"Cross-Border Wills" Project

Discussion Workshop in Lisbon

6 December 2013

9 a.m. – 1 p.m.

Minutes

Chair of the meeting:

- Mr Philippe GIRARD, ENRWA Vice-President and Treasurer, notary in Marseille (France)

List of attendees:

- Dr. João MAIA RODRIGUES, President of the Portuguese Chamber of Notaries
- Dr. João Ricardo MENEZES, member of the Executive of the Portuguese Chamber of Notaries
- Prof. Doutor Guilherme de OLIVEIRA, Faculty of Law, University of Coimbra (Portugal)
- Dr. Geraldo ROCHA RIBEIRO, Faculty of Law, University of Coimbra (Portugal))
- Mr Isidoro CALVO VIDAL, notary in Corogne (Spain)
- Mr Valerio AURIEMMA, notary in Bologna (Italy)
- Mr Joseph Henry SAYDON, notary in Valetta (Malta)
- Mr François-Xavier BARY, ENRWA Director
- Mrs Céline MANGIN, "Cross-Border Wills" Project Coordinator

Mr. GIRARD began by thanking the Portuguese Notariat for their welcome. Dr. MAIA RODRIGUES welcomed the attendees to Portugal. Me. GIRARD then presented the agenda and introduced the ENRWA and the "Cross-Border Wills" project. This project is co-funded by the European Commission as part of the 2007–2013 "Civil Justice" Programme. Its implementation will provide, among other things, information about the procedures for opening wills and the conditions for communicating the information contained in them. Its intention is not to modify the existing legal systems, but to improve cross-border legal cooperation by expanding the knowledge base relating to these systems. In fact, it is crucial to respect the diversity of national laws relating to will registrations and searches.

The main points of the summary report were then presented by Céline MANGIN. The discussion then turned to the issues set out below.

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What are the main types of will in your State and how are they opened?	
Portugal	The main types of will approved in Portugal are: - the authentic will – the most frequently used type. - the closed will – drawn up by the testator or a third party. The testator must take this document to the notary, who will then draw up a public instrument of approval in the presence of two witnesses in order to validate the instrument. Unlike authentic wills, closed wills are not kept by the notary. The contents of a closed will, by their very nature, are not known. The stipulations of these wills often do not comply with the law, making it difficult to execute them after death. The holographic will is not approved in Portugal. After death, the will is opened on presentation of the death certificate. The procedure varies according to the type of will: - authentic wills are simply read to the heirs. - a protocol must be made of the opening of a closed will. The notary must describe the condition of the will and confirm the existence of the public instrument of approval. The notary holds the disposition that opens a closed will. However, it is not necessarily the notary holding the will who will settle the succession. In theory, the Courts do not intervene in matters related to succession. It could, however, be seized in the event of a dispute.
Italy	The main types of will approved in Italy are the holographic will and the authentic will. There are less frequently used types of closed will, as well as special wills. The wills may be entrusted to a notary, who enters them in the General Register of Wills. They can also be kept by the testator, although this generally makes them more difficult to locate. In this case, the family or friends of the deceased must submit the document to a notary after the death for opening and “publication”. This procedure varies according to the type of will: - authentic wills are opened by the notary holding them. He/she draws up a report of the opening. The death certificate is attached to the report. - the contents of a holographic will are described in a protocol of the opening. The death certificate will be attached to the original holographic will. These will then be attached to the protocol. If previous dispositions have been made, all wills must be attached to the protocol. When a holographic will is kept at the testator’s home, any notary can be responsible for its publication.

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	In theory, the Courts do not intervene in the succession procedure unless there is a dispute. The will and its publication instrument (ptotocol and annexes) are sent to the Court administration service and the Register of Wills. The will then becomes public.
Malta	Several types of will are approved in Malta: - the authentic will (public will) accounts for approximately 99% of all wills. The will is retained by the notary and its references are entered in a public register. - the secret will, which is very rarely used in practice. It can be received by a notary or drawn up by anyone. It is enclosed in an envelope. When it is received by the notary, he/she then submits it to the competent court within 4 days. The envelope must show the date of the will, the name and home address of the testator and his/her national identification number. The holographic will is not approved in Malta. The opening procedure varies according to the type of will: - public wills are simply opened and read to the heirs. - secret wills are subject to a specific procedure. The notary must approach the Court to make a search for the will (one court holds all secret wills submitted in Malta). If a will is found, the notary asks the Court to set a time and date for the opening. This information is then published in the Maltese Official Journal. At the set time, the Judge verifies that the will is indeed that of the deceased and checks the condition of the will, particularly its seals. The judge then opens the will in the presence of the notary. The will and its envelope are then given to the notary, who reads it before the Court. The notary then prepares a protocol, which is kept with the original will and envelope in the notary's files. The notary then has 15 days to authenticate the will, subject to expulsion from the order of notaries. This authentication consists of recording the opening of the will in the public register containing authentic will references.
Spain	Several types of will are approved in Spain: - the most common type is the authentic will. Since 1990, it has no longer been necessary to draw up a will in the presence of witnesses. - the holographic will is rarely used in practice. It can be kept by the testator or deposited with a notary. The will references held by the notary are recorded in the Register of Wills, which can be consulted after a death. Life insurance policies have also been recorded in

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	this register by insurance companies since 1995. Certain information of use to the heirs prior to approval of the succession may also be recorded, such as details of the contracts for which the deceased is the guarantor. After the death of the testator, the notary contacted by the family will refer to the register of wills for the name of the notary holding the will made by the deceased. In the case of an authentic will, the notary holding the document will send an authentic copy to the notary responsible for settling the succession. In principle, previous wills do not have to be sent. Extracts from these may be requested, but will be marked that they are without legal value. In the case of a holographic will, the Court administration service for the area in which the deceased lived must then proceed with a legal verification of the will by contacting the Civil Status Register and hearing three witnesses familiar with the handwriting and signature of the deceased. A draft bill intends to transfer this task to the notary, which would reduce the burden on the court system. The Court would remain solely responsible for verifying that the will had been properly drawn up by the deceased, while subsequent procedures such as the provision of copies would be transferred to notaries.
	Is it possible to communicate the information contained in wills at national and international level? To whom and in what form?
Portugal	Once the will has been opened, it becomes a public document. The date of death is added to it. Anyone can then obtain a certified copy of the will (private individuals, legal practitioners, public authorities in Portugal or abroad, etc.). The authentic copy of the will can be delivered by hand or sent by (registered) post on request. It is not presently possible to send the document electronically.
Italy	After the death of the testator, the will must be “published”. It then becomes public. Anyone (private individuals, legal practitioners, public authorities in Italy or abroad, etc.) can then request the notary who carried out the “publication” to provide an authentic copy of the will or the “publication” instrument. If a passage of the will is prejudicial to an individual, this person can ask for it to be hidden. The authentic copy of the will can be sent by electronic means, usually by e-mail with the notary’s electronic signature.
Malta	After it is opened, the will becomes public. The information contained in the will can be requested from the notary holding a public will or the notary who requested

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	the opening of a secret will. Anyone can obtain a certified copy of the will (private individuals, legal practitioners, public authorities in Malta or abroad, etc.). The authentic copy of the will can be sent by hand, by post or by electronic means. However, the latter method of communication is not easy to use, since the copy needs to be authenticated by the notary. Electronic signature mechanisms must be improved in order to facilitate the electronic transmission of a copy of the will, in particular to legal practitioners responsible for settling the succession abroad.
Spain	A copy of the will may only be sent to those persons who can demonstrate a legitimate interest. This means that only those people mentioned in the will (heirs, legatees and executors) and anyone with the right of inheritance in the absence of a will or by virtue of the existence of a previous will can obtain information. If an individual believes that a refusal to provide information is not justified, he or she can refer to the Directorate General of Notarised Acts at the Ministry of Justice. The Ministry of Justice will then contact the order of notaries, who will decide whether or not the refusal of information was well-founded. The notary may not contact the heirs and legatees on his/her own initiative. The heirs and legatees must find out if they feature in a will, except in the case of bequests to foundations (general interest bequests). The notary must then inform the competent Ministry of the existence of a will. Only a paper version of the authentic copy of the will is sent to those with a legitimate interest. Copies of wills may be transmitted electronically between Spanish notaries in cases involving people with a legitimate interest. If a legal practitioner responsible for settling the succession abroad makes a search for a will, the Spanish notary will require the clients themselves to contact him or her.
Have you encountered many cases of cross-border succession in the course of your professional practice?	
Portugal	There are few such cases on the whole, but the trend is growing, in particular with Spain and England.
Italy	These successions occur more frequently in cross-border areas. By and large, there are few such cases, but citizens are using wills more frequently due to reconstituted families. The most common cases involve people who draw up a will and then leave the country.

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Malta	On average, 120 public wills are published each year in Malta. There are not many international wills and few cases of cross-border succession. When a testator's last address is abroad, the notary will make a search to see if a will has been left in that country. In most such cases, testators had an address in England or Australia, states where it is not easy to find a will. In addition, search costs are usually high and some heirs do not want to incur these expenses, resulting in the possibility that the final will and testament of the deceased may never be found.
Spain	It is often the case that notaries draw up wills for foreign residents (French, Belgian, Greek or South American). American citizens also own properties in Spain, and Spanish notaries are responsible for preparing the notarial deeds.

Conclusion:

The discussions highlighted the ease with which it is possible, in most of the states represented at this discussion workshop, to obtain the information contained in a will after the death of the testator. The processes surrounding the death are closely monitored, and the will is then opened according to procedures that, while they are national, have a number of common elements. The will then becomes public, and anyone can access its contents. This situation is an exception within the European Union, where most legal systems and practices are similar to those of Spain, i.e. access to the contents of wills is dependent on the legitimate interest of the person making the request. Within the framework of cross-border succession regulation, it is therefore easy for a legal practitioner in another State to obtain information about the deceased's last will and testament. On the other hand, this situation can be difficult to understand for citizens, as well as for legal practitioners responsible for settling successions in these States who have to make searches for wills in other EU Member States.

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