Alpe-Adria Meeting, 23/10/2023

1. Case 1
European Certificate of Succession (ECS) & 'registrability'

Well known issue and already discussed at the ENN meeting in Vienna on 02/06/2023.

It should be considered to compile & exchange best practices in the participating countries and to make them easily accessible for other notaries to speed up future succession proceedings by simply knowing what to do, e.g.

- where to get the correct cadastral information and description if needed,
- whether or not further proceedings are required for a recording of an ECS in the land register and if so, which proceedings,
- whether any specific information in or along with the ECS is required for recording the transfer of property in the land register
- which taxes and fees are to be paid etc along with a list and a how-to for special rules within the meaning of Art 30 SR,
- ….

As to Austria there is § 33 (1) d GBG (Austrian Land Register Act) and the judgments of the Austrian Supreme Court (Oberster Gerichtshof (OGH)); e.g. OGH 5 Ob 186/17i (German 'Erbschein'), 5 Ob 35/18k (German ECS), 5 Ob 77/18m (German ECS), 5 Ob 90/18y (German ECS and 'Erbschein'), 5 Ob 157/18a (German 'Erbschein'); a registration of an ECS per se is possible.

As to Germany there is still the refusal to identify assets, including immovable property, in an ECS no matter what despite rec 68, Art 63 (2) (b), 68 (l) and (m) and 66 (5) of the Succession Regulation (SR) and the issue of § 35 German Land Register Regulation (Grundbuchsordnung (GBO)), prohibiting the use of decisions under Art IV SR or authentic instruments under Art V SR from other member states as basis for a recording in the German land register.

2. Case 2
Courts - 'Non-Courts' within the meaning of the Succession Regulation (SR)

If an authority dealing with succession proceedings is a 'court' within the meaning of Art 3 (2) SR, it means that it is bound by the rules of international jurisdiction of the SR and that its decisions shall be recognised and enforced in other Member States (MS) under Chapter IV SR.

If authorities dealing with succession proceedings are not 'courts' within the meaning of Art 3 (2) SR they are not bound by the rules of jurisdiction, and authentic instruments issued by them should circulate in accordance with the provisions on authentic instruments under Chapter V SR.

Example
Habitual residence of the deceased at the time of his death in Austria, succession proceedings in Austria, Austrian law is the applicable law.
Immovable property and other assets in Austria as well as in another MS, where succession proceedings are dealt with by notaries not exercising judicial functions, therefore not qualified as court under the regime of the SR and not bound by the rules of jurisdiction of the SR:

- ➔ international jurisdiction of Austrian courts
- ➔ notaries of the other MS deal with the assets of the deceased in their country regardless of any rules of the SR, often apply their own national law and issue national certificates of inheritance limited on the deceased's property under their 'jurisdiction'

Considering the core principles of the SR the result is quite disappointing, the cost-efficiency questionable.

Similar experiences have been made from an Austrian point of view with member states considering

their competent authorities (notaries) as courts within the meaning of Art 3 (2) SR, but simply neglecting the SR's jurisdiction rules.

3. Case 3
Art 25 SR vs Art 23 (2) h SR; rec 49, 50 SR

The question of admissibility, substantive validity and binding effects of a waiver of an inheritance and/or a waiver of a reserved share *inter vivos* as an 'agreement as to succession' within the meaning of the SR is of immense importance, but may not be answered with legal certainty due to the unresolved tension between the provisions of Art 25 SR and Art 23 (2) h SR as well as rec 49 and 50.
There is a risk that contractual provisions which are admissible, substantively valid and binding at the time of the conclusion become ineffective due to a subsequent change of the applicable succession law by simply transfering the habitual residence to another MS.

Example 1
An Italian citizen has his habitual residence in Austria, has not made a choice of law in favour of Italian law and draws up an agreement as to succession in form of a waiver of the reserved share in Austria. At the time of his death, however, he has his habitual residence in Italy again.

Example 2
An Austrian citizen with habitual residence in Austria draws up an agreement as to succession in form of a waiver of the reserved share in Austria, does not make a choice of law in favour of Austrian law, moves his habitual residence to Italy twenty years after the conclusion of the contract and dies with habitual residence in Italy.

The relation between Art 25 SR and Art 23 (2) h SR should be clarified to prevent that a valid agreement as to succession in form of a waiver of inheritance or a reserved share will later be effectless, invalidated or overridden by an applicable law that does not accept/know/recognise such a waiver.

4. Case 4
Applying Foreign Procedural Law

Example
The last habitual residence of the Austrian citizen A was in Italy. His estate consists of immovables both in Italy and in Austria. The deceased Austrian citizen opted for Austrian law to be applied to his succession in his will. All close members of his family (spouse and children) live in Italy.

Since the transfer of the estate to the heirs is governed by the applicable law according to Art 23 lit e SR, the acquisition by the heirs requires a specific court procedure according to Austrian law. The jurisdiction lies with Italian courts (last habitual residence).

Where there is no choice-of-court agreement according to Art 5 SR nor any request for declining jurisdiction on the basis of Art 6, how will Italian (or, in general, any foreign) courts deal with Austrian procedure for the acquisition of the inheritance? Will they issue a court decree with constitutive effects similar to the one that exists in Austria (Einantwortungsbeschluss)?

Since liability for the debts under the succession also falls under the applicable law (Art 23 lit g), another question is how do courts/notaries deal with procedural requirements for limiting liability according to the foreign applicable law.

ALPE – ADRIA ENN SEMINAR
Gorizia, 23.10.2023.
Examples from practice of the Croatian Notariat

Case 1

1.1. The testator had her habitual residence in Italy during her lifetime. At the time of her death, she was registered as the owner/co-owner of a large number of properties in Croatia and the beneficiary of multiple bank accounts in Croatian banks. She left a handwritten Last will by which she left her entire property as an inheritance to the Foundation, a legal entity registered in the Swiss Federation.
At the request of the heirs' legal representatives, the Italian notary issued two ECSs in favour of the only testamentary heir – the said Foundation, one regarding the real estate and other for bank funds. In ECS, Italian notary specified data on all properties, as well as bank account details.

1.2. At the request of the legal representatives of the Heirs, Croatian notary compiled a Record of Testimony of the Facts by which he have established all the facts preceding the issuance of the ECS, and following the issued ECS – for real estate, Croatian notary submitted the Heir's Request for the registration of ownership rights in the name of the Foundation, as successor, in relation to three different Land Registry Departments. To that application he also attached the current Excerpt for the Foundation from the Swiss Register of Legal Entities.
With the second Record of testimony of facts, in addition to establishing previously performed actions following the issued ECS – for funds, he set the Heir's Request for remittance of inherited funds in favor of the Foundation's account.

1.3. Registration of ownership rights on inherited real estates in favor of the Foundation was successfully implemented in all three Land Registry Departments (Zagreb, Split and Dubrovnik).
Regarding the financial resources, the legal representatives of the Heir informed him that only thanks to the notary Record of testimony of the facts - with which the ECS was presented (translated in Croatian), it was possible to realize the transfer of inherited funds.
Namely, Croatian banks refused to transfer the funds only on the basis of ECS translated into Croatian.

Case 2

2.1. The deceased had his habitual residence in France, where he had most of his property. In the company incorporated in Croatia he held a 50% share of that company, together with his children, a son who has a 25% shares and a daughter who has a remaining 25% of the shares. The company is the owner of valuable real estate in Croatia.

2.2. At the request of his heirs, the French notary issued an ECS in which he enters information on the Testator, his successors and the shares in which they inherit the Deceased's property. The ECS issued by French notary nowhere mentions or describes the Deceased's assets: 50% share in the Croatian company.

2.3. According to Article 1, points 2 indents h) and (l) the application of the Regulation on succession when it comes to the regulation of company law is excluded, i.e. when it is necessary to carry out the procedure of registration of rights in the Register in relation to immovable or movable property. Therefore, in relation to the above, the national law of the Member State in which some (in this case inherited) rights are to be entered in a Register is exclusively applicable. And in order to register the inherited right in relation to the company share in the the Commercial Register, it is mandatory under Croatian law to properly describe this share.

2.4. After the repeated indication to the Testator's successor that the ECS issued by French notary - for the reasons stated in the previous point, is not a document that is enforceable in the Croatian Commercial Register, the French notary, at the request of that heir, with the presentation of the legal opinion described in the previous point, corrected and amended his ECS and described the Deceased's property as: 50% of the shares in the Croatian Company.
After that, it was possible to convene the Assembly of the Company, on the basis of ECS to determine that the Deceased as the holder of the shares died, and determine to whom of the his heirs the said shares were distributed. And after that to register in the Commercial Register rights of remaining members of the Company.

Case 3

3.1. The deceased habitually residency was in Slovenia, and in addition to property in Slovenia, he also had real estate in Croatia.
At the request of his heirs, the Slovenian Court issued ECS after the probate proceedings were conducted, along with the Decision on Succession.
The text ECS – Form V – Annex IV in point 8 describes the inherited shares of the heirs, while in point 9, by which issuing authority is required to indicate the information relevant for the identification of the inherited immovable property, the Slovenian Court did not provide information.
In the text of the Decision on Succession, it is precisely determined which property is inherited – with the indication of the data on real estate in Croatia, as well as heirs on the entire property of the Deceased while their respective shares have also been determined.

3.2. At the request of the successor, Croatian notary draw up a Record of Testimony of the Facts in which he have established all the facts preceding the issuance of the ECS. With the informations from the Decision on Succession, Croatian notary have fully and accurately described the inherited real estate in Croatia, as well as information on heirs and their inherited shares. In fact, with that action Croatian notary completed the ECS, in relation to the missing data.
He than submitted his Record of Testimony of the Facts alongside the ECS translated into Croatian to the Land Registry Department with the Request for registration of ownership rights in favour of the heirs. The procedure was successfully carried out, and in its Decision the Land Registry Department stated that the registration of ownership rights in favor of the heirs was carried out on the basis of the Record of Testimony of Facts (issued by Croatian notary) and ECS (issued by Slovenian Court).

3.3 In this regard, Croatian notary notices that an increasing number of Slovenian Courts use the ECS Form in Croatian language when issuing it (for purpose of using it in Croatia), while furthermore, which is completely understandable, they enter the necessary data in Slovenian language. Such a practice is welcome since it reduces the cost of translating the ECS issued by Slovenian authorities.

Case 4

4.1. The deceased had her habitual residence in the Federal Republic of Germany, and among other things, real estate in Croatia.
Upon the request of the heir, the German Court, issued ECS in which there was no information about the real estate in Croatia.

4.2. The heir engage Croatian lawyer with a request to perform the necessary legal actions for registering his inherited rights in the Croatian Land Registry (real estate register).
Written requests of lawyers were rejected on two occasions by the competent Court which manages the Register for that real estate. Court stated that ECS does not have all the data on real estate that is the subject of succession, and that such a document under the provisions of the Croatian Law is not a document on the basis of which one can register a inherited rights in rem in the Land Registry.

4.3. After that heir addressed the Croatian notary with a request to register his inherited rights in rem in the Land Register.
Croatian notary than submitted a Record of testimony of facts in which he established all the facts that had previously occurred (in this Record he also established accurate identification data for real estate in question) with a Request for registration of ownership rights on inherited real estate.
To his Record Croatian notary also attached the ECS (issued by German Court) translated into Croatian.
Registration of rights in rem in favour of the heir was successfully carried out, and in its Decision the Land Registry Department stated that the registration of ownership rights in favour of the heir was carried out on the basis of the Record of Testimony of Facts (issued by Croatian notary) and ECS (issued by German Court).

Conclusion:
With regard to the cases described above where where is described an ECS in which identification data on real estate or other property (subject of succession) are missing, we would like to point out that the European Court of Justice ruled in its Decision No. C-354/21 for the reasons stated therein:

"... that Article 1(2)(l) and Article 68(l) and Article 69(5) Regulation (EU) No 650/2012 must be interpreted in a way that Regulation do not preclude the law of a Member State which provides that a proposal for the registration of a property in the Land Register of that State may be rejected – **if the sole document submitted is the ECS** in which that immovable property has not been properly identified."

Following such a Decision of the EU Court of Justice, it can be concluded that in the described circumstances, the Record of testimony of facts issued by Croatian notary – as a public document, which subsequently accurately and properly identifies the real estate in question, in addition to the ALREADY issued ECS, is necessary and welcome, in order to exercise inherited rights in Croatia in favor of citizens from another Member State..

Case 5

A notary who is at the same time an authorised permanent court interpreter for the Slovenian language had an example related to the partial translation of the European Certificate of Succession (ECS).

After issuing ECS due to the transfer of ownership rights on real estate held by the deceased in the territory of the Republic of Slovenia, the only heir, in order to reduce the cost of translation, asked the authorised permanent court interpreter for slovenian language to translate part of ECS form V - ANNEX IV.

Form V- Annex IV contains the status and rights of the successor.

The abovementioned form lists information about the heir, a description of the property that belonged to the heir and for which the issuance of an ECS was requested, as well as the inheritance as whole which belongs to the heir.

Consequently, this form is the only part of the issued ECS in which it was necessary to enter a free text, i.e. a description of the property and the heir's inheritance.

The permanent court interpreter performed a translation from Croatian into Slovenian, certified the translation in which she stated that it was a partial translation and duly expanded the translation with the entire ECS issued in Croatian.

The successor submitted the translation together with ECS to the Slovenian land registry for the purpose of implementing the registration, however, the Slovenian Land Registry Department issued a Decision rejecting the implementation of the registration of ownership rights with the explanation that only a partial translation of the ECS was submitted.

It is not economical to translate the entire ECS form because the rest of the Form only contain text strictly prescribed by Succession regulation and one can easily compare the ECS form in Slovenian,

which is available to the land registry department with the issued ECS in Croatian, especially because some land registry departments in the Republic of Slovenia conduct registration on the basis of such a partial translation, while others do not want to implement it.

Case 6

Case law – a decision of the second instance court in which the Dubrovnik County Court in decision no. Gž-342/18-3 of 19 November 2020 rejected the applicant's appeal and confirmed the first instance decision rejecting the application for issuing a European Certificate of Succession.

The court of first instance rejected the application for the issuance of an ECS, because a decision was issued behind the testator that the estate would not be discussed since there is no probate property.

The inheritance property did not exist, as the deceased distributed the property through a lifelong support contract.

The court invoked the provision of Art. 68 of Regulation 650/2012 on succession, which specifies what parts the ECS needs to contain (to the extent necessary for the purpose for which it is issued).

The court found that the prerequisites for issuing an ECS were not met, since no probate property was established behind the testator nor were any actions carried out in probate proceedings.

Following all of the above, the court found that the Lifelong support contract was not a basis for issuing an EPN.

Italy

Alpe-Adria Meeting - Gorizia, 23 October 2023

Case 1

Possibility/opportunity of indicating in the ECS the assets for which it was required

In some Member States (*e. g.* Germany) the issuing authorities refuse to specify the assets, arguing that if someone is an heir is heir to everything (and no specifics are needed). On the other hand, in other member States (*e. g.* Croatia) the indication of immovables in the CSE is considered essential for its registration.

As an argument in favour, can be mentioned that in the CSE form (Implementing Regulation n. 1329/2014), in footnotes no. 13 and 15, the detailed indication of the assets is expressly foreseen and suggested and, even, the attachment of documents providing the most detailed data is said to be possible.

It can be added that the indication of the assets for which the CSE is requested is also useful for the issuing authority, since it justifies the competence to issue the certificate, as the certificate can only be issued regarding assets in a different Member State.

Case 2

Rectification, modification or withdrawal of the ECS

Article 71 of Regulation no 650/2012 provides for the possibility for the issuing authority to rectify, modify or even withdraw an ECS. However, Implementing Regulation no 1329/2014 does not provide any form for proceeding in this direction. How can this be done?

For cases of rectification and modification, the best solution would seem to be to issue a new ECS with the indication that this rectifies or modifies the previous one (in this sense the fields provided in the form for "other relevant information" could be used), and make a note to the same effect on the original ECS.

The case of withdrawal of the ECS seems to be more complicated: the issuing authority must keep the original ECS (it cannot be “destroyed"), but must also prevent new copies from being issued, even if, as would be the case in Italy, the original document must be delivered to a public archive upon termination of the issuing authority's career.

Therefore, it seems absolutely necessary to issue a new document certifying the withdrawal of the ECS and a note to this effect on the original ECS itself.

Case 3

Language in which the ECS can be drafted

Nothing is said in Reg. 650/2012 about the language that must be used by the issuing authority in drafting the original of the CSE and the related certified copies.

Pursuant to art. 67, the national authority must issue the CSE using the standard form referred to in Annex 5 of the Implementing Reg. no. 1329/2014. Since the form exists in 23 languages (corresponding to all the official languages of the European Union, with the exception of Gaelic), in itself the drafting of the CSE using a standard form in a foreign language does not violate the provisions of the aforementioned art. 67.

Added to this, on the positive side, is that the use of one of the aforementioned languages is consistent, in general, with the principle of equality of the official languages of the European Union (deriving from Article 55 TEU, as well as Articles 20, letter d, and 24 TFEU) and, in particular, with one of the guiding principles of the Regulation 650/2012, consistent – see, in this regard, recital no. 7 – with the aim of removing the difficulties that heirs and legatees encounter in exercising their rights in the context of an inheritance with cross-border implications (given that this use simplifies the obligations for those who intend to avail themselves of a CSE abroad).

CHAMBER OF NOTARIES OF SLOVENIJA

Practical cases - Slovenia

Case 1:

Higher Court in Koper
No: VSK Sklep CDn 112/2022, date: 14. 7. 2022

The case mentioned by colleague dr. Pasqualis in which the judge in Koper rejected a certificate issued by the Italian judge (an Italian "national" certificate of inheritance, issued by the tribunal, not an ECS) is the subject of this decision.

The District Court in Koper (the Court of First Instance) dismissed the applicant's objection to the decision rejecting his application for registration of ownership in the land register, on the basis of the decision of the Court of Inheritance of Trieste. The applicant filed the appeal.

The Higher court in Koper (the Court of Second Instance) dismissed the appeal and confirms the decision of the Court of First Instance. The Court explained the decision:

Correct is the appellant's submission that the European Certificate of Succession is not compulsory and that registration may be allowed on the basis of the relevant succession decision issued in the Member State, where the deceased was habitually resident at the time of death, and that there is no need for a special procedure for recognition of that decision. However, the instrument must be accompanied by a certificate of enforceability issued by a court under a special procedure (Article 43 of Regulation (EU) No 650/2012. The Court of First Instance correctly explained to the applicant that the registration could not take place because the decision of the Italian court was not accompanied by a certificate of enforceability. The Slovenian Law on Succession provides that the declaration of enforceability is to be issued by the district court having territorial jurisdiction under Article 45 of the Regulation on Succession (in the present case, the District Court of Koper). The document which is alleged to be the basis for registration in land register is not a document suitable for registration and the application was rightly rejected. The appellant cannot succeed even by referring to case-law, as the cases are not subject to appellate review.

Case 2:

RECOGNITION OF A FOREIGN COURT DECISION –
INHERITANCE CERTIFICATE
Germany (Case No. Dn 108420/2023)

The client has delivered a Certificate of Succession (Erbschein) issued by the Local Court of Esslingen, Germany, to the Slovenian notary together with a translation. The succession proceedings were carried out in the Republic of Germany, as the deceased Petra lived there, and in accordance with German law, the Amtsgericht Esslingen issued the Decision of Succession (Erbschein).

Slovenian notary then applied to the Esslingen Local Court for a confirmation of the final effect and received their letter stating that such decision does not become final. Slovenian notaryalso gave this letter into translation.

Pursuant to Article 94 of the Slovenian Private international law and procedure act and Article 39 of Regulation (EU) No 650/2012, Slovenian notary filed a proposal to the District Court in Slovenj Gradec to recognise the submitted Order on Succession (Erbschein) and thus to assimilate it to a decision of a court of the Republic of Slovenia and to give it the same legal effect as a domestic court decision.

The District Court in Slovenj Gradec granted their application and issued an decision recognising the foreign judgment.

Slovenian notary then submitted all the documents (the Certificate of Succession with translation, the decision recognising the judgment and the letter of final effect) together with the application for registration of the ownership rights to the Land Register.

In this procedure, the Slovenian notary took into account Article 39 of Regulation (EU) No. 650/2012 and the provisions of recitals 59, 60 and 61 of the preamble to the same Regulation.

Case 3:

TRANSLATION OF THE EUROPEAN CERTIFICATE OF SUCCESSION

(Translation is not necessary, as there is no additional text)

Germany (Case No. Dn 132640/2023 (Sdn 566/2023))

The client has delivered to the Slovenian notary a European Certificate of Succession (ECS) issued by the District Court of Boblingen, Germany. Upon examination of the ECS, Slovenian notary found that there were no additional entries or text in the standardised form of ECS that needed to be translated, and therefore notary did not order a translation.

After the ECS was approved by the tax office, Slovenian notary submitted a proposal for the registration of the property rights in the Land Register, together with an explanation of why the translation was not made and an (empty) Slovenian version of the standardised form of the ECS.

The Land registrer issued a decision refusing to allow the entry in the Land register due to the lach of translation. After an appeal from the notary the decision was overturned by the District Court of Ptuj and the entry in the Land Register was allowed.

In this procedure, the Slovenian notary took into account recitals 18, 67 and 76 of the preamble to Regulation (EU) No 650/2012 and Article 69 of the same Regulation.

Case 4:

Higher Court in Koper
No.: VSK Sklep CDn 196/2018

Higher Court in Koper in the case VSK Decision CDn 196/2018 of 23 April 2023 decided that it is possible to register the ownership right in the land register on the basis of the European Certificate of Succession issued by the German courts, regardless of Article 31 of the Slovenian Land Registry Act[1].

[1] In the document that is the basis for the main entry, the real estate must be marked with the identification symbol with which it is entered in the land register.

In the present case, German law was applied to the succession, and the German court had jurisdiction over the probate process. In accordance with German law, the subject of the inheritance was not explicitly stated in the European certificate of Succession, only information about the legatee, the heiress and the share of the inheritance that the heiress acquired was given. The District Court in Koper (the Court of First Instance) rejected the petitioner's proposal for registration on the basis of the European certificate of Succession, because the property subject to inheritance is not listed in the European certificate of inheritance, which means that the condition from Article 31 of the Land Registry Act is not met.

In VSK Decision CDn 196/2018 of 23 April 2023 Higher Court in Koper explains that such a position would mean that registration would never be possible on the basis of the European Certificate of Succession issued by the German courts, which is against the regulation and the public interest. The public interest is that the transfer of property in the event of death is regulated and that the land register reflects true data. Higher Court in Koper also emphasizes that heirs must not suffer harmful consequences due to differences in legal systems.