are also special provisions for some authentic instruments¹³⁰ that arise in the context of succession law although French law does not domestically provide a special regime for authentic instruments arising in the course of a succession.

There are a wide range of required and optional uses for authentic instruments in French succession law. The following list indicates the main documents that are regarded in France as authentic instruments in matters of succession:

- a) An authentic will is an authentic instrument. Article 971 of the Civil Code provides that "A testament by public act shall be received by one notary attended by two witnesses or by two notaries".
- b) Though it is not an authentic instrument at the point of drafting, an international will under the Treaty of Washington on a uniform law concerning the form of the international will consists of a hand-written private will document given by the testator to the notary and two witnesses which is given proof of validity by the drawing up of an authentic instrument by the notary for that purpose under Article 1007 of the Civil Code.
- c) Article 976 of the Civil Code concerns the requirements for a secret or mystic will as received by a notary in the presence of two witnesses. The notary writes on the sealed envelope in which the mystic will is contained to record that which is required by Article 976 and amount to an authentic instrument concerning that will.
- d) Though it is not an authentic instrument at the point of drafting, a holograph will made by the testator will after his death eventually be presented to the notary responsible for the succession who will then follow Article 1007 of the Civil Code and draft a document called a *procès-verbal*. This official document is a notarial record or minute of the proceedings and is seemingly regarded as an authentic instrument that signifies that the succession has been opened and also sets out the precise condition of the will document.¹³¹
- e) A renunciation of the right of a presumptive forced heir to exercise and action in reduction in a future succession must be via an authentic instrument: see Article 929 of the Civil Code.
- f) A proof of heirship (an *acte de notoriété*) is an authentic instrument: see Articles 730-1 to 730-3 of the Civil Code.
- g) An inventory of the estate is an authentic instrument: see Article 789 of the Civil Code.

¹³⁰ See Articles 973, 975 and 1001 of the Civil Code.

¹³¹ It should refer to the quality and dimensions of the will medium; the number of pages; the device used to write the will; the colour of the ink; the number of lines, the signature; and the description written on the envelope.

- h) If an act of partition (*acte de partage*) is proposed and is to be drawn up by a notary because it involves immovable property that must be capable of registration in the French Land Registry or (as is more common) it results from a judicial decision, the partition will be regarded as an authentic instrument.
- i) The delivery of a legacy to a legatee by the heirs upon the legatee's request will require the use of an authentic instrument if the legacy is of immovable property.

The Private International Law implications of the European Union's Succession Regulation 650/2012 and Implementing Regulation 1329/2014

The European Union Succession Regulation and its Implementing Regulation raise two distinct Private International Law issues for France as an EU Member State: first, the extent of the obligations imposed by these Regulations on France as a Member State of origin concerning its domestically created succession authentic instruments; and, second, the extent of the obligations these Regulations impose on France as a Member State addressed concerning its duties relating to incoming foreign succession authentic instruments. The comments that follow consider each position.

France is the Member State of origin: obligations concerning domestic succession authentic instruments

Article 59(1) of the European Union Succession Regulation allows, but does not require, 'a person' who wishes to use a succession authentic instrument in another Member State to ask the authority who established it, i.e. the notary who drew it up or his substitute/successor, to issue an attestation concerning that authentic instrument on the standard form provided by Annex 2 Form II of EU Implementing Regulation 1329/2014. It is unclear whether or not such a request must be complied with if it is received from a person not deemed by the notary to be 'an interested party'. The substitution of the phrase 'a person' in Article 59 for 'interested party' in Article 60 could be understood to indicate that there is no requirement in the EU Succession Regulation for the applicant seeking only cross-border acceptance to demonstrate what would otherwise be domestically regarded as a 'legitimate interest' when requesting the attestation from the notary. The exact composition of the class of those who may apply for such an attestation is, in the absence of any specific provisions, currently unclear. It is assumed that the parties to an authentic instrument, those deriving rights from that instrument and those interested in the succession may apply to the notary. The EU Succession Regulation and its Implementing Regulation do not expressly contemplate the possibility that a request under Article 59 may be refused. It is however possible to contrast the applicant 'may ask' of Article 59 with 'the authority shall' in Article 60(2) and to infer from the different wording that the notary (or other public authority) is only actually obliged to accede to the applicant's request when it concerns enforcement under Article 60. This result however seems inconsistent with Recitals 22, 59 and 60 of the EU Succession Regulation and with one of its underlying purposes, i.e. to facilitate the cross-border transmission of authentic instruments and their legal effects. In circumstances where both the acceptance and the enforcement of the authentic instrument may be sought the problem may be avoided, assuming the notary to be willing to provide information concerning both Article 59 and Article 60, by the applicant routinely requesting an attestation concerning *both* enforcement and acceptance.

Article 60 of EU Regulation 650/2012 requires that, provided that to so declare would not be manifestly contrary to its public policy, the authorities in the Member State addressed *must* on application by an interested person declare a foreign succession authentic instrument that is enforceable in its Member State of origin to also be enforceable in their Member State. A French notary may thus be in receipt of a request for such an attestation, again under Annex 2 Form II of EU Implementing Regulation 1329/2014. This standard form allows for an attestation that concerns only 'acceptance', via Article 59, or 'enforcement' via Article 60, or an attestation that jointly concerns

acceptance and enforcement of the authentic instrument depending upon the boxes ticked by the French notary.

The French notary in receipt of the request to provide a completed Annex 2 Form II attestation concerning a domestic succession authentic instrument is asked to indicate at points 4.2 to 4.2.1.1.7 of the standard form what he believes its domestic evidentiary effects to be. Though the answers will vary depending upon the specific verifications contained in the succession authentic instrument at issue, it is broadly conceivable that points 4.2.1.1.1 to 4.2.1.1.7 could be expected to be completed as follows:

4.2.1.1.1 - The date the authentic instrument was drawn up:

Article 6 of the Decree n° 2005-973 of 10 August 2005 amending the decree n°71-941 of 26 November 1971 concerning acts issued by notaries includes all authentic recordings of verified facts by the notary or other public official who drafts the authentic instrument (e.g. all information the public official has verified to draw up and issue the authentic instrument, such as the place and date of the instrument, the appearance of parties to the instrument, their identities, etc) within the evidentiary effect of that authentic instrument flowing from Article 1319 of the Civil Code.

4.2.1.1.2 - The place where the authentic instrument was drawn up:

Article 6 of the Decree n° 2005-973 of 10 August 2005 amending the decree n°71-941 of 26 November 1971 concerning acts issued by notaries includes all authentic recordings of verified facts by the notary or other public official who drafts the authentic instrument (e.g. all information the public official has verified to draw up and issue the authentic instrument, such as the place and date of the instrument, the appearance of parties to the instrument, their identities, etc) within the evidentiary effect of that authentic instrument flowing from Article 1319 of the Civil Code.

4.2.1.1.3 - The origin of the signatures from the parties of the authentic instrument:

Article 10 of the Decree n° 2005-973 of 10 August 2005 amending the decree n°71-941 of 26 November 1971 concerning acts issued by notaries includes the origins of the signatures from the parties within the evidentiary effect of an authentic instrument flowing from Article 1319 of the Civil Code.

4.2.1.1.4 - The content of the declarations of the parties:

Articles 10-20 of the Decree n° 2005-973 of 10 August 2005 amending the decree n°71-941 of 26 November 1971 concerning acts issued by notaries applies the conclusive evidentiary effect from Article 1319 of the Civil Code to the content of these declarations made by the parties but it only does so in the sense that it proves that the parties actually made the declarations recorded in the authentic instrument in the presence of the notary who drew up that authentic instrument. It does not follow that the authentic instrument *therefore* and without more proves that the declarations of the parties are true and nor does it prove that the event (concerning which the declaration was made) necessarily actually occurred.

4.2.1.1.5 - The facts that the authority declares as having been verified in its presence:

Articles 10-20 of the Decree n° 2005-973 of 10 August 2005 amending the decree n°71-941 of 26 November 1971 concerning acts issued by notaries applies the conclusive evidentiary effect from Article 1319 of the Civil Code to these verified facts .

4.2.1.1.6 - The actions which the authority declares to have carried out:

Articles 10-20 of the Decree n° 2005-973 of 10 August 2005 amending the decree n°71-941 of 26 November 1971 concerning acts issued by notaries applies the conclusive evidentiary effect from Article 1319 of the Civil Code to these declared actions of the notary (or other issuing authority).

4.2.1.1.7 - Other: (please indicate any other evidentiary effect that a domestic authentic instrument could produce)

Under Article 1319 of the Civil Code certain actions undertaken by parties, which may have legal consequences (e.g. the fact that one party has paid a certain amount of money to another party) are also covered by the special evidentiary value afforded to authentic instruments, provided they have been witnessed directly by the notary. It is conceivable that additional information concerning such actions could be presented in this box. It is also possible that if the authentic instrument were to be involved in a domestic challenge procedure that on its conclusion affected that authentic instrument some information as to these effects might be included in this box.

France is the Member State addressed: foreign succession authentic instruments

The EU Succession Regulation requires that, subject to public policy exceptions, French authorities¹³² must **accept** and/or **enforce** foreign authentic instruments in matters of succession received from other EU Member States bound by the Succession Regulation.

The **acceptance** of a foreign succession authentic instrument is governed by Article 59 and the enforcement of such an authentic instrument is governed by Article 60 of the EU Succession Regulation. Acceptance requires that, provided that to do so would not be manifestly contrary to French domestic public policy, the authorities in France (as the Member State addressed) *must* grant the foreign succession authentic instrument the same (or most comparable) evidentiary effects as it would enjoy in its own Member State of origin.

To determine the nature of the evidentiary effects that would be associated with that authentic instrument in the Member State of origin, reference should be made to any Annex 2 Form II form that may accompany the foreign authentic instrument, especially to parts 4.2.1.1.1 – 4.2.1.1.7 of any such form. It must however be noted that the use of the Implementing Regulation's Annex 2 form does not appear to be obligatory. The obligation imposed by Article 59 of the EU Succession Regulation on the Member State addressed to accept a succession authentic instrument does not require or depend upon the use or supply of the Annex 2 form. A succession authentic instrument received from a Member State of origin in accordance with the provisions of the EU Succession Regulation must still be accepted, within the meaning of Article 59 of Regulation 650/2012, even if no Annex 2 Form II form is provided or if the Annex 2 form provided is not fully or properly completed. At present there are no provisions in French law that specifically deal with the acceptance of a foreign authentic instrument concerning a matter of succession under the EU Succession Regulation. This is however in line with French policy generally for as long as the foreign authentic instrument is uncontested. Once it is contested it is necessary to go to court under Article 509 of the Civil Procedure Code.

The **enforcement** of a foreign authentic instrument via Article 60 of Regulation 650/2012 requires that, provided that to do so would not be manifestly contrary to its public policy, the authorities in the Member State addressed (France) must on application by an interested person declare enforceable a foreign succession authentic instrument that is enforceable in its Member State of origin. We are not aware of any special provision in the law of France that specifically deals with the actual enforcement of a foreign authentic instrument (differently from the actual enforcement of a foreign judgment that has been declared enforceable) after it has been declared enforceable in accordance with the procedure laid down in Articles 45 to 58 of the EU Succession Regulation as required by Article 60 thereof.

¹³² For a French authentic instrument the application must be made to the notary who is in possession of the original Instrument as per Article 509 – 3 Civil Procedure Code. For foreign authentic instruments, the application must be made to the President of the Chamber of notaries also under Article 509 – 3 of the Civil Procedure Code.

French public policy

The EU Succession Regulation allows a public policy defence in various contexts including with reference to authentic instruments under Articles 59 and 60. To invoke the public policy exception in the context of Article 59, and by so doing to justify a refusal of acceptance of that foreign authentic instrument, it must be the case that the *granting of the same or most comparable evidentiary effects* to the foreign authentic instrument would be manifestly contrary to French public policy. To invoke the public policy exception in the context of Article 60, to justify a refusal of a declaration of enforceability of the foreign authentic instrument, it must be that the *granting of the declaration of enforceability* of the foreign authentic instrument would be manifestly contrary to French public policy. Of course this public policy exception should be construed narrowly and it is envisaged that it will rarely apply. As is made plain by Recital 58 of the EU Succession Regulation, public policy is not to be applied in a manner that is discriminatory or otherwise contrary to the European Union's Charter of Fundamental Rights. Equally however Recital 26 of Regulation 650/2012 indicates that the Regulation does not prevent a court from applying mechanisms designed to tackle the evasion of the law, such as *fraude à la loi* in the context of Private International Law. However, the substantive provisions of the Regulation do not expressly empower national courts to prevent evasion of the law (including *fraude à la loi*). It would seem that the only positive basis for doing so under the Regulation is to regard such evasion of the law to be contrary to public policy unless the law being evaded is one of the "special rules" of the forum concerning certain assets that is applicable irrespective of the law applicable to the succession (see Article 30 of the EU Succession Regulation).

Our national reporters were not able to find any case in which public policy had been invoked to deny the reception of a foreign authentic instrument in the context of a French succession proceeding.

Incompatible Authentic instruments

Recital 66 of the EU Succession Regulation envisages the possibility of 'an authority' being presented with incompatible authentic instruments.¹³³ The solutions suggested by the Recital are: first, to consider priority and the circumstances of the particular case and then, if this has not resolved the incompatibility, to resort to a court with direct or incidental jurisdiction under the EU Succession Regulation. At present there are no provisions in French law that specifically deal with the possibility of incompatible succession authentic instruments.

¹³³ Recital 66: Should an authority, in the application of this Regulation, be presented with two incompatible authentic instruments, it should assess the question as to which authentic instrument, if any, should be given priority, taking into account the circumstances of the particular case. Where it is not clear from those circumstances which authentic instrument, if any, should be given priority, the question should be determined by the courts having jurisdiction under this Regulation, or, where the question is raised as an incidental question in the course of proceedings, by the court seised of those proceedings. In the event of incompatibility between an authentic instrument and a decision, regard should be had to the grounds of non-recognition of decisions under this Regulation.

GERMANY

The German legal system

Germany consists of a single legal system, composed of federal states, that belongs to the civil law family. The federal states have some limited competences to address procedural aspects such as the question whether the notary or a court is competent in succession matters. Relevant legislation which differs from the rest of Germany can be found in Sec. 38 of the Act on Non-contentious Procedure in Baden-Württemberg (Landesgesetz über die freiwillige Gerichtsbarkeit (BWFGG)). It grants the local notaries a competence equal to that of a probate court (see below question 12 b).

The substantive and procedural law can be found in -

Bürgerliches Gesetzbuch - BGB (Civil Code), Book 5, Sec. 1922 et seq.;¹³⁴ Procedure: Gesetz über Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit - FamFG (Act on proceedings in family and non-contentious matters), Sec. 342 et seq. (procedure in matters of succession), Sec. 86 (enforcement titles) and Sec. 108 (recognition of foreign decisions);¹³⁵ ZPO (Code of Civil Procedure), see in particular Sec. 415 et seq. and Sec. 794 (1) Nr. 5 (authentic instruments) and Sec. 722, 723 (enforcement of foreign decisions) and 328 (grounds for non-recognition). See also below 4).¹³⁶

The German law concerning succession has, in general, been updated to implement the EU Succession Regulation via the various legislative provisions and amendments described and set out below.

See the Act implementing the Succession Regulation (and establishing an Act on procedure in international successions, the IntErbRVG): Gesetz zum Internationalen Erbrecht und zur Änderung von Vorschriften zum Erbschein sowie zur Änderung sonstiger Vorschriften vom 29. Juni 2015 (BGBl. 2015 I, 1042 ff.).¹³⁷

The concept of an authentic instrument in Germany

The German legal system makes extensive use of authentic instruments as different types of public documents. The German code of civil procedure (the *Zivilprozeßordnung* (ZPO)) at §. 415 defines authentic instruments as "instruments issued by a public authority or person/entity expressly empowered by the authority of the State within the limits of their authority and in the form prescribed by the law". Authentic instruments are created by public authorities¹³⁸ (courts, consuls, registrars) or persons/entities expressly empowered by the authority of the State (notaries, bailiffs) depending on the type of authentic instrument. There are a number of transactions that are legally required to be carried out by using an authentic instrument e.g. registrations in public

¹³⁴ <http://www.gesetze-im-internet.de/bgb/BJNR001950896.html>. For an official English translation see http://www.gesetze-im-internet.de/englisch_bgb/index.html

¹³⁵ <https://www.gesetze-im-internet.de/famfg/BJNR258700008.html>.for an official English translation see <http://www.gesetze-im-internet.de/famfg/index.html>

¹³⁶ <http://www.gesetze-im-internet.de/zpo/index.html> for an official English translation see https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html

¹³⁷ [http://www.bgb1.de/xaver/bgb1/start.xav?start=%2F%2F*\[%40attr_id%3D%27bgb115s1042.pdf%27\]#_bgb1_%2F%2F*\[%40attr_id%3D%27bgb115s1042.pdf%27\]_1443607239863](http://www.bgb1.de/xaver/bgb1/start.xav?start=%2F%2F*[%40attr_id%3D%27bgb115s1042.pdf%27]#_bgb1_%2F%2F*[%40attr_id%3D%27bgb115s1042.pdf%27]_1443607239863). There is no official translation at this point.

¹³⁸ Civil status documents are authentic instruments, issued by the registrar, see the Act on Civil Status (Personenstandsgesetz (PStG)): birth certificate (Sec. 21 PStG); marriage certificate (Sec. 14, 15 PStG); certificate regarding a civil partnership (Sec. 17 PStG); death certificate (Sec. 31 PStG); name declarations (Sec. 41 et seq. PStG).

registers are only made if applied for via an authentic instrument.¹³⁹ This safeguards the accuracy of public registers as the authentication procedure guarantees reliable identity checks and comprehensive legal scrutiny. The use of an authentic instrument – and the authentication procedure before a notary that this involves – is also required by the legislator to make parties aware of the importance of specific legal transactions and to ensure that full impartial legal advice is provided to them: e.g. marriage contracts;¹⁴⁰ contracts on inheritance; contracts that result in an obligation to transfer immovable property. Equally, authentic instruments are required to record certain contracts¹⁴¹ and other declarations made by the parties, or facts, or to record official orders or decisions: see §. 415 and §. 417–419 ZPO for the definition and evidentiary value of public documents. Private parties may opt to employ an authentic instrument in the course of their transaction so as to take advantage of the possibility of 'immediate' enforcement of such an instrument that has been drawn up with a *Vollstreckungsklausel* included and §.794(1) Nr. 5 ZPO concerns the enforceability of such authentic instruments and any others that are drawn up to be so enforceable.

Evidentiary effects of domestic authentic instruments in German law

The domestic evidentiary effect of authentic instruments in German law is determined by §. 415 ZPO and §. 41–419 ZPO which provide a form of definition for authentic instruments (and other public documents) that differentiates them and their evidentiary effects from private documents.¹⁴² If the authentic instrument has been drawn up to be enforceable, §.794 (1) Nr. 5 ZPO generally provides for its enforceability.

According to German law, authentic instruments establish full proof with regard to the authenticity of the facts that they record (e.g. place and time of authentication; fact that the declarations contained in the authentic instrument have been made by the parties indicated) assuming that these facts are not otherwise successfully contested by adducing other evidence showing the authentic instrument to have been inaccurately recorded.¹⁴³ It is however most important to notice that these enhanced evidentiary effects **do not** extend to or concern the **material validity** (*negotium*) of the declarations that have been authenticated by the German notary or by any other equivalent public official. Thus a German authentic instrument **does not provide proof of the accuracy of its declared or attested content** (the so-called "formal evidential value" / "formelle Beweiskraft").¹⁴⁴

If an authentic instrument does not contain declarations but has a different content (ie. it documents certain facts), §. 418 ZPO sets out that it establishes full proof of the recorded facts. If an authentic instrument does not contain declarations or facts but

¹³⁹ Registration in the immovable property register requires the submission of proof in form of authentic instruments (Sec. 29 Grundbuchordnung (GBO). In case of a succession, this can either be a (national) certificate of succession, a European Certificate of Succession or, in case of notarial wills, the will plus the protocol documenting the opening of the succession, if the Registry considers the latter documents as sufficient (Sec. 35 GBO).

¹⁴⁰ Prenuptial or matrimonial agreements (Sec. 1410 BGB); maintenance agreements if concluded before the divorce has res judicata effect (Sec. 1585c BGB); recognition of paternity requires an authentic instrument issued by an authority (Sec. 1597 BGB); consent to an adoption (declaration before the competent court and notarisation (Sec. 1750 BGB)).

¹⁴¹ There is no general requirement for a contract to be by authentic instrument but this is required for the following specific circumstances: contracts regarding the obligation to transfer immovable property, see Sec. 311b (1) BGB; contracts regarding the transfer or usufruct of one's current or future property as a whole or in part ("Vermögen"), Sec. 311b (2) and (3); donations (Sec. 518 BGB, although the form requirement becomes redundant once the donation is effectuated). There is also an important function for authentic instruments in the operation of German company law but this will not be treated in this report.

¹⁴² For the lesser probative value of private documents see §. 416 ZPO.

¹⁴³ The possibility of adducing evidence of an inaccuracy concerning what is recorded in the authentic instrument is expressly allowed by §. 415(2) ZPO.

¹⁴⁴ The only exceptions to this principle are in the rare cases in which German legislation provides otherwise: see §2366 BGB allowing a purchaser of succession property to presume that the material content of a domestic certificate of succession is accurate.

contains an official order, a decree or decision, §. 417 ZPO sets out that it establishes full proof of the content of the official order, decree or decision. The German court has a discretion to freely evaluate the effect of deletions, insertions, erasures or other defects on the probative value of an authentic instrument, §. 419 ZPO.

Disputing the validity of the authentic instrument

If an authentic instrument is successfully challenged as to its formal validity/authenticity/ *instrumentum* it will lose the evidentiary effects associated with public documents. If an authentic instrument is successfully challenged only as to the validity of its *negotium*/material validity the authentic instrument itself may still be formally valid but its evidentiary meaning will change accordingly and may well be rendered nugatory. It must however in this respect be remembered that in German law the material content of even an enforceable authentic instrument **does not** benefit from a presumption of an enhanced evidential status: thus challenges to the material validity of a German authentic instrument mostly occur in connection with attempts to resist domestic enforcement.

The authenticity that §.437(1) ZPO presumes to apply to a domestic authentic instrument that corresponds in its form and content with such instruments issued by a public authority or by a person expressly vested with the authority of the State to do so, can, according to §.437(2) ZPO, be raised *ex officio* by a court which doubts the authenticity of the authentic instrument. This court is empowered to contact the authority that allegedly drew up the document and to request from it a declaration regarding the authenticity of the document.

If questions concerning the authenticity of an authentic instrument of foreign origin are raised, §.438(1) ZPO allows the German court a discretion to freely evaluate whether or not the foreign authentic instrument should or should not be regarded as authentic without further proof being required. To this end §.438(2) ZPO clarifies that if that document has been legalised by an authorised representative of the German State its authenticity is deemed to be sufficiently proven. Of course legalisation cannot be required under the EU Succession Regulation, see Article 74.

When the authenticity of a succession authentic instrument from another EU Member State is at issue in its own Member State of origin §.45 IntErbRVG (Act on Procedure in International Successions, implementing the Succession Regulation) stays the German proceedings involving that authentic instrument until the assessment of its authenticity in its Member State of origin has been resolved.

As the material content of an authentic instrument is not presumed by German Law to benefit from any enhanced evidential status by reason of its inclusion within an authentic instrument it is possible to challenge the material validity of such an authentic instrument via normal judicial procedures. Though such challenges usually occur in response to the attempts of the creditor to enforce an enforceable authentic instrument against the debtor, it is also possible for the debtor to attempt to convince the court to allow him to bring a declaratory action concerning its material validity: this is however only exceptionally permitted as it requires a) that the parties have a legal interest in the declaration, b) that a separate declaratory judgment will solve the dispute between the parties, and c) that a separate declaratory proceeding will correspond with the principle of procedural economy and serve legal certainty.¹⁴⁵

The more usual challenge to the content of an enforceable authentic instrument occurs at the enforcement stage in accordance with §.767(1) and (3) and §.797 (4 - 5) ZPO. The challenge will either be conducted before the court which itself issued and now

¹⁴⁵ See OLG Düsseldorf, FamRZ 05, 282, concerning a declaratory action brought in relation with a marital agreement made before a notary.

stores the authentic instrument, or, in all other cases, before the first instance court *Amtsgericht* of the district in which the issuer of the instrument has its seat.¹⁴⁶ If the authentic instrument was issued abroad by a German consul the *Amtsgericht* Schöneberg in Berlin serves as the appropriate court.

The use of authentic instruments in domestic German succession law

There are a wide range of uses for authentic instruments in German succession law. The following list indicates the main documents that are regarded as authentic instruments in matters of succession:

- a) A notary will is an authentic instrument. Wills created by a notary are public wills. Such a will requires either a declaration by the testator of his last will before the notary, who then drafts it, or the handing over to the notary of a document containing his last will. The procedure followed is regulated in the Act on Notarisation (Beurkundungsgesetz (BeurkG)), §.27 et seq. BeurkG. The competence of the notary results from the Federal Act on Notaries (Bundesnotarordnung (BNotO)), §.11. The public will is deposited at the probate court (see §. 346 FamFG) and included in the Central Wills Registry, held at the Federal Chamber of Notaries (Bundesnotarkammer). The evidentiary value of a notarial will covers the accuracy of the notarisation process, i.e. it is proven that the declaration (by the deceased) has been made with the documented content and within the documented context. The documented legal act is fully proven. Also, as public wills are deposited at the probate court and listed in the wills register, these wills are therefore protected against loss and destruction.
- b) Waiver of the succession. Contracts regarding the waiver of a future succession (before the death of the testator, see §.2348 BGB) must be concluded via a notary and will be in the form of an authentic instrument. Declarations concerning the waiver of a succession (after the death of the testator, see §.1945 BGB) require a declaration made before the probate court.
- c) An agreement to renounce or limit an inheritance if made before a notary, see §.2346 BGB.
- d) Agreements as to succession must be concluded before a notary and will take the form of an authentic instrument. Additionally these agreements require the presence of all parties before the notary, see §.2276 BGB. The limited circumstances in which it is possible to revoke such an agreement¹⁴⁷ also require the use of an authentic instrument, see §.2282 BGB.
- e) A declaration of death is an authentic instrument which will be used in the course of a succession.
- f) The certificate of succession, see §.2352 BGB.¹⁴⁸ The probate court will issue this authentic instrument and certificate on the application of the heir, see §.325

¹⁴⁶ See §§. 732, 795, 797(3) ZPO and §§. 768, 795, 797(5) ZPO.

¹⁴⁷ The testator is only allowed 1 year to revoke once he has learned of a specific reason for revocation that the law regards as admissible, e.g. error, threat, omission of a compulsory heir (see §§. 2078-9 BGB).

¹⁴⁸ There is some debate in the German academic literature questioning whether the domestic certificate of succession/Erbchein should be considered as falling within the Article 3(1)(i) definition of the EU Succession Regulation as an authentic instrument: Geimer/Schütze Buschbaum. This national profile prefers the conservative line that the domestic certificate of succession must fall within the definition and scope of either a decision or an authentic instrument within the Succession Regulation as the use of a European Certificate of Succession is not mandatory and as to remove the domestic certificate – whether classed as a decision or as an authentic instrument – from the scope of the EU Succession Regulation would be inimical to its basic purpose. For more detail see general Report.

FamFG.¹⁴⁹ As far as the relationship between the designated heirs and a purchaser of succession goods is concerned the evidential effects of the domestic certificate of succession go beyond the usual evidential effects of such an authentic instrument. Thus §.2365 BGB directs that it is presumed that the person named as heir in the certificate is the rightful heir of the testator and that his rights in the succession are unlimited except in so far as the certificate records otherwise. Subject to the limits of the presumption set out in §.2365 BGB, §.2366 BGB allows anyone purchasing succession property or rights in succession property from the person named as heir in the certificate of succession to assume that the content of the certificate of succession is correct, except if the purchaser knew that the certificate was incorrect or that the competent court has retracted the incorrect certificate.

- g) An executor's certificate (see §.2638 BGB) is an official document and authentic instrument that is analogous with the certificate of succession. It allows an executor (in the unusual circumstance that one is required) to act, with necessary adaptations, as would the holder of the certificate of succession.
- h) Disposition of a share in the estate by a co-heir will involve the creation of an authentic instrument by the notary before whom it is concluded, see §§. 2033 and 2371 BGB.
- i) Directions as to collation by the testator that were included in an authentic instrument.
- j) Partition. If the heirs agree on partition the notary must render this agreement into an authentic instrument, see §.366 FamFG. A plan of partition drawn up by the notary is also recorded in an authentic instrument, see §.368 FamFG.

The Private International Law implications of the European Union's Succession Regulation 650/2012 and Implementing Regulation 1329/2014

The EU Succession Regulation and its Implementing Regulation raise two distinct Private International Law issues for Germany as an EU Member State: first, the extent of the obligations imposed by these Regulations on Germany (as a Member State of origin) concerning its own domestically created succession authentic instruments; and, second, the extent of the obligations these Regulations impose on Germany as the Member State addressed concerning incoming foreign succession authentic instruments. The comments that follow consider each position.

Germany is the Member State of origin: obligations concerning domestic succession authentic instruments

Article 59(1) of the EU Succession Regulation allows, but does not require, '*a person*' who wishes to use a succession authentic instrument in another Member State to ask the authority who established it (in many cases the notary who drew it up or his substitute/successor) to issue an attestation concerning that authentic instrument on the standard form provided by Annex 2 Form II of Implementing Regulation 1329/2014.¹⁵⁰ It is unclear whether or not such a request must be complied with if the notary in receipt of the request, assuming the notary to be the appropriate authority, does not deem the applicant to be '*an interested party*'. The substitution of the phrase '*a person*' in Article 59 for '*interested party*' in Article 60 could be understood to indicate that there is no requirement in the EU Succession Regulation for the applicant seeking only cross-border

¹⁴⁹ It should be noted that the notaries of the federal state of Baden-Württemberg fulfil the function of the probate court, see Sec. 38 BWFGG.

¹⁵⁰ As the notaries of the federal state of Baden-Württemberg fulfil the function of the probate court, this affects their role in the attestations contemplated under the EU Succession Regulation.

acceptance to demonstrate what would otherwise be domestically regarded as a 'legitimate interest' when requesting the attestation from the notary. The EU Succession Regulation and Implementing Regulation do not expressly contemplate the possibility that a request under Article 59 may be refused. It is however possible to contrast the wording of the applicant 'may ask' of Article 59 with 'the authority shall' in Article 60(2) and to infer from the differences of wording that the notary (or other public authority) is only actually obliged to accede to the applicant's request when it concerns enforcement under Article 60. This result however seems inconsistent with Recitals 22, 59 and 60 of the EU Succession Regulation and with one of its underlying purposes, i.e. to facilitate the cross-border transmission of authentic instruments and their legal effects. In circumstances where both the acceptance and the enforcement of the authentic instrument may be sought the problem may be avoided, assuming the notary to be willing to provide information concerning both Article 59 and Article 60, by the applicant routinely requesting an attestation concerning *both* enforcement and acceptance.

Article 60 of Regulation 650/2012 requires that, provided that to so declare would not be manifestly contrary to its public policy, the authorities in the Member State addressed *must* on application by an interested person declare a foreign succession authentic instrument that is enforceable in its Member State of origin to also be enforceable in their Member State. A German notary or other authority may thus be in receipt of a request for such an Annex 2 Form II attestation to send a German authentic instrument from Germany to another Member State. Implementing Regulation 1329/2014 contains in Annex 2 Form II a standard form allowing an attestation that only concerns 'acceptance', via Article 59, or only 'enforcement' via Article 60. The form may however also be completed to provide an attestation that jointly concerns both acceptance and enforcement of the authentic instrument.¹⁵¹ Concerning the legislative authority to issue the attestation, §.27 of the Act on Procedure in International Successions (*Internationales Erbrechtsverfahrensgesetz* (IntErbRVG)), provides for the competence of the "court or notary" to issue an attestation under various provisions of the EU Succession Regulation including Article 60 of that Regulation. There is no mention of competence to issue an attestation under Article 59 of the EU Succession Regulation but this may be inferred from the text of Article 59 and from the domestic provisions concerning an Article 60 attestation in §.27 of IntErbRVG.

The German notary or other authority in receipt of the request to provide a completed Annex 2 Form II attestation concerning a domestic succession authentic instrument is asked to indicate at points 4.2 to 4.2.1.1.7 of the standard form what he believes its domestic evidentiary effects to be. Though the answers will vary depending upon the specific verifications contained in the succession authentic instrument at issue, it is broadly conceivable that points 4.2.1.1.1 to 4.2.1.1.7 could, depending on the particular circumstances, be expected to be completed as follows:

4.2.1.1.1 - The date the authentic instrument was drawn up:

Yes, there is a presumption of validity, for the evidentiary effect: see §.415 ZPO for authentic instruments concerning declarations, or §.418 ZPO for authentic instruments with other contents, or §.417 ZPO for public documents concerning official orders, directions or decisions.

4.2.1.1.2 - The place where the authentic instrument was drawn up:

Yes, there is a presumption of validity, for the evidentiary effect: see §.415 ZPO for authentic instruments concerning declarations, or §.418 ZPO for authentic instruments with other contents, or §.417 ZPO for public documents concerning official orders, directions or decisions.

¹⁵¹ For Article 59 acceptance tick 'yes' in box 4.1.1; for Article 60 enforcement tick 'yes' in box 6.1.1. To dispense with either option tick 'no' in box 4.1.2. or 6.1.2 as appropriate.

4.2.1.1.3 - The origin of the signatures from the parties of the authentic instrument:

Yes, there is a presumption of validity, for the evidentiary effect: see §.415 ZPO for authentic instruments concerning declarations, or §.418 ZPO for authentic instruments with other contents, or §.417 ZPO for public documents concerning official orders, directions or decisions.

4.2.1.1.4 - The content of the declarations of the parties:

No, the evidential value indicated by §.415 ZPO does not cover the accuracy of the parties' declarations, merely that they have been declared to have been made by the parties in the presence of the notary.

N.B. For domestic German certificates of succession as per §.2366 BGB the content of this certificate of succession is – exceptionally – domestically *presumed* to be correct with regard to the acquirer of succession goods, unless he knew the certificate was incorrect or that proceedings have been started at court to retract it.

N.B.2. It seems unlikely that an authority could complete this box for any authentic instrument under §.417 ZPO as it would concern the probative value of public documents such as official orders, directions or decisions and not the declarations of a private person.

4.2.1.1.5 - The facts that the authority declares as having been verified in its presence:

Yes, but usually only in a particular sense: the evidentiary effect can only apply in so far as these verifications concern the actual perceptions of the notary or other authenticating official see §418 ZPO. The evidentiary effect cannot usually – unless domestic legislation specifically indicates otherwise – extend to facts that have merely been verified in the presence of a public official.

4.2.1.1.6 - The actions which the authority declares to have carried out:

Yes, an evidentiary effect: §415, §417 and §418 ZPO.

4.2.1.1.7 - Other: (please indicate any other evidentiary effect that a domestic authentic instrument could produce)

According to the advice received it is conceivable according to academic comment¹⁵² that the following additional information could be presented in this box:

- a) that the parties made all the declarations as authenticated;
- b) that all of the declarations are complete;
- c) that there are no further declarations;
- d) that the perceptions of the authenticating person are accurate.

Germany is the Member State addressed: foreign succession authentic instruments

The EU Succession Regulation requires that, subject to public policy exceptions, German authorities must **accept** and, or, **enforce** foreign authentic instruments in matters of succession received from other EU Member States bound by the EU Succession Regulation.

The **acceptance** of a foreign succession authentic instrument produced in the Member State of origin is governed by Article 59 of the Succession Regulation: the **enforcement** of such an authentic instrument is governed by Article 60 of that Regulation. Acceptance requires that, unless to do so would be manifestly contrary to German public policy, the

¹⁵² See Huber, in: Musielak ZPO, § 415 Rn. 10.

authorities in Germany (as the Member State addressed) *must* grant the foreign succession authentic instrument the same (or most comparable) evidentiary effects as it would enjoy in its own Member State of origin.

To determine the nature of the evidentiary effects that would be associated with that authentic instrument in the Member State of origin, reference should be made to any Annex 2 Form II form that may accompany the foreign authentic instrument, especially to parts 4.2.1.1.1 – 4.2.1.1.7 of any such form. It must however be noted that the use of the Implementing Regulation's Annex 2 form does not appear to be obligatory: the obligation imposed by Article 59 of the Succession Regulation on the Member State addressed to accept a succession authentic instrument does not require or depend upon the use or supply of the Annex 2 form. A succession authentic instrument received from a Member State of origin in accordance with the provisions of the Succession Regulation must still be accepted, within the meaning of Article 59 of Regulation 650/2012, even if no Annex 2 Form II form is provided or if the Annex 2 form provided is not fully or properly completed.

The **enforcement** of a foreign authentic instrument in Germany via Article 60 of Regulation 650/2012 requires that, provided that to do so would not be manifestly contrary to German public policy, the German authorities must on application by an interested person declare enforceable a foreign succession authentic instrument that is enforceable in its Member State of origin. We are not aware of any special provision in the law of Finland that specifically deals with the actual enforcement of a foreign authentic instrument after it has been declared enforceable (differently from the actual enforcement of a foreign judgment that has been declared enforceable) in accordance with the procedure laid down in Articles 45 to 58 of the EU Succession Regulation as required by Article 60 thereof. The enforcement of decisions from other Member States in matters of succession is now regulated by the IntErbRVG, Sec. 3 et seq.

German public policy

The EU Succession Regulation allows a public policy defence in various contexts including with reference to authentic instruments under Articles 59 and 60. To invoke the public policy exception in the context of Article 59, and by so doing to justify a refusal of acceptance for that foreign authentic instrument, it must be the case that the *granting of the same or most comparable evidentiary effects* to the foreign authentic instrument would be manifestly contrary to German public policy. To invoke the public policy exception in the context of Article 60, to justify a refusal of a declaration of enforceability for the foreign authentic instrument, it must be that the *granting of the declaration of enforceability* for the foreign authentic instrument would be manifestly contrary to German public policy: of course this public policy exception should be construed narrowly and it is envisaged that it will rarely apply. As is made plain by Recital 58 of the Succession Regulation, public policy is not to be applied in a manner that is discriminatory or otherwise contrary to the European Union's Charter of Fundamental Rights. Equally however Recital 26 of Regulation 650/2012 indicates that the Regulation does not prevent a court from applying mechanisms designed to tackle the evasion of the law, such as *fraude à la loi* in the context of Private International Law. However, the substantive provisions of the Regulation do not expressly empower national courts to prevent evasion of the law (including *fraude à la loi*). It would seem that the only positive basis for doing so under the Regulation is to regard such evasion of the law to be contrary to public policy unless the law being evaded is one of the "special rules" of the forum concerning certain assets that is applicable irrespective of the law applicable to the succession (see Article 30 of the EU Succession Regulation).

In OLG Frankfurt, 10.05.2010, ErbR 2011, 29 a German court was concerned with the application of Egyptian succession law. The spouses had married and lived in Paris. The deceased Egyptian husband (with Egyptian nationality) had relatives in Egypt but no

children. His German widow (with German nationality) requested a German certificate of succession for property located in Germany. Egyptian succession law provided that the wife could inherit less than could the husband; furthermore, the fact that the wife had a different religion (Christianity) to that of her Muslim husband constituted an impediment to succession under Egyptian law. The German court concluded that the application of Egyptian succession law to this case would lead to a result in which the wife would be discriminated against twice (based both on her sex and on her religion). This discrimination was considered as being contrary to German public policy. The OLG Hamm, Beschl. v. 28.2.2005 - 15 W 117/04 has indicated that a violation of public policy could only be dismissed if the deceased made it clear in his will that he wished the inheritance to operate to favour his siblings instead of his wife.

As yet there have been no reported refusals by a German court or authority to accept or enforce foreign authentic instruments concerning succession by reason of incompatibility between the instrument and German public policy.¹⁵³

Incompatible Authentic instruments

Recital 66 of the EU Succession Regulation envisages the possibility of 'an authority' being presented with incompatible authentic instruments.¹⁵⁴ The solutions suggested by the Recital are to consider priority and the circumstances of the particular case and then, if this has not resolved the incompatibility, to resort to a court with direct or incidental jurisdiction under the EU Succession Regulation. Apparently there are no cases on this point in German Law nor are there any specific provisions in IntErbRVG (the recent legislation implementing the Succession Regulation).

¹⁵³ For a refusal on a different ground see OLG Bremen - decision of 19.05.2011 - 3 W 6/10. An heir asked the competent German Land Registry to change the land register entry in his favour (Sec. 29 GBO). The testator had died in the UK in 2006: she left a holograph will naming the applicant as heir. The change of the German register entry requires the submission of an authentic instrument to prove the heirship. Sec. 35 GBO requires either the submission of a certificate of succession or a notarial will and the protocol of the opening of the succession. The heir submitted an attestation from the District Probate Registry at Brighton and a copy of the holograph will. Neither of the conditions in Sec. 35 GBO were considered to be met.

¹⁵⁴ Recital 66: Should an authority, in the application of this Regulation, be presented with two incompatible authentic instruments, it should assess the question as to which authentic instrument, if any, should be given priority, taking into account the circumstances of the particular case. Where it is not clear from those circumstances which authentic instrument, if any, should be given priority, the question should be determined by the courts having jurisdiction under this Regulation, or, where the question is raised as an incidental question in the course of proceedings, by the court seised of those proceedings. In the event of incompatibility between an authentic instrument and a decision, regard should be had to the grounds of non-recognition of decisions under this Regulation.

GREECE

The Greek legal system

Greece consists of one legal system that belongs to the civil law family. However certain categories of legal relationships are governed by Islamic law especially matters of family law and succession as provided by a number of international conventions between Greece and Turkey. In Greece, Islamic law constitutes a personal law with local restrictions, since it applies to the Greek Muslims who are located exclusively in the area of Thrace. Consequently the subjects of the Islamic law in Greece amount to 120,000 people in a population of 11,000,000.

The substantive law concerning succession is located in the Greek Civil Code (hereinafter "GCC"), in the Introductory Law of the GCC (Mandatory Law 2783/1941) and in a number of special laws. The majority of the substantive rules are codified in the Fifth Book of the GCC, which is titled Succession Law (Articles 1710-2035).¹⁵⁵

The procedural law concerning succession is located in the Greek Code of Civil Procedure (hereinafter "GCCP") and in a number of special laws. The majority of the procedural laws are codified in the Sixth Book of the GCCP, which is titled Non-Contentious Jurisdiction (Articles 807-825).

An official website including the text of these substantive and procedural rules does not exist. The same applies for an official website with an English language version of these rules or a book including these rules in English.

The Greek law concerning succession has not yet been updated to implement the European Union Succession Regulation. New legislation as well as new procedural rules have not been drafted to implement the EU Succession Regulation in Greece. A working party has been formed but it has not yet produced any results.

The concept of an authentic instrument in Greece

The Greek legal system makes extensive use of authentic instruments, it is however important to note that the Greek concept of an authentic instrument is a wide one, that Article 158 of the GCC contains a basic principle of informality concerning the form of legal transactions meaning that it is only necessary to use a particular form for a transaction if the Greek law so stipulates. Only notarially created authentic instruments can be enforceable as such in Greece.

Article 438 of the GCCP treats all documents created by competent public officials in the course of their duties as authentic instruments. The notion of the public official is wide and includes anyone who performs public functions, even on a temporary basis, e.g. notaries, land records officers, clerks of court, registrars, bailiffs, ministers, representatives of legal persons of public law, court-appointed experts, interpreters, traffic police officers, lawyers, etc. Consequently, many documents may be authentic instruments, e.g. notarial deeds, minutes of the court, reports for the service of process, ministerial decisions, attestations of the revenue office, acts of the registrar, construction permits, etc.

Though the GCCP does not provide for the evidential effects of declarations which are recorded in authentic instruments including only the attestation of their maker that a certain fact took place, e.g. a death certificate, it is accepted that such authentic instruments still produce full evidence regarding both the recorded facts which took place before their maker and the actions he records as having undertaken. Other

¹⁵⁵ We are advised that there is no official website for this legislation in Greek or in English.

recorded declarations do not have a predetermined evidential value but are evaluated freely.

Greek law requires that an authentic instrument is used in various circumstances. Other than in the circumstances of a succession (which are set out below) the majority of these circumstances involve transactions creating or extinguishing *in rem* rights over immovable property: Article 369 of the GCC requires these transactions to be drawn up in the presence of a notary.

Concerning the enforceability of authentic instruments. One consequence of the wide range of the Greek concept of authentic instruments is that, in general, few Greek authentic instruments will as such enjoy independent enforceability. The main exception to this principle concerns authentic instruments drawn up by a notary to be enforceable as such as is provided by Article 904(2) GCCP.

Evidentiary effects of domestic authentic instruments in Greek law

If the requirements of Article 438 of the GCCP are fulfilled, the resulting document is an authentic instrument and benefits from the presumption of authenticity included in Article 455 of the GCCP. Thus, it is presumed that the document has been created by the person who appears to have drawn it up. Article 438 of the GCCP also provides that authentic instruments produce full evidence regarding the actions of the person who drew it up: the same applies regarding the facts which took place before that person, e.g. the attestation by the notary that a particular person appeared before him. Except in the case of a successful allegation of forgery – see below – it is not permitted to introduce ‘counter evidence’ to dispute the formal validity of the actions of the official who drew up the authentic instrument or to dispute the facts that he recorded in that authentic instrument as having taken place before him.

Article 440 of the GCCP also provides that the authentic instrument produces full evidence regarding any fact, the truth of which had to be asserted by the person who drew up the authentic instrument, e.g. the attestation by the notary, when creating a public will, that the testator had the mental capacity to act. It is however permitted to adduce counter evidence against officially recorded facts. If this is established, it may lead to the loss of evidential effects for the authentic instrument.

Concerning the declarations of the parties to the authentic instrument, Article 441(1) of the GCCP provides that the authentic instrument recording a transaction, e.g. a sales transaction, will produce full evidence regarding the transactional declarations made by the parties to that authentic instrument. It is however permitted to introduce counter evidence against such transactional declarations made by the parties. Article 441(2) of the GCCP goes on to provide that the declarations of the parties to the authentic instrument, which do not constitute necessary conditions of the recorded transaction, will still produce full evidence, if they are related directly to the necessary conditions of the recorded transaction, e.g. the declaration of the seller that the agreed price has been paid. Again it is possible to introduce counter evidence. If however the declarations are not ‘related directly’ within the meaning of Article 441(2) of the GCCP, they do not then produce full evidence but still make it possible for a court or other competent authority to speculate as to the facts that have to be proven, e.g. a declaration by the seller of immovable property, in the context of the sale of the same, that the property sold is subject to a lease.

Disputing the validity of the authentic instrument

If an authentic instrument is successfully challenged as to its formal validity/authenticity/ *instrumentum* it will lose the evidentiary effects associated with authentic or authenticated documents as public documents. If an authentic instrument is

successfully challenged as to the validity of its *negotium*/material validity the instrument itself may still be formally valid but its evidentiary meaning will change accordingly and may well be rendered nugatory.

Article 438 of the GCCP requires that the official who draws up an authentic instrument does so in accordance with the necessary legal formalities. If this does not occur, the authentic instrument is formally invalid. It therefore does not produce any special evidential effects and cannot enjoy enforceability. Nevertheless, in such a case, the domestic provisions regarding the evidential effects of private documents may still be applicable. The objection that the necessary legal formalities have not been satisfied may be raised by anyone who has a legal interest.

If the formal requirements have apparently been complied with, a challenge to the presumption of authenticity that Article 455 of the GCCP grants to that authentic instrument must involve a claim of 'forgery'. The precise procedure differs depending on whether the forgery is attributed to a particular person or not. As provided by Article 461 of the GCCP, if the forgery is attributed to a particular person, a related legal action, plea, appeal, etc. can be raised. If the forgery is not so attributed, only a related plea can be raised during a pending trial. In all cases, the claimant must have a legal interest in the matter at issue. An authentic instrument that is determined to have been 'forged' does not produce any evidential effects and does not enjoy any enforceability. Further, Article 465 of the GCCP requires the clerk of the court that has determined the forgery to exist to notify both the prosecutor and the public authority that created the forgery of the court's judgment on this matter.

The full evidence which is produced by the recorded declarations of authentic instruments may be contested through counter-evidence in particular cases. Though Article 438 of the GCCP does not allow counter-evidence to be adduced against the recorded actions of the official who drew up the authentic instrument, nor against the facts that he recorded to have taken place before him in the course of the transaction, counter-evidence is allowed in certain circumstances in connection with Article 440 of the GCCP. Thus Article 440 of the GCCP allows counter evidence to be adduced against the recorded facts, the truth of which had to be asserted by their maker (i.e the notary).

Counter-evidence can also be adduced, in connection with Article 441(1) of the GGCP, against the transactional declarations of the parties, regarding an authentic instrument which records a transaction, or against the declarations of the parties, which do not constitute necessary conditions of the recorded transaction but are related directly with it (Article 441(2) of the GCCP). If it is successful, this counter-evidence may lead to the loss of the evidential effects of an authentic instrument as well as the loss of its enforceability. As abovementioned, the evidential effects produced by recorded declarations in an authentic instrument will potentially be lost, if that authentic instrument is proven to be forged.

The actual enforcement of an enforceable authentic instrument, e.g. a notarial authentic instrument, may be challenged by filing a stay of execution (Article 933 of the GCCP). The stay permits objections to be raised against enforcement, concerning the validity of the enforceable title, the enforcement proceedings or the claim. The filing of the stay of execution may lead to the suspension of the enforcement proceedings of an authentic instrument (Article 937(1) of the GCCP). If the stay is affirmed it annuls the contested act of enforcement. It may also lead to the loss of the evidential effects and the enforceability of the authentic instrument, if the objections raised concerned the validity of that authentic instrument.

The use of authentic instruments in domestic Greek succession law

There are potentially many types of authentic instruments in Greek succession law. The following list indicates the main documents that are regarded as authentic instruments in matters of succession but regard should be had to the breadth of the concept of an authentic instrument in Greek law:

- a) Public wills written by a notary are authentic documents, see Article 1724 of the GCC.
- b) A mystic will (Article 1724 of the GCC) generates two authentic instruments: first via Article 1742 of the GCC the notary inscribes data onto the will he has received concerning the circumstances of receipt, second, via Article 1743 of the GCC the notary draws up an authentic instrument concerning the making of the mystic will. Greek practice regards the mystic will as equivalent to and benefitting from the presumptions concerning notarial wills.
- c) Emergency wills¹⁵⁶ via Article 1757 of the GCC are authentic instruments but only for a limited time: they lapse if the testator is still alive 3 months after the emergency event entitling the creation of an emergency will (Article 1758 of the GCC).
- d) Partial or total revocation of a will by the creation of a new Public notarial will before a notary generates an authentic instrument (Article 1763 of the GCC).
- e) Revocation of a will by declaration before a notary by Article 1763 of the GCC generates an authentic instrument.
- f) Revocation of a mystic will before a notary by Article 1766 of the GCC generates an authentic instrument.
- g) The heirship certificate, a judicial certificate issued by the Magistrate of a Court of Peace, is an authentic instrument (not a judgment) and gives the named heir a presumed right of inheritance that is limited only by the content of that certificate and the general possibility of admitting counter-evidence in rebuttal of the presumptions of status connected with the certificate.
- h) A renunciation of the succession by the heir must take the form of a declaration to the clerk of the competent succession court (Articles 1848 of the GCC and 812 of the GCCP) and generates an authentic instrument.
- i) If an heir accepts an inheritance under benefit of inventory (Articles 1902 of the GCC and 812 of the GCCP) this involves him making a declaration to the competent court which draws up a report regarding the acceptance under benefit of inventory that report is then deemed an authentic instrument.
- j) If the heir appoints an executor to assist him (Article 2017 of the GCC) the acceptance and eventual renunciation of this role is made to the clerk of the court by the natural person the heir wishes to appoint (e.g. his notary) and the clerk draws up a report which is an authentic instrument (Articles 2019 of the GCC and 812 of the GCCP).
- k) When an heir accepts an inheritance of an in rem right concerning immovable property, see Article 1195 of the GCC.
- l) When making various declarations concerning the taxation of the inheritance to the Tax office.
- m) The 'payment' or delivery of property to legatees may but need not usually be by authentic instrument.

¹⁵⁶ See Articles 1749, 1753 and 1757 of the GCC respectively concerning: persons on a ship; military personnel on a campaign; and persons blockaded.

- n) Partition may give rise to different authentic instruments depending upon whether or not it is voluntary. A voluntary partition need only involve an authentic instrument if the property at issue requires this. A judicial partition may involve a sale of assets by auction – a notary will conduct the sale and generate authentic instruments concerning its conduct.

The Private International Law implications of the European Union's Succession Regulation 650/2012 and Implementing Regulation 1329/2014

The European Union Succession Regulation and its Implementing Regulation raise two distinct Private International Law issues for Greece as an EU Member State: first, the extent of the obligations imposed on Greece as a Member State of origin concerning its domestically created succession authentic instruments; and, second, the extent of the obligations imposed on Greece as a Member State addressed concerning incoming foreign succession authentic instruments. The comments that follow consider each position.

Greece is the Member State of origin: obligations concerning domestic succession authentic instruments

Article 59(1) of the European Union Succession Regulation allows, but does not require, '*a person*' who wishes to use a succession authentic instrument in another Member State to ask the authority who established it, e.g. the notary who drew it up or his substitute/successor, to issue an attestation concerning that authentic instrument on the standard form provided by Annex 2 Form II of Implementing Regulation 1329/2014. It is unclear whether or not such a request must be complied with if it is received from a person not deemed by the notary to be '*an interested party*'. The substitution of the phrase '*a person*' in Article 59 for '*interested party*' in Article 60 could be understood to indicate that there is no requirement in the EU Succession Regulation for the applicant seeking only cross-border acceptance to demonstrate what would otherwise be domestically regarded as a '*legitimate interest*' when requesting the attestation from the notary. It seems unlikely that this will be a problem in Greece, as the prevailing view appears to be that any natural or legal person with the right to use or to enforce the authentic instrument may apply. The EU Succession Regulation and Implementing Regulation do not expressly contemplate the possibility that a request under Article 59 may be refused. It is however possible to contrast the applicant '*may ask*' of Article 59 with '*the authority shall*' in Article 60(2) and to infer from the different wording that the notary (or other public authority) is only actually obliged to accede to the applicant's request when it concerns enforcement under Article 60. This result however seems inconsistent with Recitals 22, 59 and 60 of the EU Succession Regulation and with one of its underlying purposes, i.e. to facilitate the cross-border transmission of authentic instruments and their legal effects. In circumstances where both the acceptance and the enforcement of the authentic instrument may be sought the problem may be avoided, assuming the notary to be willing to provide information concerning both Article 59 and Article 60, by the applicant routinely requesting an attestation concerning *both* enforcement and acceptance.

Article 60 of Regulation 650/2012 requires that, provided that to so declare would not be manifestly contrary to its public policy, the authorities in the Member State addressed *must* on application by an interested person declare a foreign succession authentic instrument that is enforceable in its Member State of origin (i.e. Greece) to also be enforceable in their Member State. A Greek notary may thus be in receipt of a request for such an attestation, again under Annex 2 Form II of Implementing Regulation 1329/2014. This standard form allows for an attestation that concerns only '*acceptance*', via Article 59, or '*enforcement*' via Article 60, or an attestation that jointly concerns

acceptance and enforcement of the authentic instrument depending upon the boxes ticked by the Greek notary.¹⁵⁷

The Greek notary in receipt of the request to provide a completed Annex 2 Form II attestation concerning a domestic succession authentic instrument is asked to indicate at points 4.2 to 4.2.1.1.7 of the standard form what he believes its domestic evidentiary effects to be.

Though the answers will vary depending upon the specific verifications contained in the succession authentic instrument at issue, it is broadly conceivable that points 4.2.1.1.1 to 4.2.1.1.7 could be expected to be completed with regard to the following principles of Greek law in mind:

4.2.1.1.1 - The date the authentic instrument was drawn up:

An authentic instrument falling within Article 438 of the GCCP is deemed by Article 455 of the GCCP to produce full evidence of the actions of the authority that drew it up and of the facts that took place before that official.

Counterevidence is not allowed against the actions of, or facts recorded as taking place before, the official who drew up the authentic instrument.

4.2.1.1.2 - The place where the authentic instrument was drawn up:

An authentic instrument falling within Article 438 of the GCCP is deemed by Article 455 of the GCCP to produce full evidence of the actions of the authority that drew it up and of the facts that took place before that official.

Counter-evidence is not allowed against the actions of, or facts recorded as taking place before, the official who drew up the authentic instrument.

4.2.1.1.3 - The origin of the signatures from the parties of the authentic instrument:

An authentic instrument falling within Article 438 GCCP is deemed by Article 455 GCCP to produce full evidence of the actions of the authority that drew it up and of the facts that took place before that official.

Counter evidence is not allowed against the actions of, or facts recorded as taking place before, the official who drew up the authentic instrument.

4.2.1.1.4 - The content of the declarations of the parties:

According to Article 441(1) of the GCCP an authentic instrument that records a transaction produces full evidence regarding the transactional declarations made by the parties.

However, counter-evidence is allowed against such transactional declarations made by the parties.

According to Article 441(2) of the Greek Code of Civil Procedure the declarations of the parties, which do not constitute necessary conditions of the recorded transaction, produce full evidence, if they are related directly with the necessary conditions of the recorded transaction. If they are not related directly, they do not produce full evidence but do make possible speculation on a fact which has to be proved. However, counter evidence is allowed against such declarations made by the parties.

4.2.1.1.5 - The facts that the authority declares as having been verified in its presence:

Article 440 of the GCCP produces full evidence regarding any facts that the official maker of the authentic instruments had to and did assert in order to make the authentic instrument (e.g. that the testator had capacity to make the notarial will).

¹⁵⁷ For Article 59 acceptance tick 'yes' in box 4.1.1; for Article 60 enforcement tick 'yes' in box 6.1.1. To dispense with either option tick 'no' in box 4.1.2. or 6.1.2 as appropriate.

Counter-evidence is however allowed against such officially recorded facts and, if established, it may lead to the loss of evidential effects for the authentic instrument.

4.2.1.1.6 - The actions which the authority declares to have carried out:

An authentic instrument falling within Article 438 of the GCCP is deemed by Article 455 of the GCCP to produce full evidence of the actions of the authority that drew it up and of the facts that took place before that official.

Counter evidence is not allowed against the actions of, or facts recorded as taking place before, the official who drew up the authentic instrument.

N.B. Article 440 of the GCCP produces full evidence regarding any facts that the official maker of the authentic instruments had to **and did** assert to draw up the authentic instrument. (e.g. that the testator had capacity to make the notarial will). Counter evidence is however allowed against such officially recorded facts and, if established, may lead to the loss of evidential effects for the authentic instrument.

4.2.1.1.7 - Other: (please indicate any other evidentiary effect that a domestic authentic instrument could produce)

Subject to evidentiary matters concerning Articles 438, 440, 441 and 455 of the Greek Code of Civil Procedure (discussed above) we are not advised of any further evidentiary effects that a Greek authentic instrument could produce. Additional information could however be presented in this box.

Greece is the Member State addressed: foreign succession authentic instruments

The EU Succession Regulation requires that, subject to public policy exceptions, Greek authorities must **accept** and, or, **enforce** foreign authentic instruments in matters of succession received from other EU Member States bound by the Succession Regulation.

The **acceptance** of a foreign succession authentic instrument produced in Greece is governed by Article 59 and the enforcement of such an authentic instrument is governed by Article 60 of the EU Succession Regulation. Acceptance requires that, provided that to do so would not be manifestly contrary to Greek public policy, the authorities in Greece (as the Member State addressed) *must* grant the foreign succession authentic instrument the same (or most comparable) evidentiary effects as it would enjoy in its own Member State of origin.

To determine the nature of the evidentiary effects that would be associated with that authentic instrument in the Member State of origin, reference should be made to any Annex 2 Form II form that may accompany the foreign authentic instrument, especially to parts 4.2.1.1.1 – 4.2.1.1.7 of any such form. It must however be noted that the use of the Implementing Regulation's Annex 2 form does not appear to be obligatory. The obligation imposed by Article 59 of the EU Succession Regulation on the Member State addressed to accept a succession authentic instrument does not require or depend upon the use or supply of the Annex 2 form. A succession authentic instrument received from a Member State of origin in accordance with the provisions of the EU Succession Regulation must still be accepted, within the meaning of Article 59 of Regulation 650/2012, even if no Annex 2 Form II form is provided or if the Annex 2 form provided is not fully or properly completed.

The **enforcement** of a foreign authentic instrument via Article 60 of Regulation 650/2012 requires that, provided that to do so would not be manifestly contrary to Greek public policy, the authorities in the Member State addressed (Greece) must on application by an interested person declare enforceable a foreign succession authentic instrument that is enforceable in its Member State of origin. We are not aware of any special provision in the law of Greece that specifically deals with the actual enforcement

of a foreign authentic instrument after it has been declared enforceable (differently from the actual enforcement of a foreign judgment that has been declared enforceable) in accordance with the procedure laid down in Articles 45 to 58 of the EU Succession Regulation as required by Article 60 thereof.

Greek public policy

The EU Succession Regulation allows a public policy defence in various contexts including with reference to authentic instruments under Articles 59 and 60. To invoke the public policy exception in the context of Article 59, and by so doing to justify a refusal of acceptance for that foreign authentic instrument, it must be the case that the *granting of the same or most comparable evidentiary effects* to the foreign authentic instrument would be manifestly contrary to Greek public policy. To invoke the public policy exception in the context of Article 60, it must be that the *granting of the declaration of enforceability* for the foreign authentic instrument would be manifestly contrary to Greek public policy. Of course this public policy exception should be construed narrowly and it is envisaged that it will rarely apply. As is made plain by Recital 58 of the Succession Regulation, public policy is not to be applied in a manner that is discriminatory or otherwise contrary to the European Union's Charter of Fundamental Rights. Equally however Recital 26 of Regulation 650/2012 indicates that the Regulation does not prevent a court from applying mechanisms designed to tackle the evasion of the law, such as *fraude à la loi* in the context of Private International Law. However, the substantive provisions of the Regulation do not expressly empower national courts to prevent evasion of the law (including *fraude à la loi*). It would seem that the only positive basis for doing so under the Regulation is to regard such evasion of the law to be contrary to public policy unless the law being evaded is one of the "special rules" of the forum concerning certain assets that is applicable irrespective of the law applicable to the succession (see Article 30 of the EU Succession Regulation).

There is no reported case law concerning a refusal to accept or enforce a **foreign authentic instrument** on the basis of an infringement of Greek public policy, it is however suggested by the national reporter for Greece that the acceptance of a foreign authentic instrument in a matter of succession would raise questions of incompatibility with the public policy of the forum, if its contents negatively affected the compulsory portion of a lawful heir, since the principle of protection of the lawful heirs is part of Greek public policy.

Incompatible Authentic instruments

Recital 66 of the EU Succession Regulation envisages the possibility of 'an authority' being presented with incompatible authentic instruments.¹⁵⁸ The solutions suggested by the Recital are to consider priority and the circumstances of the particular case and then, if this has not resolved the incompatibility, to resort to a court with direct or incidental jurisdiction under the EU Succession Regulation. There are no provisions on this point in Greek law.

¹⁵⁸ Recital 66: Should an authority, in the application of this Regulation, be presented with two incompatible authentic instruments, it should assess the question as to which authentic instrument, if any, should be given priority, taking into account the circumstances of the particular case. Where it is not clear from those circumstances which authentic instrument, if any, should be given priority, the question should be determined by the courts having jurisdiction under this Regulation, or, where the question is raised as an incidental question in the course of proceedings, by the court seised of those proceedings. In the event of incompatibility between an authentic instrument and a decision, regard should be had to the grounds of non-recognition of decisions under this Regulation.

HUNGARY

The Hungarian legal system

Hungary consists of a single legal system that belongs to the civil law family. The Hungarian law concerning succession is located in the new Hungarian Civil Code, in the 7th Book (Act No. 5 of 2013)¹⁵⁹ and the procedural rules are located in the Act on Succession Proceedings (Act No. 38 of 2010).¹⁶⁰ Hungarian succession has been updated to implement aspects of the European Union Succession Regulation, in particular the adaptation of unknown foreign *in rem* rights and in connection with the European Certificate of Succession (issued by notaries) so as to properly interact with Hungarian property registers. See Act LXXI of 2015 on the adaptation of rights *in rem* according to Article 31 of Regulation 650/2012/EU and on certain amendments concerning civil justice / "2015. évi LXXI. Törvény a 650/2012/EU európai parlamenti és tanácsi rendelet 31. cikke szerinti megfeleltetési nemperes eljárásról, valamint egyes igazságügyi tárgyú törvénymódosításokról".¹⁶¹ This Act has also amended various statutes, e.g., the Act on Private International Law (Law-Decree 13 of 1979), the Act on Court Enforcement (Act LIII of 1994) and the Code on Civil Procedure.

The concept of an authentic instrument in Hungary

The Hungarian legal provisions concerning authentic instruments are in the Act on Civil Procedure Rules.¹⁶² The rules on enforcing authentic instruments are in the Act on Judicial Enforcement.¹⁶³ According to the definition contained in the Act on Civil Procedure Rules, the paper based acts or electronic acts that are made by a notary or another authority, or an administrative body within its legal competence, and in the form required by the law are authentic instruments. Section 195(1) of the Code on Civil Procedure defines the types of instrument that can qualify as public deeds. Public deeds may be issued by the court, a notary or an administrative authority. It should be noted that in Hungary, **all** notarial acts are authentic instruments, Hungarian notaries are forbidden from making private acts.

The Hungarian legal system frequently offers the option of using an authentic instrument for a transaction but does not *usually* compel the parties to prefer an authentic instrument over any other 'qualified instrument', i.e. an act countersigned by an attorney or an act countersigned by a company officer. The Hungarian Land Registry and Company Registry will accept all of the foregoing agreements if contained in an authentic or in another 'qualified' instrument. There is however a mandatory requirement to use an authentic instrument in the form of a notarial deed if the transaction involves a vulnerable person: e.g. wills have to be via a notarial deed in the case of minors having limited testamentary capacity, adults who are partially restricted as to their property law acts, the blind, illiterate people and people who are in a situation where they are not able to read or to sign (see Section 7:14(4)-(5) of the Civil Code).

Evidentiary effects of domestic authentic instruments in Hungarian law

Section 195(1) of the Code on Civil Procedure sets out the evidentiary value of a public deed (a public deed/authentic instrument fully proves the disposition or decision it includes, the veracity of the data and facts certified by the deed/instrument, and also the making, date, time, place and method of the declaration or declarations that it includes).

¹⁵⁹ http://net.jogtar.hu/jr/gen/hiegy_doc.cgi?docid=A1300005.TV (only in Hungarian).

¹⁶⁰ http://net.jogtar.hu/jr/gen/hiegy_doc.cgi?docid=A1000038.TV (only in Hungarian).

¹⁶¹ http://net.jogtar.hu/jr/gen/hiegy_doc.cgi?docid=A1500071.TV (only in Hungarian).

¹⁶² http://net.jogtar.hu/jr/gen/hiegy_doc.cgi?docid=95200003.TV

¹⁶³ http://net.jogtar.hu/jr/gen/hiegy_doc.cgi?docid=99400053.TV

According to Section 195(6) of the Code on Civil Procedure, the presumption triggered by a public deed may be rebutted (evidence may be submitted for that purpose), provided the law does not exclude or restrict this. There is currently no provision in Hungarian law that would make such a rebuttal of the foregoing presumption impossible.

Disputing the validity of the authentic instrument

If an authentic instrument is successfully challenged as to its formal validity/authenticity/*instrumentum* it will lose the evidentiary effects associated with authentic or authenticated instruments as public documents. If an authentic instrument is successfully challenged as to the validity of its *negotium*/material validity the instrument itself may remain technically valid but its evidentiary meaning will change accordingly and may well be rendered nugatory or incapable of enforcement.

The authenticity of an authentic instrument may be challenged by the claimant arguing that the authentic instrument does not comply with the requirements set out in Section 195(1) of the Code on Civil Procedure. A public deed, until the contrary is proved, has to be regarded as genuine, however, the court, if it considers this to be necessary, may, *ex officio*, contact the issuer who drew it up. A deed is considered to be genuine, if it stems from the issuer indicated on it and it is considered to be fake, if it does not stem from this issuer. An authentic instrument is considered to be forged, if it comes from the issuer but its content was changed illegally. However, until the contrary is actually proven, it has to be presumed that the public deed comes from the issuer indicated on it. Accordingly, it is not sufficient for a party to merely claim that an authentic instrument is fake or forged, he must successfully prove this. N.B. The falsification of an authentic instrument carries criminal sanctions in Hungarian law.

The material validity of the content of an authentic instrument may also be challenged as Section 195(6) of the Code on Civil Procedure allows for the rebuttal of the evidential presumption concerning a public deed by submitting evidence for that purpose. As with a challenge to the authenticity of the instrument, it is not sufficient for a party to merely claim that the material content of an authentic instrument is incorrect, that party must adduce sufficient evidence to prove this fact.

The actual enforcement of an authentic instrument may also be challenged in accordance with the provisions of the Act on Court Enforcement. An authentic instrument is regarded as enforceable (with the assistance of the court) in Hungarian law if the notary who drew it up affixed an enforcement clause to it, in accordance with Section 23/C of the Act on Court Enforcement, stating that it contains a commitment related to performance and counter performance or contains a unilateral commitment. The enforcement clause must specify: the name of the obligee and the name of the obligor; the legal basis and subject of the relevant commitment(s); the amount due; and details of the method and deadline of expected performance. Such a notarial authentic instrument carrying an enforcement clause is capable of serving as the basis of court enforcement.

The use of authentic instruments in domestic Hungarian succession law

As noted above, Hungarian succession law only positively requires that authentic instruments be used by the testator in the course of his succession if he is a person deemed by Section 7:14(4)-(5) of the Civil Code to be vulnerable: e.g. a will for a minor with limited testamentary capacity, for adults who are partially restricted as to their property law acts, for blind testators, for illiterate people and for people who are unable to read or to sign.

Other testators are free to choose to use an authentic instrument to arrange a notarial will with its associated evidential and practical advantages and many testators do choose

this option. A testator can also opt to deposit his private will with a notary but must do so in person and though deposited with the notary it remains a private will.

Hungarian probate proceedings feature an exclusive competence for the notarial profession who act as the court of first instance in such successions. In accordance with Article 79 of Regulation 650/2012 Hungary has indicated to the EU Commission that its notaries are equivalent to courts within the meaning of Article 3(2) of that Regulation. After the proceedings are commenced by a civil servant (who also makes an inventory of the assets of the estate) the competent notary takes over the probate proceedings and guides them to their conclusion. One consequence of this arrangement is that the authentic instruments created by a Hungarian notary in the course of probate proceedings will tend to be regarded as court **decisions** falling within the Annex 1 Form I standard form of Implementing Regulation 1329/2014 rather than within Annex 2 Form II.

The following list indicates the documents that are regarded as authentic instruments in matters of succession in Hungary:

- a) Authentic wills drawn up by a notary¹⁶⁴ either because this form is required by law (S.7:14(4)-(5) Civil Code – see above) **or** because the testator has freely opted for an authentic will.
- b) Revocation of an authentic will: according to S.7:41(1) of the Civil Code revocation is governed by the same rules that apply to the making of the will. As a matter of practice, if the testator intends to withdraw his authentic will (created by a notary), he has to contact a public notary to bring about the revocation. If the old will is to be replaced by a new authentic will, the fact of revocation will be contained in the new authentic will. The new will is of course an authentic instrument.
- c) A succession agreement *but only if* :-
 - a. the parties are required by S.7 of the Civil Code to create such an agreement in the form of an authentic instrument.
 - or**
 - b. because the parties opted to create the succession agreement and any waiver in the form of an authentic instrument.
- d) A refusal of the succession (after the death of the testator) must be made to the competent notary in the course of probate proceedings and this fact will be recorded by the notary in the form of an authentic instrument. N.B. As the Hungarian notary is deemed the first instance court, this authentic instrument will be treated as **a decision** falling within the Annex 1 Form I standard form of Implementing Regulation 1329/2014.
- e) An allocation agreement (effectively a partition) between the relevant parties will be presented for approval to the notary. If his approval is forthcoming this fact will be recorded as such within the formal decision of the inheritance (an authentic instrument) made by the notary at the end of the probate proceedings. N.B. This authentic instrument will be treated as **a decision** falling within the Annex 1 Form I standard form of Implementing Regulation 1329/2014.
- f) The formal decision of the inheritance/grant of probate made by the notary at the end of the probate proceedings to certify succession and heirship is an authentic instrument. N.B. This authentic instrument will be treated as **a decision** falling within the Annex 1 Form I standard form of Implementing Regulation 1329/2014.
- g) If a temporary grant of probate has been issued by the notary **it is an authentic instrument** *but is not yet enforceable*. A temporary grant of probate will become final in certain circumstances (e.g. the entitled party fails to commence the succession litigation, the court rejects a claim by a final ruling, the court

¹⁶⁴ Since 15 March 2014 it is no longer possible, as a consequence of the replacement of the old Civil Code with the new Civil Code to make an authentic will before a Hungarian court.

dismisses the case by a final ruling, the court ends the litigation without a decision on the merits). In these circumstances the notary shall declare the temporary grant of probate final and fully enforceable by way of a ruling on the appropriate terms indicated by the outcome of the litigation. As in (e) above: this declaration/grant of probate is also an authentic instrument that is enforceable as of that time. N.B. This authentic instrument will be treated as **a decision** falling within the Annex 1 Form I standard form of Implementing Regulation 1329/2014.

The Private International Law implications of the European Union's Succession Regulation 650/2012 and Implementing Regulation 1329/2014

The European Union Succession Regulation and its Implementing Regulation raise two distinct Private International Law issues for Hungary as an EU Member State: first, the extent of the obligations imposed by these Regulations on Hungary as a Member State of origin concerning its domestically created succession authentic instruments; and, second, the extent of the obligations these Regulations impose on Hungary as a Member State addressed concerning its duties relating to incoming foreign succession authentic instruments. The comments that follow consider each position.

Hungary is the Member State of origin: obligations concerning domestic succession authentic instruments

Article 59(1) of the European Union Succession Regulation allows, but does not require, '*a person*' who wishes to use a succession authentic instrument in another Member State to ask the authority who established it, i.e. the notary who drew it up or his substitute/successor, to issue an attestation concerning that authentic instrument on the standard form provided by Annex 2 Form II of Implementing Regulation 1329/2014. It is unclear whether or not such a request must be complied with if it is received from a person not deemed by the notary to be '*an interested party*'. The substitution of the phrase '*a person*' in Article 59 for '*interested party*' in Article 60 could be understood to indicate that there is no requirement in the EU Succession Regulation for the applicant seeking only cross-border acceptance to demonstrate what would otherwise be domestically regarded as a '*legitimate interest*' when requesting the attestation from the notary. It seems unlikely that this will be a problem in Hungary, as the prevailing view appears to be that a wide range of potential and legitimate applicants is already possible.¹⁶⁵ The EU Succession Regulation and Implementing Regulation do not expressly contemplate the possibility that a request under Article 59 may be refused. It is however possible to contrast the applicant '*may ask*' of Article 59 with '*the authority shall*' in Article 60(2) and to infer from the different wording that the notary (or other public authority) is only actually obliged to accede to the applicant's request when it concerns enforcement under Article 60. This result however seems inconsistent with Recitals 22, 59 and 60 of the EU Succession Regulation and with one of its underlying purposes, i.e. to facilitate the cross-border transmission of authentic instruments and their legal effects. In circumstances where both the acceptance and the enforcement of the authentic instrument may be sought the problem may be avoided, assuming the notary to be willing to provide information concerning both Article 59 and Article 60, by the applicant routinely requesting an attestation concerning *both* enforcement and acceptance.

Article 60 of Regulation 650/2012 requires that, provided that to so declare would not be manifestly contrary to public policy in the Member State addressed it *must* on application by an interested person declare a foreign succession authentic instrument that is enforceable in its Member State of origin to also be enforceable in their Member State. Though it may, in practice, be difficult to find many succession authentic instruments

¹⁶⁵ See the persons listed by Annex 1 Form I of Implementing Regulation 1329/2014 at 4.3.1.7. It is also possible that a creditor of the estate or of a person who has refused the inheritance may have a legitimate interest to apply for an attestation under either Annex 1 Form I or an Annex 2 Form II.

that are capable of subsequent enforcement, a Hungarian notary may, theoretically, be in receipt of a request for such an attestation, again under Annex 2 Form II of Implementing Regulation 1329/2014. This standard form allows for an attestation that concerns only 'acceptance', via Article 59, or 'enforcement' via Article 60, or an attestation that jointly concerns acceptance and enforcement of the authentic instrument depending upon the boxes ticked by the Hungarian notary.¹⁶⁶

The Hungarian notary in receipt of the request to provide a completed Annex 2 Form II attestation concerning a domestic succession authentic instrument is asked to indicate at points 4.2 to 4.2.1.1.7 of the standard form what he believes its domestic evidentiary effects to be. Though the answers will vary depending upon the specific verifications contained in the succession authentic instrument at issue, it is broadly conceivable that points 4.2.1.1.1 to 4.2.1.1.7 could be expected to be completed as follows:

4.2.1.1.1 - The date the authentic instrument was drawn up:

The authentic instrument gives full proof of this fact. Section 195(1) of the Code on Civil Procedure sets out the evidentiary value of a public deed (a public deed/authentic instrument fully proves the disposition or decision included in it, the veracity of the data and facts certified by the deed/instrument, and also the making, date, time, place and method of the declaration or declarations that it includes).

4.2.1.1.2 - The place where the authentic instrument was drawn up:

The authentic instrument gives full proof of this fact: see Section 195(1) of the Code on Civil Procedure.

4.2.1.1.3 - The origin of the signatures from the parties of the authentic instrument:

The authentic instrument gives full proof of this fact: see Section 195(1) of the Code on Civil Procedure.

4.2.1.1.4 - The content of the declarations of the parties:

The authentic instrument gives full proof of the facts that: a) the declarations were made before him by the recorded parties, and, b) that the declarations were made in the terms that the notary has recorded: see Section 195(1) of the Code on Civil Procedure. However, Section 195(1) of the Code on Civil Procedure does *not* apply to the verification of the **truth** of the content of the declarations and indeed such verification is NOT part of the notarial function in Hungary.

4.2.1.1.5 - The facts that the authority declares as having been verified in its presence:

The authentic instrument gives full proof of these verified facts: see Section 195(1) of the Code on Civil Procedure.

4.2.1.1.6 - The actions which the authority declares to have carried out:

The authentic instrument gives full proof of these notarial declarations: see Section 195(1) of the Code on Civil Procedure.

4.2.1.1.7 - Other: (please indicate any other evidentiary effect that a domestic authentic instrument could produce)

According to the advice received, there are no further evidentiary effects not already covered by points 4.2.1.1.1 - 4.2.1.1.6. It is however conceivable that additional information could be presented in this box.

¹⁶⁶ For Article 59 acceptance tick 'yes' in box 4.1.1; for Article 60 enforcement tick 'yes' in box 6.1.1. To dispense with either option, tick 'no' in box 4.1.2. or 6.1.2 as appropriate.

Hungary is the Member State addressed: foreign succession authentic instruments

The EU Succession Regulation requires that, subject to public policy exceptions, Hungarian authorities must **accept** and, or, **enforce** foreign authentic instruments in matters of succession received from other EU Member States bound by the Succession Regulation.

The **acceptance** of a foreign succession authentic instrument presented by an applicant in Hungary is governed by Article 59 and the enforcement of such an authentic instrument is governed by Article 60 of the EU Succession Regulation. Acceptance requires that, provided that to do so would not be manifestly contrary to Hungarian domestic public policy, the authorities in Hungary (as the Member State addressed) *must* grant the foreign succession authentic instrument the same (or most comparable) evidentiary effects as it would enjoy in its own Member State of origin.

To determine the nature of the evidentiary effects that would be associated with that authentic instrument in the Member State of origin, reference should be made to any Annex 2 Form II form that may accompany the foreign authentic instrument, especially to parts 4.2.1.1.1 – 4.2.1.1.7 of any such form. It must however be noted that the use of the Implementing Regulation's Annex 2 form does not appear to be obligatory. The obligation imposed by Article 59 of the EU Succession Regulation on the Member State addressed to accept a succession authentic instrument does not require or depend upon the use or supply of the Annex 2 form. A succession authentic instrument received from a Member State of origin in accordance with the provisions of the EU Succession Regulation must still be accepted, within the meaning of Article 59 of Regulation 650/2012, even if no Annex 2 Form II form is provided or if the Annex 2 form provided is not fully or properly completed.

At present there are no provisions in Hungarian law that specifically deal with the acceptance of a foreign authentic instrument concerning a matter of succession under the EU Succession Regulation.

The **enforcement** of a foreign authentic instrument via Article 60 of Regulation 650/2012 requires that, provided that to do so would not be manifestly contrary to Hungarian public policy, the authorities in the Member State addressed (Hungary) must on application by an interested person declare enforceable a foreign succession authentic instrument that is enforceable in its Member State of origin. We are not aware of any special provision in the law of Hungary that specifically deals with the actual enforcement of a foreign authentic instrument (differently from the actual enforcement of a foreign judgment that has been declared enforceable) after it has been declared enforceable in accordance with the procedure laid down in Articles 45 to 58 of the EU Succession Regulation as required by Article 60 thereof.

Hungarian public policy

The EU Succession Regulation allows a public policy defence in various contexts including with reference to authentic instruments under Articles 59 and 60. To invoke the public policy exception in the context of Article 59, and by so doing to justify a refusal of acceptance for that foreign authentic instrument, it must be the case that the *granting of the same or most comparable evidentiary effects* to the foreign authentic instrument would be manifestly contrary to Hungarian public policy. To invoke the public policy exception in the context of Article 60, to justify a refusal of a declaration of enforceability for the foreign authentic instrument, it must be that the *granting of the declaration of enforceability* for the foreign authentic instrument would be manifestly contrary to Hungarian public policy. Of course this public policy exception should be construed narrowly and it is envisaged that it will rarely apply. As is made plain by Recital 58 of the EU Succession Regulation, public policy is not to be applied in a manner that is discriminatory or otherwise contrary to the European Union's Charter of Fundamental

Rights. Equally however Recital 26 of Regulation 650/2012 indicates that the Regulation does not prevent a court from applying mechanisms designed to tackle the evasion of the law, such as *fraude à la loi* in the context of Private International Law. However, the substantive provisions of the Regulation do not expressly empower national courts to prevent evasion of the law (including *fraude à la loi*). It would seem that the only positive basis for doing so under the Regulation is to regard such evasion of the law to be contrary to public policy unless the law being evaded is one of the "special rules" of the forum concerning certain assets that is applicable irrespective of the law applicable to the succession (see Article 30 of the EU Succession Regulation).

Our national reporters were not able to find any case in which public policy had been invoked to deny the reception of a foreign authentic instrument in the context of an Hungarian succession proceeding.

Incompatible Authentic instruments

Recital 66 of the EU Succession Regulation envisages the possibility of 'an authority' being presented with incompatible authentic instruments.¹⁶⁷ The solutions suggested by the Recital are to consider priority and the circumstances of the particular case and then, if this has not resolved the incompatibility, to resort to a court with direct or incidental jurisdiction under the EU Succession Regulation. There are at present no specific provisions on this matter under Hungarian law.

¹⁶⁷ Recital 66: Should an authority, in the application of this Regulation, be presented with two incompatible authentic instruments, it should assess the question as to which authentic instrument, if any, should be given priority, taking into account the circumstances of the particular case. Where it is not clear from those circumstances which authentic instrument, if any, should be given priority, the question should be determined by the courts having jurisdiction under this Regulation, or, where the question is raised as an incidental question in the course of proceedings, by the court seised of those proceedings. In the event of incompatibility between an authentic instrument and a decision, regard should be had to the grounds of non-recognition of decisions under this Regulation.

ITALY

The Italian legal system

Italy consists of a single legal system that belongs to the civil law family. The Italian law concerning succession has only been updated to implement the European Union Succession Regulation via Article 32 of Law No.161/2014 appointing the Italian notary as the competent authority in Italy to deliver a European Certificate of Succession.¹⁶⁸ The Italian law relevant to Succession and to the matters dealt with in this profile can be found, in Italian, in the Civil Code¹⁶⁹ Articles 456 – 768; the Civil Procedure Code¹⁷⁰ and in Legislative Decree 346/1990.¹⁷¹ There is no official translation into English.

The concept of an authentic instrument in Italy

According to Article 2699 of the Italian Civil Code, an authentic instrument is a public document drawn up in accordance with the required formalities by a notary or other public official who is authorised in the place that the instrument is drawn up, to create such an instrument benefitting from public reliability. In the Italian legal system the main creators of such public documents/authentic instruments are notaries. Italian law makes extensive use of such authentic instruments across a range of legal transactions particularly ones involving the entry or adjustment of an entry in a public register. For some transactions the use of an authentic instrument is required for its validity (e.g. donations, matrimonial agreements; the constitution and modification of companies with limited liability and certain agreements with municipalities) for other transactions (e.g. real estate transactions; business transactions; partnership transactions; and mortgages) it is not essential to use an authentic instrument but, if the transaction must be registered in a public registry, a failure to do so will prevent the transaction being entered in the public registry.

The Italian legal system also makes use of authenticated signatures. Authentication of signatures can take place by a notary or another public official and involves the official certifying that a signature of a person who's identity has been verified by the official has been written in his (the official's) presence (see Article 2703 of the Civil Code).

Evidentiary effects of domestic authentic instruments in Italian law

Under Article 2700 of the Civil Code the effects of authentic instruments are, subject to the possibility of an action to expose their falsity, that it constitutes full proof that it was drawn up by the public official that it represents as having drawn it up and also constitutes full proof of the declarations of the parties and full proof of the other facts which the public official attests to having taken place in his presence or to have been performed by him. It should however be noted that the evidentiary effect of an Italian authentic instrument does *not* extend to cover the truth of declarations made by the non-notarial parties to that authentic instrument.

The authentic instrument offers a considerable advantage in terms of evidentiary effect compared to ordinary signed private writings. Signed private writings only provide full proof of the origin of the declarations they set forth, and can only do this if either the

¹⁶⁸ Legge 30 ottobre 2014, n. 161 "Disposizioni per l'adempimento degli obblighi derivanti dall'appartenenza dell'Italia all'Unione europea - Legge europea 2013-bis".

¹⁶⁹ <http://www.diritto.it/codici/1-codice-civile>

¹⁷⁰ <http://www.diritto.it/codici/3-codice-di-procedura-civile>

¹⁷¹ https://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0ahUKEwiNqrKyoN7KAhVJ1B4KHXLrAy4QFqqqMAE&url=https%3A%2F%2Fsocialsciences.exeter.ac.uk%2Fmedia%2Funiversityofexeter%2Fcollegeofsocialsciencesandinternationalstudies%2Fpolitics%2Fresearch%2Fstatorg%2Fitaly%2Fnqo%2FTax_Law-Decreto_Legislativo_31-10-1990%2C_n._346.pdf&usg=AFQjCNGhkjAecYpTi45-Grt4bfwe_IP2Kw&cad=ria

signature is deemed to have been recognised by the process of authentication or is recognised by the person against whom it is asserted (see Article 2702 of the Civil Code (CPC)).

Authentic instruments are also in most cases potentially enforceable *ex lege*, according to Article 474 of the Civil Procedure Code (CPC), without any need for a specific *exequatur* procedure.

Disputing the validity of the authentic instrument

If an authentic instrument is successfully challenged as to its formal validity/authenticity/*instrumentum* it will lose the evidentiary effects associated with authentic instruments as public documents. If an authentic instrument is successfully challenged as to the validity of its *negotium*/material validity the instrument itself is still valid but its evidentiary meaning will change accordingly and the instrument may well be rendered nugatory.

The authenticity of an authentic instrument may be challenged only by means of a special procedure ("querela di falso") regulated in Articles 221 to 227 of the CPC. The party who brings the querela di falso has the burden of proof and must actually succeed in proving the falsity of which he complains if he is to change the apparent legal effect of that authentic instrument. The querela di falso is started by the interested party, either personally or through a personal representative, he must specify the contested elements and the alleged forgery (Article 221 of the CPC). The public prosecutor is a mandatory party to this proceeding. Once the action is introduced, the judge will formally question the party or parties who have an interest in using the challenged instrument as to whether they wish to use the document in the proceedings, and if so, the judge admits the action for fraud (Article 222 of the CPC). A record in court is formed, in which the document is duly described and it is filed with the other documents concerning the case (Article 223 of the CPC). If the document in question is not presented in court, the judge can order its seizure (Article 224 of the CPC). According to Article 227 of the CPC the enforcement of the decision is possible only after the final decision (*res judicata*). Until then the authentic instrument retains its validity, enforceability and effects. If the challenge is found to have been well-founded, the authentic instrument may be amended or quashed as appropriate.

The material validity of the contract or agreement contained in the authentic instrument can also be challenged before a court, following the general procedure (note that the evidentiary effect of an Italian authentic instrument does *not* extend to cover the truth of declarations made by the non-notarial parties to that authentic instrument).

A challenge to the actual enforcement of an enforceable authentic instrument is brought before a court using ordinary procedures.

The use of authentic instruments in domestic Italian succession law

There are a wide range of uses for authentic instruments in Italian succession law. The following list indicated the main documents that are regarded as authentic instruments in matters of succession:

- a) Public wills written by a notary and witnessed in accordance with Article 603 of the Civil Code are authentic instruments.
- b) Secret wills written by the testator or by another person for the testator in accordance with Articles 604 – 605 of the Civil Code become authentic instruments via the publication of that will by the notary on learning of the death of the testator in accordance with Articles 620–621 of the Civil Code.
- c) International wills (under the Washington Convention of 26th October 1973) made before an Italian notary are authentic instruments.

- d) A privileged will falling within Articles 611(on a ship), 616 (on an aircraft) or 617 (on military service) of the Civil Code is an authentic instrument – despite not necessarily being made before a notary – for the duration of its period of validity.
- e) A will made before an Italian consular authority outside of Italy is also an authentic instrument.
- f) The limited circumstance in which inheritance succession agreement is allowed in Italian law¹⁷² (only for businesses, in limited cases) involves the creation of an authentic instrument – see Articles 768-bis to 760-octies of the Civil Code.
- g) Acceptance of an inheritance. An express acceptance of an inheritance – with or without benefit of inventory – may be made by an authentic instrument. See Articles 470–511 of the Civil Code.
- h) A waiver/renunciation of a succession under Article 519 of the Civil Code will be recorded via an authentic instrument.
- i) Notarial Inventory. If an inventory is required from a notary it will be created by him in the form of an authentic instrument – see Articles 770–777 of the Civil Procedure Code.
- j) If there is a partition of an estate that includes immoveable property, businesses, shares of limited companies or partnerships, it will be necessary to use an authentic instrument to effect the adjustments to the public registers in which such property rights are registered. Though it is not a requirement to use the form of an authentic instrument in other circumstances it is common for the parties to a partition to prefer to do so anyway.¹⁷³

The Private International Law implications of the European Union's Succession Regulation 650/2012 and Implementing Regulation 1329/2014

The European Union Succession Regulation and its Implementing Regulation raise two distinct Private International Law issues for Italy as an EU Member State: first, the extent of the obligations imposed by these Regulations on Italy as a Member State of origin concerning its domestically created succession authentic instruments; and, second, the extent of the obligations these Regulations impose on Italy as a Member State addressed concerning its duties relating to incoming foreign succession authentic instruments. The comments that follow consider each position.

Italy is the Member State of origin: obligations concerning domestic succession authentic instruments

Article 59(1) of the European Union Succession Regulation allows, but does not require, '*a person*' who wishes to use a succession authentic instrument in another Member State to ask the authority who established it, i.e. the notary who drew it up or his substitute/successor, to issue an attestation concerning that authentic instrument on the standard form provided by Annex 2 Form II of Implementing Regulation 1329/2014. It is unclear whether or not such a request must be complied with if it is received from a person not deemed by the notary to be '*an interested party*'. The substitution of the phrase '*a person*' in Article 59 for '*interested party*' in Article 60 could be understood to indicate that there is no requirement in the EU Succession Regulation for the applicant seeking only cross-border acceptance to demonstrate what would otherwise be domestically regarded as a '*legitimate interest*' when requesting the attestation from the notary. It seems unlikely that this will be a problem in Italy as it seems that a wide

¹⁷² Article 458 of the Civil Code forbids succession agreements and declares them to be void.

¹⁷³ Though the Italian State has not presently entered a notification under Article 79 of the EU Succession Regulation to indicate that there is any circumstance in which an Italian notary can be considered to be a '*competent authority*' within the meaning of that term in Article 3(2) of the Succession Regulation, we are advised by our national reporters that it is envisaged that when a notary is instructed by the court to proceed to the partition of the estate under Article 786 of the Italian Code of Civil Procedure he is domestically understood to act as would a court and hence it is assumed that he must, if asked for an attestation on this matter, complete an Annex 1 Form I form under Implementing Regulation 1329/2014 rather than an Annex 2 Form II form.

range of potential and legitimate applicants is already envisaged and possible.¹⁷⁴ The EU Succession Regulation and Implementing Regulation do not expressly contemplate the possibility that a request under Article 59 may be refused. It is however possible to contrast the applicant 'may ask' of Article 59 with 'the authority shall' in Article 60(2) and to infer from the different wording that the notary (or other public authority) is only actually obliged to accede to the applicant's request when it concerns enforcement under Article 60. This result however seems inconsistent with Recitals 22, 59 and 60 of the EU Succession Regulation and with one of its underlying purposes, i.e. to facilitate the cross-border transmission of authentic instruments and their legal effects. In circumstances where both the acceptance and the enforcement of the authentic instrument may be sought the problem may be avoided, assuming the notary to be willing to provide information concerning both Article 59 and Article 60, by the applicant routinely requesting an attestation concerning *both* enforcement and acceptance.

Article 60 of Regulation 650/2012 requires that, provided that to so declare would not be manifestly contrary to public policy in the Member State addressed, it *must* on application by an interested person declare a foreign succession authentic instrument that is enforceable in its Member State of origin to also be enforceable in their Member State. An Italian notary may thus be in receipt of a request for such an attestation, again under Annex 2 Form II of Implementing Regulation 1329/2014. This standard form allows for an attestation that concerns only 'acceptance', via Article 59, or 'enforcement' via Article 60, or an attestation that jointly concerns acceptance and enforcement of the authentic instrument depending upon the boxes ticked by the Italian notary.¹⁷⁵

The Italian notary in receipt of the request to provide a completed Annex 2 Form II attestation concerning a domestic succession authentic instrument¹⁷⁶ is asked to indicate at points 4.2 to 4.2.1.1.7 of the standard form what he believes its domestic evidentiary effects to be. Though the answers will vary depending upon the specific verifications contained in the succession authentic instrument at issue, it is broadly conceivable that points 4.2.1.1.1 to 4.2.1.1.7 could be expected to be completed as follows:

4.2.1.1.1 - The date the authentic instrument was drawn up:

Article 2700 of the Civil Code - the authentic instrument gives full proof of this fact.

4.2.1.1.2 - The place where the authentic instrument was drawn up:

Article 2700 of the Civil Code - the authentic instrument gives full proof of this fact.

4.2.1.1.3 - The origin of the signatures from the parties of the authentic instrument:

Article 2700 of the Civil Code - the authentic instrument gives full proof of this fact.

4.2.1.1.4 - The content of the declarations of the parties:

Article 2700 of the Civil Code - the authentic instrument gives full proof that these declarations were made before him by the parties. N.B. the evidentiary effect of an Italian authentic instrument does *not* extend to cover the truth of the content of the declarations made by the parties to the authentic instrument.

¹⁷⁴ See the persons listed by Annex 1 Form I of Implementing Regulation 1329/2014 at 4.3.1.7. Other persons with a legitimate interest could include a creditor of the estate or of a person who has refused the inheritance.

¹⁷⁵ For Article 59 acceptance tick 'yes' in box 4.1.1; for Article 60 enforcement tick 'yes' in box 6.1.1. To dispense with either option tick 'no' in box 4.1.2. or 6.1.2 as appropriate.

¹⁷⁶ Though the Italian State has not presently entered a notification under Article 79 of the EU Succession Regulation to indicate that there is any circumstance in which an Italian notary can be considered to be a 'competent authority' within the meaning of that term in Article 3(2) of the Succession Regulation, we are advised by our national reporters that it is envisaged that when a notary is instructed by the court to proceed to the partition of the estate under Article 786 of the Italian Code of Civil Procedure he is domestically understood to act as would a court and hence it is assumed that he must, if asked for an attestation on this matter, complete an Annex 1 Form I form under Implementing Regulation 1329/2014 rather than an Annex 2 Form II form.

4.2.1.1.5 - The facts that the authority declares as having been verified in its presence:
Article 2700 of the Civil Code - the authentic instrument gives full proof of these facts.

4.2.1.1.6 - The actions which the authority declares to have carried out:
Article 2700 of the Civil Code - the authentic instrument gives full proof of these actions.

4.2.1.1.7 - Other: (please indicate any other evidentiary effect that a domestic authentic instrument could produce)

According to the advice received there are no further evidentiary effects not already covered by points 4.2.1.1.1 - 4.2.1.1.6. It is however conceivable that additional information could be presented in this box.

Italy is the Member State addressed: foreign succession authentic instruments

The EU Succession Regulation requires that, subject to public policy exceptions, Italian authorities must accept and, or, enforce foreign authentic instruments in matters of succession received from other EU Member States bound by the Succession Regulation.

The acceptance of a foreign succession authentic instrument presented by an applicant in Italy is governed by Article 59 and the enforcement of such an authentic instrument is governed by Article 60 of the EU Succession Regulation. Acceptance requires that, provided that to do so would not be manifestly contrary to Italian public policy, the Italian authorities (as the Member State addressed) *must* grant the foreign succession authentic instrument the same (or most comparable) evidentiary effects as it would enjoy in its own Member State of origin.

To determine the nature of the evidentiary effects that would be associated with that authentic instrument in the Member State of origin, reference should be made to any Annex 2 Form II form that may accompany the foreign authentic instrument, especially to parts 4.2.1.1.1 – 4.2.1.1.7 of any such form. It must however be noted that the use of the Implementing Regulation's Annex 2 form does not appear to be obligatory. The obligation imposed by Article 59 of the Succession Regulation on the Member State addressed to accept a succession authentic instrument does not require or depend upon the use or supply of the Annex 2 form. A succession authentic instrument received from a Member State of origin in accordance with the provisions of the EU Succession Regulation must still be accepted, within the meaning of Article 59 of Regulation 650/2012, even if no Annex 2 Form II form is provided or if the Annex 2 form provided is not fully or properly completed.

At present there are no provisions or decisions in Italian law that specifically deal with the acceptance of a foreign authentic instrument concerning a matter of succession under the EU Succession Regulation.

The enforcement of a foreign authentic instrument via Article 60 of Regulation 650/2012 requires that, provided that to do so would not be manifestly contrary to Italian public policy, the authorities in the Member State addressed (Italy) must on application by an interested person declare enforceable a foreign succession authentic instrument that is enforceable in its Member State of origin. We are not aware of any special provision in the law of Italy that specifically deals with the actual enforcement of a foreign authentic instrument after it has been declared enforceable (differently from the actual enforcement of a foreign judgment that has been declared enforceable) in accordance with the procedure laid down in Articles 45 to 58 of the EU Succession Regulation as required by Article 60 thereof.

Italian public policy

The EU Succession Regulation allows a public policy defence in various contexts including with reference to authentic instruments under Articles 59 and 60. To invoke the public

policy exception in the context of Article 59, and by so doing to justify a refusal of acceptance for that foreign authentic instrument, it must be the case that the *granting of the same or most comparable evidentiary effects* to the foreign authentic instrument would be manifestly contrary to Italian public policy. To invoke the public policy exception in the context of Article 60, to justify a refusal of a declaration of enforceability for the foreign authentic instrument, it must be that the *granting of the declaration of enforceability* for the foreign authentic instrument would be manifestly contrary to Italian public policy. Of course this public policy exception should be construed narrowly and it is envisaged that it will rarely apply. As is made plain by Recital 58 of the EU Succession Regulation, public policy is not to be applied in a manner that is discriminatory or otherwise contrary to the European Union's Charter of Fundamental Rights. Equally however Recital 26 of Regulation 650/2012 indicates that the Regulation does not prevent a court from applying mechanisms designed to tackle the evasion of the law, such as *fraude à la loi* in the context of Private International Law. However, the substantive provisions of the Regulation do not expressly empower national courts to prevent evasion of the law (including *fraude à la loi*). It would seem that the only positive basis for doing so under the Regulation is to regard such evasion of the law to be contrary to public policy unless the law being evaded is one of the "special rules" of the forum concerning certain assets that is applicable irrespective of the law applicable to the succession (see Article 30 of the EU Succession Regulation).

Our national reporters were not able to find any case in which public policy had been invoked to deny the reception of a foreign authentic instrument in the context of an Italian succession proceeding.

Incompatible Authentic instruments

Recital 66 of the EU Succession Regulation envisages the possibility of 'an authority' being presented with incompatible authentic instruments.¹⁷⁷ The solutions suggested by the Recital are to consider priority and the circumstances of the particular case and then, if this has not resolved the incompatibility, to resort to a court with direct or incidental jurisdiction under the Succession Regulation. There are currently no Italian legal provisions on this matter.

¹⁷⁷ Recital 66: Should an authority, in the application of this Regulation, be presented with two incompatible authentic instruments, it should assess the question as to which authentic instrument, if any, should be given priority, taking into account the circumstances of the particular case. Where it is not clear from those circumstances which authentic instrument, if any, should be given priority, the question should be determined by the courts having jurisdiction under this Regulation, or, where the question is raised as an incidental question in the course of proceedings, by the court seised of those proceedings. In the event of incompatibility between an authentic instrument and a decision, regard should be had to the grounds of non-recognition of decisions under this Regulation.

LATVIA

The Latvian legal system

Latvia consists of one legal system that belongs to the civil law family. The Latvian law concerning succession has been updated to implement the EU Succession Regulation via the Notariate Law in relation to the applicable law and the European Certificate of Succession.¹⁷⁸

The law and the procedural rules concerning succession are located in:

the Civil Law;¹⁷⁹
the Notariate Law;¹⁸⁰
the Cabinet Regulation No. 618, Adopted 4 August 2008,
Regulations on the Inheritance Register and Leading of Inheritance Matters, issued
pursuant to Section 64 of the Notariate Law.¹⁸¹

The concept of an authentic instrument in Latvia

The Latvian legal system makes use of authentic instruments. The legal provisions concerning authentic instruments can be found within:

Civil law:

- marriage contracts
- succession contracts
- public wills
- lasting powers of attorney

Notariate law:

- Declarations as regards acceptance or waiver of a succession
- Divorce certificates (by consent of the parties)
- Revocations of Authorisations

Special laws providing for the use of an authentic instrument:

- The Civil procedure law (Right to Representation in the Civil Procedure): Representation of natural persons shall be formalised with a notarially certified authorisation.
- Land Register Law.
- Authorisation for another person to request corroboration shall be expressed in a document which has been certified by a notary or Orphan's court.
- Procedures by which Children Cross the State Border: If a child, who is a national of Latvia, departs from the State accompanied by an authorised person, he or she shall present a notarially certified authorisation by at least one parent or a guardian for the departure of a child from the State accompanied by this authorised person.

No transactions are legally required to be carried out by using an authentic instrument.

¹⁷⁸ The amendments can be found at: <http://likumi.lv/ta/id/278508-qrozijumi-notariata-likuma>.

¹⁷⁹ <http://likumi.lv/doc.php?id=225418>.

¹⁸⁰ <http://likumi.lv/doc.php?id=59982>.

¹⁸¹ <http://likumi.lv/doc.php?id=180087>.

Authentic instruments are issued by an official body or a public official according to the legislation. Notarial deeds and notarial certifications made by a notary are authentic instruments (except for the documents that certify the authenticity of a signature). In cases when the law provides for notarial certification, public certification or certification in accordance with declaration procedures of expressions of intent, the sworn notary shall make a notarial deed.

Evidentiary effects of domestic authentic instruments in Latvian law

The power of full proof of an authentic instrument applies only to matters that a notary can verify himself and to matters that the notary has found out by himself (e.g. the place and date of making an act, the parties present, and the fact that these are the statements of the parties). The statements of the parties have an evidentiary effect of the full proof of an authentic instrument only in relation to what is certified by a notary in a deed. The truthfulness of the statements and their evidentiary effect lie within the scope of the general law.

Disputing the validity of the authentic instrument

If an authentic instrument is successfully challenged as to its formal validity/authenticity/*instrumentum* it will lose the evidentiary effects associated with authentic or authenticated instruments as public documents. If an authentic instrument is successfully challenged as to the validity of its *negotium*/material validity the instrument itself may remain technically valid but its evidentiary meaning will change accordingly and may well be rendered nugatory or incapable of enforcement.

Section 178(3) of the Latvian Civil Procedure Code provides that the veracity of documentary evidence may be disputed by the parties involved. It states that the veracity of '(...) notarised documents or other acts certified in accordance with procedures laid down in law may not be disputed.' An independent action would be necessary to dispute a notarised document or other act certified in accordance with procedures laid down in law.

The use of authentic instruments in domestic Latvian succession law

A notary makes the inheritance submission, which expresses the person's intent regarding acceptance or renunciation of an inheritance, as a notarial deed. Upon recognising the inheritance submission as justified, the sworn notary makes a notarial deed regarding the coming into legal effect of the last will instruction instrument (the inheritance certificate).

If the will is certified by a notary, upon opening a succession case, a notary will be able to find it in the Register of Public Wills. Wills, certified by a notary, are registered in the Register of Public Wills. The Public Will Register is kept by The Council of Sworn Notaries of Latvia (e-mail: info@latvijasnotars.lv). In Latvia, the Register of Public Wills was introduced on 1 May 2014. The Register incorporates all the documents relevant to the last will – its withdrawal, any amendments or supplements. The Register data regarding the last will instruction instruments, which have been made from the day of the commencement of activity of the Register, have a public credibility. Private (holographic) wills are not registered, they can come into force if an heir hands it in, during the course of a succession case.

A will registered in the register of documents of a notary or in the register of wills at an Orphan's court, or a document prepared pursuant to the procedures of Section 439 of the Civil Procedure Code shall be deemed to be the best evidence of the existence and authenticity of a last will. Private wills may be deposited for safekeeping with a notary public, observing the Notariate Law, or with an Orphan's court, observing the provisions

of the Law on Orphan's Courts. A will that has been deposited with a notary or an Orphan's court shall be valid as a public will.

An inheritance contract must be certified pursuant to notarial procedures. The estate-leaver and the contractual heir may mutually agree to revoke the inheritance contract. Contractual inheritance is superior to testamentary inheritance and they both prevail over intestate succession.

The authenticity of a public will may not be doubted; only an allegation of forgery may be raised against such a will. Assuming the will is valid and uncontested the heirs themselves have to prove their rights to inherit by handing in all the relevant documents to the sworn notary handling the succession case. They may do this by handing in either the disposition of property upon death or the documents proving their kinship or marriage (issued by a civil registry office or a court's decision establishing the relationship).

The sworn notary shall announce the opening of succession in the official gazette Latvijas Vēstnesis, and notify the known heirs thereof. Anyone may examine a Register and request extracts from it.

If the inheritance submission is justified, the sworn notary shall make a notarial deed regarding the coming into legal effect of the last will or regarding the confirmation of the heirs' inheritance rights (an inheritance certificate). A notarial deed regarding the coming into legal effect of the last will or regarding the confirmation of the heirs' inheritance rights (inheritance certificate) is made by a sworn notary when the time period for acceptance of the inheritance specified by the testator has expired, but if no such time period has been specified – the time period for acceptance of the inheritance is that specified by the sworn notary himself or herself or the time period prescribed by law.

No one is compelled to accept an inheritance. It may be accepted or renounced according to one's preference. An inheritance may be renounced expressly or implicitly. A contract to renounce the right of inheritance is effective only if it has been executed in writing. There is no obligatory notarial form.

With regard to partition, the inheritance can be divided if the heirs mutually agree to the division by signing a contract of division, there is no obligatory notarial form.

An inheritance certificate, issued by a sworn notary, certifies the rights of the heir to inherit, but doesn't certify that the property belonged to the testator.

If a sworn notary who is conducting an inheritance matter receives a court notification that an action has been brought regarding the contesting of the last will, he or she shall suspend the proceedings in the inheritance matter until the settling of the dispute in court.

The notary issuing a certificate or an authentic instrument is the one who attests it.

The Private International Law implications of the European Union's Succession Regulation 650/2012 and Implementing Regulation 1329/2014

The European Union Succession Regulation and its Implementing Regulation raise two distinct Private International Law issues for Latvia as an EU Member State. First, the extent of the obligations imposed on Latvia as a Member State of origin concerning its domestically created succession authentic instruments; and, second, the extent of the obligations imposed on Latvia as a Member State addressed concerning incoming foreign succession authentic instruments. The comments that follow consider each position.

Latvia is the Member State of origin: obligations concerning domestic succession authentic instruments

Article 59(1) of the European Union Succession Regulation allows, but does not require, 'a person' who wishes to use a succession authentic instrument in another Member State to ask the authority who established it, e.g. the notary who drew it up or his substitute/successor, to issue an attestation concerning that authentic instrument on the standard form provided by Annex 2 Form II of EU Implementing Regulation 1329/2014. It is unclear whether or not such a request must be complied with if it is received from a person not deemed by the notary to be 'an interested party'. The substitution of the phrase 'a person' in Article 59 for 'interested party' in Article 60 could be understood to indicate that there is no requirement in the EU Succession Regulation for the applicant seeking only cross-border acceptance to demonstrate what would otherwise be domestically regarded as a 'legitimate interest' when requesting the attestation from the notary. It seems unlikely that this will be a problem in Latvia, as the prevailing view appears to be that any natural or legal person with the right to use or to enforce the authentic instrument may apply. The EU Succession Regulation and Implementing Regulation do not expressly contemplate the possibility that a request under Article 59 may be refused. It is however possible to contrast the applicant 'may ask' of Article 59 with 'the authority shall' in Article 60(2) and to infer from the different wording that the notary (or other public authority) is only actually obliged to accede to the applicant's request when it concerns enforcement under Article 60. This result however seems inconsistent with Recitals 22, 59 and 60 of the EU Succession Regulation and with one of its underlying purposes, i.e. to facilitate the cross-border transmission of authentic instruments and their legal effects. In circumstances where both the acceptance and the enforcement of the authentic instrument may be sought the problem may be avoided, assuming the notary to be willing to provide information concerning both Article 59 and Article 60, by the applicant routinely requesting an attestation concerning *both* enforcement and acceptance.

Article 60 of EU Regulation 650/2012 requires that, provided that to so declare would not be manifestly contrary to its public policy, the authorities in the Member State addressed *must* on application by an interested person declare a foreign succession authentic instrument that is enforceable in its Member State of origin (i.e. Latvia) to also be enforceable in their Member State. A Latvian notary may thus be in receipt of a request for such an attestation, again under Annex 2 Form II of EU Implementing Regulation 1329/2014. This standard form allows for an attestation that concerns only 'acceptance', via Article 59, or 'enforcement' via Article 60, or an attestation that jointly concerns acceptance and enforcement of the authentic instrument depending upon the boxes ticked by the Latvian notary.¹⁸²

Section 82 of the Notariate Law states that deeds, which are made by a sworn notary, recording them into a deed book, shall be known as notarial deeds. Notarial deeds and certifications made by a sworn notary, except for the documents where only the authenticity of signatures has been certified which shall be recognised as private documents, are public documents. Paragraph 3 of section 178 of the Latvian Civil Procedure Code states that the veracity of notarised documents may only be disputed by an independent action.¹⁸³

¹⁸² For an Article 59 acceptance tick 'yes' in box 4.1.1; for an Article 60 enforcement tick 'yes' in box 6.1.1. To dispense with either option tick 'no' in box 4.1.2. or 6.1.2 as appropriate.

¹⁸³ Civil Procedure Code, Section 178. Disputing of Documentary Evidence.

(1) Participants in a matter may dispute the veracity of documentary evidence.

(2) Documentary evidence may not be disputed by the person who himself or herself has signed such evidence. Such a person may dispute the evidence by bringing an independent action, if their signature was obtained under the influence of duress, threat or fraud.

(3) The veracity of Land Register entries, notarised documents or other acts certified in accordance with procedures laid down in law may not be disputed. Such may be disputed by bringing an independent action.

The Latvian notary in receipt of the request to provide a completed Annex 2 Form II attestation concerning a domestic succession authentic instrument is asked to indicate at points 4.2 to 4.2.1.1.7 of the standard form what he believes its domestic evidentiary effects to be: -

4.2.1.1.1 - The date the authentic instrument was drawn up:

Section 73(1) of the Notariate Law requires that the date when the notarial deed or certificate was drawn up is noted.¹⁸⁴ Paragraph 3 of section 178 of the Civil Procedure Code states that the veracity of the notarised document certified in accordance with procedures laid down in law may only be disputed by an independent action.

4.2.1.1.2 - The place where the authentic instrument was drawn up:

Section 73 (1) of the Notariate Law requires that the place where the notarial deed or certificate was drawn up is noted.¹⁸⁵ Paragraph 3 of section 178 of the Civil Procedure Code states that the veracity of the notarised document certified in accordance with procedures laid down in law may only be disputed by an independent action.

4.2.1.1.3 - The origin of the signatures from the parties to the authentic instrument:

Section 83 of the Notariate Law requires the notary to verify the identity, capacity to act and the right of representation of the participants of the notarial deed.¹⁸⁶ Paragraph 3 of section 178 of the Civil Procedure Code states that the veracity of the notarised document certified in accordance with procedures laid down in law may only be disputed by an independent action.

4.2.1.1.4 - The content of the declarations of the parties:

Section 88 of the Notariate Law refers to when the notary may certify the content of the deed.¹⁸⁷ Paragraph 3 of section 178 of the Civil Procedure Code states that the veracity

(4) The submitter of disputed documentary evidence shall explain at the same court sitting whether they wish to use such documentary evidence or whether they request that it be excluded from the evidence.

(5) If a participant in the matter wishes to use the disputed evidence, the court shall decide as to allowing its use after comparing such evidence with other evidence in the matter.

¹⁸⁴ Section 73 of the Notariate Law of Latvia provides that: "All deeds and certifications shall contain the following:

1) year, day and month and, if necessary, also a more detailed time indication and the address where the deeds and certifications were made;
2) given name and surname of the sworn notary;
3) the register number;
4) the signature of the sworn notary;

5) the amount of State fee and all other amounts collected for the performed deed or certification.

A sworn notary must put his or her seal on all deeds and certifications or, if the relevant document is signed with a secure electronic signature, a time stamp must be added."

[24 October 2002; 28 October 2004; 23 May 2013]

¹⁸⁵ Ibid.

¹⁸⁶ Section 83 of the Notariate Law of Latvia provides that: "A sworn notary shall verify the identity, capacity to act and the right of representation of the participants of the notarial deed.

A sworn notary shall verify the right of representation according to the public documents submitted to him or her or entries in the Commercial Register or other public registers.

If the right of representation arises from an entry in the Commercial Register or another public register, the sworn notary shall verify this right by comparing with the data in such a register not earlier than 15 days before the making of the notarial deed or by comparing an extract of the register which not earlier than 15 days before the making of the notarial deed has been certified by the institution of the relevant register. A period of time of 30 days shall be applied to foreign registers. The sworn notary shall note in the deed the date of the data verification or the date when the extract was certified.

The sworn notary shall attach the documents, which prove the right of representation of the participant of the notarial deed, in the form of the original or a notarially certified copy in accordance with the procedures laid down in Section 74 of this Law."

[24 October 2002; 20 December 2007]

¹⁸⁷ See section 88 of the Notariate Law of Latvia which provides that: "The draft shall be read to the participants of the notarial deed in the presence of the sworn notary, but the attached plans and other images shall be offered to them for examination. If the participants of the notarial deed acknowledge to the sworn

of the notarised document certified in accordance with procedures laid down in law may only be disputed by an independent action.

4.2.1.1.5 - The facts that the authority declares as having been verified in its presence:
Paragraph 3 of section 178 of the Civil Procedure Code states that the veracity of the notarised document certified in accordance with procedures laid down in law may only be disputed by an independent action.

4.2.1.1.6 - The actions which the authority declares to have carried out:
Paragraph 3 of section 178 of the Civil Procedure Code states that the veracity of the notarised document certified in accordance with procedures laid down in law may only be disputed by an independent action.

4.2.1.1.7 - Other: (please indicate any other evidentiary effect that a domestic authentic instrument could produce)

Latvia is the Member State addressed: foreign succession authentic instruments

The EU Succession Regulation requires that, subject to public policy exceptions, Latvian authorities must **accept** and/or **enforce** foreign authentic instruments in matters of succession received from other EU Member States bound by the EU Succession Regulation.

The **acceptance** of a foreign succession authentic instrument produced in Latvia is governed by Article 59 and the enforcement of such an authentic instrument is governed by Article 60 of the EU Succession Regulation. Acceptance requires that, provided that to do so would not be manifestly contrary to Latvian public policy, the authorities in Latvia (as the Member State addressed) *must* grant the foreign succession authentic instrument the same (or most comparable) evidentiary effects as it would enjoy in its own Member State of origin.

To determine the nature of the evidentiary effects that would be associated with that authentic instrument in the Member State of origin, reference should be made to any Annex 2 Form II form that may accompany the foreign authentic instrument, especially to parts 4.2.1.1.1 – 4.2.1.1.7 of any such form. It must however be noted that the use of the Implementing Regulation's Annex 2 form does not appear to be obligatory. The obligation imposed by Article 59 of the EU Succession Regulation on the Member State addressed to accept a succession authentic instrument does not require or depend upon the use or supply of the Annex 2 form. A succession authentic instrument received from a Member State of origin in accordance with the provisions of the EU Succession Regulation must still be accepted, within the meaning of Article 59 of Regulation 650/2012, even if no Annex 2 Form II form is provided or if the Annex 2 form provided is not fully or properly completed.

The **enforcement** of a foreign authentic instrument via Article 60 of EU Regulation 650/2012 requires that, provided that to do so would not be manifestly contrary to Latvian public policy, the authorities in the Member State addressed (Latvia) must on application by an interested person declare enforceable a foreign succession authentic instrument that is enforceable in its Member State of origin. We are not aware of any special provision in the law of Latvia that specifically deals with the actual enforcement of a foreign authentic instrument after it has been declared enforceable (differently from the actual enforcement of a foreign judgment that has been declared enforceable) in

notary that they comprehend the content and meaning of the notarial deed and that the notarial deed corresponds to their intent, they and the sworn notary shall sign the draft."
[24 October 2002]

accordance with the procedure laid down in Articles 45 to 58 of the EU Succession Regulation as required by Article 60 thereof.

The Land Register Law stipulates that in certain cases foreign authentic instruments can serve as a basis for securing one's rights in the register, if they contain a certifying note from a consulate or an embassy of Latvia confirming that the issuing authority or official had the right to do so according to the laws of that country.

Latvian public policy

The EU Succession Regulation allows a public policy defence in various contexts including with reference to authentic instruments under Articles 59 and 60. To invoke the public policy exception in the context of Article 59, and by so doing to justify a refusal of acceptance for that foreign authentic instrument, it must be the case that the *granting of the same or most comparable evidentiary effects* to the foreign authentic instrument would be manifestly contrary to Latvian public policy. To invoke the public policy exception in the context of Article 60, it must be that the *granting of the declaration of enforceability* for the foreign authentic instrument would be manifestly contrary to Latvian public policy. Of course this public policy exception should be construed narrowly and it is envisaged that it will rarely apply. As is made plain by Recital 58 of the EU Succession Regulation, public policy is not to be applied in a manner that is discriminatory or otherwise contrary to the European Union's Charter of Fundamental Rights. Equally however Recital 26 of Regulation 650/2012 indicates that the Regulation does not prevent a court from applying mechanisms designed to tackle the evasion of the law, such as *fraude à la loi* in the context of Private International Law. However, the substantive provisions of the Regulation do not expressly empower national courts to prevent evasion of the law (including *fraude à la loi*). It would seem that the only positive basis for doing so under the Regulation is to regard such evasion of the law to be contrary to public policy unless the law being evaded is one of the "special rules" of the forum concerning certain assets that is applicable irrespective of the law applicable to the succession (see Article 30 of the EU Succession Regulation).

Our national reporters were not able to find any case in which public policy had been invoked to deny the reception of a foreign authentic instrument in the context of a Latvian succession proceeding.

Incompatible Authentic instruments

Recital 66 of the EU Succession Regulation envisages the possibility of 'an authority' being presented with incompatible authentic instruments.¹⁸⁸ The solutions suggested by the Recital are to consider priority and the circumstances of the particular case and then, if this has not resolved the incompatibility, to resort to a court with direct or incidental jurisdiction under the EU Succession Regulation. There are no provisions on this point in Latvian law.

¹⁸⁸ Recital 66: Should an authority, in the application of this Regulation, be presented with two incompatible authentic instruments, it should assess the question as to which authentic instrument, if any, should be given priority, taking into account the circumstances of the particular case. Where it is not clear from those circumstances which authentic instrument, if any, should be given priority, the question should be determined by the courts having jurisdiction under this Regulation, or, where the question is raised as an incidental question in the course of proceedings, by the court seized of those proceedings. In the event of incompatibility between an authentic instrument and a decision, regard should be had to the grounds of non-recognition of decisions under this Regulation.

LITHUANIA

The Lithuanian legal system

Lithuania consists of a single legal system that belongs to the civil law family. The Lithuanian law concerning succession is located in Book 5 "Succession Law" of the Civil Code of the Republic of Lithuania.¹⁸⁹ Various amendments to the Lithuanian law of succession have been introduced to implement limited aspects of the European Union Succession Regulation, see the Law on Implementation of Legal Acts of European Union and International Law on Civil Procedure. In particular it is stated that notaries will issue European Certificates of Succession.¹⁹⁰

The concept of an authentic instrument in Lithuania

The Lithuanian legal system makes extensive use of authentic instruments created by its notaries and regulated by both the Lithuanian Code of Civil Procedure and by the Lithuanian Notary Law. Lithuanian law requires that various legal transactions must be undertaken by the drawing up of an authentic instrument by a notary.

Evidentiary effects of domestic authentic instruments in Lithuanian law

According to Article 197(2) of the Code of Civil Procedure, public documents (including authentic instruments) are official written evidence that constitutes full proof of the facts they contain. These facts are presumed to be established as a matter of evidence and thus they are not subject to further proof requirements unless the document in which they are contained (or a part thereof) is invalidated in accordance with a Lithuanian legal procedure directed to this end. Because the authentic instruments (and authentic documents) drawn up or otherwise approved by notaries, acting within the limits of their competence and in accordance with the applicable Lithuanian form requirements for such official public documents, are treated as official written evidence, these official documents enjoy a higher evidential value than mere private documents. Thus, the factual circumstances and acts recorded in the official written evidence of an authentic instrument are considered to be fully proven unless and until they are denied this effect by a court acting *ex officio* (Article 203 of the Code of Civil Procedure allows the court that doubts authenticity of official evidence to contact the notary) or a claimant adducing another relevant proof in the course of proceedings to rebut this presumption. The Lithuanian legal system does not necessarily allow the evidence of witnesses to challenge the evidence contained in authentic instruments and documents drawn up or approved by notaries but as Article 197(2) of the Code of Civil Procedure makes plain, this restriction will not apply if such a ban on adducing witness evidence would itself contradict the principles of fairness, justice and reasonableness.

Traditionally there has been no inherent enforceability for Lithuanian authentic instruments. There is however already a debt recovery order that applies to mortgage agreements approved by notaries. The creditor of such an agreement applies to the notary who drew it up and asks that he issue an executive order to allow its enforcement. A draft law before the Lithuanian Parliament from January 2016 is intended to extend this process to other notarial agreements from which a monetary debt arises.

¹⁸⁹ <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.107687/RAIwboAJC> (in Lithuanian). An earlier English version of the Civil code is available from http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_e?p_id=404614&p_tr2=2 (updated to June 21, 2011 but later amendments not included).

¹⁹⁰ http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=471370&p_tr2=2

Disputing the validity of the authentic instrument

If an authentic instrument is successfully challenged as to its formal validity/authenticity/*instrumentum* it will lose the evidentiary effects associated with authentic or authenticated documents as public documents. If an authentic instrument is successfully challenged as to the validity of its *negotium*/material validity, the instrument itself may be valid but its evidentiary meaning will change accordingly and this may well render its evidential effect nugatory.

The Lithuanian legal system allows challenges to either (or both) the authenticity and the material validity of an authentic instrument to be brought to the Lithuanian court via its action procedure (this is the standard judicial procedure). In the conclusion of an action procedure the Lithuanian court may declare the document at issue to be wholly or partially invalid. In the event that the actions of the notary are impugned by a challenge to an authentic instrument a special legal procedure is followed which additionally determines whether or not the actions of the notary were in accordance with Lithuanian law.

Challenges to the actual enforcement of an authentic instrument drawn up in accordance with the debt recovery procedure (mentioned above) are also possible via the prescribed procedures concerning these mortgage or financial contracts.

The use of authentic instruments in domestic Lithuanian succession law

The Lithuanian State has, since 1 November 2011, granted the handling of non-contentious successions and also the final grant of a certificate of inheritance/grant of probate (whether the proceedings are contentious or not) to its notaries. The heirs must be proactive and seek out the relevant notary practicing in the relevant legal and geographic area in which the succession has been opened to submit to him their claim concerning the acceptance of the will. The heirs are no longer allowed to approach a court without first approaching the notary and notifying him of whether they wish to accept the will with or without inventory rights. The inventory is drawn up by a bailiff (not by the notary) and is not itself regarded as an authentic instrument.

Authentic instruments are frequently drawn up by notaries and used in Lithuanian succession law. The law offers a range of options concerning the use of these authentic instruments in Lithuania succession law: see Book 5 "Succession Law" of the Civil Code. As well as authentic instruments drawn up during the testator's life, the Lithuanian notary, in exercising his duties concerning the conduct of non-contentious probate matters, can create additional authentic instruments in the course of undertaking and concluding this probate role.

The following list indicates the documents that are regarded as authentic instruments in matters of succession in Lithuania:

- a) Authentic wills - executed in writing in two copies and certified by a notary are authentic instruments, Article 5.28(1) of the Civil Code.
- b) A joint will between spouses, Article 5.44 of the Civil Code, can ONLY be drawn up as an authentic instrument by a notary. A joint will remains valid during the joint lives of the spouses unless a spouse revokes it or the marriage itself is dissolved (or a petition for the same is presented) by order or consent prior to the opening of the succession. The joint will is revocable until the death of the first spouse, thereafter it is irrevocable.

- c) A consular will, Article 5.28(1) of the Civil Code, and various types of privileged will, Article 5.28(6) of the Civil Code, are also deemed to be authentic wills that benefit from the enhanced evidentiary effects of all authentic wills.¹⁹¹
- d) A valid private will that is presented to the notary (or to the Consulate) for deposit in accordance with Article 5.31 of the Civil Code may also become an authentic will if it is personally deposited with the authority by the testator who declares that it expresses his final true testamentary intentions and presents the will in a sealed envelope that is signed by the testator and the accepting authority as well as stamped with the official stamp of that authority, if the notary then draws up a notarial instrument to indicate that all of the above requirements have been complied with. This notarial instrument must itself be signed by the testator and by the notary. A copy of the notarial instrument must also be provided to the testator.
- e) A declaration of his acceptance of the succession by an heir – assuming he wishes to make such a declaration and does not accept in another way – will be drawn up by a notary as an authentic instrument, Article 5.50(2) of the Civil Code.
- f) A positive renunciation or entire waiver of succession can be drawn up by a notary as an authentic instrument, Article 5.60 of the Civil Code, if the party concerned is not willing simply see his entitlement lapse by inaction and refusing to accept an inheritance within 3 months of the testator's death. N.B. A forced heir *cannot* waive his reserved share during the lifetime of the testator.
- g) A partition agreement *between competent heirs*, as concerns the division of immovable property, will necessarily be drawn up as a binding contract by the notary in the form of an authentic instrument, Article 5.70 of the Civil Code.
- h) The Lithuanian certificate of succession will be drawn up and issued by the notary as an authentic instrument either at the end of the non-contentious proceedings, or, at the end of any decisive contentious proceedings that were conducted before the court. See Articles 5.67 -68 of the Civil Code

The Private International Law implications of the European Union's Succession Regulation 650/2012 and Implementing Regulation 1329/2014

The European Union Succession Regulation and its Implementing Regulation raise two distinct Private International Law issues for Lithuania as an EU Member State: first, the extent of the obligations imposed by these Regulations on Lithuania as a Member State of origin concerning its domestically created succession authentic instruments; and, second, the extent of the obligations these Regulations impose on Lithuania as a Member State addressed concerning its duties relating to incoming foreign succession authentic instruments. The comments that follow consider each position.

Lithuania is the Member State of origin: obligations concerning domestic succession authentic instruments

Article 59(1) of the European Union Succession Regulation allows, but does not require, '*a person*' who wishes to use a succession authentic instrument in another Member State to ask the authority who established it, i.e. the notary who drew it up or his substitute/successor, to issue an attestation concerning that authentic instrument on the standard form provided by Annex 2 Form II of Implementing Regulation 1329/2014. It is unclear whether or not such a request must be complied with if it is received from a person not deemed by the notary to be '*an interested party*'. The substitution of the

¹⁹¹ Privileged wills are potentially available to: those persons receiving medical care in hospitals or care homes; persons on board a Lithuanian flagged ship; persons on Lithuanian expeditions; members of Lithuanian armed services; persons in confinement; and, persons in some forms of residence homes.

phrase 'a person' in Article 59 for 'interested party' in Article 60 could be understood to indicate that there is no requirement in the EU Succession Regulation for the applicant seeking only cross-border acceptance to demonstrate what would otherwise be domestically regarded as a 'legitimate interest' when requesting the attestation from the notary. Assuming that an official copy of the relevant authentic instrument can be obtained, it seems unlikely that this will be a problem in Lithuania, as the prevailing view appears to be that a wide range of potential and legitimate applicants is already possible.¹⁹² The EU Succession Regulation and Implementing Regulation do not expressly contemplate the possibility that a request under Article 59 may be refused. It is however possible to contrast the applicant 'may ask' of Article 59 with 'the authority shall' in Article 60(2) and to infer from the different wording that the notary (or other public authority) is only actually obliged to accede to the applicant's request when it concerns enforcement under Article 60. This result however seems inconsistent with Recitals 22, 59 and 60 of the EU Succession Regulation and with one of its underlying purposes, i.e. to facilitate the cross-border transmission of authentic instruments and their legal effects. In circumstances where both the acceptance and the enforcement of the authentic instrument may be sought the problem may be avoided, assuming the notary to be willing to provide information concerning both Article 59 and Article 60, by the applicant routinely requesting an attestation concerning *both* enforcement and acceptance.

Article 60 of Regulation 650/2012 requires that, provided that to so declare would not be manifestly contrary to public policy in the Member State addressed, the relevant authority *must* on application by an interested person declare a foreign succession authentic instrument that is enforceable in its Member State of origin to also be enforceable in their Member State. A Lithuanian notary may thus be in receipt of a request for such an attestation, again under Annex 2 Form II of Implementing Regulation 1329/2014. This standard form allows for an attestation that concerns only 'acceptance', via Article 59, or 'enforcement' via Article 60, or an attestation that jointly concerns acceptance and enforcement of the authentic instrument depending upon the boxes ticked by the Lithuanian notary.¹⁹³

The Lithuanian notary in receipt of the request to provide a completed Annex 2 Form II attestation concerning a domestic succession authentic instrument is asked to indicate at points 4.2 to 4.2.1.1.7 of the standard form what he believes its domestic evidentiary effects to be. Though the answers will vary depending upon the specific verifications contained in the succession authentic instrument at issue, it is broadly conceivable that points 4.2.1.1.1 to 4.2.1.1.7 could be expected to be completed as follows:

4.2.1.1.1 - The date the authentic instrument was drawn up:

The authentic instrument provides full proof of this fact, Article 197(2) of the Code of Civil Procedure. It is also a requirement for the validity of any will, see Article 5.28(3) of the Civil Code.

4.2.1.1.2 - The place where the authentic instrument was drawn up:

The authentic instrument provides full proof of this fact, see Article 197(2) of the Code of Civil Procedure. It is also a requirement for the validity of any will, see Article 5.28(3) of the Civil Code.

4.2.1.1.3 - The origin of the signatures from the parties of the authentic instrument:

¹⁹² It has been suggested to us that the persons listed by Annex 1 Form I of Implementing Regulation 1329/2014 at 4.3.1.7. may have a legitimate interest to apply for an attestation under either Annex 1 Form I or Annex 2 Form II. Additionally it may be that a creditor of the estate or of a person who has refused the inheritance may be deemed to have the legitimate interest to apply for such an attestation

¹⁹³ For Article 59 acceptance tick 'yes' in box 4.1.1; for Article 60 enforcement tick 'yes' in box 6.1.1. To dispense with either option tick 'no' in box 4.1.2. or 6.1.2 as appropriate.

The authentic instrument provides full proof of this notarially verified fact, see Article 197(2) of the Code of Civil Procedure. It is also a requirement for the validity of any will, see Article 5.28(3) of the Civil Code.

4.2.1.1.4 - The content of the declarations of the parties:

The authentic instrument provides full proof of the fact that the declarations it includes were made to the notary by the person identified as their maker by that authentic instrument, see Article 197(2) of the Code of Civil Procedure. There is no further evidential presumption concerning the intrinsic truth of those recorded facts.

4.2.1.1.5 - The facts that the authority declares as having been verified in its presence:

The authentic instrument provides full proof of these facts, see Article 197(2) of the Code of Civil Procedure.

4.2.1.1.6 - The actions which the authority declares to have carried out:

The authentic instrument provides full proof of these actions, see Article 197(2) of the Code of Civil Procedure.

4.2.1.1.7 - Other: (please indicate any other evidentiary effect that a domestic authentic instrument could produce)

According to Article 5.28(5) of the Civil Code, it is not possible to dispute the fact of having made an authentic will.

There are no other evidentiary effects not already covered by points 4.2.1.1.1 - 4.2.1.1.6: it is however conceivable that additional information could be presented in this box such as the reference to the requirement that the will or other authentic instrument was read back by the notary to the party or parties who would create it before it was formally signed.

Lithuania is the Member State addressed: foreign succession authentic instruments

The EU Succession Regulation requires that, subject to public policy exceptions, Lithuanian authorities must **accept** and, or, **enforce** foreign authentic instruments in matters of succession received from other EU Member States bound by the Succession Regulation.

The **acceptance** of a foreign succession authentic instrument presented by an applicant in Lithuania is governed by Article 59 and the enforcement of such an authentic instrument is governed by Article 60 of the EU Succession Regulation. Acceptance requires that, provided that to do so would not be manifestly contrary to Lithuanian public policy, the authorities in Lithuania (as the Member State addressed) *must* grant the foreign succession authentic instrument the same (or most comparable) evidentiary effects as it would enjoy in its own Member State of origin.

To determine the nature of the evidentiary effects that would be associated with that authentic instrument in the Member State of origin, reference should be made to any Annex 2 Form II form that may accompany the foreign authentic instrument, especially to parts 4.2.1.1.1 – 4.2.1.1.7 of any such form. It must however be noted that the use of the Implementing Regulation's Annex 2 form does not appear to be obligatory. The obligation imposed by Article 59 of the EU Succession Regulation on the Member State addressed to accept a succession authentic instrument does not require or depend upon the use or supply of the Annex 2 form. A succession authentic instrument received from a Member State of origin in accordance with the provisions of the EU Succession Regulation must still be accepted, within the meaning of Article 59 of Regulation 650/2012, even if no Annex 2 Form II form is provided or if the Annex 2 form provided is not fully or properly completed.

At present there are no provisions in Lithuanian law that specifically deal with the acceptance of a foreign authentic instrument concerning a matter of succession under the Succession Regulation.

The **enforcement** of a foreign authentic instrument via Article 60 of Regulation 650/2012 requires that, provided that to do so would not be manifestly contrary to Lithuanian public policy, the authorities in the Member State addressed (Lithuania) must on application by an interested person declare enforceable a foreign succession authentic instrument that is enforceable in its Member State of origin. We are not aware of any special provision in the law of Lithuania that specifically deals with the actual enforcement of a foreign authentic instrument after it has been declared enforceable (differently from the actual enforcement of a foreign judgment that has been declared enforceable) in accordance with the procedure laid down in Articles 45 to 58 of the EU Succession Regulation as required by Article 60 thereof.

Lithuanian public policy

The EU Succession Regulation allows a public policy defence in various contexts including with reference to authentic instruments under Articles 59 and 60. To invoke the public policy exception in the context of Article 59, and by so doing to justify a refusal of acceptance for that foreign authentic instrument, it must be the case that the *granting of the same or most comparable evidentiary effects* to the foreign authentic instrument would be manifestly contrary to Lithuanian public policy. To invoke the public policy exception in the context of Article 60, to justify a refusal of a declaration of enforceability for the foreign authentic instrument, it must be that the *granting of the declaration of enforceability* for the foreign authentic instrument would be manifestly contrary to Lithuanian public policy. Of course the public policy exception should be construed narrowly and it is envisaged that it will rarely apply. As is made plain by Recital 58 of the EU Succession Regulation, public policy is not to be applied in a manner that is discriminatory or otherwise contrary to the European Union's Charter of Fundamental Rights. Equally however Recital 26 of Regulation 650/2012 indicates that the Regulation does not prevent a court from applying mechanisms designed to tackle the evasion of the law, such as *fraude à la loi* in the context of Private International Law. However, the substantive provisions of the Regulation do not expressly empower national courts to prevent evasion of the law (including *fraude à la loi*). It would seem that the only positive basis for doing so under the Regulation is to regard such evasion of the law to be contrary to public policy unless the law being evaded is one of the "special rules" of the forum concerning certain assets that is applicable irrespective of the law applicable to the succession (see Article 30 of the EU Succession Regulation).

Our national reporters were not able to find any case in which public policy had been invoked to deny the reception of a foreign authentic instrument in the context of a Lithuanian succession proceeding.

Incompatible Authentic instruments

Recital 66 of the EU Succession Regulation envisages the possibility of 'an authority' being presented with incompatible authentic instruments.¹⁹⁴ The solutions suggested by the Recital are to consider priority and the circumstances of the particular case and then, if this has not resolved the incompatibility, to resort to a court with direct or incidental jurisdiction under the Succession Regulation. There are presently no provisions in Lithuanian law that address this issue.

¹⁹⁴ Recital 66: Should an authority, in the application of this Regulation, be presented with two incompatible authentic instruments, it should assess the question as to which authentic instrument, if any, should be given priority, taking into account the circumstances of the particular case. Where it is not clear from those circumstances which authentic instrument, if any, should be given priority, the question should be determined by the courts having jurisdiction under this Regulation, or, where the question is raised as an incidental question in the course of proceedings, by the court seized of those proceedings. In the event of incompatibility between an authentic instrument and a decision, regard should be had to the grounds of non-recognition of decisions under this Regulation.

LUXEMBOURG

The legal system in Luxembourg

Luxembourg consists of a single legal system that belongs to the civil law family. The Luxembourg law concerning succession is located in the Civil Code, the Civil Procedure Code and the Law of 9 December 1976 concerning the organisation of the office of a Notary. The succession law of Luxembourg has been updated to implement aspects of the European Union Succession Regulation by granting notaries the right to adapt unknown *in rem* rights and also to grant the European Certificate of Succession. New provisions of the Civil Procedure Code concerning enforcement of judicial decisions have been created but none of these provisions concern authentic instruments: see "Loi du 14 juin 2015 relative à la mise en application du règlement (UE) n° 650/2012 du Parlement européen et du Conseil du 4 juillet 2012 relatif à la compétence, la loi applicable, la reconnaissance et l'exécution des décisions, et l'acceptation et l'exécution des actes authentiques en matière de successions et à la création d'un certificat successoral européen et modifiant a) la loi modifiée du 25 septembre 1905 sur la transcription des droits réels immobiliers et b) le Nouveau Code de procédure".¹⁹⁵

The concept of the authentic instrument in Luxembourg

The Luxembourg legal system makes extensive use of public documents/authentic instruments. An authentic instrument is defined by Article 1317 of the Civil Code in the following terms, 'An authentic instrument is one which has been received by public officers empowered to draw up such instruments at the place where the instrument was written and with the requisite formalities'.

The legal provisions concerning authentic instruments are variously located in the Civil Code of Luxembourg notably including Articles 1317–1320, in the law concerning the organisation of the office of the notary¹⁹⁶, and also in the New Code of Civil Procedure which sets out the responsibility and role of the notary in many different types of legal transactions. Though there are many circumstances in which it is possible for a party or the parties to a given legal transaction or declaration to voluntarily use an authentic instrument to effect it, there are also some transactions that the law of Luxembourg positively requires to be concluded by the use of an authentic instrument that is drawn up by a notary. A notarial authentic instrument must be used for transactions involving: the recording of rights and interests (including mortgages) in the property register (*Loi modifiée du 25 septembre 1905 sur la transcription des droits réels immobiliers*); marriage contracts and modifications of these contracts, see Articles 1394 et seq. of the Civil Code; for the formation of specific companies (Article 4 (2) of the "*Loi modifiée du 10 août 1915 concernant les sociétés commerciales*"); and for the creation of the public will, see Article 971 of the Civil Code.

Authentic instruments drawn up by notaries may be enforceable in Luxembourg if they have been created to be enforceable between parties in accordance with Article 37 of the law concerning the organisation of notaries. This will require that a "formule exécutoire" is included in the authentic instrument.

Evidentiary effects of domestic authentic instruments in Luxembourg law

According to Article 1319 of the Civil Code, an authentic instrument constitutes conclusive evidence of the agreement it contains between the contracting parties and their heirs or assignees. Though this evidentiary effect is conclusive, it must or may be suspended by the court in the event that certain kinds of forgery/falsification

¹⁹⁵ <http://www.legilux.public.lu/leg/a/archives/2015/0128/2015A2720A.html?highlight=650/2012>

¹⁹⁶ <http://www.legilux.public.lu/leg/a/archives/1976/0076/1976A12301.html?highlight=>

proceedings are started. These *inscription de faux* proceedings as set out by Article 310 et seq. of the New Code of Procedure also provide the means by which the presumed conclusive evidentiary effect can ultimately be rebutted by successfully completing the procedure so as to displace the presumed evidentiary effect.

Disputing the validity of the authentic instrument

If an authentic instrument is successfully challenged as to its formal validity/authenticity/*instrumentum* it will lose the evidentiary effects associated with authentic instruments as public documents. If an authentic instrument is successfully challenged as to the validity of its *negotium*/material validity the instrument itself may remain technically valid but its evidentiary meaning will change accordingly and may well be rendered nugatory or incapable of enforcement.

The authenticity of an authentic instrument may only be challenged by a plea of forgery¹⁹⁷. In case of a principal claim, this will lead to the suspension of the authentic instrument's evidentiary effect for the duration of the proceeding. In case of an incidental claim, the evidentiary effect might be provisionally suspended. Forgery claims are framed by a specific procedure (Articles 310 ff Code of Civil Procedure).

The material validity of the content of an authentic instrument may also be challenged. The material content or *negotium* of an authentic instrument does not benefit from the special evidential force referred to above as it has not been verified by the notary who drew up the authentic instrument. As a consequence, the material validity of the transaction contained within the authentic instrument (its *negotium*) may be challenged **without** having recourse to the special forgery proceedings. The ordinary rules of civil procedure will apply to the potential challenges which are themselves dependent upon what possibilities are allowed by the Civil Code concerning such legal transactions, e.g. claims for fraud or force (duress), or lack of cause may be possible.

There is no special procedure governing a challenge to the actual enforcement of an authentic instrument but in the event that a challenge to the *instrumentum*/authenticity of the authentic instrument or its *negotium* is commenced this may in certain circumstances induce the court to suspend the enforceability of that authentic instrument via Article 1319 of the Civil Code while the challenge is conducted.

The use of authentic instruments in domestic succession law in Luxembourg

As noted above, Luxembourg succession law only positively requires that authentic instruments be used in certain circumstances, e.g. for the creation of the public will, see Article 971 of the Civil Code. As will be seen below, there are a range of documents that may arise in the context of a succession that will involve the creation of an authentic instrument by reason of the involvement of a notary in the conduct of the probate proceedings.

The following list indicates the main documents that are regarded as authentic instruments in matters of succession in Luxembourg:

- a) A public will drawn up by a notary in accordance with Article 971 of the Civil Code is an authentic instrument (see also Article 25 of the Law of 9 December 1976 concerning the organisation of Notary's office).¹⁹⁸
- b) According to Article 976 Civil Code, a mystic will (a private act) created in accordance with the provisions of the law and accompanied by a notarial *act of*

¹⁹⁷ Article 310 New Code of Civil Procedure.

¹⁹⁸ It is not clear from the legislation that any privileged will can also be an authentic instrument: see M. Watgen, R. Watgen, *Successions et donations*, 5^e Ed. Promoculture Larcier Luxembourg, p.474.

suscription – which is a notarial/public act having the evidential effect of an authentic instrument, will be treated as benefitting from its association with the matters verified by the authentic instrument. The private act retains its private quality and the enhanced evidentiary effects arise from the notarial recordings in the public act of suscription, Article 976 Civil Code. Such a will can only be challenged by a plea of forgery (Tribunal d'arrondissement de Luxembourg, Jugement civil n°26/2009 – 8ième Chambre).¹⁹⁹

- c) If, which is not necessarily always required, an inventory of estate assets is drawn up (in accordance with Article 794 of the Civil Code) by a notary rather than a private person this inventory will be an authentic instrument.
- d) A proof of heirship (an *acte de notoriété*) is an authentic instrument: see Article 815 -11 (2) of the Civil Code. See also Articles 37 and 43 of the Law of 9 December 1976 concerning the organisation of Notary's office.
- e) Revocation of a public will in accordance with Article 1035 of the Civil Code can sometimes create an authentic instrument: if the revocation of the public will is made by a subsequent public will or by an *acte de suscription* in front of notaries ie an authentic instrument as stated in Article 1035. This Article provides that wills could be wholly or partially revoked and possibly by a notarial act. Also if the old public will is replaced by a new public will, the fact of revocation will be contained in the new will which is, of course, an authentic instrument.
- f) The acceptance of a succession by an heir can be made expressly in an authentic instrument pursuant to Article 778 Luxembourg Civil Code. In addition, an implied acceptance of succession can be qualified by some authentic acts such as donation deed relating to an asset which is part of the estate.
- g) If an act of partition (*acte de partage*) is proposed and is to be drawn up by a notary because it involves immovable property that must be capable of registration in the Luxembourg Land Registry, the partition will be regarded as an authentic instrument. N.B. An authentic act of sale might **also** be a relevant instrument concerning successions as illustrated by a recent decision (Jugement civil no 91/2015 – Xe Chambre). In this case, an act of sale was taken into consideration in order to determine partition of an estate.

The Private International Law implications of the European Union's Succession Regulation 650/2012 and Implementing Regulation 1329/2014

The European Union Succession Regulation and its Implementing Regulation raise two distinct Private International Law issues for Luxembourg as an EU Member State: first, the extent of the obligations imposed by these Regulations on Luxembourg as a Member State of origin concerning its domestically created succession authentic instruments; and, second, the extent of the obligations these Regulations impose on Luxembourg as a Member State addressed concerning its duties relating to incoming foreign succession authentic instruments. The comments that follow consider each position.

Luxembourg is the Member State of origin: obligations concerning domestic succession authentic instruments

Article 59(1) of the European Union Succession Regulation allows, but does not require, '*a person*' who wishes to use a succession authentic instrument in another Member State to ask the authority who established it, i.e. the notary who drew it up or his substitute/successor, to issue an attestation concerning that authentic instrument on the

¹⁹⁹ The evidential value of a mystic will is only stronger than the one of the holograph will because of the *act de suscription*. The decision n° 26/2009 (Tribunal d'arrondissement de Luxembourg – 8ème chambre) states that the mystic will is a hybrid will consisting of 2 phases: first an 'holographic' drafting and second an 'authentic' phase i.e the authentication of the will of the parties by the notary via the *acte de suscription*. The latter must respect several formalities in order to have the evidentiary effects of an authentic instrument (which could not otherwise be enjoyed by a private document such as a holograph will). The *act de suscription* must contain the date, the signature of the notaries (or of the notary and his witnesses), the place where it is signed: this act must also describe how the will was handed by the testator (etc).

standard form provided by Annex 2 Form II of EU Implementing Regulation 1329/2014. It is unclear whether or not such a request must be complied with if it is received from a person not deemed by the notary to be 'an interested party'. The substitution of the phrase 'a person' in Article 59 for 'interested party' in Article 60 could be understood to indicate that there is no requirement in the EU Succession Regulation for the applicant seeking only cross-border acceptance to demonstrate what would otherwise be domestically regarded as a 'legitimate interest' when requesting the attestation from the notary. It seems unlikely that this will be a problem in Luxembourg, as the prevailing view appears to be that a wide range of potential and legitimate applicants is already possible.²⁰⁰ The EU Succession Regulation and Implementing Regulation do not expressly contemplate the possibility that a request under Article 59 may be refused. It is however possible to contrast the applicant 'may ask' of Article 59 with 'the authority shall' in Article 60(2) and to infer from the different wording that the notary (or other public authority) is only actually obliged to accede to the applicant's request when it concerns enforcement under Article 60. This result however seems inconsistent with Recitals 22, 59 and 60 of the EU Succession Regulation and with one of its underlying purposes, i.e. to facilitate the cross-border transmission of authentic instruments and their legal effects. In circumstances where both the acceptance and the enforcement of the authentic instrument may be sought the problem may be avoided, assuming the notary to be willing to provide information concerning both Article 59 and Article 60, by the applicant routinely requesting an attestation concerning *both* enforcement and acceptance.

Article 60 of Regulation 650/2012 requires that, provided that to so declare would not be manifestly contrary to public policy in the Member State addressed it *must* on application by an interested person declare a foreign succession authentic instrument that is enforceable in its Member State of origin to also be enforceable in their Member State. Though it may, in practice, be difficult to find many succession authentic instruments that are capable of subsequent enforcement, a Luxembourg notary may, theoretically, be in receipt of a request for such an attestation, again under Annex 2 Form II of Implementing Regulation 1329/2014. This standard form allows for an attestation that concerns only 'acceptance', via Article 59, or 'enforcement' via Article 60, or an attestation that jointly concerns acceptance and enforcement of the authentic instrument depending upon the boxes ticked by the Luxembourg notary.²⁰¹

The Luxembourg notary in receipt of the request to provide a completed Annex 2 Form II attestation concerning a domestic succession authentic instrument is asked to indicate at points 4.2 to 4.2.1.1.7 of the standard form what he believes its domestic evidentiary effects to be. Though the answers will vary depending upon the specific verifications contained in the succession authentic instrument at issue, it is broadly conceivable that points 4.2.1.1.1 to 4.2.1.1.7 could be expected to be completed as follows:

4.2.1.1.1 - The date the authentic instrument was drawn up:

Article 1319 of the Civil Code and Article 30 para 2 of the Law of 9 December 1976 concerning the organisation of Notary's office – mean that this notarially verified fact of the date benefits from the evidentiary effects of authenticity and full proof.

4.2.1.1.2 - The place where the authentic instrument was drawn up:

Article 1319 of the Civil Code and Article 30 para 2 of the Law of 9 December 1976 concerning the organisation of Notary's office – mean that this notarially verified fact of the place benefits from the evidentiary effects of authenticity and full proof

²⁰⁰ Reasoning by analogy from the persons listed by Annex 1 Form I of EU Implementing Regulation 1329/2014 at 4.3.1.7. It is also conceivable that a creditor of the estate or of a person who has refused the inheritance may have a legitimate interest to apply for an attestation under either Annex 1 Form I or an Annex 2 Form II.

²⁰¹ For Article 59 acceptance tick 'yes' in box 4.1.1; for Article 60 enforcement tick 'yes' in box 6.1.1. To dispense with either option, tick 'no' in box 4.1.2. or 6.1.2 as appropriate.

4.2.1.1.3 - The origin of the signatures from the parties of the authentic instrument:
Article 1319 of the Civil Code and Article 33 of the Law of 9 December 1976 concerning the organisation of Notary's office – mean that this notarially verified fact benefits from the evidentiary effects of authenticity and full proof. :

4.2.1.1.4 - The content of the declarations of the parties:

According to Article 1319 of the Civil Code these notarially verified declarations benefit from the evidentiary effects of authenticity and full proof in the senses that: a) the declarations were made before the notary by the identified parties, and, b) that the declarations were made before the notary on the terms that he has recorded.:

4.2.1.1.5 - The facts that the authority declares as having been verified in its presence:
Article 1319 of the Civil Code means that these notarially verified facts will benefit from the evidentiary effects of authenticity and full proof. :

4.2.1.1.6 - The actions which the authority declares to have carried out:

Article 1319 of the Civil Code means that these notarially declared actions will benefit from the evidentiary effects of authenticity and full proof.

4.2.1.1.7 - Other: (please indicate any other evidentiary effect that a domestic authentic instrument could produce)

According to the advice received, there are no further evidentiary effects not already covered by points 4.2.1.1.1 - 4.2.1.1.6: it is however conceivable that additional information, such as the fact that the authentic instrument was read aloud to the party in the presence of witnesses, could be presented in this box. Equally, if the authentic instrument concerned those unable to hear, read, write, or sign for themselves it is possible that reference to the procedures required under Articles 972-975 of the Civil Code and Article 25 of the Law of 9 December 1976 concerning the organisation of Notary's office require the presence of another notary or of 2 witnesses could be mentioned here.

Luxembourg is the Member State addressed: foreign succession authentic instruments

The EU Succession Regulation requires that, subject to public policy exceptions, Luxembourg authorities must **accept** and, or, **enforce** foreign authentic instruments in matters of succession received from other EU Member States bound by the Succession Regulation.

The **acceptance** of a foreign succession authentic instrument presented by an applicant in Luxembourg is governed by Article 59 and the enforcement of such an authentic instrument is governed by Article 60 of the EU Succession Regulation. Acceptance requires that, provided that to do so would not be manifestly contrary to Luxembourg's public policy, the authorities in Luxembourg (as the Member State addressed) *must* grant the foreign succession authentic instrument the same (or most comparable) evidentiary effects as it would enjoy in its own Member State of origin.

To determine the nature of the evidentiary effects that would be associated with that authentic instrument in the Member State of origin, reference should be made to any Annex 2 Form II form that may accompany the foreign authentic instrument, especially to parts 4.2.1.1.1 – 4.2.1.1.7 of any such form. It must however be noted that the use of the Implementing Regulation's Annex 2 form does not appear to be obligatory. The obligation imposed by Article 59 of the EU Succession Regulation on the Member State addressed to accept a succession authentic instrument does not require or depend upon the use or supply of the Annex 2 form. A succession authentic instrument received from a Member State of origin in accordance with the provisions of the EU Succession Regulation must still be accepted, within the meaning of Article 59 of Regulation 650/2012, even if no Annex 2 Form II form is provided or if the Annex 2 form provided is not fully or properly completed.

At present there are no provisions in Luxembourg law that specifically deal with the acceptance of a foreign authentic instrument concerning a matter of succession under the EU Succession Regulation.

The **enforcement** of a foreign authentic instrument via Article 60 of Regulation 650/2012 requires that, provided that to do so would not be manifestly contrary to the public policy of Luxembourg, the authorities in the Member State addressed (Luxembourg) must on application by an interested person declare enforceable a foreign succession authentic instrument that is enforceable in its Member State of origin. We are not aware of any special provision in the law of Luxembourg that specifically deals with the actual enforcement of a foreign authentic instrument (differently from the actual enforcement of a foreign judgment that has been declared enforceable) after it has been declared enforceable in accordance with the procedure laid down in Articles 45 to 58 of the EU Succession Regulation as required by Article 60 thereof.

The public policy of Luxembourg

The EU Succession Regulation allows a public policy defence in various contexts including with reference to authentic instruments under Articles 59 and 60. To invoke the public policy exception in the context of Article 59, and by so doing to justify a refusal of acceptance for that foreign authentic instrument, it must be the case that the *granting of the same or most comparable evidentiary effects* to the foreign authentic instrument would be manifestly contrary to Luxembourg public policy. To invoke the public policy exception in the context of Article 60, to justify a refusal of a declaration of enforceability for the foreign authentic instrument, it must be that the *granting of the declaration of enforceability* for the foreign authentic instrument would be manifestly contrary to the public policy of Luxembourg. Of course this public policy exception should be construed narrowly and it is envisaged that it will rarely apply. As is made plain by Recital 58 of the EU Succession Regulation, public policy is not to be applied in a manner that is discriminatory or otherwise contrary to the European Union's Charter of Fundamental Rights. Equally however Recital 26 of Regulation 650/2012 indicates that the Regulation does not prevent a court from applying mechanisms designed to tackle the evasion of the law, such as *fraude à la loi* in the context of Private International Law. However, the substantive provisions of the Regulation do not expressly empower national courts to prevent evasion of the law (including *fraude à la loi*). It would seem that the only positive basis for doing so under the Regulation is to regard such evasion of the law to be contrary to public policy unless the law being evaded is one of the "special rules" of the forum concerning certain assets that is applicable irrespective of the law applicable to the succession (see Article 30 of the EU Succession Regulation).

Our national reporters were not able to find any case in which public policy had been invoked to deny the reception of a foreign authentic instrument in the context of a Luxembourgish succession proceeding.

Incompatible Authentic instruments

Recital 66 of the EU Succession Regulation envisages the possibility of 'an authority' being presented with incompatible authentic instruments.²⁰² The solutions suggested by the Recital are to consider priority and the circumstances of the particular case and then, if this has not resolved the incompatibility, to resort to a court with direct or incidental jurisdiction under the Succession Regulation. There are at present no specific provisions on this matter under Luxembourg law.

²⁰² Recital 66: Should an authority, in the application of this Regulation, be presented with two incompatible authentic instruments, it should assess the question as to which authentic instrument, if any, should be given priority, taking into account the circumstances of the particular case. Where it is not clear from those circumstances which authentic instrument, if any, should be given priority, the question should be determined by the courts having jurisdiction under this Regulation, or, where the question is raised as an incidental question in the course of proceedings, by the court seized of those proceedings. In the event of incompatibility between an authentic instrument and a decision, regard should be had to the grounds of non-recognition of decisions under this Regulation.

MALTA

The Maltese legal system

Malta consists of a single legal system. The legal system in Malta can be said to be a mixture of civil law and common law. The regime regulating succession matters largely originates from the civil law tradition, specifically, the Code Napoleon.

The law and the procedural rules concerning succession are found within:

The Civil Code - Chapter 16 Laws of Malta;²⁰³

The Notarial Profession and Notarial Archives Act - Chapter 55 Laws of Malta;²⁰⁴

The Public Registry Act - Chapter 56 Laws of Malta;²⁰⁵ and

The Code of Organization and Civil Procedure - Chapter 12 Laws of Malta.²⁰⁶

The Maltese law of succession has been amended to take into account the EU Succession Regulation. A new Act was implemented on 2 June 2015 amending provisions within the Maltese Civil Code, the Public Registry Act and the Notarial Profession and Notarial Archives Act.²⁰⁷ Within the Civil Code a new sub-title to Title III of Part II has been added.²⁰⁸ Two sub-articles are introduced regarding the European Certificate of Succession within the Notarial Profession and Notarial Archives Act. Two new articles within the Public Registry Act regarding the registration within or removal of European Certificates of Succession from the Public Registry.²⁰⁹

The concept of an authentic instrument in Malta

The Maltese legal system defines a public deed by Article 1232(2) of its Civil Code: 'A public deed is an instrument drawn up or received, with the requisite formalities, by a notary or other public officer lawfully authorised to attribute public faith thereto.' Maltese Law provides for two distinguishable classes of public documents. These two classes of public document are described respectively by Articles 627 and 629 of the Code of Organisation and Civil Procedure. In both cases the public document benefits from the same evidentiary presumption that it proves its contents (until the contrary can be proven). For a public document falling under Article 627 however, there is no further additional need to prove its authenticity.²¹⁰ For a public document falling under Article 629 – which via Article 629(c) includes all domestically created Maltese notarial authentic instruments – there is a further need to prove its authenticity: such authenticity is demonstrated by the notary declaring on oath that it is authentic. Articles 25–52 of the Notarial Profession and Notarial Archives Act list in detail the formal requirements of a public deed which are required for its validity.

Maltese Law requires the use of a public deed, which includes an authentic instrument, for the transactions set out and referred to by Article 1233 of the Civil Code. In brief such transactions encompass certain types of contract (loan contracts and marriage contracts) and legal transactions whether agreements or transfers that affect immovable property and interests relating thereto. It is also possible for the parties to use an authentic instrument to record and evidence other types of agreement or declaration.

²⁰³ <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8580&l=1>.

²⁰⁴ <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8608>.

²⁰⁵ <http://justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8609>.

²⁰⁶ <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8577>.

²⁰⁷ The Act is entitled "ACT No. XVI of 2015".

²⁰⁸ It is entitled "VIII OF CROSS-BORDER SUCCESSIONS". Eleven Articles numbered 958A to 958K have been added under this new sub-title.

²⁰⁹ <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lp&itemid=26881&l=1>.

²¹⁰ A foreign authentic instrument will enjoy the same status as the documents that fall under Article 627 if, in accordance with Article 628, it has been legalised by an overseas Maltese authority.

Evidentiary effects of domestic authentic instruments in Maltese law

Article 629 of the Code of Organisation and Civil Procedure declares that public documents including domestically created Maltese authentic instruments benefit from an evidentiary presumption that deems an authentic instrument to prove its contents (until the contrary is proven). This rebuttable evidentiary presumption does however require that the authenticity of the public document in question is asserted and proven by the notary who drew it up declaring its authenticity on oath. Though it is possible to enforce a suitably drawn up Maltese authentic instrument, enforcement may require the assistance of a final judgment by a court of law. Only where the authentic instrument is in respect of a debt which is certain, liquidated and due, and not consisting in the performance of an act, is it capable of enforcement without the need for a judgment by a Maltese court.

Disputing the Validity of an authentic instrument

If an authentic instrument is successfully challenged as to its formal validity/authenticity/*instrumentum* it will lose the evidentiary effects associated with public documents. If an authentic instrument is successfully challenged as to the validity of its *negotium*/material validity the instrument itself may still be technically valid but its evidentiary meaning will change accordingly and may well be rendered nugatory in practice.

In order to challenge the authenticity or material validity of an authentic instrument a sworn application or an application has to be filed at the Maltese courts claiming an absence of or defect in any of the requirements set by law. It is possible to challenge the actual enforcement of an authentic instrument in judicial proceedings whether the claim is centred on the invalidity of the instrument or whether it arises by way of a defence raised by the respondent or a counterclaim filed by the respondent. It must be noted, however, that certain grounds of invalidity may only be raised by a specific party, generally, in whose favour/protection the prohibitive rule is set.

The use of authentic instruments in domestic Maltese succession law

The domestic legal provisions concerning legal authentic instruments are found in:
The Notarial Profession and Notarial Archives Act - Chapter 55 Laws of Malta;²¹¹
The Public Registry Act - Chapter 56 Laws of Malta;²¹²
The Civil Code - Chapter 16 Laws of Malta;²¹³ and
The Code of Organisation and Civil Procedure - Chapter 12 Laws of Malta.²¹⁴

There are two types of will in Malta, a public will and a secret will. A public will is an authentic instrument drawn up by a notary and until the contrary is proved is evidence of its contents providing the authenticity is proved in the manner indicated above. The authenticity is proved generally by proving the authenticity of the instrument on oath. A secret will does not benefit from default presumptions of authenticity or veracity as it is treated as private writing not an authentic instrument. A public will has to be made by a notary in the presence of two witnesses. The will must then be enrolled in the public registry within 15 calendar days. A renunciation of an inheritance can only be done expressly and not tacitly. It can only be made by the registry of the appropriate Maltese court or by declaration made by a notary public in an authentic instrument. Partition of the estate requiring the dissolution of property is usually ordered by a court. However the parties generally have to enter into an authentic instrument (public deed) because a transfer of immovable property is involved.

²¹¹ <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8608>.

²¹² <http://justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8609>.

²¹³ <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8580&l=1>.

²¹⁴ <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8577>.

The Private International Law implications of the European Union's Succession Regulation 650/2012 and Implementing Regulation 1329/2014

The European Union Succession Regulation and its Implementing Regulation raise two distinct Private International Law issues for Malta: first, the extent of the obligations imposed on Malta as a Member State of origin concerning its domestically created succession authentic instruments; and, second, the extent of the obligations imposed on Malta as a Member State addressed concerning incoming foreign succession authentic instruments. The comments that follow consider each position.

Malta is the Member State of origin: obligations concerning domestic succession authentic instruments

Article 59(1) of the European Union Succession Regulation allows, but does not require, '*a person*' who wishes to use a succession authentic instrument in another Member State to ask the authority who established it, i.e. the notary who drew it up or his substitute/successor, to issue an attestation concerning that authentic instrument on the standard form provided by Annex 2 Form II of Implementing Regulation 1329/2014. It is unclear whether or not such a request must be complied with if it is received from a person not deemed by the notary to be '*an interested party*'. The substitution of the phrase '*a person*' in Article 59 for '*interested party*' in Article 60 could be understood to indicate that there is no requirement in the EU Succession Regulation for the applicant seeking only cross-border acceptance to demonstrate what would otherwise be domestically regarded as a '*legitimate interest*' when requesting the attestation from the notary. It seems unlikely that this will be a problem in Malta, the prevailing view appears to be that a range of potential and legitimate applicants is already possible: e.g. successors, creditors of the estate or of the heirs, an executor, others who can demonstrate a legitimate interest. The EU Succession Regulation and Implementing Regulation do not expressly contemplate the possibility that a request under Article 59 may be refused. It is however possible to contrast the applicant '*may ask*' of Article 59 with '*the authority shall*' in Article 60(2) and to infer from the different wording that the notary (or other public authority) is only actually obliged to accede to the applicant's request when it concerns enforcement under Article 60. This result however seems inconsistent with Recitals 22, 59 and 60 of the EU Succession Regulation and with one of its underlying purposes, i.e. to facilitate the cross-border transmission of authentic instruments and their legal effects. Considered abstractly, if both the acceptance and the enforcement of the authentic instrument are sought the problem may be avoided, assuming the notary to be willing to provide information concerning both Article 59 and Article 60, by the applicant routinely requesting an attestation concerning *both* enforcement and acceptance. In Malta however the potential for an application under Article 60 of the European Union Succession Regulation is significantly reduced by the lack of immediate domestic enforceability for most authentic instruments concerning a succession.

The Maltese legislation implementing the EU Succession Regulation does not clarify who must make the attestation concerning the authentic instrument in a matter of succession. It is thought that a notary public would be able to issue an attestation concerning an authentic instrument (public deed).

Article 60 of Regulation 650/2012 requires that, provided that to so declare would not be manifestly contrary to its public policy, the authorities in the Member State addressed *must* on application by an interested person declare a foreign succession authentic instrument that is enforceable in its Member State of origin to also be enforceable in their Member State. Though it will be very unusual for a Maltese notary to be in receipt of such a request – given that (as mentioned above) even Maltese authentic instruments that are intended and designed to be enforceable only actually become enforceable after

receiving an executory formula from the court – the possibility cannot be entirely discounted.

The Maltese notary in receipt of the request to provide a completed Annex 2 Form II attestation concerning a domestic succession authentic instrument is asked to indicate at points 4.2 to 4.2.1.1.7 of the standard form what he believes its domestic evidentiary effects to be. Though the answers will vary depending upon the specific verifications contained in the succession authentic instrument at issue, it is broadly conceivable that the answers provided to points 4.2.1.1.1 to 4.2.1.1.7 would be completed subject to the following factors:

4.2.1.1.1 - The date the authentic instrument was drawn up:

Article 629 of the Code of Organisation and Civil Procedure indicates that the authentic instrument proves this fact that must, according to Article 28 of the Notarial Profession and Notarial Archives Act, be recorded by the notary.

4.2.1.1.2 - The place where the authentic instrument was drawn up:

Article 629 of the Code of Organisation and Civil Procedure indicates that the authentic instrument proves this fact that must, according to Article 28 of the Notarial Profession and Notarial Archives Act, be recorded by the notary.

4.2.1.1.3 - The origin of the signatures from the parties to the authentic instrument:

Article 629 of the Code of Organisation and Civil Procedure indicates that the authentic instrument proves this fact that must, according to Article 28 of the Notarial Profession and Notarial Archives Act, be recorded by the notary. Further, Article 634(2) of the Code of Organisation and Civil Procedure states that any signature or mark attested by an advocate, a notary or a legal procurator shall, unless the contrary is proved, be deemed to be genuine if in the attestation it is declared by the advocate or notary or legal procurator that such signature or mark was subscribed or set in his presence and, where the person cannot sign his name, in the presence of two witnesses whose signature appears on the act, and that he has personally ascertained the identity of the persons setting such signature or mark.

4.2.1.1.4 - The content of the declarations of the parties:

Article 629 of the Code of Organisation and Civil Procedure indicates that the authentic instrument proves this fact that must, according to Article 28 of the Notarial Profession and Notarial Archives Act, be recorded by the notary. Proof of content should be understood to indicate that it is evidenced as a fact that the parties made the declarations before the notary.

4.2.1.1.5 - The facts that the authority declares as having been verified in its presence:

Article 629 of the Code of Organisation and Civil Procedure indicates that the authentic instrument proves this fact that must, according to Article 28 of the Notarial Profession and Notarial Archives Act, be recorded by the notary.

4.2.1.1.6 - The actions which the authority declares to have carried out:

Article 629 of the Code of Organisation and Civil Procedure indicates that the authentic instrument proves this fact that must, according to Article 28 of the Notarial Profession and Notarial Archives Act, be recorded by the notary.

4.2.1.1.7 - Other: (please indicate any other evidentiary effect that a domestic authentic instrument could produce)

It is possible that other aspects of Article 28 of the Notarial Profession and Notarial Archives Act, could be indicated here, e.g. that the notary has duly explained, to those who were present, when he finalised the instrument, the contents of the instrument prior

to its publication, and, that the witnesses, according to their own statement, are not related in a way prohibited by Maltese law.

Malta is the Member State addressed: foreign succession authentic instruments

The EU Succession Regulation requires that, subject to public policy exceptions, Maltese authorities must **accept** and, or, **enforce** foreign authentic instruments in matters of succession received from other EU Member States bound by the Succession Regulation.

The **acceptance** of a foreign succession authentic instrument produced in Malta is governed by Article 59 and the enforcement of such an authentic instrument is governed by Article 60 of the EU Succession Regulation. Acceptance requires that, provided that to do so would not be manifestly contrary to Maltese public policy, the Maltese authorities (as the Member State addressed) *must* grant the foreign succession authentic instrument the same (or most comparable) evidentiary effects as it would enjoy in its own Member State of origin.

To determine the nature of the evidentiary effects that would be associated with that authentic instrument in the Member State of origin, reference should be made to any Annex 2 Form II form that may accompany the foreign authentic instrument, especially to parts 4.2.1.1.1 – 4.2.1.1.7 of any such form. It must however be noted that the use of the Implementing Regulation's Annex 2 form does not appear to be obligatory. The obligation imposed by Article 59 of the EU Succession Regulation on the Member State addressed to accept a succession authentic instrument does not require or depend upon the use or supply of the Annex 2 form. A succession authentic instrument received from a Member State of origin in accordance with the provisions of the EU Succession Regulation must still be accepted, within the meaning of Article 59 of Regulation 650/2012, even if no Annex 2 Form II form is provided or if the Annex 2 form provided is not fully or properly completed.

The **enforcement** of a foreign authentic instrument via Article 60 of Regulation 650/2012 requires that, provided that to do so would not be manifestly contrary to Maltese public policy, the authorities in the Member State addressed (Maltese) must on application by an interested person declare a foreign succession authentic instrument that is enforceable in its Member State of origin to also be enforceable in Malta. The transposing legislative act in Malta does not define how the enforcement is to be done. We are not aware of any special provision in the law of Malta that specifically deals with the actual enforcement of a foreign authentic instrument after it has been declared enforceable (differently from the actual enforcement of a foreign judgment that has been declared enforceable) in accordance with the procedure laid down in Articles 45 to 58 of the EU Succession Regulation as required by Article 60 thereof.

Maltese public policy.

The EU Succession Regulation allows a public policy defence in various contexts including with reference to authentic instruments under Articles 59 and 60. To invoke the public policy exception in the context of Article 59, and by so doing to justify a refusal of acceptance for that foreign authentic instrument, it must be the case that the *granting of the same or most comparable evidentiary effects* to the foreign authentic instrument would be manifestly contrary to Maltese public policy. To invoke the public policy exception in the context of Article 60, to justify a refusal of a declaration of enforceability for the foreign authentic instrument, it must be that the *granting of the declaration of enforceability* for the foreign authentic instrument would be manifestly contrary to Maltese public policy. Of course these public policy exceptions permitted by EU law should be construed narrowly and hence should rarely apply. As is made plain by Recital 58 of the EU Succession Regulation, public policy is not to be applied in a manner that is discriminatory or otherwise contrary to the European Union's Charter of Fundamental Rights. Equally however Recital 26 of Regulation 650/2012 indicates that the Regulation does not prevent a court from applying mechanisms designed to tackle the evasion of

the law, such as *fraude à la loi* in the context of Private International Law. However, the substantive provisions of the Regulation do not expressly empower national courts to prevent evasion of the law (including *fraude à la loi*). It would seem that the only positive basis for doing so under the Regulation is to regard such evasion of the law to be contrary to public policy unless the law being evaded is one of the "special rules" of the forum concerning certain assets that is applicable irrespective of the law applicable to the succession (see Article 30 of the EU Succession Regulation).

Our national reporters were not able to find any case in which public policy had been invoked to deny the reception of a foreign authentic instrument in the context of a Maltese succession proceeding.

Incompatible Authentic instruments

Recital 66 of the EU Succession Regulation envisages the possibility of 'an authority' being presented with incompatible authentic instruments.²¹⁵ The solutions suggested by the Recital are to consider priority and the circumstances of the particular case and then, if this has not resolved the incompatibility, to resort to a court with direct or incidental jurisdiction under the EU Succession Regulation. There are no explicit provisions in Maltese law on this matter.

²¹⁵Recital 66: Should an authority, in the application of this Regulation, be presented with two incompatible authentic instruments, it should assess the question as to which authentic instrument, if any, should be given priority, taking into account the circumstances of the particular case. Where it is not clear from those circumstances which authentic instrument, if any, should be given priority, the question should be determined by the courts having jurisdiction under this Regulation, or, where the question is raised as an incidental question in the course of proceedings, by the court seized of those proceedings. In the event of incompatibility between an authentic instrument and a decision, regard should be had to the grounds of non-recognition of decisions under this Regulation.

NETHERLANDS

The legal system in the Netherlands

The Netherlands consists of one legal system that belongs to the civil law family. As of 5 November 2014 the Dutch law concerning succession has been updated to implement the EU Succession Regulation through the adoption of the 'Uitvoeringswet Verordening Erfrech' (Implementation Act Succession Regulationlaw).²¹⁶

The Dutch law relevant to succession and to matters dealt with in this profile can be found in Book 4 of the Dutch Civil Code and Articles 658-680 of the Dutch Code of Civil Procedure.²¹⁷ There is no official translation into English.

The concept of an authentic instrument in the Netherlands

The Dutch Code of Civil Procedure contains rules on the evidential value of authentic instruments in Articles 156, 157, 159, and 160. For the purpose of the evidential value, Article 156(2) defines authentic instruments as acts (a signed document) which have been drafted in conformity with the requirements by a designated person who is qualified by law to report on those events that he has witnessed or has executed. These acts are usually drafted by civil servants, and most commonly by a public notary, but can in specific circumstances also be drafted by others as designated by law.

Book 4 of the Dutch Civil Code on succession law includes a number of provisions on authentic instruments, in particular Article 4:94 (which provides that in principle a will can only be validly made by a public notary). Exceptions to this rule - usually for emergency cases - are included in Article 4:95-109 of the Dutch Civil Code.

The enforcement of authentic instruments is regulated in Article 430 and further of the Dutch Code of Civil Procedure and generally follows the rules on enforcement of judgments.

Transactions concerning Registered goods ('Registergoederen') are required to be carried out using an authentic instrument (Article 3:16 Dutch Civil Code). Registered goods include immovable property, land, ships and airplanes.

Typically, authentic instruments are created by notaries, as regulated by Article 37 of the Dutch Notary Act.

In relation to succession, in designated exceptional circumstances a will by way of authentic instrument can be drawn up by the captain or first officer of a ship or aircraft, or a consular officer, a mayor, the secretary of a municipality, a councillor, a candidate-notary, a lawyer, an officer of the military or of the fire brigade or police, or a civil servant who has been designated by the Ministry of Justice to create such acts.

Evidentiary effects of domestic authentic instruments in Dutch law

Article 159 of the Dutch Code of Civil Procedure provides that a document that has the appearance of an authentic instrument is to be regarded as such, unless it is proven that it is not. The formal evidential value is that an authentic instrument provides binding evidence of what the person drawing it up, if within that person's competence to do so,

²¹⁶ http://wetten.overheid.nl/BWBR0035741/geldigheidsdatum_03-09-2015 (in Dutch).

²¹⁷ For an unofficial English translation of the Dutch civil code see:

<http://www.dutchcivillaw.com/civilcodegeneral.htm>

For the official version of the Dutch Civil Code and Code of Civil Procedure see:
<http://wetten.overheid.nl/BWBR0002761> and
<http://wetten.overheid.nl/BWBR0001827>

has declared as regards his observations and acts (Article 157(1) Dutch Code of Civil Procedure). As regards the material evidential value, authentic documents in principle provide binding evidence as between parties as regards the declarations of these parties recorded in the instrument as far as these are intended to provide proof of such statement vis-à-vis the other party, unless this would have a legal consequence that is not at the free disposition of parties.

Disputing the validity of the authentic instrument

There are no specific procedures to challenge the authenticity of an authentic instrument. The content of the party statements included in the authentic instrument may be contested by providing counter-evidence. The authentic instrument can only serve as an enforceable title if indeed it is clear from this document that the claim (for a specific amount) is due. Should someone dispute the authenticity of an act, he must provide evidence that either the act is forged or that the person creating the act was not entitled to do so. There is no difference in this regard between challenging the authenticity or the material validity. If the challenge is successful, the authentic instrument can no longer be enforced.

The actual enforcement may be challenged by way of an 'enforcement dispute'.

The use of authentic instruments in domestic Dutch succession law

A specific provision in the Notary Act holds that an authentic instrument concerning a will cannot include other legal acts (Article 20a of the Notary Act).

Book 4 of the Dutch Civil Code deals with succession. Several provisions address the authentic instrument used for wills, the notarial deed/instrument. A key provision is Article 4:94 of the Dutch Civil Code which indicates that the drawing up of a will requires the involvement of a notary public. First and foremost by a notarial deed ('notariële akte') and, secondly, by way of deposition of a private (party) act (deposited will - 'depot-testament'). Articles 4:97-107 give exceptions to the rule that only public notaries can validly draw up a will.

These authentic instruments provide binding evidence and thus provide binding proof of the will of the deceased person. There are only limited grounds on the basis of which the instrument will be regarded as void or can be avoided. According to Article 4:109 Dutch Civil Code the instrument containing the will is void if the required signature of the deceased is lacking. The same is true when the signature of the notary public is missing in the notarial deed. If the will was not registered, it does not make it void but the notary can be punished based on the Notarial Code with a disciplinary decision.

The usual way to make a will is through an authentic instrument, a notarial deed, with the notary public. A private deed is also possible, provided that it is deposited with the notary public and becomes a deposited will.

The will is generally made via a notary. The common one is the public will made through an authentic instrument (notarial deed). Mystic wills by way of a private deed can be made and are to be deposited with the notary (deposited will).

The will created via a notary is an authentic instrument and this has a special evidential value. The private deed deposited with the notary is not truly an authentic instrument. A rule of evidence, however, provides that a document that has the appearance of a private deed deposited with the notary is regarded as such (Article 4:96 Dutch Civil Code). This makes it almost equal to an authentic instrument, but it is for instance not enforceable as an authentic instrument.

Only under extraordinary circumstances where due to war or disaster there is no access to a notary ('emergency will') the law designates other officials for different types of situation. Military personnel can in a situation of war make a will before a military officer, while for persons on board a ship or aircraft the captain or first officer is competent.

A will created by approved officials is regarded as an authentic instrument. This is also clear from Article 156(2) of the Dutch Code of Civil Procedure which states that authentic instruments are those acts that are made by public officials but can be drawn up by others in special circumstances.

Wills are to be registered in the Central Wills Register ('Centraal Testamentenregister', abbreviated as CTR). See also <http://www.notaris.nl/centraal-testamentenregister>. The Law regulating this required depository does not specify what the consequences are of not depositing. However, not all wills are in fact registered in the CTR, and it is agreed that this does not affect the character of the authentic instrument made by the notary public.

If the notary makes an act of the division of the estate, this will be an authentic instrument. For the delivery of immovable property an authentic instrument by the notary is required.

The Private International Law implications of the European Union's Succession Regulation 650/2012 and Implementing Regulation 1329/2014

The European Union Succession Regulation and its Implementing Regulation raise two distinct Private International Law issues for the Netherlands as an EU Member State: first, the extent of the obligations imposed by these Regulations on the Netherlands as a Member State of origin concerning its domestically created succession authentic instruments; and, second, the extent of the obligations these Regulations impose on the Netherlands as a Member State addressed concerning its duties relating to incoming foreign succession authentic instruments. The comments that follow consider each position.

The Netherlands is the Member State of origin: obligations concerning domestic succession authentic instruments

Article 59(1) of the European Union Succession Regulation allows, but does not require, '*a person*' who wishes to use a succession authentic instrument in another Member State to ask the authority who established it, i.e. the notary who drew it up or his substitute/successor, to issue an attestation concerning that authentic instrument on the standard form provided by Annex 2 Form II of Implementing Regulation 1329/2014. It is unclear whether or not such a request must be complied with if it is received from a person not deemed by the notary to be '*an interested party*'. The substitution of the phrase '*a person*' in Article 59 for '*interested party*' in Article 60 could be understood to indicate that there is no requirement in the EU Succession Regulation for the applicant seeking only cross-border acceptance to demonstrate what would otherwise be domestically regarded as a '*legitimate interest*' when requesting the attestation from the notary. It seems unlikely that this will be a problem in the Netherlands as it seems that a wide range of potential and legitimate applicants is already envisaged and possible.²¹⁸ The EU Succession Regulation and Implementing Regulation do not expressly contemplate the possibility that a request under Article 59 may be refused. It is however possible to contrast the applicant '*may ask*' of Article 59 with '*the authority shall*' in Article 60(2) and to infer from the different wording that the notary (or other public authority) is only actually obliged to accede to the applicant's request when it concerns

²¹⁸ See the persons listed by Annex 1 Form I of Implementing Regulation 1329/2014 at 4.3.1.7. Other persons with a legitimate interest could include a creditor of the estate or of a person who has refused the inheritance.

enforcement under Article 60. This result however seems inconsistent with Recitals 22, 59 and 60 of the EU Succession Regulation and with one of its underlying purposes, i.e. to facilitate the cross-border transmission of authentic instruments and their legal effects. In circumstances where both the acceptance and the enforcement of the authentic instrument may be sought the problem may be avoided, assuming the notary to be willing to provide information concerning both Article 59 and Article 60, by the applicant routinely requesting an attestation concerning *both* enforcement and acceptance.

Article 60 of Regulation 650/2012 requires that, provided that to so declare would not be manifestly contrary to public policy in the Member State addressed it *must* on application by an interested person declare a foreign succession authentic instrument that is enforceable in its Member State of origin to also be enforceable in their Member State. A Dutch notary may thus be in receipt of a request for such an attestation, again under Annex 2 Form II of Implementing Regulation 1329/2014. This standard form allows for an attestation that concerns only 'acceptance', via Article 59, or 'enforcement' via Article 60, or an attestation that jointly concerns acceptance and enforcement of the authentic instrument depending upon the boxes ticked by the Dutch notary.²¹⁹

The Dutch notary in receipt of the request to provide a completed Annex 2 Form II attestation concerning a domestic succession authentic instrument is asked to indicate at points 4.2 to 4.2.1.1.7 of the standard form what he believes its domestic evidentiary effects to be. Though the answers will vary depending upon the specific verifications contained in the succession authentic instrument at issue, it is broadly conceivable that points 4.2.1.1.1 to 4.2.1.1.7 could be expected to be completed as follows:

4.2.1.1.1 - The date the authentic instrument was drawn up:

There will be a conclusive evidential effect on the date of drawing up according to Article 157(1) Code of Civil Procedure: the date is a matter falling within the scope of the notary's observations and operations declared in the course of exercising his official authority. Rebuttal of this evidential presumption is possible: see Article 151 Code of Civil Procedure.

4.2.1.1.2 - The place where the authentic instrument was drawn up:

There will be a conclusive evidential effect on the place of drawing up according to Article 157(1) Code of Civil Procedure: reference to the place of drawing up is a matter falling within the scope of the notary's observations and operations declared in the course of exercising his official authority. Rebuttal of this evidential presumption is possible: see Article 151 Code of Civil Procedure.

4.2.1.1.3 - The origin of the signatures from the parties of the authentic instrument:

There will be a conclusive evidential effect on the origin of the signatures from the parties according to Article 157(1) Code of Civil Procedure: reference to the origin of the signatures is a matter falling within the scope of the notary's observations and operations declared in the course of exercising his official authority. Rebuttal of this evidential presumption is possible under Article 151 Code of Civil Procedure.

4.2.1.1.4 - The content of the declarations of the parties:

There will be a conclusive evidential effect on the fact of the making of the declarations by the parties according to Article 157(1) Code of Civil Procedure *and also* a conclusive evidential effect as to the truth of those statements *between the parties* (also binding their heirs and assigns) according to Article 157(2) Code of Civil Procedure. The conclusive presumption of the truth of the declarations made by the parties is however limited in terms of its legal effects to those legal effects that are truly at the discretion

²¹⁹ For Article 59 acceptance tick 'yes' in box 4.1.1; for Article 60 enforcement tick 'yes' in box 6.1.1. To dispense with either option tick 'no' in box 4.1.2. or 6.1.2 as appropriate.

of the parties: there can be no such legal effects concerning matters that are outside the lawful discretion of the parties. Rebuttal of both evidential presumptions is possible under Article 151 Code of Civil Procedure.

4.2.1.1.5 - The facts that the authority declares as having been verified in its presence:
There will, according to Article 157(1) Code of Civil Procedure, be a conclusive evidential effect concerning the facts that the authority (the notary) declares to have been verified by him in his presence: declarations concerning such verified facts fall within the scope of the notary's observations and operations declared in the course of exercising his official authority. Rebuttal of this evidential presumption is possible under Article 151 Code of Civil Procedure.

4.2.1.1.6 - The actions which the authority declares to have carried out:
There will, according to Article 157(1) Code of Civil Procedure, be a conclusive evidential effect concerning the actions that the authority (the notary) declares he has carried out: such declarations of his official actions fall within the scope of the notary's observations and operations declared in the course of exercising his official authority. Rebuttal of this evidential presumption is possible under Article 151 Code of Civil Procedure.

4.2.1.1.7 - Other: (please indicate any other evidentiary effect that a domestic authentic instrument could produce)

It is envisaged that additional information concerning the above mentioned evidential effects can be provided here. This could include: information as to heirs and assigns bound by the evidence in the authentic instrument; additional information that falls within Article 157(1) Code of Civil Procedure e.g. the name, place of residence and date of birth of the witnesses; and, possibly a reference to Article 151 Code of Civil procedure to indicate that only the most compelling contrary evidence will suffice to rebut the evidence in an authentic instrument.

The Netherlands is the Member State addressed: foreign succession authentic instruments

The EU Succession Regulation requires that, subject to public policy exceptions, Dutch authorities must accept and, or, enforce foreign authentic instruments in matters of succession received from other EU Member States bound by the Succession Regulation.

The acceptance of a foreign succession authentic instrument presented by an applicant in the Netherlands is governed by Article 59 and the enforcement of such an authentic instrument is governed by Article 60 of the Succession Regulation. Acceptance requires that, provided that to do so would not be manifestly contrary to Dutch public policy, the Dutch authorities (as the Member State addressed) *must* grant the foreign succession authentic instrument the same (or most comparable) evidentiary effects as it would enjoy in its own Member State of origin.

To determine the nature of the evidentiary effects that would be associated with that authentic instrument in the Member State of origin, reference should be made to any Annex 2 Form II form that may accompany the foreign authentic instrument, especially to parts 4.2.1.1.1 – 4.2.1.1.7 of any such form. It must however be noted that the use of the Implementing Regulation's Annex 2 form does not appear to be obligatory: the obligation imposed by Article 59 of the Succession Regulation on the Member State addressed to accept a succession authentic instrument does not require or depend upon the use or supply of the Annex 2 form. A succession authentic instrument received from a Member State of origin in accordance with the provisions of the Succession Regulation must still be accepted, within the meaning of Article 59 of Regulation 650/2012, even if no Annex 2 Form II form is provided or if the Annex 2 form provided is not fully or properly completed.

At present there are no provisions or decisions in Dutch law that specifically deal with the acceptance of a foreign authentic instrument concerning a matter of succession under the EU Succession Regulation.

The enforcement of a foreign authentic instrument via Article 60 of Regulation 650/2012 requires that, provided that to do so would not be manifestly contrary to Dutch public policy, the authorities in the Member State addressed (The Netherlands) must on application by an interested person declare enforceable a foreign succession authentic instrument that is enforceable in its Member State of origin. We are not aware of any special provision in the law of the Netherlands that specifically deals with the actual enforcement of a foreign authentic instrument after it has been declared enforceable (differently from the actual enforcement of a foreign judgment that has been declared enforceable) in accordance with the procedure laid down in Articles 45 to 58 of the EU Succession Regulation as required by Article 60 thereof.

Dutch public policy

The EU Succession Regulation allows a public policy defence in various contexts including with reference to authentic instruments under Articles 59 and 60. To invoke the public policy exception in the context of Article 59, and by so doing to justify a refusal of acceptance for that foreign authentic instrument, it must be the case that the *granting of the same or most comparable evidentiary effects* to the foreign authentic instrument would be manifestly contrary to Dutch public policy. To invoke the public policy exception in the context of Article 60, to justify a refusal of a declaration of enforceability for the foreign authentic instrument, it must be that the *granting of the declaration of enforceability* for the foreign authentic instrument would be manifestly contrary to Dutch public policy. Of course this public policy exception should be construed narrowly and it is envisaged that it will rarely apply. As is made plain by Recital 58 of the EU Succession Regulation, public policy is not to be applied in a manner that is discriminatory or otherwise contrary to the European Union's Charter of Fundamental Rights. Equally however Recital 26 of Regulation 650/2012 indicates that the Regulation does not prevent a court from applying mechanisms designed to tackle the evasion of the law, such as *fraude à la loi* in the context of Private International Law. However, the substantive provisions of the Regulation do not expressly empower national courts to prevent evasion of the law (including *fraude à la loi*). It would seem that the only positive basis for doing so under the Regulation is to regard such evasion of the law to be contrary to public policy unless the law being evaded is one of the "special rules" of the forum concerning certain assets that is applicable irrespective of the law applicable to the succession (see Article 30 of the EU Succession Regulation).

Our national reporters were not able to find any case in which public policy had been invoked to deny the reception of a foreign authentic instrument in the context of a Dutch succession proceeding.

Incompatible Authentic instruments

Recital 66 of the EU Succession Regulation envisages the possibility of 'an authority' being presented with incompatible authentic instruments.²²⁰ The solutions suggested by the Recital are to consider priority and the circumstances of the particular case and then, if this has not resolved the incompatibility, to resort to a court with direct or incidental jurisdiction under the Succession Regulation. There are currently no Dutch legal provisions on this matter.

²²⁰ Recital 66: Should an authority, in the application of this Regulation, be presented with two incompatible authentic instruments, it should assess the question as to which authentic instrument, if any, should be given priority, taking into account the circumstances of the particular case. Where it is not clear from those circumstances which authentic instrument, if any, should be given priority, the question should be determined by the courts having jurisdiction under this Regulation, or, where the question is raised as an incidental question in the course of proceedings, by the court seised of those proceedings. In the event of incompatibility between an authentic instrument and a decision, regard should be had to the grounds of non-recognition of decisions under this Regulation.

POLAND

The Polish legal system

Poland consists of a single legal system that belongs to the civil law family. The Polish law concerning succession has, in general, been updated to implement the EU Succession Regulation via various legislative provisions and amendments.²²¹

The concept of an authentic instrument in Poland

The legal provisions concerning authentic instruments concerning their enforcement are to be found in Articles 244 and 247 of the Code of Civil Procedure, Article 2(2) of the Notary Law and Article 363 of the Code of Civil Procedure. According to Article 244(1) of the Code of Civil Procedure a public document, including authentic instruments via Article 244(2), that are drawn up in the prescribed form by a public body or a public official, acting within the scope of their authorisation, are deemed and presumed to be admissible evidence of what is officially attested within them. Thus the authentic instrument is presumed to be authentic and it is also presumed that its content is correct and true in the sense of that which it contains. Therefore there is no need for a party who wishes to rely on a Polish authentic instrument to demonstrate that it is admissible as evidence, nor to prove that it is authentic, and, nor to prove that the facts and actions that are recorded within it are correct.

The transactions that are legally required to be carried out by an authentic instrument (notarial act) are:

- Contracts transferring ownership rights or a share in co-ownership in any immovable.
- Contracts creating or transferring a usufruct.
- Contracts creating or transferring the perpetual usufruct right to an immovable.
- Contracts creating mortgages or easements. Although an authentic instrument is only formally required in relation to a declaration of will concerning real burdens.
- Although in practise many mortgages are made by authentic instruments this is not so normal in relation to mortgages created for banks.
- Contracts transferring the whole or part of an inherited estate.
- Contracts where one party renounces their inheritance, see Article 1048 of the Civil Code.
- Marital property contracts
- Contracts creating limited liability companies.
- Contracts creating joint stock companies.

Authentic instruments are enforceable in actual enforcement proceedings only when the debtor accepts the actual enforcement. Where actual enforcement is contested a court has to issue an actual enforcement clause, as it would have to do to a court judgment, see Articles 776 and 777 of the Code of Civil Procedure.

Evidentiary effects of domestic authentic instruments in Polish law

Article 244 of the Code of Civil Procedure provides that authentic instruments drawn up in the prescribed form are deemed to be evidence of what is officially attested in them. Hence authentic instruments benefit from two rebuttable presumptions; the presumption of authenticity and the presumption that what was officially attested is correct. As the authentic instrument is presumed to be authentic and as its content is also presumed to

²²¹ ustanowiona z dnia 20.03.2015 o zmianie ustawy - Kodeks cywilny oraz niektórych innych ustaw, Dz. U. 2015, poz. 539 link: <http://isap.sejm.gov.pl/DetailsServlet?id=WDU20150000539>. ustanowiona z dnia 24.07.2015 o zmianie ustawy - Kodeks postępowania cywilnego, ustawy - Prawo o notariacie oraz niektórych innych ustaw, oficjalna publikacja: Dz. U. 2015, poz. 1137. link: <http://dziennikustaw.gov.pl/du/2015/1137>.

be correct and true in the sense of that which it contains, there is no need for a party who wishes to rely on a Polish authentic instrument to demonstrate that it is admissible as evidence, nor need he prove that it is authentic, and, nor need he prove that the facts and actions that are recorded within it are correct. Indeed, though both the presumption of authenticity and the presumption of correctness of content are rebuttable, there are restrictions on any party who would refute these presumptions by Article 247 of the Code of Civil Procedure. Article 247 of the Code of Civil Procedure restricts the admissibility of rebuttal evidence from witnesses and will only allow the hearing of the parties in restricted cases where the court deems this to be necessary.

Disputing the validity of an authentic instrument

It is a criminal offence to create an inauthentic instrument, see Article 270 of the penal code. Criminal proceedings may be initiated by the public prosecutor or the police. Private persons may supply information to them. A person who counterfeits or alters an authentic instrument is subject to a fine, or imprisonment from 3 months to 5 years.

The material validity of an authentic instrument issued by a notary may be challenged in any civil procedure where the document is used. Only when the party cannot initiate civil proceedings in relation to a material claim may the authentic instrument's validity be challenged directly based on Article 189 of the Code of Civil Procedure. That article enables a claimant to ask the court to issue a decision that the transaction covered by the authentic instrument is invalid. The claimant cannot seek specific performance from the other party.

When an authentic instrument has already been entered into the land register its effects can only be undone by a party basing their claim on Article 10 of the Land Register Act²²². The entry in the land register benefits from a strong presumption of truth which is binding in any civil proceedings unless it has been invalidated under the Land Register Act.

Notarial authentic instruments may only be enforceable if the debtor has expressly submitted to the execution with his obligation to pay a certain amount of money or to deliver goods if the authentic instrument indicates the time when the obligation becomes due and is subject to execution (Article 777 (1) point 4 of the Code of Civil Procedure). These notarial acts may be enforceable after receiving an 'execution clause' issued by a court order. Enforceability of a domestic authentic instrument may be challenged by the debtor via special civil proceedings set out in Articles 840 and 841 of the Code of Civil Procedure. If an action based on Articles 840 or 841 is successful, the court issues a decision that limits or quashes the enforceability of a previous court decision permitting execution.

The use of authentic instruments in domestic Polish succession law

The domestic legal provisions concerning authentic instruments in relation to identification of heirs and their shares and legatees are;

Articles 1025, 1026, 1029(1) of the Civil Code; Articles 669–679 of the Code of Civil Procedure; and Articles 95a and 95x of the Notary Law.

The domestic legal provisions concerning authentic instruments in relation to partition of inherited estate are found in Articles 1035–1046 of the Civil Code and Article 680–689 Code of Civil Procedure.

²²² ustanowiona o księgach wieczystych dated 06.07.1982, officially published: Dz. U. 2013 poz. 707 with changes, link: <http://isap.sejm.gov.pl/Download?id=WDU19820190147&type=3>.

The authentic instrument identifying the heirs must be registered in a special register <https://www.rejestry.net.pl/> - thereafter it is binding as a registered act of succession. Unless the registered instrument is questioned in special civil proceedings it is deemed to be valid and cannot be questioned in other special civil proceedings not in a land register procedure or a criminal or administrative procedures.

The evidence that the heirs or their shares are different from that stated in an authentic instrument may only be done in succession civil proceedings under Article 679 of the Code of Civil Procedure.

If there are two authentic instruments one that is issued by a notary and one by a court then the court instrument prevails.

An authentic instrument of inheritance may always be challenged in civil succession proceedings when the true heirs learn of their rights.

A party who had been a participant in the statement of inheritance provided by the authentic instrument can only request a change to the authentic instrument when the grounds that he is relying on could not have been raised at the time of the authentic instrument was created. The request for change must be filed within one year from the date from which it became possible to raise this ground for change. Anyone with a legal interest in doing so may challenge the legal validity of an authentic instrument.

The Private International Law implications of the European Union's Succession Regulation 650/2012 and Implementing Regulation 1329/2014

The European Union Succession Regulation and its Implementing Regulation raise two distinct Private International Law issues for Poland: first, the extent of the obligations imposed on Poland as a Member State of origin concerning its domestically created succession authentic instruments; and, second, the extent of the obligations imposed on Poland as a Member State addressed concerning incoming foreign succession authentic instruments. The comments that follow consider each position.

Poland is the Member State of origin: obligations concerning domestic succession authentic instruments

Article 59(1) of the European Union Succession Regulation allows, but does not require, '*a person*' who wishes to use a succession authentic instrument in another Member State to ask the authority who established it, i.e. the notary who drew it up or his substitute/successor, to issue an attestation concerning that authentic instrument on the standard form provided by Annex 2 Form II of Implementing Regulation 1329/2014. It is unclear whether or not such a request must be complied with if it is received from a person not deemed by the notary to be '*an interested party*'. The substitution of the phrase '*a person*' in Article 59 for '*interested party*' in Article 60 could be understood to indicate that there is no requirement in the EU Succession Regulation for the applicant seeking only cross-border acceptance to demonstrate what would otherwise be domestically regarded as a '*legitimate interest*' when requesting the attestation from the notary. It seems unlikely that this will be a problem in Poland, the prevailing view appears to be that a range of potential and legitimate applicants is already possible: e.g. successors, creditors of the estate or of the heirs, an executor, others who can demonstrate a legitimate interest. The EU Succession Regulation and Implementing Regulation do not expressly contemplate the possibility that a request under Article 59 may be refused. It is however possible to contrast the applicant '*may ask*' of Article 59 with '*the authority shall*' in Article 60(2) and to infer from the different wording that the notary (or other public authority) is only actually obliged to accede to the applicant's request when it concerns enforcement under Article 60. This result however seems inconsistent with Recitals 22, 59 and 60 of the EU Succession Regulation and with one of its underlying purposes, i.e. to facilitate the cross-border transmission of authentic

instruments and their legal effects. Considered abstractly, if both the acceptance and the enforcement of the authentic instrument are sought the problem may be avoided, assuming the notary to be willing to provide information concerning both Article 59 and Article 60, by the applicant routinely requesting an attestation concerning *both* enforcement and acceptance. In Poland however the potential for an application under Article 60 of the European Union Succession Regulation is significantly reduced by the lack of immediate domestic enforceability for most authentic instruments concerning succession.

Article 60 of Regulation 650/2012 requires that, provided that to so declare would not be manifestly contrary to its public policy, the authorities in the Member State addressed *must* on application by an interested person declare a foreign succession authentic instrument that is enforceable in its Member State of origin to also be enforceable in their Member State. Though it will be very unusual for a Polish notary to be in receipt of such a request – given that (as mentioned above) even Polish authentic instruments that are intended and designed to be enforceable only actually become enforceable after receiving an executory formula from the court – the possibility cannot be entirely discounted.

The Polish notary in receipt of the request to provide a completed Annex 2 Form II attestation concerning a domestic succession authentic instrument is asked to indicate at points 4.2 to 4.2.1.1.7 of the standard form what he believes its domestic evidentiary effects to be. Though the answers will vary depending upon the specific verifications contained in the succession authentic instrument at issue, it is broadly conceivable that the answers provided to points 4.2.1.1.1 to 4.2.1.1.7 would be completed subject to the following factors:

4.2.1.1.1 - The date the authentic instrument was drawn:

Article 244 of the Code of Civil Procedure: the authentic instrument provides presumed evidence of both the authenticity and the truth of this fact.

4.2.1.1.2 - The place where the authentic instrument was drawn up:

Article 244 of the Code of Civil Procedure: the authentic instrument provides presumed evidence of both the authenticity and the truth of this fact.

4.2.1.1.3 - The origin of the signatures from the parties of the authentic instrument:

Article 244 of the Code of Civil Procedure: the authentic instrument provides presumed evidence of both the authenticity and the truth of this fact.

4.2.1.1.4 - The content of the declarations of the parties:

Article 244 of the Code of Civil Procedure: the authentic instrument provides presumed evidence of both the authenticity of the declarations recorded and of the truth of the fact that the parties made these declarations.

4.2.1.1.5 - The facts that the authority declares as having been verified in its presence:
Article 244 of the Code of Civil Procedure: the authentic instrument provides presumed evidence of both the authenticity and the truth of these verified facts.

4.2.1.1.6 - The actions which the authority declares to have carried out:

Article 244 of the Code of Civil Procedure: the authentic instrument provides presumed evidence of both the authenticity and the truth of any such actions recorded in the authentic instrument.

4.2.1.1.7 - Other: (please indicate any other evidentiary effect that a domestic authentic instrument could produce)

It is conceivable that reference could be made to the size of shares and the identity of the heirs.

Poland is the Member State addressed: foreign succession authentic instruments

The EU Succession Regulation requires that, subject to public policy exceptions, Polish authorities must **accept** and, or, **enforce** foreign authentic instruments in matters of succession received from other EU Member States bound by the Succession Regulation.

The **acceptance** of a foreign succession authentic instrument produced in Poland is governed by Article 59 and the enforcement of such an authentic instrument is governed by Article 60 of the EU Succession Regulation. Acceptance requires that, provided that to do so would not be manifestly contrary to Polish public policy, the Polish authorities (as the Member State addressed) *must* grant the foreign succession authentic instrument the same (or most comparable) evidentiary effects as it would enjoy in its own Member State of origin.

To determine the nature of the evidentiary effects that would be associated with that authentic instrument in the Member State of origin, reference should be made to any Annex 2 Form II form that may accompany the foreign authentic instrument, especially to parts 4.2.1.1.1 – 4.2.1.1.7 of any such form. It must however be noted that the use of the Implementing Regulation's Annex 2 form does not appear to be obligatory. The obligation imposed by Article 59 of the EU Succession Regulation on the Member State addressed to accept a succession authentic instrument does not require or depend upon the use or supply of the Annex 2 form. A succession authentic instrument received from a Member State of origin in accordance with the provisions of the EU Succession Regulation must still be accepted, within the meaning of Article 59 of Regulation 650/2012, even if no Annex 2 Form II form is provided or if the Annex 2 form provided is not fully or properly completed.

The **enforcement** of a foreign authentic instrument via Article 60 of Regulation 650/2012 requires that, provided that to do so would not be manifestly contrary to Polish public policy, the authorities in the Member State addressed (Polish) must on application by an interested person declare a foreign succession authentic instrument that is enforceable in its Member State of origin to also be enforceable in Poland. We are not aware of any special provision in the law of Poland that specifically deals with the actual enforcement of a foreign authentic instrument after it has been declared enforceable (differently from the actual enforcement of a foreign judgment that has been declared enforceable) in accordance with the procedure laid down in Articles 45 to 58 of the EU Succession Regulation as required by Article 60 thereof..

Polish public policy

The EU Succession Regulation allows a public policy defence in various contexts including with reference to authentic instruments under Articles 59 and 60. To invoke the public policy exception in the context of Article 59, and by so doing to justify a refusal of acceptance for that foreign authentic instrument, it must be the case that the *granting of the same or most comparable evidentiary effects* to the foreign authentic instrument would be manifestly contrary to Polish public policy. To invoke the public policy exception in the context of Article 60, to justify a refusal of a declaration of enforceability for the foreign authentic instrument, it must be that the *granting of the declaration of enforceability* for the foreign authentic instrument would be manifestly contrary to Polish public policy. Of course these public policy exceptions permitted by EU law should be construed narrowly and hence should rarely apply. As is made plain by Recital 58 of the EU Succession Regulation, public policy is not to be applied in a manner that is discriminatory or otherwise contrary to the European Union's Charter of Fundamental Rights. Equally however Recital 26 of Regulation 650/2012 indicates that the Regulation does not prevent a court from applying mechanisms designed to tackle the evasion of

the law, such as *fraude à la loi* in the context of Private International Law. However, the substantive provisions of the Regulation do not expressly empower national courts to prevent evasion of the law (including *fraude à la loi*). It would seem that the only positive basis for doing so under the Regulation is to regard such evasion of the law to be contrary to public policy unless the law being evaded is one of the "special rules" of the forum concerning certain assets that is applicable irrespective of the law applicable to the succession (see Article 30 of the EU Succession Regulation).

Our national reporters were not able to find any case in which public policy had been invoked to deny the reception of a foreign authentic instrument in the context of a Polish succession proceeding.

Incompatible Authentic instruments

Recital 66 of the EU Succession Regulation envisages the possibility of 'an authority' being presented with incompatible authentic instruments.²²³ The solutions suggested by the Recital are to consider priority and the circumstances of the particular case and then, if this has not resolved the incompatibility, to resort to a court with direct or incidental jurisdiction under the EU Succession Regulation. Though there are no explicit provisions in Polish law on this matter, Polish jurisprudence knows of the notion of a judicial comparison of titles as a means to resolve such situations. In such a comparison, which is most likely to occur in the context of 'enforceable' authentic instruments drawn up in an adversarial 'inter partes' procedure, the court may compare the competing instruments and determine which of them is the "more qualified". It is not clear how, or if, a conflict detected by a notary between authentic instruments could be determined other than by means of a reference to a Polish court.

²²³ Recital 66: Should an authority, in the application of this Regulation, be presented with two incompatible authentic instruments, it should assess the question as to which authentic instrument, if any, should be given priority, taking into account the circumstances of the particular case. Where it is not clear from those circumstances which authentic instrument, if any, should be given priority, the question should be determined by the courts having jurisdiction under this Regulation, or, where the question is raised as an incidental question in the course of proceedings, by the court seized of those proceedings. In the event of incompatibility between an authentic instrument and a decision, regard should be had to the grounds of non-recognition of decisions under this Regulation.

PORTUGAL

The Portuguese legal system

Portugal consists of a single legal system that belongs to the civil law family. The Portuguese law concerning succession has, in general, been updated to implement the European Union Succession Regulation via the various legislative provisions and amendments described and set out below. However there have been no specific amendments to the Portuguese law concerning authentic instruments consequent on the coming into operation of the European Union Succession Regulation.

Though general constitutional principles²²⁴ may also affect its succession law, the core substantive law concerning Portuguese succession law is located in Book V of the Civil Code (CC), Articles 2024 to 2334.²²⁵ Other Civil Code provisions are also relevant, for instance the regime of the prenuptial agreements concerning *inter vivos* contractual agreements concerning an inheritance, i.e. Articles 1700 to 1707, or Article 946 regarding a *donatio mortis causa*. The Civil Procedure Code²²⁶ (CPC) sets out procedures regarding: the liquidation of the vacant estate in favour of the State – Articles 938 to 940; estate not accepted by heirs and legatees (in abeyance) and subrogatory action – Articles 1039 to 1041; request to be excused after accepting the function and cases of removal of the executor of the will – Articles 1042 to 1044; judicial authorisation to dispose of or encumber assets submitted to a *fideicomisso*.²²⁷

The Notarial Code²²⁸ (CN) contains rules governing specific succession related matters: certificate of heirs or legatees (*escritura de habilitação de herdeiros ou legatários*) – Articles 82 to 88; closed wills and the international will – Articles 106 to 115; and several other rules relating to wills and waiver of the succession, e.g. Articles 135, 136, 139 to 141, etc, including the obligatory information sent to the central registry (*Conservatória dos Registos Centrais*) – Articles 187 and 188.

The Civil Registry Code²²⁹ (CRC) contains the rules concerning simplified procedures on succession – Articles 210-A to 210-R; the declaration and registration of death – Articles 192 to 210; and rules on prenuptial agreements – Articles 189 to 191.

The Land Registry Code²³⁰ (CRP) governs the registration of the acquisition by succession of immovable property (but the intermediate registration in name of all heirs of the undivided estate is not obligatory – Article 35) and the registration of the encumbrance of an eventual reduction of the donations subject to collation (Article 2 (1)(a) and (q)).

²²⁴ Such as the principle of the recognition and transmissibility of private property (Article 62 of the Constitution), the protection of the family as a fundamental institution in society (Article 36 of the Constitution), the equality principle (Article 13 of the Constitution), etc.

²²⁵ Approved by Decree-law nr. 47344/66 dated 25 November and last amended by Law nr. 150/2015 dated 10 September 2015. See http://www.pqdisboa.pt/leis/lei_mostra_articulado.php?nid=775&tabela=leis&

²²⁶ Approved by Law nr. 41/2013 dated 26 June (rectified by Rectification nr. 36/2013 dated 12 August) and last amended by Law nr. 122/2015 dated 1 September 2015. See http://www.pqdisboa.pt/leis/lei_mostra_articulado.php?nid=570&tabela=leis&

²²⁷ A type of substitution, whereby the testator imposes to an heir (or legatee – Article 2296 CC) the obligation to preserve the estate so that it reverts at his/her death to another person – Article 2286 of the Civil Code.

²²⁸ Approved by Decree-law nr. 207/95 dated 14 August and last amended by Decree-law nr. 125/2013 dated 30 August 2013.

²²⁹ Approved by Decree-law nr. 131/95 dated 6 June and last amended by Law nr. 143/2015 dated 8 September and Decree-law nr. 201/2015 dated 17 September 2015. See http://www.pqdisboa.pt/leis/lei_mostra_articulado.php?nid=682&tabela=leis&

²³⁰ Approved by Decree-law nr. 224/84 dated 6 July and last amended by Decree-law nr. 125/2013 dated 30 August 2013 and Decree-law nr. 201/2015 dated 17 September 2015.

Law nr. 23/2013 dated 5 March, and Portaria nr. 278/2013 dated 26 August as amended by Portaria nr. 46/2015 dated 23 February, governs the inventory proceedings (*processo de inventário*).

The concept of an authentic instrument in Portugal

The Portuguese legal system makes extensive use of documentary evidence which includes two domestically distinct types of documents: first, those documents that are domestically classified as 'authentic documents' and; second, those documents that are domestically classified as 'authenticated documents'. Both types of document will usually involve notaries in their creation albeit at different stages of that creative act. The distinction between authentic and authenticated documents is explored below, however, this discussion is prefaced by the suggestion that both classes of documents would, for reasons that are set out below under the heading 'international classification', be properly regarded as 'authentic instruments' within the meaning of Article 3(1)(f) of the EU Succession Regulation 650/2012 and Implementing Regulation 1329/2014.

Domestic classification

Under Portuguese law only authentic documents are *domestically* regarded as authentic instruments. This domestic distinction is based upon Article 363(2) of the Portuguese Civil Code, according to which the notion of authentic documents refers only to documents that notaries directly draw up within the sphere of their competence. If a document was drawn up by another party lacking such authority, even though the document was later confirmed by the parties as regards the entire content in front of an authority who would have had the competence to create that document and was then registered and or deposited by that public authority, it is still *not* an authentic document. Such a document is instead domestically classed as "authenticated". Both types of document, however, enjoy the same evidential value (Article 377 CC) and are potentially admissible as enforcement titles under the same conditions. Equally, their "authenticity" can also only be challenged by initiating proceedings concerning the falsity of the document.

It should be noted that under Article 377 of the Portuguese Civil Code, authenticated documents *cannot* replace an authentic document in the rare cases where that authentic form is specifically required by law (e.g. for the certificate of heirs).

Under Article 80 of the Notarial Code only the following are required to have the form of a notarial authentic document (*escritura pública*):

1. Notarial justification:²³¹
2. The modification of acts that have been made through the notarial authentic document (*escritura pública*);
3. Incorporation of foundations and associations and the modification and revocation of their statutes;
4. Certificate of heirs (*habilitação de herdeiros*). This public document drawn up by a notary identifies the known heirs.

Otherwise, Decree-law nr. 116/2008, which entered into force on 1 January 2009, establishes that acts relating to immovable property can *either* be made through an authentic *or* by an authenticated document, including sale, mortgage, donation, etc.

In the context of succession the following must be made through an authentic *or* via an authenticated document when they involve immovable property (Article 22 of Decree-

²³¹ A declaration made by the party and confirmed by 3 witnesses regarding the establishment, re-establishment or establishment of a new, succession instrument/deed in which the same declares that it holds, to the exclusion of all other parties, the right claimed, specifying the cause of acquisition and the reasons that make it impossible to prove the same by normal channels, with the reconstitution of successive sales or other proof of the acquisition.

law nr. 116/2008).

1. Sale of the undivided estate,
2. Waiver of the succession,
3. Partition.

Authenticated documents can be made by notaries and also by the entities empowered to do so under Article 38 of Decree-law nr. 76-A/2006 dated 29 March: e.g. Registrars, Lawyers, *Solicitadores*²³² and certain Chambers of Commerce and Industry.²³³ For a privately drafted document to become an authenticated document the parties need to confirm its content in front of the notary or other legally competent entity, and several legal formalities typical of notarial acts need to be respected (see Articles 150 and 151 of the Notarial Code).²³⁴ Moreover the document needs to be registered and *Portaria* nr. 657-B/2006 dated 29 June governs the obligatory electronic registration of such documents and auxiliary documents when made by lawyers, solicitors, registrars and Chambers of Commerce under Decree-law nr. 76-A/2006. Furthermore, Decree-law nr. 116/2008 dated 4 July²³⁵ created a specific regime for authenticated documents, which enables these documents to also be used for acts subject to registration in the land registry (Articles 22 to 25 of Decree-law nr. 116/2008).²³⁶ However, additional formalities²³⁷ need to be complied with in these cases, which are similar to the ones applied to the notarial authentic document that used to be the basis of these acts – *escritura pública*. In particular, the validity of the authentication is dependent on the electronic deposit of the document and respective auxiliary documents in an electronic IT platform under the control of the Institute of Registries and Notaries (implemented by *Portaria* nr. 1535/2008 dated 30 December²³⁸). This deposit has to be done on the same day as the authentication²³⁹ and replaces the further need for registration under Decree-law nr. 76-A/2006.

These documents are frequently used in the context of a succession, where *solicitadores* and lawyers often have recourse to them to make undisputed partition of assets or simply in the closed will approved by a notary.²⁴⁰ The Notarial Code not only applies to documents authenticated by notaries but also to those authenticated by lawyers, *solicitadores*, Chambers of Commerce and Registrars under Decree-law nr. 76-A/2006,

²³² *Solicitadores* are independent professionals with a degree in law or *solicitadoria* that provide legal advice and legal representation in court (in proceedings not subject to appeal). They may also provide legal representation outside of court, e.g. before the tax administration or notary offices. They must be registered with the respective professional association.

²³³ As last amended by Decree-law nr. 250/2012 dated 23 November.

²³⁴ The document drafted by the entity in order to authenticate the private document, besides the normal formalities that apply to notarial instruments (i.e. Article 46 Code Notarial – reference to date, hour and place, full name of the public officer and the quality in which he/she has intervened, full identification of the parties, witnesses and other participants (incl. residence), reference to the way the identification has been verified by the officer, mention of any power of attorney or other representation and its verification that corresponds to enough powers for the act at stake, reference to the auxiliary documents that shall be filed/deposited incl. proof of payment of tax with date and number, reference to all documents exhibited with their nature, date, authority and number or code for direct access on-line, reference to the oath of honour of interpreters or translators, that the document has been read, signatures of parties and statement of the officer), has also to contain the reference that the parties have read the document and that this expresses their will and the reference to any amendments, spaces, lines, etc that are in the document.

²³⁵ As last amended by Decree-law nr. 99/2010 dated 2 September.

²³⁶ The concrete scope of this regime and its functioning in practice have given rise to some doubts. For a detailed approach to the subject in general see, Lopes de Figueiredo, *Titulação de Negócios Jurídicos sobre imóveis*, 2ed., Almedina, Coimbra 2014 and Mouteira Guerreiro, *Ensaio sobre a problemática da titulação e do registo à luz do direito português*, Coimbra Editora, Coimbra, 2014.

²³⁷ For an exhaustive and practical explanation of these formalities and the regime of these acts, see Neto Ferreira/Lino da Silva, *A função Notarial dos advogados - Teoria e Prática*, 1.ª ed., Almedina, Coimbra, 2009, p. 65 to 126.

²³⁸ As last amended by *Portaria* nr 283/2013 of 30 August.

²³⁹ Article 7 (1) *Portaria* nr 1535/2008.

²⁴⁰ Practice before the Regulation shows that in certain cases, like the UK, these documents have been accepted while in other countries, like France, there seems to be a tendency to require documents drawn up by notaries.

and the specified regime of Decree-law nr. 116/2008, as these persons or bodies are considered to be special notarial bodies for these purposes (Article 3 CN).

International classification

It is suggested that the definition in Article 3(1)(i) of the EU Succession Regulation can and should encompass both authentic and authenticated documents in Portuguese law. Both types of documentary instrument are registered or registered/deposited; their authenticity relates to the content rather than only the signature; the evidentiary and executory effects are the same for authenticated documents as they are for the domestic concept of authentic instrument drawn up by notaries; and, lawyers, registrars and *solicitadores* have been empowered by law to act as special notarial bodies for those purposes. Finally, each type of legal professional or legal entity is under the disciplinary control of their own professional associations.

The issue with authenticated documents is merely that under the Portuguese Civil Code these documents are not classified or named as authentic instruments. Even if conformity with the law and all other formalities equivalent to the notarial authentic instrument were to be met the instrument would still, under Portuguese law, be called authenticated rather than authentic. Although Portuguese notaries formally consider that authenticated documents, even for the purposes of the EU Succession Regulation, cannot be considered as authentic (despite potentially being subject to the Decree-law nr. 116/2008) this view of the classification issue does not follow from the definition of authentic instruments provided by Article 3(1)(i) of the EU Succession Regulation.

How the Portuguese regime concerning authenticated documents will work in an international situation is not yet clear, in particular as the regime is based on a dematerialised system where documents need to be deposited *on-line* in the relevant platform in order to be valid as authenticated documents, and the *on-line* access through a code replaces the presentation of a physical document for evidentiary purposes (Article 24(5) of Decree-law nr. 116/2008).²⁴¹

Evidentiary effects of domestic authentic instruments in Portuguese law

Under Article 371 of the Civil Code, authentic documents have full evidentiary value as regards the facts they refer to as having been performed by the authority or public officer that made them, as well as the facts they attest to on the basis of the perceptions of that entity. Mere personal opinions of the authority or public officer in question do not benefit from Article 371 and are only taken into consideration as elements subject to the free assessment of the judge.

Importantly, if the authentic or authenticated document contains words that have been corrected, truncated or written over erasures or between the lines, without due acknowledgment of that fact, the judge is then empowered by this fact to freely assess the extent to which the external defects of the document exclude or reduce its evidentiary value under Article 371.

Article 371 of the Civil Code and its relationship to the evidentiary effects of authentic instruments have each been clarified by Pereira Rodrigues in the following terms:²⁴²

²⁴¹ For the resolution of doubts that this regime may raise even in internal situations see several opinions of the Institute of Registries and Notaries, e.g. Opinion CN 29/2010 SJC-CT on whether a certificate in paper can be made by the registries of an authenticated document deposited in the IT platform, Opinion R.P. 67/2009 SJC-CT on the distinction between *escritura pública* and authenticated document, Opinion 96/2010 on the interpretation of Article 4(1) of Portaria nr. 1535/2008 on which auxiliary documents need to be deposited in the IT platform.

²⁴² Pereira Rodrigues, *Os meios de prova em processo civil*, Almedina, Coimbra, 2015, p. 100 to 101.

"This provision entails that the evidentiary value of an authentic document does not cover the entire content of that document. Indeed, such value is limited to the facts the document refers to as having been performed by its author (the authority or public officer) and to the facts which are recorded in it and attested to as having been perceived by the author during that act."

Thus, if the notary attests to the fact that he/she carried out a certain notarial act and that the parties made certain declarations before him or her, what the document proves with full evidentiary value is that the act occurred and that the people who are identified took part in it and made the statements included in the public instrument. The document does not prove the truthfulness of those statements, neither that the will of the parties was not vitiated by error, intent to deceive or coercion, nor that the agreement was not concluded with simulation or mental reservation.

Despite Article 394 of the Civil Code providing generally that testimony is not possible against the content of authentic and authenticated documents, recent case law from the Portuguese Supreme Court has confirmed that the evidence of witnesses can be used to prove that a matter declared by the parties in the authentic or authenticated document (such as the price of a sale of property) was not in fact truthful.²⁴³

Disputing the validity of the authentic instrument

If an authentic instrument is successfully challenged as to its formal validity/authenticity/*instrumentum* it will lose the evidentiary effects associated with authentic or authenticated documents as public documents. If an authentic instrument is successfully challenged as to the validity of its *negotium*/material validity the instrument itself is valid but its evidentiary meaning will change accordingly and may well be rendered nugatory.

The authenticity of an authentic or authenticated instrument may be challenged in a Portuguese court on the grounds of falsity (Article 372 of the Civil Code). Depending on the nature of the allegation and the findings of the court, the challenge may involve criminal sanctions under Articles 256 and 257 of the Penal Code.

Equally, the making of false declarations to a public official on the basis of which an authentic document is or may be drawn up may also be considered a crime (Article 348-A of the Penal Code). In this case, however, if the parties have made the false declarations that were recorded in the instrument, the alleged falsity does not theoretically affect the authenticity (*instrumentum*) of the authentic document under Article 372 of the Civil Code as, technically, it is not the authenticity of the document that is at stake but rather the truth of the declarations (*negotium*) made by the parties. Obviously if such a challenge to material content succeeds the evidentiary effects and implications of the authentic instrument would be affected on the points demonstrated to be false.

A document is considered false when a fact attested by the authority as having happened did not happen, or an act that the authority attests to having occurred did not take place. It is important to note that if such falsification is evident in the light of the exterior signs of the document, the court may declare it false *ex officio*. Thus if there is a partial or total modification to the body of the actual document, this may be an example of 'documentary falsification'. It is also possible for there to be '*intellectual falsification*' of the document: this occurs when the origin of the document is correct and unchanged

²⁴³ See case-law from the Supreme Court of Justice in the context of a dispute over the price of a contract of sale of property: Supreme Court decision dated 19/04/2005 in proc. 05A416 and Supreme Court decision dated 4/5/2015 in proc. 28247/10.4T2SNT-A-L1.S1, available in Portuguese in:
[http://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/a0a45f98357c588380257e28005f60ef?Open Document](http://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/a0a45f98357c588380257e28005f60ef?OpenDocument)

but the information it contains, considered as a perception of the official authority, does not represent what has happened.²⁴⁴

In either case, when falsity of the document is raised and proven the document loses its probative value and its enforceability as an authentic document. In principle, if the falsity encompasses only part of the document, the parties may make use of the remaining part. Article 447 of the Civil Procedure Code enables the person that presents the document to plead its partial falsity. However, if the content of the document and the part falsified are interdependent, the entire document will have its evidentiary value affected.

Falsity may be argued in declaratory proceedings of simple appreciation (Article 10 of the CPC) or in interlocutory proceedings (Article 446 to 450 of the CPC). It can be raised in enforcement proceedings (Article 450 of the CPC) with the particular effect that until the issue is settled no creditor may be paid without offering a guarantee. If argued in declaratory proceedings the decision may be the basis of an appeal of another decision (*recurso de revisão* – Article 696(b) of the CPC) or special opposition in enforcement proceedings based on a judicial decision (*embargos de executado* – Article 729(1)(b) of the CPC).

Authentic instruments may contain both statements by a public official and also declarations presented by the parties. Despite all efforts and formal requirements designed to avoid this, the declarations made by the parties may be either untrue or inexact in circumstances that allow no possibility for the authority to detect or check their truthfulness. Accordingly, declarations presented by the parties are generally challengeable on the following grounds: 1) Simulation; 2) mental reservation; 3) non-serious declaration; 4) error in the declaration; 5) error in the person or the declaration; 6) error in the motives; 7) fraud; 8) moral coercion; 9) accidental incapacity (See Articles 240 to 257 and 282 of the Civil Code for general declarations and also Articles 2199 to 2203 of the Civil Code for the special regime as regards wills). It should be noted that in these circumstances it is the material validity of the declarations contained in the document (the *negotium*) rather than the authenticity (*instrumentum*) of the document itself that is at stake.²⁴⁵

The use of authentic instruments in domestic Portuguese succession law

Portuguese succession law does not contemplate holographic wills or wills that are privileged in the sense that they do not involve a public authority. Under Portuguese law the will is a formal deed (Article 2204 to 2210 of the CC) requiring the use of the legally prescribed forms in order to be valid. Article 2179 defines a will as the unilateral and revocable act whereby a person disposes of all or part of his/her assets to have effect after death. Wills made by two or more people are not allowed under Portuguese law (Article 2181 of the CC).

Under Portuguese law, the common forms of will are the public will and the closed will. A notary intervenes in the creation of both, albeit in a different way. A public will is written by the notary in his/her official books (*livro de notas*) (Article 2205 of the CC). A closed will is handwritten and signed by the testator or by another person at the testator's request, but must be approved by a notary in order to be valid (Article 2206(1) of the

²⁴⁴ The concept of falsity of the Civil Registry Code is even wider as it encompasses all facts that were registered but did not happen even if they were not under the perception of the authority to verify, for instance the registry of a death that did not actually occur (Article 88(c) CRC). When the documents challenged were at the basis of a registration on the land registry, the interested parties or authorities may request that the challenge of falsity be recorded and it is then communicated to the public prosecutor in order to start proceedings to annul the registration if he/she considers it adequate (Article 16-B CRP).

²⁴⁵ Certain of these cases however may give rise to borderline situations where in practice it may not be a unanimous position on whether an action/incident on falsity may be required.

CC and Article 106(1) of the CN).²⁴⁶ The signature of the testator may only be dispensed with when he/she is unable or does not know how to sign, but in that case the reason for not signing must be specified in the instrument by which the will is approved (Article 2206(2) of the CC). Closed wills may be kept by the testator or by another person or be deposited in a notary office (Article 2209(1) of the CC and Article 109(1) of the CN). Portuguese law also provides for special forms of will e.g. the military will, made before the commander of the unit or force; the maritime will, made before the ship's captain; the will on board an aircraft, made before the aircraft's commander; and the will in a situation of public calamity, made before any notary, judge or priest (Articles 2210 to 2222 of the CC). These special wills may be public or closed in nature, depending on the specific procedure followed. In each case however the commander, captain, judge or priest acts as a special notary body (Article 3 of the CN). The legal effect of these special wills ceases two months after the disappearance of the cause that prevented the use of a normal form of will (Article 2222 of the CC).

International wills made in Portugal pursuant to the Washington Convention²⁴⁷ are also required to be approved by notaries and may also be deposited with a notary (Article 1(a) and Article 2 of Decree-law nr. 177/79 dated 7 June). Article 2223 of the Civil Code requires the will of a Portuguese national drawn up abroad, in accordance with the foreign law, to respect a "solemn form in its making or approval" in order to produce effects in Portugal.²⁴⁸ Commentators have discussed whether this term requires only written form²⁴⁹ or also the intervention of an authority.²⁵⁰ Court decisions are not always convergent, but have recently tended to consider that the intervention of an authority is required.²⁵¹

There are a wide range of uses for authentic and authenticated documents in Portuguese succession law. The following list indicated the documents that are regarded as authentic instruments in matters of succession:

- a) Public Wills written by a notary in his/her official books (*livro de notas*) and are thus authentic documents (Article 2205 of the CC).
- b) Closed wills and international wills are not written by the notary but must later be approved by one; the instruments made by a notary for the purpose of signifying

²⁴⁶ With a closed will the notary must on learning of the death of the testator open the will, verify the state of the will, including any erasure, amendment or other defect and read it out loud in the presence of the interested parties and witnesses. The notary then draws up an authentic document regarding the opening of the will which shall describe all the formalities, the date of death (proven by the death certificate from the registry or of the judicial decision that requested the opening of the will). The will may be opened by the notary *ex-officio* if he/she knows the person died, in which case he/she shall first request the Registries to send him/her a death certificate (*certidão de óbito*) – Article 115 CN.

²⁴⁷ Convention on providing a uniform law on the form of an international will, Washington D.C., 1973.

²⁴⁸ Consular agents can also make wills for Portuguese citizens abroad. Consular agents are considered special notary bodies for this purpose and can perform notarial acts relating to Portuguese citizens who are abroad to produce effects in Portugal (Article 3(1)(a) CN and Article 55 of the Consular Regulation, adopted by Decree-law nr. 71/2009 dated 31 March). They are also the authorities designated to approve international wills abroad (Article 1(b) of Decree-law nr. 177/79).

²⁴⁹ Baptista Machado, *Lições de Direito Internacional Privado*, Almedina, Coimbra, 3.^a ed. reprinted, 1995, p.451.

²⁵⁰ Guilherme Oliveira, *Temas de Direito da Família*, "Testamento Ológrafo – Acórdão do Supremo Tribunal de Justiça, de 12 de Maio de 1992 (Anotação)", Coimbra editora, 1999, p. 180/182; Inocêncio Galvão Telles, *Direito das Sucessões - Noções Fundamentais*, 6.^a ed., Coimbra editora, 1996, p. 332/333; Lima Pinheiro, *Direito Internacional Privado – Parte Especial*, Almedina, Coimbra, 1999, p.153/154.

²⁵¹ In favour of the reasoning that "solemn form" means written form, see Decision from the Supreme Court dated 12 May 1992, published in *Revista de legislação e jurisprudência*, Ano 125, nr. 3823, Coimbra editora, p.309-314. Requiring intervention of an authority, see, Decision from the Appeal Court of Porto dated 23 October 1997, in *Colectânea de Jurisprudência*, 1997, 4.^º, 224 and Supreme Court decision dated 18 June 2013, available in Portuguese in:

[http://www.dksi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/1f45a2dd217e4c9b80257b8e004971df?Open Document](http://www.dksi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/1f45a2dd217e4c9b80257b8e004971df?OpenDocument)

- their approval and opening the will are authentic documents, as well as any express revocation (Article 2206 of the CC and Articles 106 to 115 of the CN).
- c) The waiver of the succession may be contained in an authentic document – a *escritura pública* – or in an authenticated document (Article 2126 via Article 2063 of the CC) if the estate encompasses immovable property.
 - d) In exceptional cases agreements as to succession are allowed if contained in a prenuptial agreement. The prenuptial agreement takes the form of an authentic document (Articles 1700 and 1710 of the CC and 189 of the CRC) done by the notary or directly in the civil registry. It is registered together with the marriage (Article 190 CRC).
 - e) The certificate of heirs is normally contained in an authentic document made by a notary or made by a civil registry official but may also be contained in a judicial decision if proceedings are pending (Article 82 to 87 of the CN; Article 24 of the Law on Inventory Proceedings; Articles 351 to 357 of the CPC; Articles 210-A to 210-Q of the CRC).
 - f) The certificate of legatees (which is only possible in some cases, for example when there are no heirs and the estate is entirely divided into legacies) may be contained in an authentic document made by a notary or in a document made by the civil registry official (Article 88 of the CN; Article 210-P of the CRC).
 - g) Partition can be made by way of a judicial decision and in undisputed cases it may also be made by way of an authentic document made by a notary or of a document of a civil registry official if there are assets subject to registration (Article 2102 of the CC; Article 57 to 81 of the Law on Inventory Proceedings; Articles 210-A to 210-N and 210-R of the CRC). Finally, it can be made by way of a document authenticated by a lawyer or a *solicitador* (Article 22(f) of Decree-law nr. 116/2008) even if the estate includes immovable property, as explained above.

The Private International Law implications of the European Union's Succession Regulation 650/2012 and Implementing Regulation 1329/2014

The European Union Succession Regulation and its Implementing Regulation raise two distinct Private International Law issues for Portugal as an EU Member State: first, the extent of the obligations imposed by these Regulations on Portugal as a Member State of origin concerning its domestically created succession authentic instruments; and, second, the extent of the obligations these Regulations impose on Portugal as a Member State addressed concerning its duties relating to incoming foreign succession authentic instruments. The comments that follow consider each position.

Portugal is the Member State of origin: obligations concerning domestic succession authentic instruments

Article 59(1) of the European Union Succession Regulation allows, but does not require, '*a person*' who wishes to use a succession authentic instrument in another Member State to ask the authority who established it, i.e. the notary who drew it up or his substitute/successor, to issue an attestation concerning that authentic instrument on the standard form provided by Annex 2 Form II of Implementing Regulation 1329/2014. It is unclear whether or not such a request must be complied with if it is received from a person not deemed by the notary to be '*an interested party*'. The substitution of the phrase '*a person*' in Article 59 for '*interested party*' in Article 60 could be understood to indicate that there is no requirement in the EU Succession Regulation for the applicant seeking only cross-border acceptance to demonstrate what would otherwise be domestically regarded as a '*legitimate interest*' when requesting the attestation from the notary. It seems unlikely that this will be a problem in Portugal, as the prevailing view appears to be that a wide range of potential and legitimate applicants is already

possible.²⁵² The EU Succession Regulation and Implementing Regulation do not expressly contemplate the possibility that a request under Article 59 may be refused. It is however possible to contrast the applicant 'may ask' of Article 59 with 'the authority shall' in Article 60(2) and to infer from the different wording that the notary (or other public authority) is only actually obliged to accede to the applicant's request when it concerns enforcement under Article 60. This result however seems inconsistent with Recitals 22, 59 and 60 of the EU Succession Regulation and with one of its underlying purposes, i.e. to facilitate the cross-border transmission of authentic instruments and their legal effects. In circumstances where both the acceptance and the enforcement of the authentic instrument may be sought the problem may be avoided, assuming the notary to be willing to provide information concerning both Article 59 and Article 60, by the applicant routinely requesting an attestation concerning *both* enforcement and acceptance.

It should be particularly noted that in the event that an authentic or authenticated document is created by a notary in the course of partition proceedings conducted before him, it will be necessary for the applicant to apply via the **Annex 1 Form I form of Regulation 1329/2014** for an attestation relating to a **decision** in a matter of succession: when the Portuguese notary so acts in partition proceedings to produce a document setting out the partition he does so in a judicial capacity and the partition document he creates is subject to judicial approval.²⁵³

Article 60 of Regulation 650/2012 requires that, provided that to so declare would not be manifestly contrary to Portuguese public policy, the authorities in the Member State addressed (Portugal) *must* on application by an interested person declare a foreign succession authentic instrument that is enforceable in its Member State of origin to also be enforceable in their Member State. A Portuguese notary may thus be in receipt of a request for such an attestation, again under Annex 2 Form II of Implementing Regulation 1329/2014.²⁵⁴ This standard form allows for an attestation that concerns only 'acceptance', via Article 59, or 'enforcement' via Article 60, or an attestation that jointly concerns acceptance and enforcement of the authentic instrument depending upon the boxes ticked by the Portuguese notary.²⁵⁵

The Portuguese notary in receipt of the request to provide a completed Annex 2 Form II attestation concerning a domestic succession authentic instrument is asked to indicate at points 4.2 to 4.2.1.1.7 of the standard form what he believes its domestic evidentiary effects to be. Though the answers will vary depending upon the specific verifications contained in the succession authentic instrument at issue, it is broadly conceivable that points 4.2.1.1.1 to 4.2.1.1.7 could be expected to be completed as follows:

4.2.1.1.1 - The date the authentic instrument was drawn up:

A domestic authentic document as well as an authenticated document constitute proof with full evidential value on this matter, see Article 371 of the CC.

4.2.1.1.2 - The place where the authentic instrument was drawn up:

A domestic authentic document as well as a domestically notarially authenticated document will constitute proof with full evidential value on this matter, see Article 371 of the CC.

²⁵² See the persons listed by Annex 1 Form I of EU Implementing Regulation 1329/2014 at 4.3.1.7. It is also possible that a creditor of the estate or of a person who has refused the inheritance may have a legitimate interest to apply for an attestation under either Annex 1 Form I or Annex 2 Form II.

²⁵³ Articles 57–69 of the Law on Inventory Proceedings (Law nr. 23/2013 dated 5 March, and Portaria nr. 278/2013 dated 26 August as amended by Portaria nr. 46/2015 dated 23 February).

²⁵⁴ Please note that, as discussed above, if the application is in connection with an authentic or authenticated document concerning partition proceedings the application is in connection with a judicial decision and hence involves Annex 1 Form I of EU Implementing Regulation 1329/2014.

²⁵⁵ For Article 59 acceptance tick 'yes' in box 4.1.1; for Article 60 enforcement tick 'yes' in box 6.1.1. To dispense with either option tick 'no' in box 4.1.2. or 6.1.2 as appropriate.

4.2.1.1.3 - The origin of the signatures from the parties of the authentic instrument:

A domestic authentic document as well as an authenticated document will constitute proof with full evidential value on this matter, see Article 371 of the CC.

4.2.1.1.4 - The content of the declarations of the parties:

A domestic authentic instrument as well as an authenticated document will constitute proof with full evidential value on this matter as regards what the parties actually stated, but not whether or not their statements are true, see Article 371 of the CC.

4.2.1.1.5 - The facts that the authority declares as having been verified in its presence:

A domestic authentic document as well as an authenticated document may – depending on what the authority decides to verify and does then verify as a fact – constitute proof with full evidential value on this specific matter, see Article 371 of the CC.

4.2.1.1.6 - The actions which the authority declares to have carried out:

A domestic authentic document as well as an authenticated document will constitute proof with full evidential value on this matter, see Article 371 of the CC.

4.2.1.1.7 - Other: (please indicate any other evidentiary effect that a domestic authentic instrument could produce)

According to the advice received there are no further evidentiary effects not already covered by points 4.2.1.1.1 – 4.2.1.1.6: it is however conceivable that additional information could be presented in this box.

Portugal is the Member State addressed: foreign succession authentic instruments

The EU Succession Regulation requires that, subject to public policy exceptions, Portuguese authorities must **accept** and, or, **enforce** foreign authentic instruments in matters of succession received from other EU Member States bound by the Succession Regulation.

The **acceptance** of a foreign succession authentic instrument produced in Portugal is governed by Article 59 and the enforcement of such an authentic instrument is governed by Article 60 of the Succession Regulation. Acceptance requires that, provided that to do so would not be manifestly contrary to Portuguese domestic public policy, the authorities in Portugal (as the Member State addressed) *must* grant the foreign succession authentic instrument the same (or most comparable) evidentiary effects as it would enjoy in its own Member State of origin.

To determine the nature of the evidentiary effects that would be associated with that authentic instrument in the Member State of origin, reference should be made to any Annex 2 Form II form that may accompany the foreign authentic instrument, especially to parts 4.2.1.1.1 – 4.2.1.1.7 of any such form. It must however be noted that the use of the EU Implementing Regulation's Annex 2 form does not appear to be obligatory. The obligation imposed by Article 59 of the EU Succession Regulation on the Member State addressed to accept a succession authentic instrument does not require or depend upon the use or supply of the Annex 2 form. A succession authentic instrument received from a Member State of origin in accordance with the provisions of the EU Succession Regulation must still be accepted, within the meaning of Article 59 of Regulation 650/2012, even if no Annex 2 Form II form is provided or if the Annex 2 form provided is not fully or properly completed. At present there are no provisions in Portuguese law that specifically deal with the acceptance of a foreign authentic instrument concerning a matter of succession under the Succession Regulation. It must however be noted that Article 365 of the Civil Code provides that authentic documents drawn up in accordance

with a foreign country's law can possess the same probative force as documents of the same nature drawn up in Portugal.²⁵⁶

The **enforcement** of a foreign authentic instrument via Article 60 of Regulation 650/2012 requires that, provided that to do so would not be manifestly contrary to Portuguese public policy, the authorities in the Member State addressed (Portugal) must on application by an interested person declare enforceable a foreign succession authentic instrument that is enforceable in its Member State of origin. We are not aware of any special provision in the law of Croatia that specifically deals with the actual enforcement of a foreign authentic instrument after it has been declared enforceable (differently from the actual enforcement of a foreign judgment that has been declared enforceable) in accordance with the procedure laid down in Articles 45 to 58 of the EU Succession Regulation as required by Article 60 thereof.

Portuguese public policy

The EU Succession Regulation allows a public policy defence in various contexts including with reference to authentic instruments under Articles 59 and 60. To invoke the public policy exception in the context of Article 59, and by so doing to justify a refusal of acceptance for that foreign authentic instrument, it must be the case that the *granting of the same or most comparable evidentiary effects* to the foreign authentic instrument would be manifestly contrary to Portuguese public policy. To invoke the public policy exception in the context of Article 60, to justify a refusal of a declaration of enforceability for the foreign authentic instrument, it must be that the *granting of the declaration of enforceability* for the foreign authentic instrument would be manifestly contrary to Portuguese public policy. Of course this public policy exception should be construed narrowly and it is envisaged that it will rarely apply. As is made plain by Recital 58 of the EU Succession Regulation, public policy is not to be applied in a manner that is discriminatory or otherwise contrary to the European Union's Charter of Fundamental Rights. Equally however Recital 26 of Regulation 650/2012 indicates that the Regulation does not prevent a court from applying mechanisms designed to tackle the evasion of the law, such as *fraude à la loi* in the context of Private International Law. However, the substantive provisions of the Regulation do not expressly empower national courts to prevent evasion of the law (including *fraude à la loi*). It would seem that the only positive basis for doing so under the Regulation is to regard such evasion of the law to be contrary to public policy unless the law being evaded is one of the "special rules" of the forum concerning certain assets that is applicable irrespective of the law applicable to the succession (see Article 30 of the EU Succession Regulation).

Under Article 2186 of the Portuguese Civil Code, any disposition of a will with an aim contrary to public policy is null and void. There is however also a specific domestic mechanism in Portuguese law that is designed to protect the legitimate portion by reducing the deceased's dispositions, via inventory proceedings, to the extent necessary to protect the legitimate portion (Article 2168 of the CC – *redução de liberalidades inoficiosas*). If this domestic concept is applied, it does not involve an annulment or a declaration of nullity. However, any attempt to disrespect the legitimate portion of the necessary heirs through a deed not subject to this mechanism may be subject to annulment/declaration of nullity under general terms. The regime of reduction/clawback (Article 2168 of the CC), as well as collation (Article 2104 of the CC), is only applicable to gifts and does not apply to situations where a price is paid. However, in order to avoid simulation, sales to children without the agreement of all the others may be subject to annulment (Article 877 of the CC). The necessary heirs also enjoy procedural legitimacy to act during the life-time of the (future) *de cuius* to plead simulation against any sham or pretence sale contract that is made with the intention of creating a prejudice to them

²⁵⁶ Legalisation could be requested if there were grounds for doubts regarding the authenticity of the document but case law shows that if the evidence taken together demonstrates authenticity there is no overriding need for legalisation. Of course legalisation is not permitted under the EU Succession Regulation, see Article 74.

(Article 242(2) of the CC). In exceptional cases the court may annul the deed making recourse to the general rule of morally offensive contracts or contracts against public policy (Article 280(2) of the CC).²⁵⁷

As regards the possible application of the concept of public policy in an international context, one should note that the Supreme Court in a decision dated 18/06/2013²⁵⁸ considered that the application to a will of a foreign law that established a different share for the legitimate portion of certain heirs (difference was between $\frac{3}{4}$ and $\frac{1}{2}$) would **not** constitute a violation of Portuguese public policy. In that case, however, despite the reference in the will to a foreign law, the applicable law under the Portuguese conflict of law rules was held to be Portuguese.

Legal doctrine is clear in considering that the recourse to the public policy exception should depend on the strength of the connection that the case may have with the Portuguese forum.²⁵⁹ In practice courts follow this approach, as exemplified by the Supreme Court of Justice's Decision dated 27 September 1994 (proc. 085405) in a case regarding applicable law. In that case an Englishman had left by will his estate entirely to his wife. Although the applicable law was English law the children wanted to be recognised as heirs under Portuguese law but the court considered that,

"even if one were to consider that the children's reserved share is a principle of the international public policy, the case under analysis has such a thin link with the Portuguese legal order that the intervention of this exception is not justified".²⁶⁰

The protection of the children's reserved share was at stake in another case where the spouses, who were both Portuguese nationals but were habitually resident in Luxembourg, had agreed that on the death of one the other would inherit the totality of the assets in accordance with the law of Luxembourg. The permissibility of this arrangement was discussed in inventory proceedings that took place in Portugal, where assets were located (other assets were located in Luxembourg). The Portuguese Supreme Court of Justice in a Decision dated 23/10/2008 noted the stronger connection to the forum in this case and applied the public policy exception to safeguard the *legitima portio* of the children.²⁶¹

²⁵⁷ See decision of the Appeal Court of Oporto dated 5 November 2010 Decision nr. TRP_2135/04.1TBPVZ.P1 dated 11-05-2010. The children of A (deceased) and B (married in total communion), in the context of the partition of the assets of the deceased mother (A) actually included all patrimony owned in common by the couple and divided it among them. In practice it meant that the deed divided also all the assets that the father B (87 years old) owned. They paid B a ridiculously low amount of money that did not correspond at all to the value of the assets. The transaction was made through an authentic instrument (*escritura pública*) but the children intentionally avoided informing the notary that B had had another child Z from a different mother. Z did not participate in or authorise the deed. Upon the death of B there were no assets to be inherited by any of his necessary heirs. The Appeal Court concluded that the transaction affected the legitimate portion of Z and was against public policy (Article 280(2) of the CC) under the general rules on contracts and annulled it. One should note however that the Court seems to have given great importance to the entirety of the circumstances, including the age of the father (he had died 3 years after the deed), the ridiculous amount of money given to the father for all his property, and the intentional omission to disclose to the notary the existence of another heir by the other children.

²⁵⁸ Supreme Court decision in proc. 832/07.9TBVVD.L2.S2.

²⁵⁹ Marques dos Santos, "Revisão e confirmação de sentenças estrangeiras no novo Código de Processo Civil de 1997 (Alterações ao regime anterior)", in *Estudos de Direito Internacional Privado e de Direito Processual Civil Internacional*, Almedina, Coimbra, 1998, p. 128; Ferrer Correia, *Lições de Direito Internacional Privado I*, Almedina, Coimbra, 2000, p. 459; Lima Pinheiro, *Direito Internacional Privado, Vol. III Competência Internacional e reconhecimento de Decisões Estrangeiras*, 2.ª ed., Almedina, Coimbra, 2012, p. 521 "What is decisive to the intensity of the action of the international public policy reservation is the degree of connection between the situation and the state of the forum(...)".

²⁶⁰ *Colectânea de Jurisprudência, Acórdãos do Supremo Tribunal de Justiça, Ano II, Tomo III, 1994*, págs. 71-73.

²⁶¹ Available in Portuguese in

<http://www.dgsi.pt/jsti.nsf/954f0ce6ad9dd8b980256b5f003fa814/892882c56a02f154802574f1003db347?OpenDocument>

Although often the pleading by the parties of the public policy exception is not accepted by the court, there is one recent example of its application in the context of recognition and enforcement of a foreign judgment on matters of succession in the decision dated 15 January 2015 of the Supreme Court of Justice.²⁶² In this case AA, a Brazilian national, asked for the confirmation of a Brazilian foreign judgment that had named her as the only heir of MM, a Portuguese national, that died intestate, without ascendants or descendants but with 8 brothers, on the basis that AA and MM were living in a registered *de facto* union - a legal institution provided for by Article 1723 of the Brazilian Civil Code. The Supreme Court of Justice refused to recognise the Brazilian foreign judgment on the grounds that the exclusion of the brothers of the *de cuius* as heirs of MM was, in this concrete case, manifestly incompatible with the principles of public policy (*ordre public*) of the Portuguese State, namely the protection of the family bond (*lato sensu*) and the principle of equality (Articles 36 and 13 of the Portuguese Constitution).

Incompatible Authentic Instruments

Recital 66 of the EU Succession Regulation envisages the possibility of 'an authority' being presented with incompatible authentic instruments.²⁶³ The solutions suggested by the Recital are to consider priority and the circumstances of the particular case and then, if this has not resolved the incompatibility, to resort to a court with direct or incidental jurisdiction under the Succession Regulation. The earlier approach of the Portuguese legal system when there was a conflict between different authentic instruments was set out in case law – there are no legislative provisions on this point – from 9 February 2012 where a party who wanted to prove entitlement to pension rights had submitted three contradictory certificates relating to the contributions he had made to the pension scheme. These contradictory documents were authentic instruments delivered by public authorities from the same foreign State. The Central Administrative Court of the South stated that facing contradictory authentic instruments a court should not use one if it is not proven from different means that the facts contained in that document correspond to the reality. As such the court should first try to find out the truth by ordering *ex officio* all required diligences in accordance with our procedural law under Article 411 of the CCP (at the time of the judgment Article 265(3)). Only when after the taking and presentation of evidence the judge still remains with an irresolvable doubt he may have recourse to deciding the issue against the party that had to prove the fact, in accordance with Article 414 of the CPC (at the time of the judgment Article 516).²⁶⁴

²⁶² Available in Portuguese in

[http://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/6e40177a3d076f1e80257dce005194df?Open Document](http://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/6e40177a3d076f1e80257dce005194df?OpenDocument)

²⁶³ Recital 66: Should an authority, in the application of this Regulation, be presented with two incompatible authentic instruments, it should assess the question as to which authentic instrument, if any, should be given priority, taking into account the circumstances of the particular case. Where it is not clear from those circumstances which authentic instrument, if any, should be given priority, the question should be determined by the courts having jurisdiction under this Regulation, or, where the question is raised as an incidental question in the course of proceedings, by the court seized of those proceedings. In the event of incompatibility between an authentic instrument and a decision, regard should be had to the grounds of non-recognition of decisions under this Regulation.

²⁶⁴ Available, in Portuguese, in

[http://www.dgsi.pt/jtca.nsf/170589492546a7fb802575c3004c6d7d/5faf1ca4cfe27c8a802579ac0031b4ce?Open Document](http://www.dgsi.pt/jtca.nsf/170589492546a7fb802575c3004c6d7d/5faf1ca4cfe27c8a802579ac0031b4ce?OpenDocument)

ROMANIA

The Romanian legal system

The Romanian legal system is unitary, and is a member of the civil law family of legal systems. It was, for the most part, inspired (as far as authentic instruments are concerned) by the French Civil Code, and numerous provisions constitute adaptations based on the current Civil Code of Quebec.

The substantive legal norms concerning succession (the law of succession) are located in the Romanian Civil Code.²⁶⁵ Title I. of Book IV. on the general rules concerning succession, Title II. on intestacy, Title III. on testate succession, donations, and the legal reserve of certain heirs and finally Title IV. on the transmission of the estate.

Act no. 71/2011²⁶⁶ contains provisions at Articles 91--98 on the entry into force of the Romanian Civil Code in the field of succession, resolving the conflict of laws in time between the Romanian Civil Code now in force and the previous Romanian Civil Code of 1864.

The procedural legal norms regarding succession are located in several pieces of legislation. Act no. 36/1995²⁶⁷ deals with the non-contentious procedure of succession, carried out by public notaries. This act, in Chapter V., contains the rules for all procedures undertaken by a notary, and Section 3 of this chapter provides the rules for the notarial procedure of succession.

These rules are reproduced in greater detail and complemented by Ministry of Justice Order no. 2333 of the 24th of July 2013,²⁶⁸ Chapter IV. Section 4.

It is important to note that the creation of authentic instruments with effects on succession may also occur outside the scope of the procedural norms of succession.²⁶⁹

Any litigation arising as a result of succession, as well as the litigious procedure for the devolution of succession, is governed by the Code of Civil Procedure.²⁷⁰ We are not aware of any English language version of these provisions or of any official website containing the relevant texts.

The Ministry of Justice has published for public debate a bill (draft legislation), by which it proposes to amend Government Emergency Ordinance no. 119/2006 regarding certain measures necessary to implement community regulations.²⁷¹ The draft, as of the 30th of August 2015, has not yet been forwarded to the legislature.²⁷²

The concept of an authentic instrument in Romania

The Romanian legal system makes extensive use of authentic instruments and takes particular care to ensure that the rights of the person facing the enforcement of an authentic instrument, assuming enforcement to be conceivable from the terms of the

²⁶⁵ Act no. 287 from the 17th of July 2009 – republished in consolidated form in the Romanian Official Monitor Part I. issue 505/15.07.2011, in force as of the 10 October 2011) Book IV. "Concerning succession and liberalities".

²⁶⁶ Published in issue 409/10.06.2011. of Part I. the Romanian Official Monitor.

²⁶⁷ Consolidated and republished in issue 444/18.06.2014. Part I. of the Romanian Official Monitor.

²⁶⁸ Published in issue 479/01.08.2013. Part I. of the Romanian Official Monitor.

²⁶⁹ The creation and authentication of last wills and testaments is regulated by Chapter V. Section 2 of Act no. 36/1995 and Chapter IV. Section 3 of Ministry of Justice Order 2333/2013.

²⁷⁰ Act no. 134/2010, most recently consolidated and republished in issue 247/10.04.2015. of the Romanian Official Monitor.

²⁷¹ Initially published in issue 1036/28.12.2006. of the Romanian Official Monitor.

²⁷² The draft legislation can be viewed on the following hyperlink (Romanian), leading to the website of the Ministry of Justice: <http://www.just.ro/LinkClick.aspx?fileticket=hvXmrLpqI0o%3D&tabid=93>

instrument, are not infringed. The creditor seeking enforcement must first demonstrate to the court that he has a formally valid authentic instrument which it may then properly stamp to allow enforcement to proceed; further, the party enforcing the authentic instrument must do so in a proper manner that respects the 'debtor's' rights.

The legal provisions concerning the definition, evidentiary force and the conditions in which an authentic instrument can be rendered null and void can be found mainly in Articles 269-271 of the Romanian Code of Civil Procedure.²⁷³ The potential for the direct enforcement of authentic instruments **after securing the necessary approval from the court to proceed to enforcement** is provided by Act 134/2010, Article 638(1).

If, as is often the case, Romanian law indicates that authentic form is a pre-condition of validity, a transaction may only be carried out by an authentic instrument drafted by a notary: Act 36/1995, Article 78(1). Numerous transactions can only be validly carried out under Romanian law by using an authentic instrument. By way of illustrative and non-exhaustive example, the Civil Code (Act no. 287/2009) requires that if the following transactions are to be carried out validly, an authentic instrument must be used:

- Marriage contracts, see Article 330,
- Transactions involving registered immovable property rights see Articles 589, 885(2), 888, 889(1),
- Any agreement involving immovable property, see Articles 672 and 680(2),
- Fiduciary contracts, see Article 774,
- Contracts of donation, see Article 1011,
- The sale of an entire estate resulting from succession, see Article 1747,
- Articles of incorporation when one of the members' contribution is an immovable see Article 1883(2),
- Personal care agreements, see Article 2255,
- Mortgage contracts pertaining to immovable property, see Article 2378 (1)

Usually *only* notaries may create authentic instruments concerning private law transactions. It is however exceptionally possible, if observing an authentic form is *not* a pre-condition of validity and the use of an authentic instrument is desired by the parties, that the parties *themselves* may draw up the instrument for the notary to then authenticate (after first having verified that it respects all necessary legal conditions).

Evidentiary effects of domestic authentic instruments in Romanian law

Certain aspects of the authentic instruments involved in private law transactions benefit from what the Romanian legal system describes as "**full**" **evidential value**: see Article 270(1) of the Code of Civil Procedure (Act 134/2010). This means that on these aspects of evidence an authentic instrument definitively proves many parts of the transaction it is used to record (e.g. the identity of the parties; their consent as to the content of the instrument; their signatures and the date of the instrument – see Article 269(1) sentence II of the Code of Civil Procedure).

Such an authentic instrument is also regarded as fully proving certain facts that the notary is specifically empowered by the legislation to personally ascertain by his own senses while he engages with the formal conditions imposed and required by the law in drawing up the authentic instrument. If the notary records any of the facts enumerated by Article 99(2) of Act 36/1995,²⁷⁴ these facts will also have **full evidential value** concerning this aspect of the content of an authentic instrument. The facts at issue are exhaustively set out by Article 99(2) of Act no. 36/1995 as the following and only the following:

²⁷³ See Act no. 134/2010, in force since 15 February 2013, consolidated and republished in issue 247/10.04.2015. of the Romanian Official Monitor.

²⁷⁴ <http://lege5.ro/Gratuit/qm4tsmtgy/legea-notarilor-publici-si-a-activitatii-notariale-nr-36-1995>

- the personal presence of the parties **and** of other persons who participated at the authentication procedure **and** the fact that they were all identified;
- the time when **and** place where the authentic instrument was drawn up;
- the expression of consent of the parties (*to the legal act undertaken*).

When an aspect of an authentic instrument benefits from such "**full" evidential value**", this proof exists against any person (parties, or third persons), **until it is proven that the authentic instrument itself was forged, falsified or was authenticated invalidly** because of a breach of legal formalities. Unless and until this should occur, no evidence to the contrary is admissible on any point benefitting from "full" evidential value. To introduce contrary evidence concerning a matter with full evidential value it is thus first necessary to 'defame' the authentic instrument by **proving** – not merely *alleging* – that it was forged or false on the matter at issue, or to prove that it is otherwise formally defective, to render it null and void as an authentic isntrument.

Article 99(3) of Act no. 36/1995 deals with the other statements made by the parties relating to the transaction that do not fall within the exhaustive list in Article 99(2) but that still have been ascertained by the notary and are included in the authentic instrument. These other statements **do not** have "full" evidential value (see also Article 270 of the Code of Civil Procedure) but are **presumed to be accurate** until **proof to the contrary is provided**. According to Article 270(2) of the Code of Civil Procedure, such statements do constitute proof between the parties themselves, and with any third party, *until* proof to the contrary is provided. It follows that evidence to the contrary **is** admissible against these Article 99(3) assertions/statements relating to the transaction by the parties, as long as other Romanian rules on admissibility (such as the prohibition of proof by witness deposition against written evidence) do not prevent such evidence from being adduced.

Miscellaneous assertions by the parties contained in the authentic instrument that do not relate to the transaction conducted have **no special evidential value** at all apart from absolving the parties from the limitations imposed by law (when claims are valued over 250 lei) on proof by means of a witness testimony.

The potential enforceability of the **content** of an authentic instrument is derived from Article 639(1) of the Code of Civil Procedure which provides that any authentic instrument ascertaining the existence of an obligation, and which also determines the object of that obligation (or at least renders it possible to determine it) can be directly enforced from the date that performance is due or the benefit of the term is forfeited, with no need for prior judicial procedure to ascertain the existence or object of that obligation (see also Article 663(2)–(4) of the Code of Civil Procedure and Article 100 of Act no. 36/1995).

An authentic instrument can only become directly enforceable if, after having been submitted to a Romanian court, a court official, after checking and approving its apparent authenticity, stamps it with an **executory formula** to signify that actual enforcement may proceed.²⁷⁵ This administrative process occurs without a hearing and without the knowledge of the debtor. Assuming the executory formula is granted, the application of the court's stamp allows a bailiff to proceed to the actual enforcement of that authentic instrument.

²⁷⁵ See Act 134/2010 Article 641(3). In this procedure the court only checks if the instrument is an authentic instrument (as provided by law) and, if issued by a notary, that it bears the standard formula of authentication which must be used by the notary. The inspection is only (and may only be) a *prima facie* examination of the instrument.

Disputing the validity of the authentic instrument

If an authentic instrument is successfully challenged as to its authenticity/formal validity *instrumentum* it will lose the evidentiary effects associated with authentic (or authenticated) documents as a public document. If an authentic instrument is successfully challenged as to the validity of its *negotium* material validity the instrument itself may remain technically valid but its evidentiary meaning will change accordingly and may well be rendered nugatory on the points successfully challenged.

The authenticity of the instrument may be challenged in court proceedings whether by defending a claim in general litigious procedure or by bringing a claim in the form of a criminal complaint to show that the authentic instrument was forged or false. The burden of proof of forgery or falsehood lies upon the person who alleges the defects. This procedure is common to all authentic instruments. Alternatively, Article 271(1) of the Code of Civil Procedure declares an authentic instrument to be null and void if it is drawn up in breach of the procedure prescribed for its validity, or is drawn up by a person who should not act in the particular circumstances (for example due to conflict of interests affecting the notary), or is drawn up by a person who lacks the necessary jurisdiction or exceeds his jurisdiction, unless the law provides otherwise.²⁷⁶ A challenge as to formal validity can be brought in court, either as a separate claim, in general procedure or a defence against the claims of another; again the burden of proof is with the party alleging the defect. Such challenges, if successful, will deprive the authentic instrument of all evidentiary value, evidentiary effect, and enforceability. If the transaction is one that requires the use of an authentic form for its validity, it will thus be null and void. If the validity of the transaction not depend upon the use of an authentic form, the evidentiary value of the hitherto authentic instrument will be reduced to that of a simple written instrument, without any of the special evidentiary effects or direct enforcement possibilities of an authentic instrument.

The material validity of the transaction can be challenged by the same means as the authenticity of the instrument in any case in which an authentic instrument is legally required for the material validity of the underlying transaction. Even however if the authentic instrument is formally valid, the material validity of the transaction (including any legal act or legal relationship it contains) can still be challenged, for reasons of:

- error,
- fraud,
- coercion,
- lesion beyond moiety ("laesio enormis"),
- lack of civil capacity of either party,
- the object or cause /"causa" of the transaction is contrary to Romanian law
- the transaction is contrary to Romanian public policy / morality.

It is important to note that these challenges do not question the authenticity of the instrument, but only question its **material validity**. Of course, such material challenges may only be based on admissible evidence (i.e. concerning facts for which proof is permitted). If a fact is one that was recorded in the authentic instrument and benefits from 'full proof', it can only be disputed once the authentic instrument has been annulled on grounds of forgery or falsification (see above). If the challenge succeeds, it deprives the authentic instrument of its evidentiary effects to the extent of the challenge. Any remaining evidentiary value, effect and enforceability of such an authentic instrument depends upon what has been annulled. A partially annulled transaction maintains its evidential value, evidential effect and enforceability for those parts of the authentic instrument not affected by the annulment.

²⁷⁶ Romanian law exceptionally allows the parties to a transaction, for which an authentic form is **not** required as a condition of its validity, to draw up the instrument themselves and then to ask a notary to authenticate that instrument after he has verified that it is in accordance with all legal requirements.

Romanian law has introduced provisions designed to protect the rights of the debtor when confronted by a seemingly authentic and directly enforceable authentic instrument. The requirement that prior to actual enforcement the creditor must receive the approval of the court and an executory formula concerning the apparent authenticity of the authentic instrument (as discussed above) is one part of this. A further part of this protective policy is a special procedure allowing the debtor to challenge the direct enforcement of an authentic instrument on the basis of any of the admissible reasons discussed above (concerning authenticity, formal validity or material validity). One can also challenge the *manner* in which the creditor of a non judicial decision has conducted the enforcement: see Book V. Title I. Chapter VI. Articles 712–720 of the Code of Civil Procedure. This procedure is designed to protect the rights of the debtor of the authentic instrument and to allow him a procedural opportunity to bring any admissible challenges to the formal or material validity of the authentic instrument as discussed above (and with the same effects if he should succeed).

If however the debtor successfully raises only a challenge to the **manner** in which a formally and materially valid authentic instrument has been enforced against him, the annulment of the existing enforcement procedure does not affect the underlying enforceability of the authentic title.²⁷⁷ The creditor is generally free to repeat the enforcement in a proper way.

The use of authentic instruments in domestic Romanian succession law

Romanian succession law operates either via a contentious procedure before a court or, more commonly, via a non-contentious procedure²⁷⁸ conducted by a notary. The non-contentious procedure is quicker, less expensive and thus is also the most commonly followed.²⁷⁹ The notary is thus also an important part of post mortem succession law in Romania, accordingly a wide range of notarial authentic instruments is possible in Romanian succession law. It should be noted that it is not always compulsory for the heirs or a notary to proceed via an authentic instrument simply because the use of such an instrument is possible. Actual notarial practice reflects the fact that if there is entire agreement on a given point there may be no need to use an authentic instrument. Further, most succession authentic instruments are not drawn up to be enforceable like a contractual obligation. They may still benefit from the evidentiary advantages associated with the use of an authentic form. As is noted below, the Romanian certificate of succession has a somewhat anomalous domestic classification as it is not technically an authentic instrument but benefits from similar evidentiary advantages.

The following list indicates the documents that are regarded as authentic instruments (or documents analogous thereto) in matters of succession:

- a) A notarial will written by a notary, see Article 1040 of the Civil Code.²⁸⁰
NB the notarial will is only compulsory if the testator is unable to compose a valid holograph will by reason of his illness or infirmity.
- b) A testator may use a will of any form or use a statement in an authentic instrument to 'pardon' an heir to prevent him from being disinherited by operation of law.

²⁷⁷ If however the challenge successfully questioned the manner in which the enforceable formula was applied to the authentic instrument, this would prevent it from being actually enforceable until a new formula applied.

²⁷⁸ This non-litigious procedure is regulated by Articles 101–118 of Act no. 36/1995 and Articles 233–259 of Ministry of Justice Order 2333/2013.

²⁷⁹ It should be noted that it is open to the parties to opt for one procedure or the other. If the non-contentious option is taken, this does not prevent it from being suspended in favour of a contentious determination of one or more issues when the circumstances envisaged by Article 107 of Act no.36/1995 are operative.

²⁸⁰ Mystic wills/closed wills are no longer allowed.

- c) A testator may revoke a will either by drafting a new will or by using a statement in an authentic instrument to revoke the will.
- d) An *inter vivos* contract of donation must be made by authentic instrument and may affect collation obligations, see Article 1146 of the Civil Code.
N.B. Succession agreements *while the testator lives* are prohibited, see Article 956 of the Civil Code.
- e) Any executor appointed by will or by a statement in an authentic instrument **must** accept this role via a statement in an authentic instrument, see Article 124(a) of Act 36/1995. He may later renounce this role via a statement in an authentic instrument: article 1085(b) Civil Code.
- f) The heir may accept the inheritance by an authentic instrument or in writing, see Article 1108 of the Civil Code.
- g) The heir may make it clear that though he is acting with the estate he is **not** accepting the inheritance: This may only proceed via a statement in an authentic instrument, see Article 1111 of the Civil Code.
- h) The heir may accept the inheritance by an authentic instrument or in writing, see Article 1108 of the Civil Code.
- i) The heir may renounce the inheritance by a statement in an authentic instrument or in writing, see Article 1120(2) of the Civil Code.
- j) The heirs may *voluntarily* agree a partition **only** in a statement in an authentic instrument, see Article 1144 of the Civil Code.
- k) The property held in common by the deceased and a spouse is liquidated by the use of an authentic instrument, see Article 106 of Act no.36/1995.
- l) The proposal to liquidate the estate **must** be approved by the heirs via an authentic instrument: see Article 127(1) of Act no. 36/1995.
- m) The sale of an entire estate resulting from succession must be by authentic instrument, see Article 1747 of Civil Code,
- n) The **finalising notarial writ** (from which the information in the domestic certificate of succession is drawn) has the **evidential value** – not the enforceable potential – of an authentic instrument via Article 111 of Act no. 36/1995.

The Romanian domestic certificate of succession (see Articles 1132–1134 Civil Code and Article 114 of Act no. 36/1995) is based on the contents of the finalising notarial writ. It is not however domestically classed as an authentic instrument.²⁸¹ Article 1133(1) of the Civil Code states that the certificate of succession constitutes proof to the quality of legal or testamentary heir, of the ownership of the heirs regarding the property rights which constitute the estate and the share to which each heir is entitled from the estate.

Any heir alleging breach of his rights may challenge the validity of the certificate of succession in court according to Article 1134 of the Civil Code and Article 118(2) of Act no. 36/1995. Therefore the domestic certificate of inheritance has no special evidentiary value over any other aspect of the succession than those enumerated at Article 1133(1) of the Civil Code, and may be challenged in court both on grounds of material invalidity (for example a mistaken calculation of the share to which the heir is entitled) or formal invalidity. Anyone who challenges the certificate of succession must however contend with the enhanced evidentiary value of the notarial writ it is based upon. Until the challenge is successful, the evidentiary value of the certificate of succession over the

²⁸¹ It is as yet unclear whether a domestic certificate of succession could qualify as an authentic instrument under the European Union Succession Regulation.

aspects listed at Article 1133 of the Civil Code subsists according to Article 118(3) of Act no. 36/1995.

N.B. Any dispute regarding the domestic certificate of succession may be resolved out of court by the parties, by means of an authentic agreement according to Article 118 (2) of Act no. 36/1995.

The Private International Law implications of the European Union's Succession Regulation 650/2012 and Implementing Regulation 1329/2014

The European Union Succession Regulation and its Implementing Regulation raise two distinct Private International Law issues for Romania: first, the extent of the obligations imposed on Romania as a Member State of origin concerning its domestically created succession authentic instruments; and, second, the extent of the obligations imposed on Romania as a Member State addressed concerning incoming foreign succession authentic instruments. The comments that follow consider each position.

Romania is the Member State of origin: obligations concerning domestic succession authentic instruments

Article 59(1) of the European Union Succession Regulation allows, but does not require, '*a person*' who wishes to use a succession authentic instrument in another Member State to ask the authority who established it, i.e. the notary who drew it up or his substitute/successor, to issue an attestation concerning that authentic instrument on the standard form provided by Annex 2 Form II of EU Implementing Regulation 1329/2014. It is unclear whether or not such a request must be complied with if it is received from a person not deemed by the notary to be '*an interested party*'. The substitution of the phrase '*a person*' in Article 59 for '*interested party*' in Article 60 could be understood to indicate that there is no requirement in the EU Succession Regulation for the applicant seeking only cross-border acceptance to demonstrate what would otherwise be domestically regarded as a '*legitimate interest*' when requesting the attestation from the notary. It seems unlikely that this will be a problem in Romania, the prevailing view appears to be that a range of potential and legitimate applicants is already possible: e.g. successors, creditors of the estate or of the heirs, an executor, others who can demonstrate a legitimate interest. The EU Succession Regulation and Implementing Regulation do not expressly contemplate the possibility that a request under Article 59 may be refused. It is however possible to contrast the applicant '*may ask*' of Article 59 with '*the authority shall*' in Article 60(2) and to infer from the different wording that the notary (or other public authority) is only actually obliged to accede to the applicant's request when it concerns enforcement under Article 60. This result however seems inconsistent with Recitals 22, 59 and 60 of the EU Succession Regulation and with one of its underlying purposes, i.e. to facilitate the cross-border transmission of authentic instruments and their legal effects. Considered abstractly, if both the acceptance and the enforcement of the authentic instrument are sought the problem may be avoided, assuming the notary to be willing to provide information concerning both Article 59 and Article 60, by the applicant routinely requesting an attestation concerning *both* enforcement and acceptance. In Romania, however, the potential for an application under Article 60 of the European Union Succession Regulation is significantly reduced by the lack of immediate domestic enforceability for most authentic instruments concerning succession.

Article 60 of Regulation 650/2012 requires that, provided that to so declare would not be manifestly contrary to its public policy, the authorities in the Member State addressed *must* on application by an interested person declare a foreign succession authentic instrument that is enforceable in its Member State of origin to also be enforceable in their Member State. Though it will be very unusual for a Romanian notary to be in receipt of such a request – given that (as mentioned above) even Romanian authentic

instruments that are intended and designed to be enforceable only actually become enforceable after receiving an executory formula from the court – the possibility cannot be entirely discounted. The national reporter for Romania could only identify one type of Romanian authentic instrument that might be able to benefit from Article 60 of the European Union Succession Regulation, viz. an authentic instrument containing a Partition agreement and also concerning the manner in which earlier liberalities by the testator should be collated and/or clawed-back from the parties to that agreement.

The Romanian notary in receipt of the request to provide a completed Annex 2 Form II attestation concerning a domestic succession authentic instrument is asked to indicate at points 4.2 to 4.2.1.1.7 of the standard form what he believes its domestic evidentiary effects to be. Though the answers will vary depending upon the specific verifications contained in the succession authentic instrument at issue, it is broadly conceivable that the answers provided to points 4.2.1.1.1 to 4.2.1.1.7 would be completed subject to the following factors:

4.2.1.1.1 - The date the authentic instrument was drawn up:

Unless forgery or fraud are demonstrated in a judicial procedure, the date at which an authentic instrument, or an instrument with the evidentiary value of an authentic instrument, is drawn up may not be contested, and no proof to the contrary may be admitted: see Article 269(2) sentence II of the Code of Civil Procedure.

4.2.1.1.2 - The place where the authentic instrument was drawn up:

The authenticity of the instrument **would** extend to the place where it was drawn up. Despite Article 269(1) sentence II of the Code of Civil Procedure not specifically listing the place of drawing up, Article 270(1) of the Code of Civil Procedure grants full evidentiary value (that is no proof against such assertions in the instrument is permitted, *until* the falsity or forgery of the instrument itself is proven) to certain statements of fact personally ascertained by the notary who drew up the instrument. Further it should be noted that Article 99(2)(b) of Act 36/1995 explicitly mentions 'place' as an element of fact to which the authenticity of an official's statement of fact may extend.

4.2.1.1.3 - The origin of the signatures from the parties of the authentic instrument:

Article 269(2) sentence II of the Code of Civil Procedure explicitly extends the authenticity of the instrument to the signatures of the parties.

4.2.1.1.4 - The content of the declarations of the parties:

Though Article 269(2) sentence II of the Code of Civil Procedure extends the authenticity of the instrument to "consent given by the parties", Article 270(2) of the Code of Civil Procedure only grants elevated (*not full*) evidentiary value (including towards third persons) to the other statements of the parties relating to the transaction made before a notary, which do not constitute expressions of consent, and then only until proof to the contrary is provided.

4.2.1.1.5 - The facts that the authority declares as having been verified in its presence:

It would produce such evidential effects. An authentic instrument has full evidentiary value pertaining to any facts verified explicitly by the drafting notary as having been ascertained by him personally, according to Article 270(1) of the Code of Civil Procedure. So even though the 'authenticity' of the instrument does not extend to these facts "ad litteram" they nonetheless cannot be contested, nor can proof to the contrary be admitted, except if the authentic instrument is defamed as forged or falsified, in a judicial procedure. So the evidentiary value of authentic instruments extends to the facts declared verified by the drafting notary but only if they pertain to the circumstances indicated at Article 99(2) of Act 36/1995, namely:

- the personal presence and identity of the parties and other participants to the authentication of the instrument

- the date and place the instrument was drawn up (in case of wills this extends to time as well)
- expressions of the consent of the parties.

4.2.1.1.6 - The actions which the authority declares to have carried out:

It would only produce such evidential effects, if the actions were of the right form and were also carried out by the notary himself. See answer at 4.2.1.1.5 above.

4.2.1.1.7 - Other: (*please indicate any other evidentiary effect that a domestic authentic instrument could produce*)

It is conceivable that additional information concerning a domestic certificate of succession or a contract of donation could be presented in this box.

Romania is the Member State addressed: foreign succession authentic instruments

The EU Succession Regulation requires that, subject to public policy exceptions, Romanian authorities must **accept** and, or, **enforce** foreign authentic instruments in matters of succession received from other EU Member States bound by the EU Succession Regulation.

The **acceptance** of a foreign succession authentic instrument produced in Romania is governed by Article 59 and the enforcement of such an authentic instrument is governed by Article 60 of the EU Succession Regulation. Acceptance requires that, provided that to do so would not be manifestly contrary to Romanian public policy, the Romanian authorities (as the Member State addressed) *must* grant the foreign succession authentic instrument the same (or most comparable) evidentiary effects as it would enjoy in its own Member State of origin.

To determine the nature of the evidentiary effects that would be associated with that authentic instrument in the Member State of origin, reference should be made to any Annex 2 Form II form that may accompany the foreign authentic instrument, especially to parts 4.2.1.1.1 – 4.2.1.1.7 of any such form. It must however be noted that the use of the EU Implementing Regulation's Annex 2 form does not appear to be obligatory. The obligation imposed by Article 59 of the EU Succession Regulation on the Member State addressed to accept a succession authentic instrument does not require or depend upon the use or supply of the Annex 2 form. A succession authentic instrument received from a Member State of origin in accordance with the provisions of the EU Succession Regulation must still be accepted, within the meaning of Article 59 of Regulation 650/2012, even if no Annex 2 Form II form is provided or if the Annex 2 form provided is not fully or properly completed.

The **enforcement** of a foreign authentic instrument via Article 60 of Regulation 650/2012 requires that, provided that to do so would not be manifestly contrary to Romanian public policy, the authorities in the Member State addressed (Romania) must on application by an interested person declare a foreign succession authentic instrument that is enforceable in its Member State of origin to also be enforceable in Romania. It seems plausible that this application will be equated with the existing domestic Romanian requirement that a potentially enforceable Romanian authentic instrument must receive an executory formula before it becomes actually enforceable. We are not aware of any special provision in the law of Romania that specifically deals with the actual enforcement of a foreign authentic instrument after it has been declared enforceable (differently from the actual enforcement of a foreign judgment that has been declared enforceable) in accordance with the procedure laid down in Articles 45 to 58 of the EU Succession Regulation as required by Article 60 thereof.

Romanian public policy

The EU Succession Regulation allows a public policy defence in various contexts including with reference to authentic instruments under Articles 59 and 60. To invoke the public policy exception in the context of Article 59, and by so doing to justify a refusal of acceptance for that foreign authentic instrument, it must be the case that the *granting of the same or most comparable evidentiary effects* to the foreign authentic instrument would be manifestly contrary to Romanian public policy. To invoke the public policy exception in the context of Article 60, to justify a refusal of a declaration of enforceability for the foreign authentic instrument, it must be that the *granting of the declaration of enforceability* for the foreign authentic instrument would be manifestly contrary to Romanian public policy. Of course these public policy exceptions should be construed narrowly and hence should rarely apply. As is made plain by Recital 58 of the EU Succession Regulation, public policy is not to be applied in a manner that is discriminatory or otherwise contrary to the European Union's Charter of Fundamental Rights. Equally however Recital 26 of Regulation 650/2012 indicates that the Regulation does not prevent a court from applying mechanisms designed to tackle the evasion of the law, such as *fraude à la loi* in the context of Private International Law. However, the substantive provisions of the Regulation do not expressly empower national courts to prevent evasion of the law (including *fraude à la loi*). It would seem that the only positive basis for doing so under the Regulation is to regard such evasion of the law to be contrary to public policy unless the law being evaded is one of the "special rules" of the forum concerning certain assets that is applicable irrespective of the law applicable to the succession (see Article 30 of the EU Succession Regulation).

Our national reporters were not able to find any case in which public policy had been invoked to deny the reception of a foreign authentic instrument in the context of a Romanian succession proceeding.

Incompatible Authentic instruments

Recital 66 of the EU Succession Regulation envisages the possibility of 'an authority' being presented with incompatible authentic instruments.²⁸² The solutions suggested by the Recital are to consider priority and the circumstances of the particular case and then, if this has not resolved the incompatibility, to resort to a court with direct or incidental jurisdiction under the Succession Regulation. Though there are no explicit provisions in Romanian law on this matter, Romanian jurisprudence knows of the notion of a judicial comparison of titles as a means to resolve such situations. In such a comparison, which is most likely to occur in the context of 'enforceable' authentic instruments drawn up in an adversarial 'inter partes' procedure, the court may compare the competing instruments and determine which of them is the "more qualified". It is not clear how, or if, a conflict detected by a notary between authentic instruments could be determined other than by means of a reference to a Romanian court.

²⁸² Recital 66: Should an authority, in the application of this Regulation, be presented with two incompatible authentic instruments, it should assess the question as to which authentic instrument, if any, should be given priority, taking into account the circumstances of the particular case. Where it is not clear from those circumstances which authentic instrument, if any, should be given priority, the question should be determined by the courts having jurisdiction under this Regulation, or, where the question is raised as an incidental question in the course of proceedings, by the court seized of those proceedings. In the event of incompatibility between an authentic instrument and a decision, regard should be had to the grounds of non-recognition of decisions under this Regulation.

SLOVAKIA

The Slovakian legal system

Slovakia consists of a single legal system that belongs to the civil law family. The Slovakian law concerning succession is presently to be found in the Civil Code,²⁸³ and the Civil Procedure Code.²⁸⁴ At present the law is awaiting updating to implement the European Union Succession Regulation into the various legislative provisions set out below.

A Bill of 1 September 2015 that comes into force on 1 July 2016²⁸⁵ as the Non-Contentious Civil Procedure Code will amend and complement:

Act No 323/1992 on Notaries and Notarial Activity, as amended ('Notarial Code');
Act No 99/1963 Code of Civil Procedure, as amended;
Act No 97/1963 on Private International Law and the Rules of Procedure Relating Thereto, as amended;
Act No 71/1992 on Court Fees and Copies of Entries in the Criminal Records, as amended;
The Ministry of Justice Implementing Decree No 31/1993 on Fees and Compensation of Notaries, as amended; and
Act 161/2015 on Civil Non-Adversary Procedure.

The concept of an authentic instrument in Slovakia

The Slovakian legal system makes use of public documents²⁸⁶ in a variety of contexts. Authentic instruments created by a notary are deemed to be public documents.²⁸⁷ Though authentic instruments are predominantly created by notaries (and take the form of a notarial protocol that is capable of registration), courts and other public authorities (e.g. the tax office,) may also, in certain circumstances, create authentic instruments.

In the Slovak Republic it is only compulsory to use an authentic instrument in connection with written legal acts of those who cannot read or write (if there is no other alternative); a will concerning a minor between the ages of 15 and 18 years of age; agreements modifying the property regime otherwise applicable to spouses memoranda of association or deeds of association of joint stock companies and, agreements to merge or to divide a company. As well as these circumstances, there are a wide range of circumstances in which an authentic instrument may voluntarily be chosen to allow the parties to enjoy the added value, evidential benefits and the potential to include these public documents in the appropriate Slovakian public register.

Evidentiary effects of domestic authentic instruments in Slovakian law

In accordance with § 134 of the Code of Civil Procedure, instruments issued by the courts of the Slovak Republic or issued by other public authorities (e.g. the notarial protocols of notaries) within the scope of their legal competence, as well as other instruments that have been declared to be instruments by specific legislative acts (e.g.

²⁸³ Slovakian Civil Code:

<https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/1964/40/20150401#predpis.cast-siedma>

²⁸⁴ Slovakian Civil Procedure Code

<https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/1963/99/20150901#hlava-piata.skupinaParagrafov-konanie-o-dedicstve>

²⁸⁵Slovakian Non-Contentious Civil Procedure Code:

<https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2015/161/20160701#hlava-druha.skupinaParagrafov-miestna-prislusnost-sudu>

²⁸⁶ Defined by § 134 of the Slovakian Civil Procedure Code (Act no. 99/1963 Coll).

²⁸⁷ See §3(4) of the Notaries Regulation (Act no. 323/1992 Coll).

para 3, section 4 of the Notarial Code), are regarded as certifying and confirming that the instrument represents an order or a declaration of the authority that has created the instrument, and unless evidence to the contrary proves otherwise, that instrument also certifies the authenticity and accuracy of the testimonials and confirmations included within it.

If a notarial protocol/authentic instrument includes an enforceable obligation and also contains a declaration by the debtor signifying his consent to its enforcement, that notarial protocol will also be enforceable in accordance with the requirements of §41(2)(c) of the Slovakian Code of Enforcement Procedure.

Disputing the validity of the authentic instrument

If an authentic instrument is successfully challenged as to its formal validity/authenticity/*instrumentum* it will lose the evidentiary effects associated with authentic or authenticated documents as public documents. If an authentic instrument is successfully challenged as to the validity of its *negotium*/material validity the instrument itself is valid but its evidentiary meaning will change accordingly and may well be rendered nugatory.

If the authenticity of an authentic instrument is challenged, it is effectively alleged that it was not created by an authority with the legal competence to draw it up. The authenticity of an authentic instrument may be challenged via civil law proceedings either in the same proceeding in which the authentic instrument is being used or via an independent civil procedure seeking a court declaration of its lack of authenticity. It is also possible to challenge authenticity by criminal procedures concerning falsification. It is not sufficient merely to challenge the authentic instrument; the person who challenges its authenticity has the burden of proof concerning the allegation, and must prove it, in order to deprive the instrument of its 'authenticity'. An authentic instrument is regarded as authentic until there is a court decision stating the contrary.

It is also possible to contest the material validity of an authentic instrument during the same proceeding in which the authentic instrument is adduced as proof. To this end it is possible to introduce evidence that proves the contrary of the authentic instrument both as regards the content of declarations it contains and as regards other facts it states. Again the party who would dispute the material validity and evidentiary effect of an authentic instrument has the burden of proving his allegation and he must do so with sufficient evidence to the contrary to discharge the evidentiary presumptions that the material content of an authentic instrument would otherwise enjoy. It is not enough just to put the evidentiary value of the authentic instrument in doubt. Such a challenge to the material validity of an authentic instrument in the context of a succession would in non-contentious probate proceedings initially be considered by the notary who has been appointed as court commissioner for the probate. If this officer cannot resolve the dispute he can direct the heir with the (apparently) weaker case to bring the matter to court. If this direction is followed, the court must then decide on the material validity of a notarial protocol/authentic instrument

The enforcement of a notarial protocol in Slovakia first requires that the notarial protocol has been drafted in accordance with the requirements of §46 of the Code of Enforcement Procedure. Assuming such compliance, actual enforcement requires an application to the court and its authorisation of the desired enforcement.

The use of authentic instruments in domestic Slovakian succession law

Though there are few circumstances in Slovakian law in which it is required by law that an authentic instrument *must* be used by the testator (e.g. a will of someone who cannot read or write and a will of a minor between the ages of 15 and 18 years of age) there are a range of optional and official uses for authentic instruments in Slovakian

succession law. The optional uses for authentic instruments/notarial protocols in succession proceedings all seek to exploit the practical and evidential advantages offered by such documents. The practical advantages include advice and preparation of the documents by a legal professional plus the safe-keeping and registration of these authentic instruments (see § 54 and § 73c of the Notarial Code) so that their existence will not be overlooked on the death of the *de cuius*. The evidential advantages are those mentioned above and take the form of strong evidentiary presumptions of authenticity, formal validity and material validity.

Concerning official uses of authentic instruments, it must also be noted that a Slovakian notary who is appointed as a court commissioner (by the probate court seised with a given probate) is, at the end of his task, likely to issue a domestic Succession Certificate. Such a certificate would also be issued by the probate court if it was seised with a contentious probate case. This certificate, regardless of by whom it is issued, is domestically regarded by Slovakian law as equivalent to a court decision and it can produce *res judicata* effects. The Slovakian Civil Procedure Code makes it plain that, again regardless of its creator, such a succession certificate can only be attested by a decision of a court via the Annex 1 Form I of EU Implementing Regulation 1329/2014 and not as an authentic instrument via Annex 2 Form II of that Regulation.

The following list indicates the documents that are regarded as authentic instruments in matters of succession:

- a) Notarial will/will in notarised form is completed by the notary for the testator and is an authentic instrument: see § 476(1) of the Civil Code. The will must be registered in the Notarial Central Register of Wills.²⁸⁸
- b) Notarial will/will in notarised form (if required by reason of the disability of the testator (see § 49 of the Notary Code) and or if the testator is between the ages of 15 and 18 years of age) is also an authentic instrument that must be registered in the Notarial Central Register of Wills.
- c) An instrument of disinheritance if made via an authentic instrument, see § 469a of the Civil Code and § 54 of the Notary Code.
- d) Resolutions on inheritance issued by a court are authentic instruments.
- e) Minutes of succession proceedings that contain a declaration of heirs (e.g. concerning an oral refusal of the inheritance by an ostensible or compulsory heir) are authentic instruments. N.B. The actual refusal, if in written form, is not an authentic instrument.
- f) The certificate of succession. In contentious probate cases the certificate is issued as a resolution by a court. In non-contentious probate cases the certificate is issued by a notary who has been appointed as a court commissioner. In *both* cases the certificate of succession is technically an authentic instrument but is one that is domestically treated in Slovakia as a decision by the court (e.g. it has a *res judicata* effect). Such a special authentic instrument becomes the basis for the registration of rights in the registers and the registration of a change of the owner(s) with retrospective effect back to the date of death. The succession certificate will contain a resolution about the liquidation of the inheritance in one of the following forms:
 - i. a single heir certificate;
 - ii. an agreement of the heirs on the liquidation of the inheritance;

²⁸⁸ Though it is possible to merely deposit a will with a notary, for safe-keeping and registration, it will not be deemed to become an authentic instrument on deposit or later after the death of the testator.

- iii. a certificate of the inheritance shares in case the heirs have failed to reach an agreement or the court has refused to approve their agreement because it was contrary to law or 'good morals';
- iv. a certificate on the acquisition of the property by the State.

The Private International Law implications of the European Union's Succession Regulation 650/2012 and Implementing Regulation 1329/2014

The European Union Succession Regulation and its Implementing Regulation raise two distinct Private International Law issues for Slovakia as an EU Member State: first, the extent of the obligations imposed by these Regulations on Slovakia as a Member State of origin concerning its domestically created succession authentic instruments; and, second, the extent of the obligations these Regulations impose on Slovakia as a Member State addressed concerning its duties relating to incoming foreign succession authentic instruments. The comments that follow consider each position.

Slovakia is the Member State of origin: obligations concerning domestic succession authentic instruments

Assuming that the applicant can actually obtain an official copy or extract from the relevant authentic instrument,²⁸⁹ Article 59(1) of the European Union Succession Regulation allows, but does not require, '*a person*' who wishes to use a succession authentic instrument in another Member State to ask the authority who established it, i.e. the notary who drew it up or his substitute/successor, to issue an attestation concerning that authentic instrument on the standard form provided by Annex 2 Form II of EU Implementing Regulation 1329/2014. It is unclear whether or not such a request must be complied with if it is received from a person not deemed by the notary to be '*an interested party*'. The substitution of the phrase '*a person*' in Article 59 for '*interested party*' in Article 60 could be understood to indicate that there is no requirement in the EU Succession Regulation for the applicant seeking only cross-border acceptance to demonstrate what would otherwise be domestically regarded as a '*legitimate interest*' when requesting the attestation from the notary. It seems unlikely that this will be a problem in Slovakia as it is probable that a reasonable range of potential applicants are already indicated by Implementing Regulation 1329/2014.²⁹⁰ The EU Succession Regulation and Implementing Regulation do not expressly contemplate the possibility that a request under Article 59 may be refused. It is however possible to contrast the applicant '*may ask*' of Article 59 with '*the authority shall*' in Article 60(2) and to infer from the different wording that the notary (or other public authority) is only actually obliged to accede to the applicant's request when it concerns enforcement under Article 60. This result however seems inconsistent with Recitals 22, 59 and 60 of the EU Succession Regulation and with one of its underlying purposes, i.e. to facilitate the cross-border transmission of authentic instruments and their legal effects. In circumstances where both the acceptance and the enforcement of the authentic instrument may be sought the problem may be avoided, assuming the notary to be willing to provide information concerning both Article 59 and Article 60, by the applicant routinely requesting an attestation concerning *both* enforcement and acceptance.

Article 60 of EU Regulation 650/2012 requires that, provided that to so declare would not be manifestly contrary to public policy in the Member State addressed it *must* on application by an interested person declare a foreign succession authentic instrument that is enforceable in its Member State of origin to also be enforceable in their Member State. Assuming that the relevant authentic instrument could itself be obtained by the applicant, it is theoretically possible for a Slovakian notary to be in receipt of a request

²⁸⁹ It should be noted that Slovakian notarial practice does not provide the testator with a copy (official or otherwise) of a notarial will: a receipt is all that is provided.

²⁹⁰ See the persons listed by Annex 1 Form I of Implementing Regulation 1329/2014 at 4.3.1.7. It is also possible that a creditor of the estate or a person who has refused the inheritance may have a legitimate interest to apply for an attestation under either Annex 1 Form I or Annex 2 Form II.

for such an attestation, again under Annex 2 Form II of EU Implementing Regulation 1329/2014. The Annex 2 standard form allows for an attestation that concerns only 'acceptance', via Article 59, or only 'enforcement' via Article 60, or an attestation that jointly concerns acceptance and enforcement of the authentic instrument depending upon the boxes ticked by the Slovakian notary.²⁹¹

Despite the comments in the two paragraphs above it is important to note that at present the Slovakian legal system seemingly seeks to prevent any application for an attestation under Annex 2 Form II of Regulation 1329/2014 and to divert any such application to its courts who will complete the Annex 1 Form I of that Regulation. Thus it is not open to a Slovakian notary to complete either an Annex 1 Form I or an Annex 2 Form II form. All requests for an attestation must, according to §352b of the Code of Civil Procedure, be made to the appropriate Slovakian court. That is the District court of first instance that delivered the decision in succession matters or in whose jurisdiction the notary appointed as a court commissioner issued the certificate of succession (which certificate is deemed to be a decision of the court).

Consequentially, there will be very few practical circumstances in which an applicant can both secure an authentic instrument and also in which – given §352b of the Code of Civil Procedure – a Slovakian notary can be requested to provide a completed Annex 2 Form II attestation concerning a domestic succession authentic instrument. In what must at present be the unusual circumstances in which the notary were to be asked to complete the Annex 2 standard form, he would also be asked to indicate at points 4.2 to 4.2.1.1.7 of the standard form what he believes to be the domestic evidentiary effects of the authentic instrument in question. Though the answers will vary depending upon the specific verifications contained in the succession authentic instrument at issue, it is broadly conceivable that points 4.2.1.1.1 to 4.2.1.1.7 could be expected to be completed as follows:

4.2.1.1.1 - The date the authentic instrument was drawn up:

§134 of the Code of Civil Procedure: authentic instruments certify the authenticity of all facts that are contained therein. Reference to a date will be made.

4.2.1.1.2 - The place where the authentic instrument was drawn up:

§134 of the Code of Civil Procedure: authentic instruments certify the authenticity of all facts that are contained therein. Reference to a place will be made.

4.2.1.1.3 - The origin of the signatures from the parties of the authentic instrument:

§134 of the Code of Civil Procedure: authentic instruments certify the authenticity of all facts that are contained therein. This will include the fact that the signatures were made by the identified persons.

4.2.1.1.4 - The content of the declarations of the parties:

§134 of the Code of Civil Procedure: authentic instruments certify the authenticity of all facts that are contained therein. Thus it will be evidenced that the declarations were made by the parties and in the form recorded in the authentic instrument.

4.2.1.1.5 - The facts that the authority declares as having been verified in its presence:

§134 of the Code of Civil Procedure: authentic instruments certify the authenticity of all facts that are contained therein. The notarial verification of those facts will benefit from the evidentiary presumption.

4.2.1.1.6 - The actions which the authority declares to have carried out:

§134 of the Code of Civil Procedure: authentic instruments certify the authenticity of all facts that are contained therein. The declared notarial actions will benefit from the evidentiary presumption.

²⁹¹ For Article 59 acceptance tick 'yes' in box 4.1.1; for Article 60 enforcement tick 'yes' in box 6.1.1. To dispense with either option tick 'no' in box 4.1.2. or 6.1.2 as appropriate.

4.2.1.1.7 - Other: (*please indicate any other evidentiary effect that a domestic authentic instrument could produce*)

We have not been advised of other evidentiary effects. It is however conceivable that additional information could be presented in this box.

Slovakia is the Member State addressed: foreign succession authentic instruments

The EU Succession Regulation requires that, subject to public policy exceptions, Slovakian authorities must **accept** and, or, **enforce** foreign authentic instruments in matters of succession received from other EU Member States bound by the Succession Regulation.

The **acceptance** of a foreign succession authentic instrument presented in Slovakia by an applicant is governed by Article 59 and the enforcement of such an authentic instrument is governed by Article 60 of the EU Succession Regulation. Acceptance requires that, provided that to do so would not be manifestly contrary to Slovakian public policy, the authorities in Slovakia (as the Member State addressed) *must* grant the foreign succession authentic instrument the same (or most comparable) evidentiary effects as it would enjoy in its own Member State of origin.

To determine the nature of the evidentiary effects that would be associated with that authentic instrument in the Member State of origin, reference should be made to any Annex 2 Form II form that may accompany the foreign authentic instrument, especially to parts 4.2.1.1.1 – 4.2.1.1.7 of any such form. It must however be noted that the use of the EU Implementing Regulation's Annex 2 form does not appear to be obligatory. The obligation imposed by Article 59 of the EU Succession Regulation on the Member State addressed to accept a succession authentic instrument does not require or depend upon the use or supply of the Annex 2 form. A succession authentic instrument received from a Member State of origin in accordance with the provisions of the EU Succession Regulation must still be accepted, within the meaning of Article 59 of Regulation 650/2012, even if no Annex 2 Form II form is provided or if the Annex 2 form provided is not fully or properly completed.

The **enforcement** of a foreign authentic instrument via Article 60 of Regulation 650/2012 requires that, provided that to do so would not be manifestly contrary to Slovakian public policy, the authorities in the Member State addressed (Slovakia) must on application by an interested person declare enforceable a foreign succession authentic instrument that is enforceable in its Member State of origin. We are not aware of any special provision in the law of Slovakia that specifically deals with the actual enforcement of a foreign authentic instrument after it has been declared enforceable (differently from the actual enforcement of a foreign judgment that has been declared enforceable) in accordance with the procedure laid down in Articles 45 to 58 of the EU Succession Regulation as required by Article 60 thereof.

Slovakian public policy

The EU Succession Regulation allows a public policy defence in various contexts including with reference to authentic instruments under Articles 59 and 60. To invoke the public policy exception in the context of Article 59, and by so doing to justify a refusal of acceptance for that foreign authentic instrument, it must be the case that the *granting of the same or most comparable evidentiary effects* to the foreign authentic instrument would be manifestly contrary to Slovakian public policy. To invoke the public policy exception in the context of Article 60, to justify a refusal of a declaration of enforceability for the foreign authentic instrument, it must be that the *granting of the declaration of enforceability* for the foreign authentic instrument would be manifestly contrary to Slovakian public policy. Of course this public policy exception should be construed narrowly and it is envisaged that it will rarely apply. As is made plain by Recital 58 of the EU Succession Regulation, public policy is not to be applied in a manner that is

discriminatory or otherwise contrary to the European Union's Charter of Fundamental Rights. Equally however Recital 26 of Regulation 650/2012 makes plain that a court may act to prevent *fraude à la loi* in the context of Private International Law. However, the substantive provisions of the Regulation do not expressly empower national courts to prevent evasion of the law (including *fraude à la loi*). It would seem that the only positive basis for doing so under the Regulation is to regard such evasion of the law to be contrary to public policy unless the law being evaded is one of the "special rules" of the forum concerning certain assets that is applicable irrespective of the law applicable to the succession (see Article 30 of the EU Succession Regulation).

Our national reporters were not able to find any case in which public policy had been invoked to deny the reception of a foreign authentic instrument in the context of a Slovakian succession proceeding.

Incompatible Authentic instruments

Recital 66 of the EU Succession Regulation envisages the possibility of 'an authority' being presented with incompatible authentic instruments.²⁹² The solutions suggested by the Recital are to consider priority and the circumstances of the particular case and then, if this has not resolved the incompatibility, to resort to a court with direct or incidental jurisdiction under the Succession Regulation. There is no Slovakian legislation applicable to this matter.

²⁹² Recital 66: Should an authority, in the application of this Regulation, be presented with two incompatible authentic instruments, it should assess the question as to which authentic instrument, if any, should be given priority, taking into account the circumstances of the particular case. Where it is not clear from those circumstances which authentic instrument, if any, should be given priority, the question should be determined by the courts having jurisdiction under this Regulation, or, where the question is raised as an incidental question in the course of proceedings, by the court seized of those proceedings. In the event of incompatibility between an authentic instrument and a decision, regard should be had to the grounds of non-recognition of decisions under this Regulation.

SLOVENIA

The Slovenian legal system

Slovenia consists of a single legal system that belongs to the civil law family. The Slovenian law concerning succession is due to be updated to implement the European Union Succession Regulation but, at the time of the compilation of the national report, the proposed legislative provisions and amendments were not yet available. The legislation that is particularly relevant to the authentic instruments discussed in this country profile is to be found in its original language in the Inheritance Act,²⁹³ the Notaries Act;²⁹⁴ and the Code of Obligations.²⁹⁵

The concept of an authentic instrument in Slovenia

The Slovenian legal system makes use of notarially created authentic instruments in a range of circumstances.²⁹⁶ Every document, issued by a public body within the limits of its powers and competences, is considered a "public document" and as such establishes a rebuttable presumption that the facts, verified therein, are true. No such evidential presumption exists for "private documents". Authentic instruments must be distinguished from the so called "public documents" (javna listina).

Certain types of contracts, to be valid, must be drawn up in the form of an authentic instrument/notarial record (e.g. an inter vivos contract on the delivery and distribution of property; a contract of lifetime maintenance, certain contracts of donation and promises to make gifts and also a contract to renounce an inheritance). The notary is legally liable to ensure that these contracts concluded in the form of an authentic instrument/notarial record do not contravene mandatory provisions of Slovenian law. It should however be noted that using the form of an authentic instrument for such a contract does not conclusively evidence its validity. The contract can still be challenged on the ground that it is void or voidable. In such circumstances the notary public could be held liable if found to be in breach of his obligation of diligence. Another option concerning an authentic instrument is to ask the notary to draw up a contract in the form of a notary record, with direct effect of enforceability. All kinds of contracts may be drawn up in this way (it is utterly typical for loans and mortgages). In the case of non-performance by the debtor, the creditor can immediately move to execution of the debt.

In contradistinction to a contract or agreement concluded via an authentic instrument, the Slovenian notary may also merely certify the veracity of the signatures of the parties to a given transaction. There are numerous cases in the Slovenian legal system where the "authenticity" required for a document to be legally effective concerns only the signature: e.g. sale of real estate and an application to record a right *in rem* in a property register. In these circumstances the notary is not obliged to control the contents of the contract and does not certify that the contract itself is valid. The notarial function in this context is limited to verifying the identity of the person or persons who sign.

²⁹³ Zakon o dedovanju; (Uradni list (Official Gazette) SRS, št. 15/76, 23/78, Uradni list RS, št. 13/94 – ZN, 40/94 – odl. US, 117/00 – odl. US, 67/01, 83/01 – OZ in 31/13 – odl. US)

<http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO317>

²⁹⁴ Zakon o notariatu, Uradni list RS, št. 2/07 (uradno prečiščeno besedilo; consolidated text);

<http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO1329>

²⁹⁵ Obligacijski zakonik, Uradni list RS 97/2007 (uradno prečiščeno besedilo, consolidated text)

<http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO5252>

²⁹⁶ The Notaries Act, Zakon o notariatu, Uradni list RS, št. 2/07 (uradno prečiščeno besedilo; consolidated text); <http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO1329>

The execution of civil judgments and protective measures Act, Zakon o izvršbi in zavarovanju, Uradni list RS, št. št. 3/07 – uradno prečiščeno besedilo, 93/07, 51/10, 26/11, 17/13 – odl. US, 45/14 – odl. US, 53/14, 58/14 – odl. US in 54/15) <http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO1008>

Evidentiary effects of domestic authentic instruments in Slovenian law

For those documents drawn up as authentic instruments/drawn up as notarial records, there is a high (though rebuttable – see below) presumption of authenticity and correctness. This extends to all of the matters that the notary must verify in accordance with the law including: the date, the time and place of drawing up the instrument, the declarations made by the parties to the document, that the document was read aloud by the notary public to the parties before it was signed, that the party signing the document confirmed that it corresponded to his true will, that no duress or incapacity was apparent to the notary at that moment, that the notary carried out the actions that he records and that the notary considered whether the document contravened mandatory rules of law and formed the opinion that this was not the case (although concerning the last matter there is no conclusive presumption that the document at issue is in fact legally valid).

In the case of a notarised signature there is usually only a high evidentiary value concerning the verified identity of the person or persons signing the document and of the verified fact that the document was signed in the presence of the notary. It is seemingly possible for the Slovenian notary to affirm a private document and to thereby enhance its evidential standing according to the extent of the affirmation undertaken.

Disputing the validity of the authentic instrument

If an authentic instrument is successfully challenged as to its formal validity/authenticity/*instrumentum* it will lose the evidentiary effects associated with authentic or authenticated documents as public documents. If an authentic instrument is successfully challenged as to the validity of its *negotium*/material validity the instrument itself is valid but its evidentiary meaning will change accordingly and may well be rendered nugatory.

The authenticity of an authentic instrument or authenticated document may be challenged in the course of normal litigation before the Slovenian court. The party who would rebut the presumption of authenticity and or the material validity of the authentic instrument must bear the burden of proving to the satisfaction of the court that his claim is, in whichever respect of the authentic instrument is at issue, valid.

The use of authentic instruments in domestic Slovenian succession law

Though the Slovenian legal system makes use of notorially created authentic instruments in other legal contexts, it does not presently feature any mandatory or exclusive role for its notarial profession²⁹⁷ in the course of the operation of its succession law.²⁹⁸ One consequence of this present state of affairs is that authentic instruments rarely feature in the course of a domestic succession either during the life of the testator or after his death during probate proceedings that are run by the court. The court opens the probate and also ultimately records the essential evidential matters in its final decision on inheritance. As there is no overt notarial role in succession during the life of the testator and as the crucial probate ruling of the final decision on inheritance is currently a court decision, and not a notarial act, the potential for succession authentic instruments to be created in Slovenia is currently small.

²⁹⁷ In Slovenia, a far reaching legislative reform concerning the transfer of competence for probate matters from courts of laws to notaries was prepared in 2010. A draft law was submitted to Parliament, but was controversial and it failed. An amended draft law was submitted in 2012, but without success. Therefore, for the time being, despite repeated attempts by the Slovenian Chamber of Notaries to gain more involvement in probate matters, these proceedings remain in the competence of courts of law.

²⁹⁸ The court can and frequently does entrust a notary, a bailiff or other officer of the court to undertake the property listing of the deceased person's property and, if the court so decides, to take property into custody. The court has discretion as to whom it will entrust with this task and others in the course of its probate activities.

The following list indicates the documents that *potentially* could be regarded as authentic instruments with some relevance in matters of succession in Slovenia. It must however be noted that except for (a) they describe very unusual events often sounding in domestic contract law despite potentially affecting the operation of Slovenian succession law:

- a) It should be noted that there is officially no special form of notarial will in Slovenian law. It is however apparently accepted that if an ordinary will²⁹⁹ is drawn up by a notary for the testator in the form of a notarial record it can benefit from the evidentiary advantages of a Slovenian authentic instrument. That is to say that it will conclusively identify the testator, conclusively identify the witnesses; evidence that there was no duress or apparent incapacity at the time of the drawing up of the will, and evidence the presence of the notary public at the time at which the will was drawn up.
- b) A contract to renounce a succession must be drawn up in the form of a notarial record/authentic instrument.
- c) Despite the fact that succession agreements are prohibited, an *inter vivos* contract on the delivery and distribution of property³⁰⁰ (not a true inheritance contract as it only applies to property owned at the date of the contract) can be created if it is drawn up in the form of a notarial record/authentic instrument.
- d) Similarly a contract of lifetime maintenance; a contract of donation effective on death; and a promise to make a gift must all be drawn up in the form of a notarial record/authentic instrument.

The Private International Law implications of the European Union's Succession Regulation 650/2012 and Implementing Regulation 1329/2014

The European Union Succession Regulation and its Implementing Regulation raise two distinct Private International Law issues for Slovenia as an EU Member State: first, the extent of the obligations imposed by these Regulations on Slovenia as a Member State of origin concerning its domestically created succession authentic instruments; and, second, the extent of the obligations these Regulations impose on Slovenia as a Member State addressed concerning its duties relating to incoming foreign succession authentic instruments. The comments that follow consider each position.

Slovenia is the Member State of origin: obligations concerning domestic succession authentic instruments

Article 59(1) of the European Union Succession Regulation allows, but does not require, 'a person' who wishes to use a succession authentic instrument in another Member State to ask the authority who established it, i.e. the notary who drew it up or his substitute/successor, to issue an attestation concerning that authentic instrument on the standard form provided by Annex 2 Form II of EU Implementing Regulation 1329/2014. It is unclear whether or not such a request must be complied with if it is received from a person not deemed by the notary to be 'an interested party'. The substitution of the phrase 'a person' in Article 59 for 'interested party' in Article 60 could be understood to indicate that there is no requirement in the EU Succession Regulation for the applicant seeking only cross-border acceptance to demonstrate what would otherwise be domestically regarded as a 'legitimate interest' when requesting the attestation from the

²⁹⁹ Such a will is created in the presence of two witnesses without any conflict of interest as with any other will before witnesses.

³⁰⁰ Contracts of inheritance (whether leaving an estate or a part thereof to another party; disposing of an expected inheritance or legacy or agreeing on the content of a will) are all null and void under Slovenian law (Articles 103-105 of the Inheritance Act). Similar provisions forbid inheritance clauses in prenuptial agreements and forbid joint wills.

notary. It seems unlikely that this will be a problem in Slovenia given the reduced circumstances in which a succession authentic instrument could be created. It is however possible to speculate that the range of potential and legitimate applicants for such an authentic instrument would include its parties and those legitimately attempting to rely upon a status derived from such an authentic instrument.³⁰¹ The EU Succession Regulation and Implementing Regulation do not expressly contemplate the possibility that a request under Article 59 may be refused. It is however possible to contrast the applicant 'may ask' of Article 59 with 'the authority shall' in Article 60(2) and to infer from the different wording that the notary (or other public authority) is only actually obliged to accede to the applicant's request when it concerns enforcement under Article 60. This result however seems inconsistent with Recitals 22, 59 and 60 of the EU Succession Regulation and with one of its underlying purposes, i.e. to facilitate the cross-border transmission of authentic instruments and their legal effects. In circumstances where both the acceptance and the enforcement of the authentic instrument may be sought the problem may be avoided, assuming the notary to be willing to provide information concerning both Article 59 and Article 60, by the applicant routinely requesting an attestation concerning *both* enforcement and acceptance.

Article 60 of Regulation 650/2012 requires that, provided that to so declare would not be manifestly contrary to public policy in the Member State addressed it *must* on application by an interested person declare a foreign succession authentic instrument that is enforceable in its Member State of origin to also be enforceable in their Member State. Although it is not likely, to be a common eventuality, a Slovenian notary could be in receipt of a request for such an attestation under Annex 2 Form II of EU Implementing Regulation 1329/2014.³⁰² This standard form allows for an attestation that concerns only 'acceptance', via Article 59, or 'enforcement' via Article 60, or an attestation that jointly concerns acceptance and enforcement of the authentic instrument depending upon the boxes ticked by the Slovenian notary.³⁰³

The Slovenian notary in receipt of the request to provide a completed Annex 2 Form II attestation concerning a domestic authentic instrument that is of relevance to a succession is asked to indicate, at points 4.2 to 4.2.1.1.7 of the Annex 2 standard form, what he believes its domestic evidentiary effects to be. Though the answers will vary depending upon the type of authentic instrument (most probably a will) and with respect to the specific verifications contained in the succession authentic instrument at issue, it is broadly conceivable that points 4.2.1.1.1 to 4.2.1.1.7 could be expected to be completed as follows:

4.2.1.1.1 - The date the authentic instrument was drawn up:

An authentic instrument establishes full proof with regard to this fact.

4.2.1.1.2 - The place where the authentic instrument was drawn up:

An authentic instrument establishes full proof with regard to this fact.

4.2.1.1.3 - The origin of the signatures from the parties of the authentic instrument:

An authentic instrument establishes full proof with regard to this fact and the verified identities of the party(ies).

³⁰¹ The persons listed by Annex 1 Form I of EU Implementing Regulation 1329/2014 at 4.3.1.7 is comprehensive but could be enlarged to include a creditor of the estate or a person who has refused the inheritance: in the right circumstances all may have a legitimate interest to apply for an attestation under Annex 1 Form I or Annex 2 Form II.

³⁰² If, as discussed above, the application is in connection with the final probate decision of the Slovenian court the application is in connection with a judicial decision and hence involves Annex 1 Form I of EU Implementing Regulation 1329/2014.

³⁰³ For Article 59 acceptance tick 'yes' in box 4.1.1; for Article 60 enforcement tick 'yes' in box 6.1.1. To dispense with either option tick 'no' in box 4.1.2. or 6.1.2 as appropriate.

4.2.1.1.4 - The content of the declarations of the parties:

An authentic instrument establishes full proof that the parties made the declarations that were recorded by the notary.

4.2.1.1.5 - The facts that the authority declares as having been verified in its presence:

An authentic instrument establishes full proof with regard to the facts so verified.

4.2.1.1.6 - The actions which the authority declares to have carried out:

An authentic instrument establishes full proof with regard to these acts.

4.2.1.1.7 - *Other: (please indicate any other evidentiary effect that a domestic authentic instrument could produce)*

According to the advice received it is possible that the attestation might also refer to the fact that, according to the Slovenian notary, no incapacity or duress was apparent at the time of signing the document and also that the two identified witnesses required for the creation of an ordinary will were present in accordance with the law. Additional information could also be presented in this box.

Slovenia is the Member State addressed: foreign succession authentic instruments

The EU Succession Regulation requires that, subject to narrow public policy exceptions, Slovenian authorities must **accept** and, or, **enforce** foreign authentic instruments in matters of succession received from other EU Member States bound by the Succession Regulation.

The **acceptance** of a foreign succession authentic instrument presented by an applicant in Slovenia is governed by Article 59 and the enforcement of such an authentic instrument is governed by Article 60 of the EU Succession Regulation. Acceptance requires that, provided that to do so would not be manifestly contrary to Slovenian public policy, the authorities in Slovenia (as the Member State addressed) *must* grant the foreign succession authentic instrument the same (or most comparable) evidentiary effects as it would enjoy in its own Member State of origin.

To determine the nature of the evidentiary effects that would be associated with that authentic instrument in the Member State of origin, reference should be made to any Annex 2 Form II form that may accompany the foreign authentic instrument, especially to parts 4.2.1.1.1 – 4.2.1.1.7 of any such form. It must however be noted that the use of the EU Implementing Regulation's Annex 2 form does not appear to be obligatory. The obligation imposed by Article 59 of the EU Succession Regulation on the Member State addressed to accept a succession authentic instrument does not require or depend upon the use or supply of the Annex 2 form. A succession authentic instrument received from a Member State of origin in accordance with the provisions of the EU Succession Regulation must still be accepted, within the meaning of Article 59 of Regulation 650/2012, even if no Annex 2 Form II form is provided or if the Annex 2 form provided is not fully or properly completed.

At present there are no known provisions in Slovenian law that specifically deal with the acceptance of a foreign authentic instrument concerning a matter of succession under the EU Succession Regulation.

The **enforcement** of a foreign authentic instrument via Article 60 of Regulation 650/2012 requires that, provided that to do so would not be manifestly contrary to Slovenian public policy, the authorities in the Member State addressed (Slovenia) must on application by an interested person declare enforceable a foreign succession authentic instrument that is enforceable in its Member State of origin. We are not aware of any special provision in the law of Slovenia that specifically deals with the actual enforcement of a foreign authentic instrument after it has been declared enforceable (differently from the actual enforcement of a foreign judgment that has been declared

enforceable) in accordance with the procedure laid down in Articles 45 to 58 of the EU Succession Regulation as required by Article 60 thereof.

Slovenian public policy

The EU Succession Regulation allows a public policy defence in various contexts including with reference to authentic instruments under Articles 59 and 60. To invoke the public policy exception in the context of Article 59, and by so doing to justify a refusal of acceptance for that foreign authentic instrument, it must be the case that the *granting of the same or most comparable evidentiary effects* to the foreign authentic instrument would be manifestly contrary to Slovenian public policy. To invoke the public policy exception in the context of Article 60, to justify a refusal of a declaration of enforceability for the foreign authentic instrument, it must be that the *granting of the declaration of enforceability* for the foreign authentic instrument would be manifestly contrary to Slovenian public policy. Of course this public policy exception should be construed narrowly and it is envisaged that it will rarely apply. As is made plain by Recital 58 of the EU Succession Regulation, public policy is not to be applied in a manner that is discriminatory or otherwise contrary to the European Union's Charter of Fundamental Rights. Equally however Recital 26 of Regulation 650/2012 indicates that the Regulation does not prevent a court from applying mechanisms designed to tackle the evasion of the law, such as *fraude à la loi* in the context of Private International Law. However, the substantive provisions of the Regulation do not expressly empower national courts to prevent evasion of the law (including *fraude à la loi*). It would seem that the only positive basis for doing so under the Regulation is to regard such evasion of the law to be contrary to public policy unless the law being evaded is one of the "special rules" of the forum concerning certain assets that is applicable irrespective of the law applicable to the succession (see Article 30 of the EU Succession Regulation).

Our national reporters were not able to find any case in which public policy had been invoked to deny the reception of a foreign authentic instrument in the context of a Slovenian succession proceeding.

Incompatible Authentic instruments

Recital 66 of the EU Succession Regulation envisages the possibility of 'an authority' being presented with incompatible authentic instruments.³⁰⁴ The solutions suggested by the Recital are to consider priority and the circumstances of the particular case and then, if this has not resolved the incompatibility, to resort to a court with direct or incidental jurisdiction under the Succession Regulation. There are currently no known provisions on this matter in Slovenian law.

³⁰⁴ Recital 66: Should an authority, in the application of this Regulation, be presented with two incompatible authentic instruments, it should assess the question as to which authentic instrument, if any, should be given priority, taking into account the circumstances of the particular case. Where it is not clear from those circumstances which authentic instrument, if any, should be given priority, the question should be determined by the courts having jurisdiction under this Regulation, or, where the question is raised as an incidental question in the course of proceedings, by the court seized of those proceedings. In the event of incompatibility between an authentic instrument and a decision, regard should be had to the grounds of non-recognition of decisions under this Regulation.

SPAIN

The Spanish legal system

Spain consists of multiple legal systems all of which belong to the civil law family. There are 17 Autonomous Communities and 2 Autonomous Cities (Ceuta and Melilla). Political and administrative powers are variously devolved and distributed between the central and the autonomous authorities. Six Autonomous Communities have their own Succession Laws,³⁰⁵ which coexist with the rules on succession contained in the Spanish Civil Code.³⁰⁶ Certain areas of Spanish law are however not devolved and Spanish legislation applies throughout Spain in these areas of law. The non-devolved areas of law include: procedural law (*derecho procesal*); Private International Law (*derecho internacional privado*); notarial law; and, land registration law.³⁰⁷ Equally, the provisions contained in the Spanish Civil Code may apply by default when an Autonomous Community either has no power to legislate in civil matters or has such a power but has not yet exercised it completely. The Spanish State has implemented the European Union Succession Regulation via various legislative provisions and amendments to its national laws and procedural rules.³⁰⁸

³⁰⁵ **Catalonia:** Civil Code (Codi civil). Book IV on Succession was enacted by Law 10/2008, 10 July, as amended (Catalan CC). Available at: <https://www.boe.es/buscar/act.php?id=BOE-A-2008-13533>

English version available at: <http://www.parlament.cat/web/documentacio/altres-versions/Ileis-versions>

Basque Country: Ley 5/2015, de 25 de julio, de Derecho Civil Vasco (BOE, núm. 176, 24/7/2015) (L 5/2015) Available at: http://www.boe.es/diario_boe/txt.php?id=BOE-A-2015-8273 (Law 5/2015)

Aragon: **Decreto Legislativo** 1/2011, de 22 de marzo, del Gobierno de Aragón, por el que se aprueba, con el título de «Código del Derecho Foral de Aragón», el Texto Refundido de las Leyes civiles aragonesas (Aragon Code). Available at: <http://www.boe.es/buscar/doc.php?id=BOA-d-2011-90007>

Balearic Islands: Decreto Legislativo 79/1990, de 6 de septiembre, por el que se aprueba el Texto Refundido de la Compilación del Derecho Civil de las Islas Baleares, as amended. Available at: <http://81.89.32.211/buscar/act.php?id=BOIB-i-1990-90001&p=20090505&tn=2&lang=en>

Galicia: Ley 2/2006, de 14 de junio, de derecho civil de Galicia, as amended (L.2/2006). Available at: <http://www.boe.es/buscar/pdf/2006/BOE-A-2006-14563-consolidado.pdf> (Law 2/2006)

Navarre: Ley 1/1973, de 1 de marzo, por la que se aprueba la Compilación del Derecho Civil Foral de Navarra, as amended (Navarre Compilation) Available at: <http://www.boe.es/buscar/pdf/1973/BOE-A-1973-330-consolidado.pdf>.

³⁰⁶ **Spanish Civil Code** (Código civil). Royal Decree 24 July 1889, as amended. Available at: <https://www.boe.es/buscar/act.php?id=BOE-A-1889-4763> English version available at: http://www.mjusticia.gob.es/cs/Satellite/Portal/1292427177941?blobheader=application%2Fpdf&blobheadername1=Content-Disposition&blobheadervalue1=attachment%3B+filename%3DSpanish_Civil_Code_%28Codigo_Civil%29.PDF

³⁰⁷ **Spanish Civil Procedural Law:** Ley 1/2000, de 7 de enero, de enjuiciamiento civil, as amended. Available at: <https://www.boe.es/buscar/act.php?id=BOE-A-2000-323> English version available at: http://www.mjusticia.gob.es/cs/Satellite/Portal/1292426983864?blobheader=application%2Fpdf&blobheadername1=Content-Disposition&blobheadervalue1=attachment%3B+filename%3DCivil_Procedure_Act_%28Ley_de_Enjuiciamiento_Civil%29.PDF

Land Registration Law: Decreto de 8 de febrero de 1946 por el que se aprueba la nueva redacción oficial de la Ley Hipotecaria, as amended. (LH) Available at: <https://www.boe.es/buscar/act.php?id=BOE-A-1946-2453>;

Land Registry Regulations: Decreto de 14 de febrero de 1947 por el que se aprueba el Reglamento Hipotecario, as amended. Available at: <http://www.boe.es/buscar/act.php?id=BOE-A-1947-3843> English version available at:

http://www.mjusticia.gob.es/cs/Satellite/Portal/1292426984632?blobheader=application%2Fpdf&blobheadername1=Content-Disposition&blobheadervalue1=attachment%3B+filename%3DMortgage_Law_%28Ley_y_Reglamento_Hipotecario%29.PDF

Notarial law: Ley del Notariado de 28 de mayo de 1862, as amended (LN). Available at: <http://www.boe.es/buscar/act.php?id=BOE-A-1862-4073>

Notarial Regulations: Decreto de 2 de junio de 1944, por el que se aprueba con carácter definitivo el Reglamento de la organización y régimen del Notariado, as amended (RN). Available at: <http://www.boe.es/buscar/act.php?id=BOE-A-1862-4073>

³⁰⁸ **Law on International Legal Cooperation in Civil Matters:** Ley de cooperación jurídica internacional civil: Ley 29/2015, de 30 de julio, de cooperación jurídica internacional en materia civil (BOE de 31.7.2015), in force 20.8.2015. Especially: Final Provision 1 amends art. 14.1 LH, introducing the European Certificate of Succession as a title granting access to the land registry; Final Provision 2 introduces a Final Provision 26 in the State Civil Procedure Law. It refers to the European Certificate of Succession, the role of notaries and the enforceability of public documents, but it does not refer to Article 59 of Regulation 650/2012 with regard to

The concept of an authentic instrument in Spain

The Spanish legal system makes extensive use of authentic instruments, whether created in the presence of a notary or another empowered public official, to authoritatively record in a public document that identified persons have made specified declarations, and or have entered into various types of legal act. If the authentic instrument is created by a notary he always retains the original document recording that instrument in his protocol (an archive of notarial documents). He supplies authentic copies of the original to those who may legitimately require this. The authentic instrument created by this process is a public document. It is presumed to be strong and compelling evidence of all facts that the notary has verified as true when creating the authentic instrument. It must be stressed that in Spanish law this evidentiary presumption concerning authentic instruments only applies to matters that the notary actually has verified in the specific authentic instrument. e.g. matters concerning the identities of the parties and the fact that the parties made certain declarations in the presence of the notary. In Spanish law the evidential presumption concerns the fact that a declaration was made before the notary. It does not additionally establish the truth of the declaration so made.

Because the notary is a public official creating a public document, the evidence he verifies in an authentic instrument may also be relied upon by third parties. The use of an authentic instrument in certain transactions is required by Spanish law, in other cases though not required by law it is required in practice: e.g. Spanish public registers insist upon receiving public documents concerning any entry onto a register, thus if a transaction is eventually to be registered in a public register it will proceed via an authentic instrument.

Evidentiary effects of domestic authentic instruments in Spanish law

Disputing the validity of the authentic instrument

If an authentic instrument is successfully challenged as to its formal validity/authenticity it will lose the evidentiary effects associated with its former status as a public document. A challenge to authenticity may either involve a verification dispute concerning the accuracy of the copy of the authentic instrument that is relied upon, or, may involve criminal allegations of forgery by either the notary or other persons.

Article 320 of the Civil Procedure Law lays down the rules on the verification process that are to be followed when the authenticity of an instrument is contested within a civil court procedure. Verification may be required due to the allegation that parts of the document are missing or that there are errors in the copy so that it does not coincide with the original. Verification basically entails a comparison between the original or master document and the copy provided. This is carried out by the court clerk; not as a separate

acceptance of public documents. Available at: https://www.boe.es/diario_boe/txt.php?id=BOE-A-2015-8564 (Law 29/2015)

Law on Non-Contested Jurisdiction: Ley de jurisdicción voluntaria: Ley 15/2015, de 2 de julio, de la Jurisdicción Voluntaria (BOE, núm. 158, 3/7/2015), in force 23.7.2015. Especially: Title IV, on non-contentious jurisdiction proceedings in matters of succession; Additional Provision 3 on recording foreign documents in public registries. Available at: <https://www.boe.es/boe/dias/2015/07/03/pdfs/BOE-A-2015-7391.pdf> (Law 15/2015)

Notarial law: Ley del Notariado (Notarial Law), as amended by Law 15/2015. Reglamento Notarial (Notarial Regulations), as amended. Available at: <http://www.boe.es/buscar/act.php?id=BOE-A-1862-4073>.

Spanish Civil Code, as amended by Law 15/2015. Available at: <http://www.boe.es/buscar/act.php?id=BOE-A-1889-4763>.

International jurisdiction rules: Ley orgánica del poder judicial, as amended by Law 7/2015: Modification of the Organic Law on Judicature, Ley Orgánica 7/2015, 21 July, por la que se modifica la Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial (BOE, núm. 174, 22/7/2015). Available at: <http://www.boe.es/buscar/act.php?id=BOE-A-1985-12666>.

See also the repeal of the 1881 Civil Procedure Law by Law 29/2015. Real decreto aprobando el proyecto de reforma de la Ley Enjuiciamiento civil (BOE núm. 36, de 5 de febrero de 1881) https://www.boe.es/diario_boe/txt.php?id=BOE-A-1881-813.

procedure, but as part of the activities that may be necessary within an ordinary civil procedure. If the copy does not coincide with the original, the court clerk will state this in order to grant evidentiary effect to the real content of the public document. According to Article 1220 of the Spanish Civil Code, "copies of public instruments of which there is an original or an official file, challenged by those to whom they prejudice, shall only have evidentiary force when they have been duly verified."

If the disputed document is the original authentic instrument, Article 319 of the Civil Procedure Law grants it the automatic effect of providing full proof of the aspects dealt with above and thus it must be understood to be incapable of accidental manipulation. Therefore, such a document may only be challenged on the ground of forgery. Articles 390 to 394 of the Criminal Code define the offence and distinguish between different perpetrators. If forgery of the authentic instrument is raised during a civil court procedure (such as those regarding succession), the civil court will stay its proceedings as soon as it is informed of the fact that a criminal proceeding has begun regarding a document that is considered decisive for the civil case.³⁰⁹

According to Article 1218 of the Spanish Civil Code, a public document (which phrase includes an authentic instrument) is a means of evidence and has evidentiary effect: "Public instruments constitute evidence, effective even against third parties, of the fact which motivates their execution and of the date thereof. They shall also constitute evidence effective against the contracting parties and their successors, as concerns the statements made therein by the former."

As is explained below, the domestic evidential effect of a Spanish authentic instrument is limited to certain specified issues and **does not** extend to the truthfulness or accuracy of the declarations made by the parties to the authentic instrument and recorded by the notary.

Spanish procedural law makes no meaningful distinction between evidential effect and evidential value. The legal system recognises certain means of evidence (Article 299 of the Civil Procedure Law: questioning the parties; public documents; private documents; expert's opinions; taking of evidence by the court; questioning of witnesses). The evidential value granted to these forms of evidence could either be set by the law (where certain forms of evidence are deemed to produce full proof) or may be left to the court's reasonable discretion. The evidential effect and value of public documents before the courts is provided for, especially, by Articles 317 to 323 of the Civil Procedure Law and Articles 1218 to 1221 of the Spanish Civil Code. Authentic instruments are admitted as a means of taking evidence in trials (Article 299 of the Civil Procedure Law), and as the evidentiary effect thereof is set by the law; the court will have to grant it said effect when making its decision.

Otherwise all public documents and authentic instruments (See Articles 318 and 319.1 of the Civil Procedure Law) grant full proof with regard to:

- 1) the facts, acts or state of affairs recorded by the public official;
- 2) the date;
- 3) the identity of the intervening certifying officer and of the other persons, if any, that may have intervened in them.

This evidential value **does not** cover the truthfulness or the accuracy of the content of the public document. Other means of evidence **may** be brought to the attention of a court and the declarations recorded in the document **may** be decided by that court to be proven to be incorrect or untrue. According to the Spanish Supreme Court, public documents **do not** prevail over other means of evidence; **the court is only bound with regard to the fact that the document was created, the identification of the intervening parties and the date.**³¹⁰ The evidential value of the *material content* of

³⁰⁹ The party who would benefit from the evidentiary effect of the document may however avoid the stay of the civil proceedings by waiving the possibility of using the disputed document in those proceedings: Article 40 of the Civil Procedure Law.

³¹⁰ Supreme Court Judgment of 28 May 2008.

the document is to be determined at the court's discretion, which may legitimately extend to include any other means of evidence that has been adduced.

Of course authentic instruments may also have evidentiary effects before non-judicial authorities, such as a notary. For example, the parties may present an authentic instrument whereby they accept an inheritance in order to proceed to partition before a different notary. If a notary is presented with a domestic authentic instrument he will, assuming it to be in accordance with the law, only grant it the evidential effects specified by Articles 318 and 319.1 of the Civil Procedure Law (see above). It is not possible to challenge the evidentiary effect of an authentic instrument before a notary – such a challenge must proceed before a court.

The use of authentic instruments in domestic Spanish succession law

It should be noted that it is **very** common for persons in Spain to use a notary to assist in the creation of a will and thereafter in the operation of all subsequent matters of succession law. The notary who acts in either of these senses will, assuming this to be appropriate, do so via the creation of authentic instruments. The use of an authentic instrument is practically necessary if any aspect of the succession is ever intended to interact with a public registry because the registry will require a public document before it will create or adjust any existing entry. Because of the different possibilities allowed by the Spanish Civil Code and by the various succession laws of the autonomous regions, the possible uses of authentic instruments in succession differ somewhat.

Subject to the two aforementioned caveats, the legal systems within Spain will usually regard the following documents as authentic instruments in matters of succession:

- a) **an 'open will'** created by a notary (or by a specifically empowered equivalent public official in the context of a privileged will) on the instructions of the testator is an authentic instrument. Open notarial wills are presumed to be: authentic (i.e. made by the testator); the date and time of execution are deemed to be correct and the testator's capacity to make a will is presumed to have existed at the time of executing it (identifying the testator and evaluating his or her capacity are two of the functions the notary is compelled to carry out). The content of the will is also presumed to correspond to the testator's declaration. These presumptions are rebuttable, but they allow the course of the succession to continue unless successfully challenged. The notary will keep the original will in his protocol and register its existence.³¹¹
- b) **the document concerning the post mortem process carried out by the notary in relation to a closed will.** A closed will is **not** itself an authentic instrument. It is not created by the notary but is merely received by him, having already been completed by the testator. At the point of receipt the notary notes the details on the sealed envelope in which the will is supplied and thereafter keeps it in his protocol and registers its existence with the authorities.³¹² After the death of the testator it is necessary for the notary³¹³ to enter into a process to establish the authenticity of the content of the closed will and to incorporate it into a public instrument (Article 714 of the Spanish Civil Code; Articles 57 to 60 of the Notarial Law).
- c) **a partition agreement.**
- d) **a disclaimer of rights concerning an inheritance.**

³¹¹ Registro de Actos de Última Voluntad (in the Ministry of Justice). Its official website is:

http://www.mjusticia.gob.es/cs/Satellite/es/1215197983369/Estructura_P/1215198331120/Detalle.html

³¹² Registro de Actos de Última Voluntad (in the Ministry of Justice). Its official website is:

http://www.mjusticia.gob.es/cs/Satellite/es/1215197983369/Estructura_P/1215198331120/Detalle.html

³¹³ At present and since the Spanish Law 15/2015 came into force, there are conflicting legal provisions regarding which authority is to carry out the processes needed to give formal validity to holograph wills and wills made before witnesses, since various Autonomous Community provisions still refer to the judicial procedure that was in place prior to this new piece of legislation. It is suggested that, since procedure law and notarial law are exclusive powers of the central State (Article 1491. 6 and 8 of the Spanish Constitution), the conflicting regional provisions should be deemed to have been repealed.

e) **a waiver of a legitimate portion right** – if this is permissible.

f) **a joint will** – if this type of will is permissible. Article 669 of the Spanish Civil Code prohibits joint wills but most Autonomous Communities with separate succession laws allow and accept joint wills in the sense employed by Article 3(1)(c) of the European Union Succession Regulation 650/2012.³¹⁴

g) **a contractual inheritance agreement** – When such an agreement is permissible. As a rule, the Spanish Civil Code does *not* allow contractual agreements concerning an inheritance.³¹⁵ However, there are a few exceptions within the Spanish Civil Code that allow inheritance agreements. For instance, Articles 826 and 827 permit certain agreements regarding part of the legitimate portion, as long as they are made within an authentic instrument establishing a marriage settlement and as long as they benefit one or more descendants. Also, Article 1341 allows future spouses to give each other assets that they do not have at the time, provided these donations are included in an authentic instrument establishing a marriage settlement. The position under the autonomous legal areas is that inheritance agreements are often allowed.³¹⁶

The Private International Law implications of the European Union's Succession Regulation 650/2012 and Implementing Regulation 1329/2014

The European Union Succession Regulation and its Implementing Regulation raise two distinct Private International Law issues for Spain as an EU Member State: first, the extent of the obligations imposed by these Regulations on Spain as a Member State of origin concerning its domestically created succession authentic instruments; and, second, the extent of the obligations these Regulations impose on Spain as a Member State addressed concerning its duties relating to incoming foreign succession authentic instruments. The comments that follow consider each position.

Spain is the Member State of origin: obligations concerning domestic succession authentic instruments

Article 59(1) of the European Union Succession Regulation allows, but does not require, 'a person' who wishes to use a succession authentic instrument in another Member State to ask the authority who established it, i.e. the notary who drew it up or his substitute/successor, to issue an attestation concerning that authentic instrument on the standard form provided by Annex 2 Form II of EU Implementing Regulation 1329/2014. It is unclear whether or not such a request must be complied with if it is received from a person not deemed by the notary to be 'an interested party'. The substitution of the phrase 'a person' in Article 59 for 'interested party' in Article 60 seems to indicate that there is no requirement in the EU Succession Regulation for the applicant seeking only cross-border acceptance to demonstrate what would otherwise be domestically regarded as a 'legitimate interest' when requesting the attestation from the notary. Though most

³¹⁴ See **Aragon** (Articles 410, 411 and 417 to 422 of the Code), **Basque Country** (Articles 24 to 29 of Law 5/2015), **Galicia** (Articles 187 to 195 of Law 2/2006) and **Navarre** (Articles 199 to 205 of the Compilation). The types of Joint Will that are accepted in every territory vary, as do the provisions on revocation.

³¹⁵ Articles 658 and 1271 of the Spanish Civil Code lay down the express prohibition; Article 635 - concerning the prohibition to donate assets that the donor cannot dispose of at the time of making the gift - and Article 816 - banning agreements on the future legitimate portion or a forced share - complement the general rule.

³¹⁶ **Aragon:** Contractual inheritance agreements are allowed by Article 317 of the Aragonese Code and Articles 377 to 404 are dedicated to them. Article 380 defines permissible types of agreement. **Balearic Islands:** For Mallorca, Article 6 of the Compilation allows contractual inheritance agreements. Articles 8 to 13 provide for universal donations, which may be included in this category; Articles 50 and 51 regulate a succession agreement to waive future inheritance rights, and Articles 69 and 72 to 78 provide, in generous terms, for inheritance agreements with regard to people subject to the local law of the islands of Ibiza and Formentera. Note however that Article 65 **excludes** contractual inheritance agreements when the local law of Menorca applies. **Basque Country:** Article 18 of Law 5/2015 expressly allows contractual inheritance agreements, which are provided for by Articles 100 to 109. **Catalonia:** Contractual inheritance agreements have been traditionally possible and are now provided for by Articles 431-1 to 431-30 of the Catalan Civil Code. **Galicia:** Law 2/2006 expressly allows certain inheritance agreements (Article 181). It is a matter of discussion whether only agreements provided for in Articles 209 to 227 are accepted or whether other inheritance agreements are also possible. **Navarre:** Contractual inheritance agreements are provided for by Articles 172 to 183 of the Navarre Compilation. Article 177 describes the types of agreement which are allowed in generous terms.

imaginable classes of applicant already fall into the category of possessing a legitimate interest,³¹⁷ this poses a theoretical problem for domestic practice which considers that the applicant must demonstrate a legitimate interest. The EU Succession Regulation and Implementing Regulation do not expressly contemplate the possibility that such a request under Article 59 may be refused. It is however possible to contrast the applicant 'may ask' of Article 59 with the authority 'shall' in Article 60(2) and to infer from the different wording that the notary (or other public authority) is only actually obliged to accede to the applicant's request when it concerns enforcement under Article 60. This result however seems inconsistent with Recitals 22, 59 and 60 of the EU Succession Regulation and with one of its underlying purposes, i.e. to facilitate the cross-border transmission of authentic instruments and their legal effects. In circumstances where both the acceptance and the enforcement of the authentic instrument may be sought the problem may be avoided, assuming the notary to be willing to provide information concerning both Article 59 and Article 60, by the applicant routinely requesting an attestation concerning *both* enforcement and acceptance.

Article 60 of Regulation 650/2012 requires that, provided that to so declare would not be manifestly contrary to Spanish public policy, the authorities in the Member State addressed (Spain) *must* on application by an interested person declare a foreign succession authentic instrument that is enforceable in its Member State of origin to also be enforceable in their Member State. A Spanish notary may be in receipt of a request for such an attestation, again under Annex 2 Form II of EU Implementing Regulation 1329/2014. This standard form allows for an attestation that concerns either only 'acceptance' of the succession authentic instrument, via Article 59, or only 'enforcement' of the authentic instrument via Article 60. The Annex 2 form also allows an attestation that jointly concerns acceptance and enforcement of the authentic instrument depending upon the boxes ticked by the notary.³¹⁸

The Spanish notary in receipt of the request to provide a completed Annex 2 Form II attestation concerning a domestic succession authentic instrument is asked to indicate at points 4.2 to 4.2.1.1.7 of the standard form what he believes its domestic evidentiary effects to be. Though the answers may vary depending upon the specific succession authentic instrument at issue, it is broadly conceivable that points 4.2.1.1.1 to 4.2.1.1.7 could be expected to be completed as follows:

4.2.1.1.1 - The date the authentic instrument was drawn up:

According to Articles 317 and 319 of the Civil Procedure Law and Article 1218 of the Spanish Civil Code, an authentic instrument provides full proof of the date on which it was produced.

4.2.1.1.2 - The place where the authentic instrument was drawn up:

According to Articles 317 and 319 of the Civil Procedure Law and the case law of the Spanish Supreme Court, an authentic instrument provides full proof of the place in which it was produced.

4.2.1.1.3 - The origin of the signatures from the parties of the authentic instrument:

According to Articles 317 and 319 of the Civil Procedure Law, an authentic instrument provides full proof of the identity of the notary certifying it and of any other persons intervening in it.

4.2.1.1.4 - The content of the declarations of the parties:

According to Articles 317 and 319 of the Civil Procedure Law and the case law of the Spanish Supreme Court, an authentic instrument provides full proof of the fact, action or state of affairs it documents, including the fact that the declarations of the

³¹⁷ e.g. heirs, legatees, other beneficiaries, creditors of the deceased and people with a claim to a legitimate portion or to other rights over the estate.

³¹⁸ For Article 59 acceptance tick 'yes' in box 4.1.1; for Article 60 enforcement tick 'yes' in box 6.1.1. To dispense with either option tick 'no' in box 4.1.2. or 6.1.2 as appropriate.

parties were made, but it does not provide proof of the accuracy or truthfulness of such declarations.

The evidentiary effect of an authentic instrument in Spanish law does not cover the content of the declarations of the parties. The Spanish Supreme Court decided by a judgment of 28 May 2008 that legal acts or legal relationships recorded in an authentic instrument may therefore be challenged as to content before a court by adducing other conflicting evidence concerning the accuracy or truthfulness of declarations made by the parties in a Spanish authentic instrument.

4.2.1.1.5 - The facts that the authority declares as having been verified in its presence:

According to Articles 317 and 319 of the Civil Procedure Law, Article 1218 of the Spanish Civil Code and the Supreme Court's case law, an authentic instrument provides full proof of the facts, actions or state of affairs recorded in it. The notary's legal authority to attest documents grants enhanced evidentiary effect to the facts that the notary directly witnesses, including the declarations of the parties, **but not to the content of the declarations of the parties.**

4.2.1.1.6 - The actions which the authority declares to have carried out:

According to Articles 317 and 319 of the Civil Procedure Law and Article 1218 of the Spanish Civil Code, an authentic instrument provides full proof of the facts, actions or state of affairs recorded in it, including those carried out by the notary.

4.2.1.1.7 - Other: (please indicate any other evidentiary effect that a domestic authentic instrument could produce)

According to our advice there are no further evidentiary effects in Spanish law concerning authentic instruments that were not already covered by points 4.2.1.1.1 - 4.2.1.1.6: it is however conceivable that additional information could be presented in this box.

The proceeding to issue Annex 2 Form II of EU Implementing Regulation 1329/2014 in accordance with Article 60 of the Succession Regulation 650/2012 is domestically provided for in Spain by Final Provision 26, section 10-2, Law 29/2015, 30 July, on international legal cooperation in civil matters, in force 20.08.2015. There is no equivalent provision specifically concerning Article 59 but it is assumed that an application for the issue of an attestation under Article 59 of the Succession Regulation would proceed in the same manner.

Spain is the Member State addressed: foreign succession authentic instruments

The EU Succession Regulation requires that, subject to public policy exceptions, Spanish authorities **must accept** and, or, grant declarations of **enforceability** for foreign authentic instruments in matters of succession received from other EU Member States bound by the Succession Regulation.³¹⁹

The **acceptance** of a foreign succession authentic instrument produced in Spain is governed by Article 59 and Recitals 60 – 63 of the EU Succession Regulation. Acceptance requires that, provided that to do so would not be manifestly contrary to Spanish public policy, the authorities in Spain (as the Member State addressed) **must** grant the foreign succession authentic instrument the same (or most comparable) evidentiary effects as it would enjoy in its own Member State of origin.

The **Enforcement** of a foreign authentic instrument via Article 60 of EU Regulation 650/2012 requires that, provided that to do so would not be manifestly contrary to Spanish public policy, the authorities in the Member State addressed (Spain) **must** on application by an interested person declare enforceable a foreign succession authentic instrument that is enforceable in its Member State of origin. We are not aware of any special provision in the law of Spain that specifically deals with the actual enforcement of

³¹⁹ **Enforcement** of a foreign authentic instrument via Article 60 of Regulation 650/2012 requires that, provided that to do so would not be manifestly contrary to Spanish public policy, the authorities in the Member State addressed (Spain) **must** on application by an interested person declare enforceable a foreign succession authentic instrument that is enforceable in its Member State of origin.

a foreign authentic instrument after it has been declared enforceable (differently from the actual enforcement of a foreign judgment that has been declared enforceable) in accordance with the procedure laid down in Articles 45 to 58 of the EU Succession Regulation as required by Article 60 thereof.

To determine the enforceability and the nature of the evidentiary effects associated with an authentic instrument in the Member State of origin, reference should be made to any Annex 2 Form II form that may accompany the foreign authentic instrument, especially to parts 4 and 6 of that form. Part 4 concerns the evidentiary effect of the authentic instrument and this is detailed in points 4.2.1.1.1 to 4.2.1.1.7 of the Annex 2 form. It must however be noted that the use of the EU Implementing Regulation's Annex 2 form is not obligatory. The obligation imposed by Article 59 of the Succession Regulation on the Member State addressed to accept a succession authentic instrument does not require or depend upon the use or supply of the Annex 2 form. A succession authentic instrument received from a Member State of origin in accordance with the provisions of the EU Succession Regulation must still be accepted, within the meaning of Article 59 of Regulation 650/2012, even if no Annex 2 Form II form is provided or if the Annex 2 form provided is not fully or properly completed.³²⁰

The public policy exception in the Succession Regulation and in Spanish law

The EU Succession Regulation allows a public policy defence in various contexts including with reference to authentic instruments under Articles 59 and 60. To invoke the public policy exception in the context of Article 59, to justify a refusal of acceptance for that foreign authentic instrument, it must be that *granting of the same or most comparable evidentiary effects* to the foreign authentic instrument would be manifestly contrary to Spanish public policy. In the context of Article 60 it would have to be shown that *granting a declaration of enforceability* would be manifestly contrary to Spanish public policy. It is envisaged that the public policy exception will rarely apply under either Article. As Recital 58 of the EU Succession Regulation makes plain, public policy is not to be applied in a manner that is discriminatory or otherwise contrary to the European Union's Charter of Fundamental Rights.³²¹ Equally however Recital 26 of EU Regulation 650/2012 indicates that the Regulation does not prevent a court from applying mechanisms designed to tackle the evasion of the law, such as *fraude à la loi* in the context of Private International Law. However, the substantive provisions of the Regulation do not expressly empower national courts to prevent evasion of the law (including *fraude à la loi*). It would seem that the only positive basis for doing so under the Regulation is to regard such evasion of the law to be contrary to public policy unless the law being evaded is one of the "special rules" of the forum concerning certain assets that is applicable irrespective of the law applicable to the succession (see Article 30 of the EU Succession Regulation).

The exceptional nature of public policy means that it has rarely been invoked with success. In the Spanish Supreme Court decision of 8 October 2010 (n. 602/2010), the appellant sought a declaration stating that a joint will made by a German national had been revoked by a later Spanish will with regard to assets located in Spain. The heir under this later Spanish will had accepted the inheritance in Spain via a Spanish notary;

³²⁰ It may be that assistance might be sought from the European judicial network <http://www.ejn-crimjust.europa.eu/ejn/> and or from notarial organisations whether European <http://www.cnue.eu/> or national notarial bodies.

³²¹ Recital 58: Considerations of public interest should allow courts and other competent authorities dealing with matters of succession in the Member States to disregard, in exceptional circumstances, certain provisions of a foreign law where, in a given case, applying such provisions would be manifestly incompatible with the public policy (*ordre public*) of the Member State concerned. However, the courts or other competent authorities should not be able to apply the public-policy exception in order to set aside the law of another State or to refuse to recognise or, as the case may be, accept or enforce a decision, an authentic instrument or a court settlement from another Member State when doing so would be contrary to the Charter of Fundamental Rights of the European Union, and in particular Article 21 thereof, which prohibits all forms of discrimination.

the German court named the German heir under the joint will executor of the estate. A contested proceeding was undertaken before a Spanish court. The applicable law was German and provided that a reciprocal joint will could not be revoked after the death of the first spouse: under German law the joint will was thus irrevocable. The appellant - the heiress according to the Spanish will – alleged that this German rule was contrary to Spanish public policy, specifically the Spanish principle of free revocability of wills. The Supreme Court dismissed the allegation, holding that the issue of whether a will is revocable or not such a fundamental principle of Spanish law that its breach in this case could be held to be contrary to Spanish public policy.

It may be that public policy could successfully be raised in a matter of succession if the application of the applicable foreign law would entail gender discrimination. This suggestion is based on Spanish case-law concerning intestacy. For example, in the decision of the Barcelona Court of Appeal (Section 4) of 28 October 2008 it was held that Moroccan legislation (Mudawana) was incompatible with Spanish international public policy inasmuch as it contains a provision whereby prohibitions to inherit are based on religion and on filiation.

Our national reporters were not able to find any case in which public policy had been invoked to deny the reception of a foreign authentic instrument in the context of a Spanish succession proceeding.

Incompatible Authentic instruments

Recital 66 of the Succession Regulation envisages the possibility of 'an authority' when applying the Regulation being presented with incompatible authentic instruments.³²² The solutions suggested by the Recital are: first, to consider priority and the circumstances of the particular case and then, if this has not resolved the incompatibility, to resort to a court with direct or incidental jurisdiction under the Succession Regulation. The approach of the Spanish legal system, if there is a conflict between different means of evidence (such as documents) with evidentiary effects granted by law, has been for the court to evaluate the evidence as a whole at its discretion. If conflicting public documents were at issue, their binding effects would be temporarily annulled during this process. As far as notarial documents are concerned, the closest domestic law rule addressing aspects of this issue is Article 1219 of the Spanish Civil Code, according to which: "Public deeds executed to invalidate another prior public deed between the same interested parties shall only be effective against third parties if the content of the former is noted at the competent public registry or on the margin of the original document, and of the extract or copy pursuant to which the third party should have acted." Since foreign documents are granted the same treatment as domestic documents, it seems likely that these rules and principles will also be applied in the event of the presentation of incompatible authentic instruments.

³²² Recital 66: Should an authority, in the application of this Regulation, be presented with two incompatible authentic instruments, it should assess the question as to which authentic instrument, if any, should be given priority, taking into account the circumstances of the particular case. Where it is not clear from those circumstances which authentic instrument, if any, should be given priority, the question should be determined by the courts having jurisdiction under this Regulation, or, where the question is raised as an incidental question in the course of proceedings, by the court seized of those proceedings. In the event of incompatibility between an authentic instrument and a decision, regard should be had to the grounds of non-recognition of decisions under this Regulation.

SWEDEN

The Swedish legal system

Sweden consists of a single legal system that belongs to the civil law family. The Swedish law concerning succession has been updated to implement the EU Succession Regulation via the:

Lag (2015:417) om arv i internationella situationer/Act (2015:417) on Succession in International Situations.³²³

This Act gives effect to amendments to the Nordic Inheritance Convention 1934, which regulates matters of succession between Nordic countries, to take account of the intergovernmental agreement between the Nordic States of 1 June 2012. The new law and the changes to the law entered into force on 17 August 2015.

The concept of an authentic instrument in Sweden

The Swedish legal system does feature public documents (usually in the form of registers) **but does not feature the legal institution of the authentic instrument.**

There are 250 notaries in Sweden but there is no centralised register of notaries public. The notaries public are competent authorities. A Swedish notary is not able to create an authentic instrument. They are able to attest to signatures, translations, translators, adoptions, company documents, copies of documents, sales documents and also issue apostilles.

There is no domestic legal competence for a Swedish notary to ever be professionally involved in a succession conducted in Sweden. The Swedish Tax Agency is the competent authority for issuing the European Certificate of Succession. The Swedish Tax Agency issues official certificates such as death certificates which automatically show spouse and children.

Evidentiary effects of domestic authentic instruments in Swedish law

As the Swedish legal system does not feature authentic instruments it follows that there are no such domestic evidentiary effects in Swedish law.

The use of authentic instruments in domestic Swedish succession law

The Swedish legal system does not use authentic instruments in any part of its domestic law. Further a Swedish notary has no domestic role in the creation of any kind of will. There are no rules in the Swedish Inheritance Code concerning the deposit or registration of wills. There is no public depository for wills and nor is there any kind of Wills Registry in Sweden.

Sweden allows for three types of will: written, holograph and oral. The ordinary form is the written will which must be in writing. It must be signed by the testator and witnessed by two witnesses who are both present at the same time and understand that it is a will that they are witnessing. The holograph will and oral will are valid for three months within which time the testator should seek to have it drawn up in the ordinary way.

³²³https://www.riksdagen.se/sv/Dokument-Lagar/Lagar/Svenskforfatningssamling/Lag-2015417-om-arv-i-intern_sfs-2015-417/?bet=2015:417.

The Private International Law implications of the European Union Succession Regulation 650/2012 and Implementing Regulation 1329/2014

As the legal institution of the authentic instrument is absent from Swedish law, Sweden can never be a Member State of origin in connection with an authentic instrument concerning succession. Equally, it must be noted that prior to the EU Succession Regulation there were no provisions apart from the Nordic Inheritance Convention 1934³²⁴ concerning recognition and enforcement of foreign succession decisions in the Swedish legal system.

The comments that follow therefore only address the position of Sweden as a Member State addressed.

Sweden is the Member State addressed – foreign succession authentic instruments

The EU Succession Regulation requires that, subject to public policy exceptions, Swedish authorities must accept and, or, enforce foreign authentic instruments in matters of succession received from other EU Member States bound by the Succession Regulation.

The acceptance of a foreign succession authentic instrument produced by a holder in Sweden is governed by Article 59 of the EU Succession Regulation. The enforcement of such an authentic instrument is governed by Article 60 of that Regulation. Acceptance requires that, provided that to do so would not be manifestly contrary to Swedish public policy, the authorities in Sweden (as the Member State addressed) must grant the foreign succession authentic instrument the same (or most comparable) evidentiary effects it would enjoy in its own Member State of origin.

To determine the nature of the evidentiary effects that would be associated with that authentic instrument in the Member State of origin, reference should be made to any Annex 2 Form II form that may accompany the foreign authentic instrument, especially to parts 4.2.1.1.1 – 4.2.1.1.7 of any such form. It must however be noted that the use of the EU Implementing Regulation's Annex 2 form does not appear to be obligatory. The obligation imposed by Article 59 of the EU Succession Regulation on the Member State addressed to accept a succession authentic instrument does not require or depend upon the use or supply of the Annex 2 form. A succession authentic instrument received from a Member State of origin in accordance with the provisions of the EU Succession Regulation must still be accepted, within the meaning of Article 59 of Regulation 650/2012, even if no Annex 2 Form II form is provided or if the Annex 2 form provided is not fully or properly completed.

The enforcement of a foreign succession authentic instrument via Article 60 of EU Regulation 650/2012 requires that, provided that to do so would not be manifestly contrary to Swedish public policy, the Swedish authorities must, on application by an interested person, declare enforceable a foreign succession authentic instrument that is itself enforceable in its Member State of origin. We are not aware of any special provision in the law of Sweden that specifically deals with the actual enforcement of a foreign authentic instrument after it has been declared enforceable (differently from the actual enforcement of a foreign judgment that has been declared enforceable) in accordance with the procedure laid down in Articles 45 to 58 of the EU Succession Regulation as required by Article 60 thereof.

³²⁴ In so far as that Convention, as revised by the intergovernmental agreement of 1 June 2012, provides for simplified and more expeditious procedures for the recognition and enforcement of decisions in matters of succession, that Convention still applies between Denmark, Finland, Iceland, Norway and Sweden. (See Article 75(3) of the EU Succession Regulation) Such 'decisions' are those given by a court and do not include authentic instruments.

Swedish Public Policy

The EU Succession Regulation allows a public policy defence in various contexts including with reference to authentic instruments under Articles 59 and 60. To invoke the public policy exception in the context of Article 59, and by so doing to justify a refusal of acceptance for that foreign authentic instrument, it must be the case that the granting of the same or most comparable evidentiary effects to the foreign authentic instrument would be manifestly contrary to Swedish public policy. To invoke the public policy exception in the context of Article 60, to justify a refusal of a declaration of enforceability for the foreign authentic instrument, it must be that the granting of the declaration of enforceability for the foreign authentic instrument would be manifestly contrary to Swedish public policy. Of course this public policy exception should be construed narrowly and it is envisaged that it will rarely apply. As is made plain by Recital 58 of the EU Succession Regulation, public policy is not to be applied in a manner that is discriminatory or otherwise contrary to the European Union's Charter of Fundamental Rights. Equally however Recital 26 of Regulation 650/2012 indicates that the Regulation does not prevent a court from applying mechanisms designed to tackle the evasion of the law, such as *fraude à la loi* in the context of Private International Law. However, the substantive provisions of the Regulation do not expressly empower national courts to prevent evasion of the law (including *fraude à la loi*). It would seem that the only positive basis for doing so under the Regulation is to regard such evasion of the law to be contrary to public policy unless the law being evaded is one of the "special rules" of the forum concerning certain assets that is applicable irrespective of the law applicable to the succession (see Article 30 of the EU Succession Regulation).

Our national reporters were not able to find any case in which public policy had been invoked to deny the reception of a foreign authentic instrument in the context of an Swedish succession proceeding.

Incompatible Authentic Instruments

Recital 66 of the EU Succession Regulation envisages the possibility of 'an authority' being presented with incompatible authentic instruments.³²⁵ The solutions suggested by this Recital are to consider priority and the circumstances of the particular case and then, if this has not resolved the incompatibility, to resort to a court with direct or incidental jurisdiction under the EU Succession Regulation.

There are no domestic or Private International Law provisions concerning authentic instruments in general or concerning this issue in Swedish law.

³²⁵ Recital 66: Should an authority, in the application of this Regulation, be presented with two incompatible authentic instruments, it should assess the question as to which authentic instrument, if any, should be given priority, taking into account the circumstances of the particular case. Where it is not clear from those circumstances which authentic instrument, if any, should be given priority, the question should be determined by the courts having jurisdiction under this Regulation, or, where the question is raised as an incidental question in the course of proceedings, by the court seized of those proceedings. In the event of incompatibility between an authentic instrument and a decision, regard should be had to the grounds of non-recognition of decisions under this Regulation.

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

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