avec le soutien financier du programme justice de la Commission Européenne

European Regulation in matters of international successions

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Successions in Europe

1. Scope of application of the Regulation

1.1. Temporal scope of application

1.1.1. The rules: successions opened after 17 August 2015.

This part refers to Article 83(1)[p.147] of the Regulation.

Article 83(1)[p.147] of the Regulation, states that this Regulation shall apply to the succession of persons who die on or after 17 August 2015.

It should therefore be deduced that for successions opened prior to 17 August 2015, national rules of conflict shall continue to apply in the Member States bound by the Regulation.

1.1.2. Nuances: choice of law and dispositions of property upon death prior to 17 August 2015.

The Regulation applies only to successions opened from 17 August 2015.

However, certain instruments established before the Regulation came into force may be governed by some provisions of the Regulation provided that the person whose succession is concerned died after 17 August 2015.

b) Explicit choice of law

This part refers to Article 83(2)[p.147] of the Regulation.

A choice of law made prior to 17 August 2015 will be valid

- if it complies with the provisions of Article 22[p.122] of the Regulation

? *Exemple*

A choice of law made in 2013 by a French national residing in the United Kingdom in favour of his national law for a gift he was making to his children is not valid because Article 22 of the Regulation [p.122] requires that choice to be contained in an instrument on dispositions of property upon death.

A choice of law made by a French national residing in the United Kingdom in favour of English law is not valid because the choice of law may only be made in favour of the national law of the deceased.

- If it complies with the rules of conflict in force at the moment the choice was made,
  - either in the State in which the deceased had his habitual residence
  - or in another State of which he held the nationality

? *Exemple*

A French national residing in Belgium (2013) opted for Belgian law. He died in September 2015 in France. The choice in favour of Belgian law will be valid because on the day when he made that choice, he was residing in Belgium which allows such a choice of law (Article 78 of the Belgian law of 16 July 2014[p.146] establishing a Private International Law Code).

c) Tacit choice of law

This part refers to Article 83(4)[p.147] of the Regulation.

Article 83(4)[p.147] states that if a disposition of property upon death made prior to the entry into force of the Regulation was made in accordance with the law which the deceased could have chosen in accordance with this Regulation, that law shall be deemed to have been chosen as the law applicable to the succession.

The choice of law is deduced from an objective analysis of the terms of the disposition. In this case, it is not a matter of seeking to determine the intention of the deceased.

Exemple

An individual of English nationality established a trust under a will for certain assets. Can it be deduced that he intended the whole of his succession to be governed by English law?

Disputes might arise.

Conseil

It would be useful to go over the dispositions of property upon death established prior to 17 August 2015 in order to determine whether this article is likely to apply.

d) Testamentary dispositions prior to 17 August 2015

This part refers to Article 83(3)[p.147] of the Regulation.

Article 83(3)[p.147] of the Regulation also sets out generous transitional provisions concerning the law applicable to dispositions of property upon death, following the same logic as in matters of the choice of law.

In other words, the provisions of the Regulation may be applied to such wills, while the rules of conflict in force on the day the instrument was established in the State where the deceased resided, in the State of which he had the nationality or in the Member State of the authority in charge of settling the succession may also apply

1.2. Substantive scope of application

1.2.1. Absence of a positive definition

The substantive scope of application of the Regulation is not defined insofar as the questions to which the Regulation applies are not specified.

A certain number of indications can be obtained from the Regulation and its preamble (follow the treasure hunt!)

- Point 11 of the Preamble[p.148] specifies that the Regulation should not apply to areas of civil law other than successions and Article 1(1)[p.118] states that the Regulation applies to successions to the estates of deceased persons.
- Article 3[p.127] of the Regulation defines a certain number of notions which are central to the Regulation and notably that of succession, which encompasses both testate and intestate successions.
- Articles 26[p.124] and 27[p.125], meanwhile, concern the formal and substantive validity of dispositions of property upon death.

When put end to end, the various articles of the Regulation provide quite a comprehensive vision of the questions governed by the Regulation.

1.2.2. On the other hand, the exclusions

a) Introduction

As a general rule, Article 1(1)[p.118] begins by indicating that the Regulation shall apply only to the **civil dimension of succession law**. It does not apply to matters of revenue, customs or administrative matters (Point 10 of the Preamble[p.148] to the Regulation).

In addition and more specifically, Article 1(2)[p.118] lists **12 items that are excluded from the scope of application** of the Regulation.

Attention

Vigilance is required, however, as some of these items are not the subject of total exclusions.

Whatever the case, these are questions that are linked in one way or another with succession law and which will mostly be governed by national rules of conflict.

b) The questions to be asked prior to applying succession law.

Some questions will arise **prior to** the application of succession law: these are the questions referred to in Article 1(2) a,b,c,d.[p.118]

- **The status of natural persons is excluded from the Regulation.**
  To answer the question of whether a person has the status of spouse or child of the deceased, we must look at the law applicable to the marriage in the former case and the law applicable to parenthood in the latter.
- **The legal capacity of natural persons is excluded from the Regulation, but the capacity to inherit and capacity to make dispositions are subject to the Regulation**. This exclusion is therefore only partial.
- **Conditions relating to disappearance, absence or presumed death are excluded from the Regulation**. However, if the absence or disappearance of a person results in their succession being opened, that succession is governed by the Regulation.
- **Matrimonial property regimes and the property regimes** of the other relations of the couple are excluded from the Regulation.

Remarque

NB: For the time being, there is no European-wide text on matrimonial questions. A text is currently

under discussion, however (Proposals of 16 March 2011: COM (2011)126 and COMM(2011)127).

Maintenance obligations other than those arising by reason of death

The question of the active or passive inheritability of maintenance obligations other than those arising by reason of death is not subject to the Regulation. On the matter of jurisdiction, in those Member States bound by the Regulation it is Regulation n°4/2009 of 18 December 2008 (cf. Règlement (CE) no 4-2009 du conseil.pdf) that will apply, and as regards legislative competence, the Hague Protocol of 23 November 2007 (cf. Règlement (CE) no 4-2009 du conseil.pdf).

c) The questions to be asked prior to applying succession law.

Certain questions will arise **concurrently** with the application of the law of the succession. Such is the case of the questions referred to inArticle 1(2) f,g,h,i,j,k.*p.119*

- **The formal validity of dispositions of property upon death made orally is excluded from the Regulation**
  p.119.
- **Gifts made inter vivos are excluded from the Regulation.**
  The list proposed in this article is not exhaustive. It includes gifts, accretion clauses, pension plans and insurance policies. This exclusion is only partial, since the effectiveness of these parallel gifts is subject to the law on succession*p.123*.
- **Questions pertaining to company law are excluded from the Regulation.**
  When a partner dies, the transmission of his shares is subject to the law determined by the rules of conflict applicable in matters of company law.
- **Trusts** are also excluded from the scope of application of the Regulation. Once again, this exclusion is only partial, as it concerns the creation, administration and dissolution of the trust. Therefore, if the trust creates a gift, the law applicable to the succession will limit its effectiveness.

? *Exemple*

If we imagine a trust established pursuant to English law, if the law applicable to the succession is French law, the trust may end up being subject to the latter's provisions on restoring or accounting for gifts.

- **The nature of rights in rem**. In this matter, the law of the succession will be set aside in favour of the law of the location of the assets. The idea behind this exclusion is that a right in rem that is unknown in the location of the assets cannot be imposed. It should be noted, however, that Article 31 of the Regulation*p.129* invites us, to the extent possible, to adapt the unknown right in rem by seeking to identify the closest equivalent right in rem in the location of the asset.

d) The questions to be asked prior to applying succession law.

Certain questions will arise **afterwards**:such is the case in particular of the recording in a register of rights referred to in Article 1(2) lp.119. Publication remains subject to the law of the location of the property. This provision will need to be articulated withArticle 69(5)p.141 on the recording of the European Certificate of Succession (ECS).

1.3. Spatial scope of application

1.3.1. 1. Successions with an international element.

The Regulation does not define the successions it intends to address. It is nonetheless obvious that the Regulation does not apply to purely national successions, but only to successions with an international element.

Likewise, it is unlikely that the Regulation will apply only to cross-border successions or, in other words, to European successions, despite the terms of Point 7 of the Preamble[p.150].

Fondamental

In principle, the **Regulation should therefore apply to all successions with an international element**.

It should be noted, however, that the Regulation should be set aside, as stated by Article 75[p.144], in the presence of an international conventions to which one or more Member States are party at the time of adoption of this Regulation and which concern matters covered by this Regulation. This applies in particular to the Hague Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions. The Regulation does prevail, nevertheless, if the Convention is not binding upon the Member States that are parties to the Regulation.

Attention

Internationality is a contingent notion, however. To appreciate the international nature of the situation, an in-depth analysis must be conducted of the situation and should not necessarily be limited to the facts at the time of death.

Hypothesis 1: Divergence between nationality and residence

If the deceased had the nationality of one State and resided in another State on the day of his death, there can be no doubt that the succession has an international element.

For the succession of a German who dies while resident in Italy, there are grounds to implement the Regulation.

Hypothesis 2: Assets located in several States

If the deceased has the nationality of the State in which he has his habitual residence, the Regulation must be implemented whenever he had assets located in another Member State.

For the succession of a German who dies in Germany and leaves behind an immoveable property in Italy, there are grounds to implement the Regulation.

Hypothesis 3: A disposition of property upon death established abroad.

If the deceased has the nationality of the State in which he has his habitual residence, the at-least partial implementation of the Regulation *may be justified whenever he established a disposition at a time when his situation had an international element.*

For a Frenchman residing in France who established a joint will while residing in Germany, there are grounds to implement the Regulation.

1.3.2. States bound by the Regulation

The Member States of the European Union

The Regulation is binding upon the European Union Member States that participated in its adoption. In 2016, there were 25 of them.

States that become members of the European Union in the future will be bound by the text which is part of the Community acquis.

The three exceptions

Three European Union Member States are not bound by the Regulation.

- **Denmark**
- **United Kingdom and Ireland**

In these three States, the Regulation and the solutions it contains do not apply unless they should serve notice at some time in the future of their intention to be bound by the Regulation.

Therefore, if the authorities of these States are seised with a succession that is connected with another Member State, they will apply their national rules of conflict.

On the other hand, if the authorities of one of the 25 Member States that are bound by the Regulation must settle a succession that is connected with one of these three States, they will apply the Regulation. The same remark applies to relationships with non-European Union third countries.

Attention

Several of the provisions of the Regulation, notably on the matter of renvois, use the notion of Member State.

The United Kingdom, Denmark and Ireland might be considered as being included in this notion.

This interpretation should be ruled out, however, as the Member States within the meaning of the Regulation are the Member States bound by the Regulation and not the European Union Member

States.

1.3.3. Reflexes to learn for implementation

a) In matters of jurisdiction

Fondamental

The rules of jurisdiction contained in the Regulation apply only in the Member States bound by the Regulation. The same applies to the provisions on lis pendens and related actions.

Exemple

- If the deceased resided in France and opted for the Belgian law of his nationality, the French judge may decline jurisdiction pursuant to Article 6p.135 of the Regulation.
- If the deceased resided in France and opted for the Brazilian law of his nationality, the French judge may not decline jurisdiction pursuant to Article 6p.135 of the Regulation.
- If the French and then Belgian courts are seised successively with a dispute in matters of succession, the rules on lis pendens contained in the Regulation are applied.
- If the French and then English courts are seised successively with a dispute in matters of succession, the rules on lis pendens contained in the Regulation are applied in France.

It might be imagined that none of the grounds for jurisdiction contained in the Regulation is fulfilled in a Member State, the ordinary rules of conflict will apply. However, the Regulation has been drafted in such a way that it leaves no place for internal rules of jurisdiction.

b) In matters of conflict of laws

Fondamental

The Regulation is of universal application (Article 20p.122). If the applicable law specified by the Regulation is that of a Member State that is not bound by the Regulation or of a third State, it will apply to the succession.

Exemple

If an Italian national dies when residing in Ireland, the Irish law of his habitual residence should apply to his succession.

c) In matters of recognition and enforcement of judgements and authentic instruments

Fondamental

The rules on recognition and enforcement concern only decisions given in the Member States bound by the Regulation.

Exemple

A *grant of probate* issued by English courts and the effects of which are to be enforced in France will be subject to the national system for the recognition and enforcement of decisions. Whereas a judgement handed down in Belgium will benefit from the system set out in the Regulation in France.

d) In matters of agreements as to succession

Fondamental

The Certificate of Succession does not provide an additional means of evidence of the status of heir in the Member States, as it is not possible to draw up a certificate of succession within the framework of an internal succession; this instrument is for use only in international successions (Article 62p.137). It will produce its effects automatically if it is presented in a Member State other than the State of origin.

However, those Member States that are not bound by the Regulation and third States are not obliged to recognise it.

Exemple

A certificate of succession established in Spain will be recognised automatically in France. It will not necessarily be recognised in Morocco where the deceased owned property.

2. Legal rules on inheritance

2.1. Applicable law

2.1.1. Choice of law (anticipation)

One of the main innovations of the Regulation consists in introducing **free will** in matters of succession.

Like other European Union Regulations which make provision for a choice of law, any person now has the possibility of choosing the law that will be applicable to their succession. This possibility of making a choice has been introduced in order to:

- guarantee legal security.
- express the proximity between the chosen law and the deceased.
- secure the anticipation of successions.

b) Which choice of law?

Article 22*p.122* of the Regulation strictly limits the choice a person may make.

Choice of the law of the State of which the person holds the nationality at the moment of his choice

The first possibility in favour of the national law of the person at the moment when they made their choice poses no particular difficulties, except in the event of dual or multiple nationalities. In such cases, the choice may be made in favour of any one of the national laws of the person.

If the deceased had several nationalities, they must be treated on an equal footing in principle, meaning that there is no reason to give preference to one of those nationalities, notably the nationality of the forum, as expressed by Article 22(1)*p.122* of the Regulation. The deceased may therefore opt for the national law of one of the States of which he is a national.

Choice of the law of the State of which the person thinks he will hold the nationality at the moment of his death

Concerning the possibility of choosing the national law *« at the time of death »*, this may be considered surprising as it is a potential source of legal insecurity. For example, if the person fails to obtain the nationality he thought he would have at the time of death, the choice of law will no longer be effective and the applicable law will be that of the habitual residence.

Conseil

If the law professional is asked for advice about such a choice of law, he should therefore draw the attention of the person to the risks of such an option. He should not hesitate to make a record of the advice he delivered. More generally, any person should be advised against choosing the law of a nationality they hope to hold at the time of their death, unless there is little real doubt as to that nationality being granted to them.

c) Why make a choice of law?

There can be several reasons for making a choice of law.

To make advance provision for the succession with secure, predictable solutions.

First of all, a choice of law makes it possible to secure the advance provisions for their succession: that can not only make legal provisions in preparation for their succession, but also make sure that their choices are valid by choosing the law applicable to that succession.

It is therefore a mechanism that boosts the legal security and therefore predictability of the chosen solutions.

Stability of the applicable law

Secondly, the choice of national law has the advantage of providing stability, since a change of residence will not affect the law applicable to the settlement of the succession.

Failing this, every time there is a change of residence, information will have to be obtained about the succession rules applicable in that State.

A single law applicable to peripheral issues surrounding the succession

Thirdly, the choice of law means only a single law applies to the peripheral questions around the succession, in particular regarding matrimonial property, divorce and gifts.

Given that a certain number of European instruments, and in particular Rome I applicable to gifts or Rome III on divorce, allow a choice to be made in favour of one's own national law, if a person also chooses national law to apply to their succession, a single law will then be applicable to all these questions.

d) What is the scope?

Article 20p.122 of the Regulation provides for the universal application of the conflict rule set out in the Regulation.

In the event of a choice of law, that law will therefore apply to the whole of the succession, even if it is the law of a European Union Member State that is not bound by the Regulation.

If the choice of law has been made in favour of a Member State that is not bound by the Regulation or of a Third State, however, a check should be conducted that the law of that State will accept that choice. Although the Regulation does expressly state that the choice *« should be valid even if the chosen law does not provide for a choice of law in matters of succession »* (extract from recital 40 of the Regulation)

p.149

in such cases the authority that will have to settle the succession must be that of a Member State or State that recognises the validity of such a choice. Failing this, and particularly when the competent authority would be that of another State that does not recognise such a choice of law, the said choice of law may prove to be without effect.

Conseil

In any case, when the law that is chosen is that of a Member State that is not bound by the Regulation or of a third State that does not recognise the choice of law, the legal professional should warn the client of the risk of the choice of law not being recognised.

Conseil

To guarantee the effectiveness and knowledge of the choice of law that is made, the legal professional may be wise to list the choice of law in a register, if possible.

- In France, the notary should register a choice of law in the form of a disposition of property upon death in the central file of last wills and testaments.
- In Germany, the choice is recorded in a will and registered in the file of wills or in a separate authentic instrument.
- In Austria, such disposition are not listed in the register as such, with only their establishment and the place where they are deposited being indicated in the register. The register therefore contains no information on the choice of law made in any such dispositions.
- In Belgium, Spain and Hungary, there are no precise provisions in this respect.
- In the Netherlands, registration of testamentary provisions and of a choice is possible, although the choice of applicable law cannot be listed in the register as such.
- In Romania, declarations of the choice of law applicable to the succession are made in authentic form. The testamentary provisions are registered by the notary in a special register for gifts and dispositions of property upon death. This electronic register administered by CNARRN-INFONOT is interconnected with the other ENRWA countries by the RERT LIGHT option.

The choice of law will cover the whole estate. Only one law can be chosen, even if the person has several nationalities. It is not possible to make several choices and only one law must apply to the whole.

e) How to choose?

Express choice or tacit choice

Article 22(2)[p.122] of the Regulation states that the choice must be made *« expressly in a declaration in the form of a disposition of property upon death or shall be demonstrated by the terms of such a disposition »*. The Regulation therefore accepts a tacit choice resulting from the terms of a disposition of property upon death, in addition to an express choice made in a testamentary disposition.

- Such a tacit choice of French law will exist more particularly if the deceased had made reference in a testamentary disposition to any provisions of the French Civil Code or to French law in general. The same solution will apply in Belgium or Romania.
- In Germany, it is strongly recommended that notaries should make an explicit choice of the applicable law.
- In Austria, Austrian law does not have any special rules on a tacit choice of law.
- In Spain, such a tacit choice will be the result of the terms of a disposition of property upon death. However, each individual case should be analysed and interpreted to establish whether there is a tacit choice of law. For example, if a Spaniard with the *vecindad civil navarre* residing in France establishes a will in France making reference to the foral reserved share, it must be deduced that there is a tacit choice of Spanish-Navarre law. Likewise, we can consider that an Englishman residing in Spain who establishes a trust in his will has made a tacit or implicit choice of English law.
- In the Czech Republic, a tacit choice of the law applicable to a succession is neither admitted nor excluded by the national legislation and there is not yet any case law on this subject. The legal situation is therefore uncertain.

Conseil

However, as tacit choices are open to interpretation, the legal professional should advise their client to opt for an express choice to avoid any discussion or challenges.

Formal validity

As regards the form required of a disposition of property upon death (which may therefore contain an explicit or tacit choice of law), Article 27[p.125] of the Regulation sets down highly favourable rules on such validity. This Article 27[p.125], which applies to determine the formal validity of a choice of law contained in a written disposition of property upon death, makes provision for a number of alternatives.

Fondamental

A disposition of property upon death shall be formally valid if its form complies with the law of the State in which the instrument containing the disposition was made, with the national law of the testator or of one of the persons concerned by the agreement as to succession, with the law of the domicile or habitual residence of the testator or of one of the persons concerned by the agreement as to

succession, or, for immovable property, with the law of the State where that property is located.

Attention

If the law that is chosen is the law of a Member State that is not bound by the Regulation or of a third State, it should be verified whenever possible that the law of that State accepts choices of law in matters of succession, if the substantive validity of the instrument is governed by the chosen law (Article 22(3)p.122).

f) Modifying a choice of law

The Regulation makes express provision for the modification or revocation of a choice of law that has been made. Article 22(4)p.122 of the Regulation states the conditions for such a modification or revocation to be valid as to its form.

It is therefore necessary to refer to the laws that may govern the conditions of form that are applicable to dispositions of property upon death, as set out in Article 27p.125 of the Regulation, to determine in what conditions such a modification or revocation is possible.

2.1.2. If no choice has been made: the law of habitual residence

a) Principle and notions

Fondamental : The principle

In order to guarantee proximity between the law applicable to the succession and the deceased, the Regulation provides that, unless specified to the contrary, the law applicable to the whole of the succession is the law of the habitual residence of the person at the time of his death.

The notion of habitual residence

The Regulation establishes the “habitual residence” at the time of death as the main criterion for determining the law applicable to the succession. It is also the predominant criterion for *determining jurisdiction*.

The notion of “habitual residence” is not defined by the articles of the Regulation but recitals 23p.150 and 24p.150 do provide some indications: it is generally a matter of determining the State with which the deceased had the closest and most stable connections.

In light of the criteria set out in the Regulation, this is a highly concrete and factual process.

Conseil

- First remark: the notion of habitual residence within the meaning of the Regulation does not necessarily match the notion of tax residence (or tax domicile) and/or matrimonial residence (or domicile, although these notions can provide relevant indications.
- Second remark: the legal professional must determine the State in which the deceased had “the centre of interests of his family and his social life”, and take into consideration, among other things, the length of time he has been in that State, the circumstances of and reasons for his presence there and the location of his movable and immovable assets, etc.
- Third remark: the legal professional should indicate the grounds on which he considers that the deceased has his habitual residence in a given State.

Exemple

Francesco, an Italian national who has lived his whole life in Milan where he owns a building and returns regularly, has lived in Geneva for three years for professional reasons, within the framework of a fixed-term expatriation contract. He dies in a traffic accident in Spain. He will be considered as having his habitual residence in Italy if it appears that he has only been living abroad for professional reasons and for a limited period of time, as the deceased otherwise continued to be most closely connected with Italy.

? *Exemple*

Jacques is accommodated for two years in a retirement home in Belgium purely for financial and healthcare quality reasons. All his property and family have remained in France where he continued to exercise his voting rights. His habitual residence will be considered as being in France.

b) Exceptions: the exception clause

Article 21

Like other Regulation, (2) p.122 introduces an exception clause by the terms of which « *where, by way of exception, it is clear from all the circumstances of the case that, at the time of death, the deceased was manifestly more closely connected with a State other than the* » State of habitual residence, « *the law applicable to the succession is that of this other State* ».

This exception clause, which may not be used when the deceased has made a choice of law, offers the advantage of being able to apply another law when that connected to the habitual residence will clearly produce an inadequate result.

? *Exemple*

We will take once again the example of a German national who has lived for many years in Portugal, who had just decided to return to Germany,a State with which he had always kept many close ties, after selling all his assets in Portugal, but who died before he had time to fulfil his project.

Provided that he had expressed the intention of transferring his habitual residence to Germany,a country with which he was clearly closely connected, the exception clause and German law may be applied.

However, this clause is a source of insecurity and may run contrary to the succession plans that had been put in place. Likewise, it is contrary to the objective of predictability which largely inspired the Regulation.

It is for this reason that the Regulation provides that this should only be applied “exceptionally” when the deceased is “manifestly more closely connected” with this State other than that of his habitual residence.

Conseil

In all cases, people with expatriation projects, among others, should be advised to make a choice of law, if only to make things more predictable and avoid an inappropriate law being applied.

2.1.3. Other remedial provisions to the application of the law that applies in principle

In addition to the renvoi, which is only possible when the law of the habitual residence results in specifying **the law of a Member State which is not bound by the Regulation or of a third State** and which is expressly excluded in the case of a choice of law, public policy and overriding mandatory provisions are the two main notions that can lead to the law that would have applied in principle being set aside.

In addition, the Regulation comprises certain substantive rules, in particular concerning commorientes, as provided notably by Article 32p.129 of the Regulation. Finally, as in all private international law matters, fraude à la loi, meaning seeking to elude the law which would normally have applied with the sole aim of another law applying, may result in the law that is determined in this way by fraudulent means being set aside, as expressly stated in recital 26p.151 of the Regulation. However, we will not come back to these two remedial provisions, which will be applied only exceptionally, and will focus only on public policy and overriding mandatory provisions.

b) Public policy

The principle

By the terms of Article 35 of the Regulationp.130,« *the application of a provision of the law of a State specified by this Regulation may only be set aside if such application is manifestly incompatible with public policy* ».

This public policy exception may also be invoked whenever the application of the foreign law specified by the Regulation produces an outcome that is a manifest breach of the international public policy of the forum.

Legal professionals called upon to settle a succession, notably pursuant to a foreign law (or to provide advice on a choice of law) should therefore assess the compatibility of the content of that law with the international public policy of the forum. This is quite new and is certainly a challenge.

Remarque

International public policy is necessarily a fluctuating notion and one that is likely to change, meaning that it is quite impossible to draw up an exhaustive and never-changing list of the foreign legal provisions that would breach the public policy of the forum. However, there can be little doubt that certain principles must clearly be upheld and result in any foreign law that breaches them being set aside.

The principle of non-discrimination

Such is the case of the principle of non-discrimination: any foreign law resulting in discrimination between those eligible to inherit on account of their religion, nationality, gender or birth, will most certainly be set aside.

For example, a foreign law that totally excludes a child born outside wedlock or in adultery from a succession, must be set aside because it breaches the international public policy of a Member State, as the Member States guarantee equality between the children in matters of succession, whatever the child-parent relationship.

Reserved share

A more awkward question is that of the reserved share about which much has been written and which does not exist in all the Member States. While it is certain, in our opinion, that a foreign law that makes different provisions in terms of the proportion or nature of such a share reserved for the descendants should not be regarded as contrary to international public policy, the position is less clear when the application of the foreign law would allow an heir entitled to a reserved share to be excluded purely and simply from the succession.

In the latter case, French international public law in particular would be likely to oppose the application of such a law, at least when the the connections with France are close.

However, if the connections appear to be more distant while being close with the State whose law is applicable, the matter of public policy should not result in the other law being set aside. The question remains open, however.

c) Overriding mandatory provisions

Article 30*p.129* of the Regulation specifically addresses the hypothesis of special rules. It states that when such special rules exist in the State in which certain immovable property is located, imposing restrictions concerning or affecting the succession in respect of those assets, then those special rules shall apply irrespective of the law applicable to the succession.

? *Exemple*

In French law, for example, the preferential allocation of an asset, which is an overriding mandatory provision in the French legal system, should be applied as such when it concerns an asset located in France.

- In Germany, the most important overriding provisions in matters of succession are the special provisions on rural successions. These legal provisions are contained in the " *Höfeordnung* " and in the special laws of the Länder.
- In Austria, the provisions of Paragraph 14 of the Law on co-ownership and life-long leases (Wohnungseigen-tumsgesetz/WEG) contain other mandatory rules on the joint immovable

property of married couples and registered partners. It is the same for Paragraph 14 of the Law on rental leases (Mietrechtsgesetz/MRG) applying to rented apartments.

- Belgian law, meanwhile, makes provision for certain specific cases of devolution for certain assets. This is the case notably of the legal right of return to the benefit of ascendants, allowing the return of an asset given by ascendants to a descendant when the latter dies first without leaving any offspring, even though that asset is by nature part of the succession of the child in question. “Family souvenirs” are also subject to specific inheritance rules to seek to provide for their transmission between the different generations of the same family. Family souvenirs are goods whose moral value predominates over their asset value; and which are closely connected to the family of the deceased.
- In Croatia, according to inheritance law, foreign nationals have the same rights as Croatian nationals. There are, however, special rules providing exceptions in matters of agricultural properties, woods and protected environments. These rules are not applicable to other European Union nationals.
- In Spain, there are special succession rules on the transmission of rights to farms. This matter is governed in particular by the *Ley de Modernizacion de Explotaciones Agrarias* Which does not allow the division of farming land between heirs if the land areas will fall below the minimum farmland units. There are also restrictions on the transmission of companies.

There are also special norms on the succession of the moral rights of authors contained in the Law on intellectual property, and rules allowing testators to avoid the division of a family company via compensation in cash of the other heirs (Art. 2015 Civil Code).

Other examples of special successions are the succession of the titles of the nobility and provincial norms on the “ *troncalidad* “ providing for the allocation of goods down the family line.

Attention should also be paid to the specific rules on special estates set aside for the protection of *vulnerable and disabled persons, as provided by the Ley 41/2003 on ”el patrimonio del discapacitado*".

- In Estonia, there are restrictions on disposals of company shares. For limited liability companies, the Civil Code provides that on the death of the holder, the shares are passed on to the legal heirs and that any statutory clauses providing otherwise are valid only if they make provision for appropriate compensation of the heirs.

Other forms of company may also be subject to restrictions.

There are also restrictions on income from retirement pensions. Unlike the funds that have already been paid out to the deceased, the capital assets can be passed on. There are now two possibilities: the heirs may receive the money from the pension fund to divide it out among themselves. They can also hand it over to one of the heirs without dividing it out.

- In Hungary, there is one case of overriding mandatory provisions: for successions of Hungarian farming land by a will, a check must be conducted to see whether the acquisition of the land by the legatee is possible according to the law on the circulation of farming land.
- In the Netherlands, there are no overriding mandatory provisions.
- In Romania, special legal provisions apply to land located in Romania. In principle, this land

> cannot be acquired by anyone who is not a Romanian citizen. However, European Union citizens benefit from favourable provisions that endow them with a similar status to that of Romanian citizens.

This provision results in the succession being governed by different laws, when one of the main objectives of the Regulation was to allow the application of a single law to the whole of the succession.

It should therefore be applied only exceptionally, as indicated by the Regulation which states in recital 54[p.151] that this should be subject to strict interpretation and that "*« provisions providing for a reserved share of the estate greater than that provided for in the law applicable to the succession »*" do not fall within the scope of such special rules.

2.2. The European Certificate of Succession

2.2.1. When to issue an ECS?

To determine whether an ECS[p.117] may be issued, we need to focus on its purpose. The purpose of the ECS[p.117] is its use in another Member State **bound by the Regulation** to invoke a status or exercise a right or a power. Issue is therefore not useful for successions that concern a single Member State bound by the Regulation in which the ordinary internal produces are sufficient (Article 63[p.137]).

The ECS[p.117] is a means of evidence of the following in another Member State **bound by the Regulation**:

- Status as heir or legatee, along with the corresponding quantity of their rights,
- The attribution of specific assets,
- The powers of the person mentioned in the Certificate to execute the will or administer the estate.

The issuing authority must always check the reality of this purpose before issuing the ECS.

2.2.2. Who are the actors in the ECS?

a) Competence to issue an ECS

Competence to issue the certificate is explained in Article 64[p.138] and Article 78[p.145] of the Regulation

The ECS[p.117] may be established and issued by:

- a court as defined in Article 3(2)[p.127],
- another authority which, under national law, has competence to deal with matters of succession.

Not all *issuing authorities* of the European Union have competence to issue an ECS for a given succession. Only the following will have competence:

- The *issuing authority - p.* of the State of the habitual residence of the deceased,
- in the case of a choice of law, the *issuing authority - p.* of the chosen national law,
- exceptionally:
    - We should note the subsidiary jurisdiction of the Member State bound by the Regulation in which any immovable property is located (Article 10[p.119])
    - Case of forum necessitatis: if no court of a Member State is competent, or if the procedure is impossible in a third State or in a Member State not bound by the Regulation with which the case is closely connected, then the authority of the Member State bound by the Regulation which is most closely connected will have competence (Article 11[p.120]).

b) Status of the applicant

Not just anybody can apply for the issue of an ECS[p.117]. Only certain persons are entitled to apply for issue. They are the following:

- Heirs or legatees having direct rights in the succession (Article 63(1)[p.137] and Article 65(1) [p.138]),
- Executors of wills or administrators of the estate who need to invoke their status in another Member State.

Creditors of the succession or the creditors of an heir may not apply for the issue of an ECS[p.117].

The status of the applicant must be examined in light of the law applicable to the succession.

The applicant must provide evidence (originals or certified copies) of their status and of the rights they claim to have in the assets of the estate as beneficiary, administrator or executor (Article 66[p.140]).

Remarque

We should point out that it is not necessary for the heirs to have accepted the succession in order to apply for an ECS[p.117], and that the application for an ECS[p.117] does not constitute acceptance of the succession.

2.2.3. How to issue an ECS

a) The application for issue

This part refers to Article 65 of the Regulation.

The applicant must submit a certain number of elements and information to the *issuing authority* - *p.* , as mentioned in Article 65(2), notably information concerning:

- The deceased
- The applicant
- The spouse or partner of the deceased
- The legatees
- The purpose of the ECS
- The contact details of the issuing authority
- The elements on which the applicant is basing himself in claiming the right to succession property, or his right to execute the will of the deceased or to administer the estate of the deceased
- An indication of whether the deceased had made a disposition of property upon death
- An indication of whether the deceased had entered into a marriage contract or into a contract regarding a relationship
- An indication of whether any of the beneficiaries has made a declaration concerning acceptance or waiver of the succession
- A declaration stating that, to the applicant's best knowledge, no dispute is pending

And any other information that the applicant considers useful for the issue of the certificate.

b) Official application form template (Regulation 1329/2014)

To facilitate applications for an ECS, Article 65 refers to the form established by Implementing Regulation n°1329/2014 of the Commission of 9 December 2014 (cf. formulaire_cse_5.docx).

Use of this form is not mandatory for applicants, but it is strongly recommended in that its provides a guide to the different elements required to establish an ECS and the different sections to be completed (cf. formulaire_V_rempli.pdf).

c) Examination of the ECS application and the duty of information of the issuing authority

This part refers to Article 66[p.140] of the Regulation.

On receiving the application for the issue of an ECS, the *issuing authority - p.* will examine and check the information, documents and other means of evidence provided by the applicant.

To do so, the *issuing authority - p.* has the full powers bestowed upon it by national law (e.g. sworn declaration, consultation of property registers, civil registry records, etc.), and may cooperate with issuing authorities in another Member State bound by the Regulation.

The *issuing authority - p.* will inform the other beneficiaries that the ECS application has been filed).

d) Issue of the ECS

The *issuing authority - p.* will issue the certificate on the basis of the official template as in *Implementing Regulation n°1329/2014 of the Commission of 9 December 2014*.

However, the authority may not issue the certificate:

- If the certified elements are being challenged,
- If the Certificate turns out not be in conformity with a decision covering the same elements.

Keeping of the ECS

The *issuing authority - p.* keeps the original of the certificate. Only certified copies may circulate.

Nothing is expressly stated in the Regulation as to the conditions in which the original of the ECS is kept, except that it must be numbered with a reference number (officer number/year/reference number) and bear its date of issue.

It is recommended that the issuing authority should keep a register of ECS distinguishing:

- The ECS and the mandatory annexes which will be kept in the minutes of the notaries,
- The exhibits of the procedure (supplied with the issue application and the elements used by the notary to fill out the ECS), which will be kept in the file for the succession along with the usual documents.

Issue of copies

The *issuing authority - p.* may issue certified copies when requested:

- By the applicant for the original ECS;
- By any person demonstrating a legitimate interest, such as the legatees and creditors of the deceased.

There is no specific procedure or form to apply for a copy, but an application in writing will make it

possible to keep a trace of the interest of the applicant.

Validity period of copies

- The period of validity of certified copies is limited to six months as of the date of issue.
- In exceptional, duly justified cases, the notary may extend the period of validity and must indicate the reason for the extension at the bottom of the copy.

2.2.4. The effects of the ECS and absence of formalities

The ECS shall produce its effects in all Member States without any special procedure being required (Article 74*p.144*).

The elements established and certified in the ECS shall be considered accurate (Article 69*p.141*) and the persons mentioned in the certificate are presumed:

- To have the status mentioned in the certificate,
- To have the rights and powers set out in the certificate without any restrictions other than those that might be mentioned in the ECS,

This status and the rights and powers attached to it are binding upon third parties or co-contractors acting in good faith (Article 69*p.141*) unless:

- They were aware of the inaccuracy,
- Or they were unaware of it due to gross negligence.

2.2.5. Validity of the ECS (rectification, modification, withdrawal, suspension and appeals)

Validity of the ECS may be challenged in several cases (Article 71[p.142]). In all the cases presented below, the issuing authority will promptly inform all those persons to whom certified copies have been delivered and will make a marginal note in its ECS register.

b) Rectification of clerical error

Such an error would be a mistake in noting the identity of the deceased, of the heirs (date of birth, civil status, date of death) or in the description of the assets.

The rectification is carried out automatically by the issuing authority which rectifies the ECS unilaterally.

c) Modification of a substantive error

In this case, the substantive content of the ECS is inaccurate and does not correspond to the reality (notably regarding the identification of property or persons, the shares for the heirs, etc.)

The modification may be made at the request of any person demonstrating a legitimate interest.

The *issuing authority - p.* will then establish a new ECS. If the authority has ceased its professional activity, the ECS may be established by any *other competent authority - p.*.

d) Withdrawal of the ECS

At the request of any person demonstrating a legitimate interest, the *issuing authority - p.*, *or any other competent authority - p.* if it has ceased its professional activity, will establish a dated, signed document testifying to the withdrawal of the ECS[p.117].

e) Suspension of the effects of the ECS

This part refers to Article 73[p.143] of the Regulation.

The effects of the Certificate may be suspended by:

- The *issuing authority - p.*, at the request of any person demonstrating a legitimate interest, pending a modification or withdrawal of the Certificate pursuant to Article 71[p.142].

- The judicial authority, at the request of any person entitled to challenge a decision taken by the issuing authority.

Effects of the suspension

The *issuing authority - p.* or judicial authority shall without delay inform all persons to whom certified copies of the Certificate have been issued.

During the suspension of the effects of the Certificate no further certified copies of the Certificate may be issued.

f) Redress procedures

This part refers to Article 72[p.143] of the Regulation.

Any person entitled to apply for an ECS and demonstrating a legitimate interest may challenge any decision given by the *issuing authority - p.* before a *judicial authority* in the Member State of the issuing authority in accordance with the law of that State.

If the authority that is seised confirms that the ECS is not accurate, the *competent judicial authority - p. 60* will rectify, modify or withdraw the ECS or ensure that the *issuing authority - p.* re-examines the file and gives another decision.

2.3. Jurisdiction, recognition and enforcement of decisions and authentic instruments

2.3.1. Jurisdiction

a) Notion of jurisdiction

The Regulation defines the notion of jurisdiction in Article 3(2)[p.127].

The examination of cases in which the deceased had his habitual residence outside the European Union at the time of his death will be addressed in Module 2 of the course (Article 10[p.119] of the Regulation).

b) Determining the competent court

i The principle: Article 4

By the terms of recitals 23[p.150] and 24[p.150], Court jurisdiction and legislative competence coincide: *the court having jurisdiction in any dispute relating to a succession is that of the Member State in which the deceased had his habitual residenceat the time of his death.* - p.22

? *Exemple*

Charlotte, an Austrian national, has lived in Toledo in Spain for 30 years. She died on 1st September 2015 during a holiday in France. A dispute arises between her three children, who are Austrian residents, as to how to share out her estate. A Spanish court will have jurisdiction.

ii Choice of court agreement: Article 5

When the deceased has chosen to have their succession governed by the law of their nationality (Article 22[p.122]), their heirs may conclude a choice-of-court agreement pursuant to Article 5[p.132] of the Regulation. This agreement must be in writing, dated and signed by all the parties concerned. It gives exclusive jurisdiction to the courts of the State whose law is applicable to the succession.

? *Exemple : Example (cont'd):*

On 20 August 2015, Charlotte had established a will in which she stated that she wished her succession to be subject to Austrian law, as that was her nationality.

Her three children who are Austrian residents do not agree on how to share out their mother's estate but they manage to conclude an agreement on 2 November 2015 to submit the dispute to the Austrian courts, in order to reduce the costs of the proceedings.

⚠ *Attention*

Choice-of-court agreements only became possible from 17 August 2015 and only between States participating in the Regulation.

iii In the event of a choice of law by the deceased: Article 7

If the deceased had chosen national law to settle his succession, the courts of that State may have jurisdiction to settle that succession:

- if the court of the habitual residence previously seised with the matter has declined jurisdiction,
- If the parties have concluded a choice-of-court agreement in favour of the courts of that State (see Article 5 below),
- Of if the parties have accepted the jurisdiction of the court seised.

iv To what extent is a choice-of-court agreement binding on third parties?
Article 9

? *Exemple : Example (cont'd):*

Charlotte's three children have concluded an agreement specifying an Austrian court to settle their mother's succession. Their mother had previously chosen Austrian law to govern her succession.

During the proceedings, it emerges that Charlotte had a fourth child who was born in Spain and is of Spanish nationality. Is the choice-of-court agreement binding upon that child who did not sign it?

The child from Spain may accept the jurisdiction of the Austrian court by appearing before said court and not challenging its jurisdiction (Article 9.1p.148).

The Spanish child may also challenge the jurisdiction of the Austrian court and argue that he was not a party to the choice-of-court agreement. In the latter case, the Austrian court must decline jurisdiction in favour of the Spanish court (Article 9.2p.148), which has jurisdiction on account of the last habitual residence of the deceased (Article 4p.130).

v Declining of jurisdiction: Article 6

If necessary, reference may be made to Article 6p.136

When the deceased has chosen his national law to govern his succession, the court which is seised, which in principle should be the court of the last habitual residence, may, at the request of one of the parties, decline jurisdiction in favour of a court in the Member State of which the deceased chose the law, on the grounds that such court is better placed to rule on the succession, notably as regards the habitual residence of the parties or the location of the assets.

? *Exemple : Example (cont'd):*

Charlotte's three children are unable to come to an agreement on how to share out the estate or on the choice of court.

The dispute is referred to the Toledo Court of First Instance and Charlotte's eldest daughter requests that it decline jurisdiction in favour of an Austrian court on the following grounds:

- Austrian law is applicable to the succession
- the three heirs reside in Austria

- Charlotte owned a family home in Austria but was only the tenant of her apartment in Toledo.

The Court of Toledo considers that these practical circumstances justify referring the matter to an Austrian court.

Such declining of jurisdiction will probably be more widely used than choice-of-court agreements, as an agreement is often difficult to find in disputes in matters of succession, even limited to the competent court.

Attention

The court simply declines its competence and there is no need to request beforehand whether it accepts its jurisdiction or not. This only works between States participating in the Regulation.

vi Own motion proceedings and choice of law: Article 8

This part concerns Article 8p.146

When the law of the last habitual residence of the deceased provides for a court to open proceedings of its own motion, then that court must close the proceedings of its own motion if the parties have agreed to settle the succession amicably out of court in the Member State whose law had been chosen by the decease

Exemple

Antoine, a French national, resides in Krakow in Poland. He has worked there for 20 years and married Mirella, a Polish national, with whom he has had two children.

Antoine has written a will indicating a choice of French law to settle his succession, and has named Mirella as the universal legatee of his assets.

He died suddenly on 15 September 2015 in a traffic accident in Germany.

Krakow Regional Court opens succession proceedings. However, Mirella and her children have contacted a French notary to settle the succession amicably and have signed the instrument of partition. Mirella may seise the Court of Krakow with an application to close the proceedings of its own motion, stating that Antoine had made his succession subject to French law and that the heirs have shared out the assets amicably.

vii The importance of jurisdiction rules: Article 15

According to Article 15p.121, « *, where a court of a Member State is seised of a succession matter over which it has no jurisdiction under this Regulation, it shall declare of its own motion that it has no jurisdiction.* ». The judge seised of a European succession must therefore examine systematically whether he does have jurisdiction under the rules set out in the Regulation.

Attention

The judge must hear the preliminary remarks of the parties before declaring that he has no jurisdiction.

viii Lis pendens: Article 17

This part concerns Article 17[p.121]

Where proceedings involving the same succession are brought in two different courts, the court that is seised second shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established. If the first establishes its jurisdiction, the second shall decline jurisdiction in its favour.

The date on which the courts were seised is determined by Article 14[p.121].

Exemple

Françoise, a Belgian national, has resided in Greece since she retired in 1990. She has three children: two daughters from a first marriage, who reside in Belgium, and one son from a second marriage, who lives with her in Greece.

On 1st November 2015, knowing that she was very ill, Françoise established a will specifying Belgian law to govern her succession. She died soon afterwards, on 27 November 2015.

For several years, the children of Françoise have not been getting on with each other.

On 15 December 2015, her eldest daughter seised the Belgian Succession Court, invoking its jurisdiction on account of the choice made by her mother.

On 17 December 2015, her son seised a Greek succession court claiming that the last residence of Françoise was in that country and that all her assets were located there.

The Greek court that is seised second must stay its proceedings until the Belgian court has ruled on its jurisdiction.

The Belgian court could decline jurisdiction in favour of the Greek court, considering that that was the last place of habitual residence of the deceased (Article 4[p.130]) and that the Greek court is therefore better placed to rule on the succession (residence of an heir, all assets located in Greece).

Conseil

A ruling should be issued promptly on jurisdiction to ensure that the dispute is referred to the competent court.

ix Related actions: Article 18

This part concerns Article 18[p.121]

Actions are related when there is such a close connection between them that it is preferable to hear and judge them at the same time to avoid irreconcilable decisions.

When related actions are presented to courts in different States, the court seised second may stay its proceedings (but is not obliged to).

If the related actions are presented to courts of the first instance, the court seised second may decline jurisdiction at the request of a party, if the court seised first has jurisdiction to hear the requests and its law permits their consolidation.

c) Area of jurisdiction of the court

A court that does not have jurisdiction to settle the whole of an estate may be involved, however, in the following circumstances:

ii Provisional measures, Article 19

This part concerns Article 19p.122

A succession may require provisional measures to be taken promptly. In this case, the court may be seised of and rule on such provisional measures, even if it is not the court that will be seised of the dispute as to the succession.

? *Exemple*

Marcello, an Italian national, lives in Milan. He is the owner of a small building in the French Alps where he rents out apartments to holidaymakers.

Marcello died on 17 September 2015, leaving behind him his wife Simona and a son, Luigi, who lives in France.

Simona and Luigi do not agree on what to do about the building in the French Alps. Simona wishes to sell it while Luigi wants to continue renting it out to holidaymakers, even though some work is required to renovate the apartments.

Luigi applies to a court in France to have a provisional administrator appointed to carry on the rentals, collect the rents and pay for the renovation work.

The French court may order such a measure, even if it does not have jurisdiction to settle Marcello's succession, which will be a matter for an Italian court as the place of habitual residence of the deceased.

iii Acceptance or waiver of a succession: Article 13

This part concerns Article 13p.120

In certain States participating in the Regulation, the law requires the heir to declare that he accepts or waives the succession.

When the heir resides in another State than that whose courts have jurisdiction to rule on the succession, he may appear in front of the court of the habitual residence.

Exemple

Leonard, a Luxembourg resident, was heavily in debt further to a number of unsuccessful business deals in the course of his life. He died on 18 September 2015, leaving his daughter Lucie as his heir. She resides in Lille in France and appears before the clerk of the court of that city to waive her father's succession. The clerk has jurisdiction to receive that waiver, even though the succession itself is a matter for the courts of Luxembourg in principle.

Remarque

The subsidiary jurisdiction provided by Article 10p.119 of the Regulation will be addressed in Module 2 on the application of the Regulation outside the participating States (when the deceased resided outside the States participating in the Regulation).

2.3.2. Recognition and enforcement of decisions

a) The principles governing recognition of decisions given in another participating State

- **The purpose of the Regulation is to facilitate the circulation and recognition of decisions handed down in matters of succession on the territory of all the participating Member States (Article 39 p.130).**
- **In principle, the substance of the decision handed down in another State must not be reviewed** p.131 **(Article 41 p.131)**

The court seised with an application for the recognition of a decision given by a court of another participating State simply grants or refuses the requested authorisation, and must not review the substance of the case.

The decision that is handed down may only be a recognition or a refusal of recognition.

However, Article 55 p.134 allows partial recognition of enforceability of some of the matters in the application, when enforceability cannot be given for the judgement as a whole.

? *Exemple : Full recognition of a foreign judgement*

Sofia, who resided in Germany, died on 20 August 2015. She owned a holiday home in Spain. A German judgement has been given on the sharing-out of this succession.

José, Sofia's son, makes an application to a Spanish court for the recognition of the German judgement, accompanied by Form (cf. formulaire_cse_1.docx) I (cf. formulaire_cse_1.docx), for the purpose of proceeding with the sharing-out of the holiday home located in Spain.

The Spanish court that is seised may not modify the German judgement, but only recognise its validity and allow its compulsory enforcement in Spain, where appropriate.

? *Exemple : Partial enforcement*

Sofia, who resided in Germany, died on 20 August 2015. She was married to Anton, a German national, and was the owner of a holiday home in Spain. A German decision has been given on the matrimonial regime applicable to the marriage between Sofia and Anton, and on the sharing-out of Sofia's succession.

José, Sofia and Anton's son, makes an application to a Spanish court for the recognition of the German judgement, accompanied by Form I (cf. formulaire_cse_1.docx), for the purpose of proceeding with the

sharing-out of the holiday home located in Spain. He limits this application solely to those provisions pertaining to Sofia's succession, excluding those relating to his parents' matrimonial regime.

The Spanish court that is seised may recognise the partial validity, in Spain, only of that part of the judgement pertaining to Sofia's succession.

Several grounds of non-recognition: Article 40.

Several grounds of non-recognition are presented in Article 40[p.130]:

- If the decision for which enforcement has been sought is manifestly contrary to public policy in the Member State in which recognition is sought because it creates discrimination according to the line of parentage of the heirs / recognises the succession rights of a spouse of the same sex as the deceased / refuses succession rights to a spouse of the same sex as the deceased.
- The decision for which recognition is sought was given in default of appearance and the defendant was unable to exercise their rights or arrange for their defence in front of the court. When examining the foreign decision, particular attention should be paid to the procedure that was followed, to see why the defendant was not present or represented, whether they were informed of the summons or not, whether they were informed of the decision handed down against them, whether they had the possibility of appeal or not.
- The decision for which recognition is sought is irreconcilable with another decision given in the Member State in which recognition is sought

b) From recognition to enforcement of decisions from another participating State

i Who should be seised of a request for exequatur of a foreign decision? Article 45

This part concerns Article 45p.131

Any party wishing to have a decision given in one State enforced in another participating State should seise the authority indicated in the following list: *Notification under the terms of Article 78*.

The territorial jurisdiction of that authority is determined by the domicile of the party against which enforcement is sought or by the place of enforcement.

ii Mandatory use of a form: Article 46

This part concerns Article 46p.131

The decision handed down by a court of another Member State must be accompanied by Form I, filled out by the said court, as provided by Implementing Regulation EU n°1329/2014 of 9 December 2014.

This form provides proof that the decision has been declared enforceable in its State of origin.

If it appears that the decision for which exequatur is sought is the subject of a challenge in its State of origin, a stay of proceedings must be ordered (Article 42p.131).

iii The procedure: Articles 46 to 55

- The Regulation makes provision for the application of the procedure in the Member State of enforcement.
- The request is submitted by the applicant who produces the foreign judgement accompanied by Form I, with these documents being translated at the request of the court seised.

Conseil

A translation by a sworn court translator should be requested systematically in order to proceed with the verifications required by Article 40p.130 notably to check that the defendant has had the opportunity to exercise his rights.

- The Regulation does not make provision for contradictory proceedings in this first examination of the application, and the judge simply grants or refuses the enforceability of the foreign

judgement in his State, based on the documents submitted and without any contradictory debate.

- The applicant is informed of the judge's decision in accordance with the procedure applicable in the Member State of enforcement.
- When the foreign judgement is declared enforceable in the Member State of enforcement, notice of this decision is served to the party against whom enforcement is sought.
- This decision granting or refusing enforceability may be appealed in front of the relevant authorities defined in *Notification under Article 78*.
- The time for appealing is 30 days as of service of the decision to be appealed, or 60 days when the defendant is domiciled in another Member State,
- The contradictory procedure is then applicable when examining this appeal and the court that is seised must give its decision without delay.
- This decision on the appeal may be referred to the relevant authorities defined in *Notification under Article 78*.

iv Provisional and protective measures, Article 54

This part concerns Article 54*p.133*

A party that is considering applying for recognition and enforcement of a decision given by the courts of another Member State may, before obtaining that decision in the State of enforcement, apply for provisional or protective measures in the State of enforcement in accordance with the law applicable in that State of enforcement.

? *Exemple*

Marcello, an Italian national, lived in Milan. He was the owner of a number of buildings, including a large chalet, in the French Alps where he rented out apartments to holidaymakers.

Marcello died on 17 September 2015, leaving behind him his wife Simona and a son, Luigi, who lives in France.

Simona and Luigi do not agree as to how to share out the estate.

An Italian court is seised of the dispute and decides, among other things, to attribute the building in France to Luigi. However, since Marcello's death, Simona alone has been receiving the rents from the building.

Luigi seises a French court to have it ascertained that the Italian judgement must be enforced in France, and in particular to obtain recognition of the fact that the chalet has been attributed to him.

Pending the outcome of this procedure, Luigi will apply to the enforcement judge to issue an attachment order on the rents paid by the holidaymakers who occupy the chalet.

c) Circulation of a judgement or court settlement

Circulation of a judgement or court settlement issued in one Member State and enforced in another Member State.

This interactive diagram shows how to enforce a judgement or court settlement given in one Member State in another Member State. - p.116

2.3.3. Recognition and enforcement of authentic instruments and court settlements

Le Règlement a pour objet de faciliter la circulation et la reconnaissance des actes authentiques et des transactions judiciaires rendues en matière successorale sur le territoire de tous les États participants. Il met en place une procédure allégée, distincte de l'apostille et de la légalisation de droit commun, qu'il convient d'écarter.

b) Definitions of authentic instrument and court settlement

Authentic instrument: Article 3 (i)

The “Successions” Regulation reprises the definition of an authentic instrument already included in Regulation EC n°805/2004 of 21 April 2004 creating a European Enforcement Order for uncontested claims(Article 4(3)p.130).

According to Article 3ip.127, “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 relates to the signature and the content of the authentic instrument; and has been established by a public authority or other authority empowered for that purpose by the Member State of origin. “

Court settlement

However, the Regulation does not provide a particular definition of a settlement. Article 3(h)p.136 states that it is a settlement approved by a court or concluded before a court.

c) From acceptance to execution of authentic instruments

i Circulation of authentic instruments: Article 59

This part concerns Article 59p.134

The Regulation facilitates the circulation and mutual recognition of authentic instruments on the territory of the participating Member States.

An authentic instrument established in one Member State therefore has the same evidentiary effects or produces the most comparable evidentiary effects in the other Member States.

A person wishing to use an authentic instrument in another Member State must apply to the authority that established the instrument in the State of origin to fill out Form II provided by Implementing regulation EU n°1329/2014 of 9 December 2014.

This form provides assurance that the circulating instrument is indeed an authentic instrument in its State of origin and describes its evidentiary effect.

Attention

Section 4 of the form serves to prevent difficulties relating to the circulation of authentic instruments established by notaries whose jurisdiction is limited to the authentication of signatures and documents, as in Finland or Sweden.

ii Challenging the authenticity of the instrument: Article 59.2

This part concerns Article 59p.134

The courts of the Member State in which the authentic instrument was established have jurisdiction to rule on any challenges to the authenticity of that instrument.

As long as this dispute has not been judged, the instrument subject to this challenge does not have evidentiary effect in another Member State.

Exemple

The estate of Erick has been shared between his two children, Anna and Frederik, in Lithuania, by a notarial instrument. The estate comprises a holiday home in Greece which has been attributed to Anna. She wants to have this authentic partition recognised in Greece.

Frederik, however, who regrets the fact that the holiday home was not part of his share, realises that the notary who established the partition did not yet have the accreditation required to claim the status of notary.

Frederik will have to challenge the authenticity of the partition of the estate in a Lithuanian court. During this procedure, Anna will not be able to make use of the instrument of partition in Greece.

iii Challenging the content of an authentic instrument: Article 59.3

This part concerns Article 59p.134

When the challenge relates to the content of the authentic instrument, *it will be a matter for the court with jurisdiction to settle the succession - p.38*.

? *Exemple*

Leonard, an Estonian resident, died on 5 September 2015. He left his spouse Penelope and a child, Gaspard.

Leonard was of Italian nationality and had established a will with an Italian notary in which he chose to have his succession governed by Italian law and left all his assets to Gaspard.

Penelope challenges the will, stating that Leonard was very ill when he established his will and had lost his mind.

Penelope will have to seise an Estonian court of this challenge as Leonard's last habitual residence was in that country (jurisdiction pursuant to Article 4)p.130.

The Lithuanian judge who has jurisdiction to rule on the whole of the succession will have to assess the regularity of Leonard's will according to Italian law, as the latter is applicable to the whole of the succession (Article 22p.122).

? *Exemple : Alternative case*

Leonard did not choose Italian law to govern his succession. In this case, the Lithuanian judge will have to assess the regularity of the will according to Lithuanian law, as the latter is applicable to the whole of the succession (Article 21p.122).

iv Enforceability of authentic instruments: Article 60

This part concerns Article 60p.136

The procedure is identical to that for the enforcement of decisions given in another Member State.

v Who is seised of the request? Article 45

This part concerns Article 45p.131

Any party wishing to have an authentic instrument from one State enforced in another participating

State should seise the authority indicated in the following list: *Notification under the terms of Article 78*.

The territorial jurisdiction of that authority is determined by the domicile of the party against which enforcement is sought or by the place of enforcement.

vi Mandatory use of a form: Article 60.2

This part concerns Article 60p.136

The authentic instrument must be accompanied by Form II, filled out by the authority that issued the authentic instrument, as provided by *Implementing regulation EU n°1329/2014 of 9 December 2014*.

This form provides assurance that the circulating instrument is indeed an authentic instrument in its State of origin and describes its evidentiary effect.

vii The procedure: Articles 46 to 55

- The Regulation makes provision for the application of the procedure in the Member State of enforcement.
- The request is submitted by the applicant who produces the authentic instrument accompanied by Form II, with these documents being translated at the request of the court seised.

Conseil

A translation of all the documents by a sworn court interpreter should be requested systematically by the courts in order to check the extent of the authentication of the foreign instrument (Section 4 of Form II).

Attention

If the authenticity of the instrument is challenged in its State of origin, it may not be circulated abroad (Article 59 (2)p.134).

Attention

A challenge of the authenticity of the instrument is always possible in its State of origin, even if the authentic instrument has been granted enforceability in another State participating in the Regulation. The check carried out on granting enforceability is purely formal.

- The Regulation does not make provision for contradictory proceedings in this first examination of the application, and the judge simply grants or refuses the enforceability of the authentic instrument in his State, based on the documents submitted and without any contradictory debate.
- The applicant is informed of the judge's decision in accordance with the procedure applicable in the Member State of enforcement.

When the authentic instrument is declared enforceable in the Member State of enforcement, notice of this decision is served to the party against whom enforcement is sought.

- This decision granting or refusing enforceability may be appealed in front of the following relevant authorities: *Notification under the terms of Article 78.*

The time for appealing is 30 days as of service of the decision to be appealed, or 60 days when the defendant is domiciled in another Member State,

The contradictory procedure is then applicable when examining this appeal and the court that is seised must give its decision without delay.

- This decision on the appeal may be referred to the following authorities: *Notification under the terms of Article 78.*

viii Public policy reserve clause: Articles 59.1 and 60.3

This public policy reserve clause is addressed in Article 59*p.134* and in Article 60*p.136*.

The Regulation allows the recognition or enforceability of an authentic instrument established in another Member State to be refused if *the enforcement of that authentic instrument is manifestly contrary to the public policy of the Member State of enforcement. - p.24*

d) The enforceability of court settlements

i Obtaining enforceability: Article 61(1) and (2)

The article in question here is Article 60p.136.

The procedure is identical to that for the enforcement of decisions given in another Member State.

ii Who is seised of the request? Article 45

This part concerns Article 45p.131

Any party wishing to have a court settlement from one State enforced in another participating State should seise the authority indicated in the following list: *Notification under the terms of Article 78*.

The territorial jurisdiction of that authority is determined by the domicile of the party against which enforcement is sought or by the place of enforcement.

iii Mandatory use of a form: Article 61.2

This part concerns Article 61p.136

The court settlement must be accompanied by Form III, filled out by the authority that approved the settlement, as provided by *Implementing regulation EU n°1329/2014 of 9 December 2014*.

This form provides proof that the settlement has been declared enforceable in its State of origin.

iv The procedure: Articles 46 to 55

- The Regulation makes provision for the application of the procedure in the Member State of enforcement.
- The request is submitted by the applicant who produces the coourt settlement accompanied by Form III, with these documents being translated at the request of the court seised.

Conseil

A translation of all the documents by a sworn court interpreter should be requested systematically by the courts in order to check the extent of the enforceability of the settlement (Section 4 of Form III (cf. formulaire_cse_3.docx)).

- The Regulation does not make provision for contradictory proceedings in this first examination

of the application, and the judge simply grants or refuses the enforceability of the court settlement in his State, based on the documents submitted and without any contradictory debate.

- The applicant is informed of the judge's decision in accordance with the procedure applicable in the Member State of enforcement.
  When the court settlement is declared enforceable in the Member State of enforcement, notice of this decision is served to the party against whom enforcement is sought.
- This decision granting or refusing enforceability in the State of enforcement may be appealed in front of the following authorities: *Notification under the terms of Article 78*.
  The time for appealing is 30 days as of service of the decision to be appealed, or 60 days when the defendant is domiciled in another Member State,
  The contradictory procedure is then applicable when examining this appeal and the court that is seised must give its decision without delay.
- This decision on the appeal may be referred to the following authorities: *Notification under the terms of Article 78*.

v Public policy reserve clause: Article 61(3)

This part concerns Article 61 *p.136*

The Regulation allows enforceability to be refused if the enforcement of that court settlement is manifestly contrary to the *public policy of the Member State of enforcement.* *- p.24*

e) Circulation of an authentic instrument

Circulation of an authentic instrument (other than an ECS) drawn up in one Member State and enforced in another Member State.

This interactive diagram shows how to enforce an authentic instrument (other than an ECS) established in another Member State. *- p.116*

2.3.4. Competent judicial authorities by country

a) Enforceability

List of authorities empowered to declare enforceability by country

by the terms of Article 45.1 :*p.131*

COUNTRY	REDRESS AGAINST THE ECS
Belgium	court of first instance
Bulgaria	Absence of declaration by the State
Czech Republic	district court
Germany	regional court
Estonia	county court
Greece	court of first instance
Spain	court of first instance
France	regional court
Croatia	municipal court
Italy	court of appeal
Cyprus	district court
Latvia	district court
Lithuania	Court of Appeal of Lithuania
Luxembourg	district court
Hungary	district court, Buda Central District Court
Malta	civil court, magistrates court
Netherlands	court of first instance
Austria	district court
Poland	regional court
Portugal	local court of first instance
Romania	regional court
Slovenia	regional court
Slovakia	district court
Finland	court of first instance
Sweden	local court

b) Contesting a decision given on enforceability

List of authorities empowered to declare a contestation against an enforceability decision

by the terms of Article 51 :*p.133*

COUNTRY	CONTESTING A DECISION GIVEN ON ENFORCEABILITY?
Belgium	Court of Cassation
Bulgaria	Absence of declaration by the State
Czech Republic	the court which ruled at first instance on the application
Germany	Federal Court of Justice
Estonia	Supreme Court
Greece	Court of Cassation
Spain	Supreme Court
France	Court of Cassation
Croatia	county court
Italy	Supreme Court of Cassation
Cyprus	Supreme Court of Cyprus
Latvia	Supreme Court
Lithuania	Supreme Court of Lithuania
Luxembourg	Court of Cassation
Hungary	the Curia of Hungary
Malta	Absence of declaration by the State
Netherlands	Supreme Court of the Netherlands
Austria	Supreme Court
Poland	Supreme Court

Portugal	Supreme Court of Justice
Romania	High Court of Cassation and Justice
Slovenia	Supreme Court of the Republic of Slovenia
Slovakia	Supreme Court of the Slovak Republic
Finland	Supreme Court
Sweden	court of appeal and Supreme Court

c) Redress against the ECS

List of authorities empowered to issue redress against the ECS

by the terms of Article 72 :*p.143*

COUNTRY	REDRESS AGAINST THE ECS
Belgium	family court
Bulgaria	Absence of declaration by the State
Czech Republic	regional court
Germany	higher regional court
Estonia	county court
Greece	court of first instance with a single judge
Spain	court of first instance
France	regional court or court of appeal
Croatia	municipal court when the ECS is issued by a notary, county court when ECS issued by the municipal court
Italy	ordinary courts
Cyprus	Supreme Court of Cyprus
Latvia	district / city court
Lithuania	district court
Luxembourg	district court

Hungary	regional court, Budapest-Capital Regional Court
Malta	civil court, magistrates court
Netherlands	cantonal judge of the district court
Austria	district court if ECS issued by a notary, regional court if ECS issued by a district court
Poland	Absence of declaration by the State
Portugal	local court of first instance
Romania	court of first instance
Slovenia	higher court than the one that issued the ECS
Slovakia	notary if the ECS is issued before the end of the procedure, district court if the ECS is issued after the end of the procedure
Finland	administrative court
Sweden	court of first instance, court of appeal, Supreme Court

d) Appeal against an enforceability decision

List of authorities empowered to make an appeal against an enforceability decision by country

by the terms of Article 50(2):*p.132*

COUNTRY	APPEAL AGAINST AN ENFORCEABILITY DECISION?
Belgium	Opposition: court of first instance, appeal: court of appeal
Bulgaria	Absence of declaration by the State
Czech Republic	regional court
Germany	higher regional court
Estonia	District court
Greece	court of appeal

Spain	provincial court
France	court of appeal
Croatia	municipal court
Italy	court of appeal
Cyprus	district court
Latvia	regional court
Lithuania	Court of Appeal of Lithuania
Luxembourg	court of appeal
Hungary	regional court, Budapest Regional Court
Malta	court of appeal
Netherlands	court of judge hearing applications for interim relief
Austria	regional court
Poland	court of appeal
Portugal	court of appeal, Supreme Court of Justice
Romania	court of appeal
Slovenia	regional court
Slovakia	regional court
Finland	court of appeal
Sweden	local court

3. Voluntary dispositions

3.1. Circumscribe the scope of application of the Regulation in the presence of dispositions of property upon death

3.1.1. Temporal scope of application

The Regulation applies only to successions opened from 17 August 2015. It must therefore apply to dispositions of property upon death established after 17 August 2015 and falling within its substantive scope of application.

However, its scope of application may also be extended to dispositions of property upon death made prior to 17 August 2015.

In this respect, Article 83(3)[p.147] of the Regulation establishes an alternative conflict rule for dispositions of property upon death. For the disposition to be valid, it must comply with:

- Either the provisions set out in the Regulation concerning the formal and substantive validity of dispositions of property upon death
- Or the rules of conflict in force on the day when the disposition was made in the State in which the deceased had his habitual residence or in the State whose nationality he possessed or in the State of the authority dealing with the succession.

It is a conflict rule of a substantive type. The possibilities are alternatives without any order of priority. It is necessary and sufficient that the disposition be valid pursuant to one of the specified laws. This therefore increases the chances that the disposition of property upon death will produce its effects and that the wishes of the deceased will be respected.

Exemple

A French couple established an agreement as to succession while residing in Germany in 2013. One of them died in France, where he lived, in September 2015. Pursuant to the Regulation, the instrument will be valid if it was drawn up in accordance with the German law of the residence of the couple on the day the instrument was established. It would have been invalid, however, if application had been made of the conflict rules in force in France on the day of the instrument, as that would have resulted in giving preference to succession law in the case at hand, which is to say French law.

Complément

While there is no doubt that the Regulation may be applied to instruments concluded between the Regulation coming into force and its actual implementation, can it also apply to instruments established prior to 16 August 2012 when the Regulation came into effect?

No text expressly prohibits it. In accordance with the saying “ubi lex non distinguit”, the application of Article 83(3)[p.147] of the Regulation to instruments prior to 16 August 2012 could be defended.

However, although the adoption of Article 83[p.146] was dictated by a wish to give effect to the legitimate expectations of the parties, there would be no grounds to apply the Regulation to instruments established prior to its entry into force. In such a situation, the parties to the instrument cannot have based their behaviour on a text that did not exist on the date the instrument was established.

3.1.2. Champ d'application matériel

Article 3(2)g[p.127] excludes gifts and other alternative forms of disposition from the scope of application of the Regulation. There is an exclusion, however:

- On the one hand, the treatment of all gifts in the succession is subject to the Regulation: Article 3(2)g[p.127] reserves the application of Article23(2)i[p.123] on restoring or accounting for gifts.
- On the other, the Regulation therefore applies to the substantive validity (Article 26[p.124]) and formal validity (Article 27[p.125]) of the dispositions of property upon death (Article 25[p.124] and Article 26[p.124]).

b) Concerning inter vivos gifts

What are we talking about here?

These might be donations inter vivos, and also “tontine” clauses (see *1joint tenancy with right of survivorship* for US/UK law) or top-up pension plans with rights for the survivor or life insurance (see *2life insurance* for US/UK law). Trusts are also subject to exceptions (Article 1(2)j[p.119]).

Which questions are excluded from the scope of application of the Regulation?

However, the formal and substantive validity of inter vivos dispositions are outside the scope of application of the Regulation.

Usually, the national rules of conflict will apply. But not necessarily.

The validity conditions of inter vivos gifts under ordinary law will therefore be governed, in some countries, and more particularly in France and Germany, by the Rome I Regulation of 17 June 2008 on the law applicable to contractual obligations. Other States, such as the United Kingdom, will exclude the application of such a text to gifts. Without seeking to predict the position of the CJEU on this question, it should be pointed out that Point 9 in the Preamble of the proposal for a regulation of 14 October 2009 stipulated that “*« the validity and effects of gifts are covered by Regulation EC n°593 /2008 of 17 June 2008 on the law applicable to contractual obligations »*”.

Which questions relating to inter vivos gifts are included within the scope of the Regulation?.

Concerning the abovementioned forms of inter vivos gifts, application of the Regulation is not entirely

ruled out. We need to make a distinction here between the questions that are likely to arise. The Authors of the Regulation have noted the fact that in certain legal systems - Germany, Spain, France, Italy - the effects of the gift are not finished once it has been granted. They have therefore established a reserve in the application of the law governing the succession (Article 23(2)ip.123).

Complément : In French law

A gift granted to an heir in advance of their share in the succession must be restored to the succession on the death of the deceased (it is subject to the law governing the succession). When a gift has been granted to a third party and there are heirs with reserved shares, it must be restored to the succession ifor the purposes of determining whether it exceeds the fraction of the estate that the deceased could dispose of freely and whether it must therefore be accounted for (this being subject to the law governing the succession).

Exemple

A deceased person had donated a building located in Spain to one of his children as a gift. He was a resident in France when he died.

Pursuant to Article 4(1) c of the Rome I Regulation on the law applicable to contractual obligations, the validity of the gift will be governed by the law of Spain where the building is located. The same will apply to its irrevocability.

As the last habitual residence of the deceased was in France, French law will be applicable to the succession. By the terms of Article 23(2)ip.123,it applies to the question of restoring or accounting for gifts.

Consequently, French law will be applied to restoring the gift of the building located in Spain.

Attention

This also means that the law governing the succession will also be applicable to the clauses concerning restoring the gift (fixed sum, exclusion from restoring) which might be contained in the gift.

c) Concerning dispositions of property upon death.

Articles 24[p.124] and following of the Regulation apply to dispositions of property upon death.

ii The notion of “dispositions of property upon death” within the meaning of the Regulation

What are we talking about here?

The notion of dispositions of property upon death is explained in Article 3(1) d[p.127]). Dispositions of property upon death mean “*« a will, a joint will or an agreement as to succession »*”.

While the notion of will is not defined by the text, this is not the case of the two other terms.

- The absence of any definition of a will is admittedly regrettable. However, it is a notion that is defined fairly uniformly in the different States, which should limit any interpretation difficulties.
- A joint will, meanwhile, is defined as being a will drawn up in one instrument by two or more people (Article 3(1)c[p.127]).
- Finally, an agreement as to succession means “means an agreement, including an agreement resulting from mutual wills, which, with or without consideration, creates, modifies or terminates rights to the future estate or estates of one or more persons party to the agreement”

These definitions raise a certain number of qualification questions.

- **What is the difference between a mutual will and a joint will?**
  Before answering the question, we must assess the importance of it. While the joint will is subject to the system of wills (Article 24[p.124]), mutual wills are subject to the system specific to agreements as to succession (Article 25[p.124]). While both texts follow the same logic, there are still differences between them.
  To resolve this problem of prior qualification, the Regulation does not provide any response. The doctrine provides the following qualification guidelines:
  - the joint will is characterised by the fact there is a single document (formal element)
  - the specific feature of the mutual will, on the other hand, is that it is based on an agreement.
  The two notions can therefore be combined in some cases (but not always). A will may be both joint and mutual. This is the case notably in Germany: the “*gemeinschaftliches Testament*” is based on an agreement between testators; its provisions are interdependent and irrevocable.

- **What are the boundaries of the "agreement as to succession" category?**
  According to Article 3(1)b[p.127] the common denominator between all agreements as to succession is the existence of an agreement on a succession that has not yet been opened:
  - The agreement may concern the succession of more than one person.
  - The agreement may be with or without consideration.
  - The agreement may constitute an attribution or a waiver. If it is a waiver agreement, it may contain a simple waiver or a waiver in favour of a given person.

Questions

- Article 3(1) b[p.127] requires the existence of an agreement. Should it therefore be concluded that agreements as to succession taking the form of unilateral instruments escape from the scope of application of the Regulation?

Complément : Concerning French law more particularly

The question could be asked as to whether an inter vivos distribution falls within the definition of agreements as to succession contained in the Regulation. It is not easy to answer when it does not concern a future succession.

When it is an advance distribution of the future succession While in the former case, the beneficiaries acquire only potential rights to future goods, in the other they acquire final rights in present goods. Despite these differences, the doctrine considers that there are grounds to include inter vivos distributions within the scope of application of Article 25[p.124] of the Regulation.

It will be up to the CJEU[p.117] to decide (uniform interpretation). This being the case and as food for thought, it may be useful to stress that the Hague Convention of 1st August 1989 on the law applicable to contractual obligations which served as a template for drafting the Regulation excluded inter vivos distributions from its scope of application.

iii Main application of Articles 24 and following of the Regulation to dispositions of property upon death.

What is the scope of the conflict regime by derogation?

The dispositions of property upon death above are subject to a particular treatment of conflicts insofar as the conflict principle set out in Article 21[p.122] of the Regulation must be disregarded. We must come to an agreement, however, on the scope of the setting aside of this conflict rule. It is the substantive admissibility and validity of the dispositions of property upon death and the binding effects between the parties to the agreements as to succession that are subject to a special conflict rules. It is also the formal validity of the dispositions of property upon death that is subject to special rules

iv Residual application of Article 21 of the Regulation

According to Article 23[p.123] of the Regulation, a certain number of questions pertaining to the treatment of gifts in matters of succession is subject to the law governing the succession.

Point 50 of the Preamblep.149 also suggests this.

The law governing the succession therefore keeps its jurisdiction for:

- Obligations imposed by the deceased.

Remarque

By reserving the application of the law of the succession for the appreciation of the obligation, does this not suggest that the possibility of imposing an obligation upon the recipient to keep or to return the property to a third party falls under the jurisdiction of the law governing the succession?

This would considerably restrict the scope of application of the law governing the succession.

This therefore remains to be confirmed. It may be that only the consequences of the obligations in succession matters that are subject to the law governing the succession.

Exemple

When there is an inalienability clause attached to a legacy: the law applicable to the will would determine the extent to which this clause is valid, while the law applicable to the succession would determine the extent to which such a clause can be imposed upon an heir it considers entitled to a reserved share.

- Acceptance or waiver of a legacy, delivery of legacies
    - In the event of a universal legacy, the law applicable to the succession will determine whether it is necessary to follow any judicial procedure to take possession of the bequeathed property, or not.

Attention

As in matters of succession, Article 28p.127 authorises the legatee to follow the acceptance (or waiver) formalities not of the law applicable to the succession, but of that of his place of residence.

Exemple

In the event of a universal legacy, the law applicable to the succession will determine whether it is necessary to follow any judicial procedure to take possession of the bequeathed property, or not.

- The powers of the executor appointed in the will.
- Restrictions on the freedom to make a disposition

Exemple

It is the law applicable to the succession that determines the extent to which the deceased may make a disposition in favour of any third parties when there are heirs entitled to a reserved share.

Restoring or accounting for gifts

Conseil

In the event of gifts of property upon death, the practitioner will therefore have to apply several rules of conflict in succession.

He must first ensure that the gift is valid by applying Articles 24p.124 and following of the Regulation, and then assess whether the gift can produce its full effects pursuant to Articles 21p.122 and 23p.123 of the Regulation. It may happen that the successive application of these rules of conflict ends up specifying one and the same law. It may also result in different laws being applied.

We must be particularly vigilant: the partial application of several legislative systems must not result in denaturing those legislative systems.

3.1.3. Spatial scope of application

Attention

It is essential to draw the attention of practitioners to the following point. The special conflict rules in matters of validity of gifts do have consequences for the spatial scope of application of the Regulation. In the future, the practitioner may have to apply the Regulation at least partially, even if there is no longer any international element at the time of death. It is enough that there should have been an international element at the time when the agreement as to succession was established for the rules of conflict in matters of dispositions of property upon death to apply to this instrument. As we will see, we must place ourselves on the day when the instrument was established to determine validity.

Exemple

A French couple residing in Germany establishes a joint mutual will in accordance with German legislation. They then return to France, where one of them dies. The absence of any international element on the day of the death is unquestionable: the deceased is French and resides in France. We might therefore be tempted to stick to the provisions of French substantive law. However, as the will was established at a time when there was an international element, there are grounds to apply Article 25 p.124 of the Regulation.

3.2. On substantive matters: law applicable to the substantive validity of dispositions of property upon death

3.2.1. Identification of the law applicable to substantive validity

For both wills and agreements as to succession, the Regulation establishes a specific rule of conflict. Such a rule is justified by the wish to "ensure legal certainty for persons wishing to plan their succession in advance" (Recital 48 of the Regulation[p.149]). The validity of the instrument must therefore be certain from the moment when it is concluded. The Regulation therefore seeks to provide predictable solutions by fixing the applicable law on the day the instrument is established.

This is all the more important in light of the wide divergences between legal systems. States such as Germany and Austria, for example, generally validate agreements as to successions, contrary to France and Italy.

To allow this predictability of the solutions, the rules of conflict set out in Articles 24[p.124] and 25[p.124] of the Regulation are therefore based on specifying the law to which the succession should be connected in advance, while leaving the people concerned the possibility of making a choice of law.

Identification of the law applicable to substantive validity of wills (Article 24[p.124]).

To identify the law applicable to the will, Article 24[p.124] invites us to make a distinction according to whether the testator specified the law applicable to the will, or not. If he did not specify the applicable law, Article 24[p.124] orders that we anticipate the system to which the succession should be connected. If he has specified the applicable law, this choice should be complied with.

b) Anticipation of the system to which the succession should be connected

This means making the will subject to the law that would have applied to the succession if the testator had died on the day when he established the will. It therefore implies applying the criteria for determining the applicable law in Articles 21[p.122] and 22[p.122] not on the day of the death, but on the date of the will.

We must therefore proceed in three steps.

1er temps

In principle, the law of the habitual residence of the testator on the day of the instrument has jurisdiction

? *Exemple*

A French national residing in Germany established a joint will with his spouse. He died a few years later

while residing in France. Although the succession is subject to French law (Article 21[p.122]), German law is applicable to the validity of the will (Article 24[p.124]).

2ème temps

As an exception and pursuant to the terms of Article 21[p.122], the law of the habitual residence on the day of the instrument will be disregarded if it is established that the testator was clearly more closely connected with a State other than that of his habitual residence.

Conseil

The exception clause is a mechanism that is intended only for exceptional use as it is a source of unpredictability and is likely to run contrary to the objectives of the Regulation (and of the testator). Great care is required in implementing this clause, especially as the closeness of those connections must be assessed on the day the will was established and not on the day of death. Nor must it be an indirect way of restoring the jurisdiction of the law applicable to the succession (residence on the date of death).

Attention

By advancing that moment at which the applicable law is determined, the Regulation may oblige practitioners settling a succession to apply two laws, one for the will and one for the succession, whenever the deceased has changes their residence between the day when the will was established and the day of their death. This dual legislative jurisdiction will:

- Increase the number of situations in which practitioners will be required to apply foreign laws, at least in States which hitherto made the question of the validity of will subject to the law governing the succession.
- Oblige practitioners to identify the habitual residence of the testator retrospectively.
- Oblige practitioners to make a careful distinction between the questions falling within the scope of application of the law applicable to the will and those subject to the law governing the succession.
- Generate adaptation problems whenever the two laws involved are based on different logics.

3rd step

Finally, as the anticipation required by Article 24[p.124] is absolute, we must make a reserve for the hypothesis whereby on the date of the will, the deceased had already opted for the application of his national law to the succession. In this situation, the national law applicable to the succession will also be applicable to the will. It should therefore be noted that this is a way of ensuring the application of one and the same law to the succession and the will.

Attention

To fully understand the importance of this rule, a distinction should be made between three situations:

- In his will, the testator made a choice of law for his succession in accordance with Article 22. p.122 This choice of law will also apply to determine the validity of the will pursuant to Article 24 p.124.
- A first will was established containing a choice-of-law clause in matters of succession. A second will was established thereafter and did not contradict the first one. The validity of the second will shall be assessed pursuant to the national law chosen by the testator in the first will.
- A first will was established and did not contain a choice-of-law clause. A second will was established containing a choice of law in matters of succession. The national law chosen here will not be applicable to the validity of the first will. The text does not allow retroactive application of a choice of law.

Complément

If a first will containing a choice of law is revoked by a second will, does that revocation also concern the choice of law?

The Regulation does not provide an answer to this question. That is a matter for interpretation, no doubt. It is therefore under the law applicable to the revocation of the first will that the extent of the revocation will have to be assessed.

If the choice-of-law clause is contained in a will and the clause is then revoked at a later date, does that revocation apply to the succession and the will or only to the succession that has not yet been opened?

The Regulation does not provide an answer to this question.

c) Choice of law

Which law?

Article 24(2)p.124 therefore extends the provisions of 'Article 22p.122 to the will. In other words, the testator may have his law governed either by his national law on the day of the will of by his national law on the day of death.

Remarque

It should be pointed out immediately that the transposition of Article 22p.122 may run contrary to the objective of Article 24p.124 which is to secure this anticipation by fixing the applicable law on the day of the instrument. If the deceased opts for his national law on the day of his death, there is a risk that this wish will not be fulfilled.

What form?

The choice of law will need to comply with the formal requirements set out in Article 22p.122. It may be contained in a will or in a disposition of property upon death dating from before or after the establishment of the will.

Remarque

The fact that the choice of law can be made after establishing the will is of no consequence insofar as the disputed instrument will only produce its effects on the death of the deceased.

Attention

The scope of such a choice of law must be taken into full account: failing any wish to the contrary expressed by the testator, it will concern only the will: consequently, the succession will be governed by the law of the last habitual residence of the deceased on the date of their death (Article 21p.122). Once again, practitioners will be required to apply two laws concurrently.

The same will apply in the presence of a person with dual nationality who opts for one of those nationalities for the will and the other for their succession.

Finally, the question of the scope of this choice (only for the will or also for the succession?) is certain to be a source of disputes in the future. Practitioners should therefore be invited to draft choice-of-law clauses in wills with great care and to circumscribe their scope.

3.2.2. Identification of the law applicable to substantive validity of agreements as to succession (Article 25).

The rules of conflict applicable to agreements as to succession (Article 25p.124) follow the same logic as that for wills, except that a distinction must be made according to whether the agreement concerns the succession of one or of several people.

b) The agreement as to succession concerns a single person

As in matters of wills, Article 25[p.124] offers the possibility of determining the law to which the succession should be connected in advance and allows a choice of law.

ii Anticipation of the system to which the succession should be connected

We must follow the same approach in three steps as in matters of wills and look in the same way to determine the law that would have applied to the succession on the day the agreement was concluded.

1st step

In principle, the law of the habitual residence of the person making the disposition on the day the agreement was concluded has jurisdiction.

2nd step

By exception, it will be set aside if it is demonstrated that the person making the disposition was manifestly more closely connected with another State than that of their habitual residence.

3rd step

If, on the day the agreement was established, the person making the disposition had already chosen his national law as being applicable to his succession, this law will also apply to the will. The rule has the same advantages as in matters of wills, and guarantees the application of the same law to the succession and the agreement as to succession.

Complément : If a first will containing a choice of law is revoked by a second will, does that revocation also concern the choice of law?

The Regulation does not provide an answer to this question. That is a matter for interpretation, no doubt.

It is therefore under *the law applicable to the revocation of the first will* that the extent of the revocation will have to be assessed.

iii Choice of law

In accordance with Article 25(3)[p.124] it should be possible for the choice of law to be made in favour of the national law of the person making the disposition on the day of the instrument or on the day of

their death.

This choice of law may be expressed in the agreement. It remains to be seen whether it can be contained in an instrument at an earlier or later date. In our opinion, it all depends on the form that is used. Admittedly, Article 22[p.122] requires the choice to be indicated in a disposition of property upon death, which encompasses both wills and agreements as to succession.

But, given that an agreement as to succession is an agreement, any choice of law that might be made after the conclusion of the agreement should also take the form of an agreement, failing which the choice of law might serve as a way for the parties to go back on their commitments unilaterally and would be likely to disregard the legitimate expectations of the parties at the time when the agreement was concluded.

As for a choice of law made at an earlier date, once again the choice of law cannot result from a unilateral instrument, unless it is confirmed in the agreement.

? *Exemple*

An Italian residing in Germany obtains an agreement from one of his children to waive all his rights to the succession. Pursuant to Article 25[p.124], the agreement is subject to German law and must therefore be considered valid. If the deceased made a choice of law at a later date by a will, pursuant to Article 25(3)[p.124], opting for his national law, the agreement would be null and void! This solution is unacceptable.

Apart from this, the choice of law when there an agreement has been established as to the succession of a person, calls for the same remarks as those that apply to wills.

c) The agreement concerns the succession of more than one person (e.
g. a joint mutual will)

When the agreement concerns the successions of several people, any governing laws that have already been identified must be adapted, because if the persons in question should live in two different States, a distributive application of each of the two laws will therefore be required. And if these laws take different views of agreements as to succession (with one validating them, the other cancelling them), we may end up at a dead end.

Therefore, Article 25(2)p.124 requires us to proceed in two steps when the agreement concerns the successions of more than one person. It makes a distinction between the admissibility and the validity of the agreement. Such an approach is not necessary, however, if the parties to the agreement do not make a choice of law.

ii Anticipation of the system to which the succession should be connected

When the agreement concerns the succession of more than one person, Article 25p.124 always requires us to place ourselves on the day when the agreement was concluded and anticipate the determination of the applicable law. But, it indicates an approach in two steps. We must begin by checking the admissibility of the agreement before determining the law applicable to its validity.

We must first check that the agreement is admissible under the laws which would have been applicable to the succession of each of the people if they had died on the day on which the agreement was concluded. The practitioner must therefore carry out a cumulative application of the laws, giving preference to the more restrictive of them.

Remarque

Receivability is a notion that is not defined by the Regulation. In principle, it is the same as that of admissibility. We must therefore check that the laws involved accept the principle of agreements as to succession.

We will therefore need to adopt the same approach as previously. In principle, we must consult the law of the habitual residence of each of the persons concerned.

Exemple

If the agreement is concluded between two spouses, one of whom resides in Italy and the other in Germany, the agreement is not receivable since Italian legislation does not accept the principle of such agreements.

By exception, this law will be set aside if the agreement is more closely connected with another State (distributively for each of the persons concerned).

Finally if the persons concerned or one of them previously specified his law applicable to successions as being applicable to his succession, it is also applicable to the receivability of the agreement.

Once the admissibility of the agreement has been established, we then address the question of the law applicable to the validity of the agreement. Insofar as it is impossible to make a arbitrary choice between the laws identified previously, as they have equivalent grounds to be applicable, the text has opted for a compromise solution based on the principle of proximity: “The agreement is governed by the law, from among those referred to in the first subparagraph, with which it has the closest connection.”

Depending on the situation, the applicable law will be either the law of residence of one of the persons concerned, or the national law of one of them, or the law specified pursuant to the exception clause.

Attention : Which elements should be taken into account to decide between the two laws that potentially apply to the agreement? Is it possible to take account of elements after the conclusion of the agreement?

If the agreement was concluded in Germany between a German resident and an Austrian resident: Can we consider that the connections with Germany are closer?

If the agreement concerns assets located mainly in Germany: can we consider that the agreement is more closely connected with Germany?

If, after the agreement, the German resident settled in Austria: can we consider that the agreement is more closely connected with Austria?

It is clear that application of the principle of proximity is a source of insecurity and unpredictability as regards the solutions and largely rests on the shoulders of the practitioner. It is likely to give rise to disputes in the future, when the laws involved produce radically opposite results on the matter of validity.

There is, however, one way of preventing its application: *It is enough that the parties to the agreement make a choice of law for the agreement* .

Attention : Risk of depecage

There is a genuine risk that the practitioner will have to apply several laws on the day when the succession is opened: the more people are concerned, the greater the risks.

And whereas for wills and agreements as to the succession of one person, a choice of law in succession matters guarantees that a single law would be applicable to the instrument making a disposition of property upon death and the succession, the same does not apply when the agreement concerns the succession of several people.

? *Exemple*

A couple resides in France: one partner is Austrian, the other German. Each of the partners has made their succession subject to their national law by a disposition of property upon death. They then conclude an agreement as to succession. Admissibility of the agreement as to succession must be checked pursuant to German and to Austrian law. Validity of the agreement will be governed by the law which has the closest connection with the agreement. If we suppose that this is German law, only in the case of the German deceased will both the agreement and the succession be governed by the same law. For the Austrian deceased, however, German law will apply to the agreement and Austrian law to the succession.

iii Choice of law

A choice of law is possible, but in terms that are adapted to the fact that there are several persons involved.

Given that the agreement concerns the succession of more than one person, they may opt for the national law of one of them. Once again, the choice of law applies only to the agreement, in principle. And once again, whether the choice of law is made before or after the agreement, it requires the agreement of all the parties to that agreement and cannot be made in a unilateral instrument.

The advantage of such a choice is that the specified law will apply to both the admissibility and validity of the agreement. This increases the chances of the agreement being considered valid.

? *Exemple : Two spouses, one of whom is French and the other German, reside in France. They conclude an agreement.*

- If no choice of law has been made (Article 25(2)p.124) :The French law of their place of residence on the day of the agreement is applicable to the admissibility of the agreement. The agreement cannot be considered as having been concluded in a valid manner.
- When a choice of law in matters of succession has been made at the time when the agreement was concluded (Article 25(2)p.124): The French law of the nationality of one of the parties to the agreement and the German law of the nationality of the other party must be consulted to examine the admissibility of the agreement. The agreement cannot be concluded in a valid manner.
- When a choice of law has been made in matters of the agreement in favour of the German law of the nationality of one of the parties to the agreement: German law is applicable to the admissibility and substantive validity of the agreement. The agreement may be considered as having been concluded in a valid manner if it meets the requirements of German law.

In this way, the choice of law also avoids the uncertainty arising from application of the principle of proximity.

Remarque

The choice of law in matters of agreements as to succession may also be valid as choice of law in matters of succession, but only for one of the spouses if they have different nationalities.

Exemple

An Austrian and a German conclude a joint mutual will. They decide to make the will subject to German Law. At the same time, only the deceased of German nationality may decide to have his succession governed by German law. Unity of jurisdiction is therefore possible only for one of the parties to the agreement.

If the spouses reside in different States that allow agreements as to succession but have the nationality of a State whose legislation prohibits agreements as to succession, it is not possible to remedy the unpredictability linked to the regime set out in Article 25(2)*p.124* and the application of the principle of proximity, as the only law that might be chosen is the national law of the persons concerned, which prohibits such agreements!

3.2.3. Area of application of the specified law (Article 25)

Circonscrire le domaine d'application des lois applicables aux dispositions à cause de mort précédemment identifiées est une étape essentielle car cela va permettre d'isoler les questions soumises aux règles de conflit que l'on s'est appliqué à exposer.

Attention : sur certains points testaments et pactes successoraux relèvent du même dispositif ; pour d'autres et en raison du caractère essentiellement contractuel du pacte, les deux types d'actes relèvent de régimes distincts.

b) Admissibility of a disposition of property upon death

The question of the admissibility of dispositions of property upon death arises for both wills and agreements as to succession,

The French version of the Regulation distinguishes between the terms “recevabilité and “admissibilité”, without defining any difference. They would both appear to mean “the possibility of concluding the instrument”. It must be possible for the disposition to be recognised in a State.

? *Exemple*

In the case of a mutual will, ensuring its admissibility implies checking that the law specified by' Article 25p.124 of the Regulation does make provision for it. However, the question of whether such a will can be established by two partners is no longer a matter of admissibility but one of validity.

It is for the law applicable to the admissibility of the agreement to determine any restrictions that might exist as regards the persons who may be parties to the instrument or the property concerned by it.

? *Exemple : In France, appointment of heir is only possible between spouses.*

In matters of wills and agreements as to succession concerning the succession of a single person, the boundary between admissibility and validity is of little importance insofar as the same law will apply to both questions.

This is not the case of agreements involving the succession of several people, as admissibility will be subject to the cumulative application of the anticipated laws governing the succession *while validity will be subject to the principle of proximity.*

c) Validity of a disposition of property upon death

Article 26[p.124] of the Regulation specifies the questions pertaining to the validity of the disposition of property upon death.

This concerns:

- Capacity (to make dispositions or receive)
- Representation of the person making the disposition
- Interpretation of the disposition
- Vices of consent

The scope of application of the anticipated law governing the succession must be specified. For certain legal systems, the Regulation represents a radical change to the rules applied hitherto.

ii General capacity to make a disposition of property upon death

Although Article 1-2 b[p.118] excludes the legal capacity of natural persons from the scope of the Regulation, it is subject to Article 26[p.124] on the capacity to make dispositions relating to successions. In other words, the capacity to make a will and to make dispositions of property upon death are subject to the expected law on the succession. Therefore, to answer the question of whether a minor may make a will or not, the expected law governing the succession must be consulted.

? *Exemple*

To find out whether an Italian minor aged 17 who resides in France may make a will, we must consult the French law of his habitual residence and it is of no matter if Italian law does not allow him that right. Nor does it matter if he is an Italian resident at the time of his death.

This therefore means that a person who is a resident in a State that does not allow them to make a will can opt for their national law whenever that law does allow them to make a will. The Regulation therefore allows the testator the possibility of choosing the law applicable to their capacity.

? *Exemple*

A German minor residing in Italy may not make a will under the Italian law of his habitual residence. By opting for his national law, however, as authorised by Article 24[p.124], he may make a valid will pursuant to German law.

Attention : On the scope of application of the law specified in this way

The anticipated law governing the succession does not apply to restrictions in matters of form related to the testator's age such as, for example, the obligation or otherwise for a minor to comply with certain forms when establishing the will. This falls within the *jurisdiction of the law applicable to the form of testamentary dispositions* (Article 27[p.125]; The Hague Convention).

The anticipated law applicable to the succession applies only to the capacity of the person making the disposition and not to the capacity of the other people participating in the agreement as to succession.

The capacity to modify or revoke a will as assessed pursuant to the law applicable to the succession anticipated not on the day of the revocation but on the date the will was established (Article 26(2)[p.124]).

Exemple

A 16-year-old Italian established a will while he was a resident in France. He will keep the right to revoke his will even though the right to make a will is closed to minors in Italy. However, he may not make certain testamentary disposition as the question will be subject to the Italian law of his new residence.

iii Special incapacity to make or receive dispositions

Certain legislations place limits on the capacity to make or receive dispositions on account of links between the persons making and receiving the gift. Such is the case in France (*Article 907 of the Civil Code*) or in Italy (*Article 596 of the Italian Civil Code*). Once again, the anticipated law applicable to the succession will apply.

Exemple

In France, it is not possible to make a disposition in favour of a doctor who cared for the testator during the illness from which he died. A will containing a disposition in favour of such a physician will therefore be null and void whenever French law is anticipated to govern the succession and whatever the actual law applied to the succession.

Complément

Is the list in Article 26[p.124] restrictive, thereby preventing any questions that are not referred to in the disposition- within the scope of application of Article 26[p.124]?

Two points in the text argue in favour of it being a closed list:

One the one hand, Article 26[p.124], unlike Article 23[p.123], is not introduced by the the expression "in particular" indicating that a list is not restrictive.

On the other, Point 48 in the Preamble[p.149] states that "To ensure the uniform application of that rule, this Regulation should list which elements should be considered as elements pertaining to substantive validity".

Despite the elements in the text, however, some authorised sources consider that the list is not restrictive: any question relating to the substantive validity of dispositions of property upon death should be subject to the anticipated law applicable to the succession, even if not referred to in Article 26 p.124.

d) Revocation and modification of wills

The Regulation as regards the question of specifying the law applicable to the modification or revocation of a will.

The question is as follows:

- Should we apply the law governing the succession anticipated on the day the will was established?
- Should we apply the law governing the succession anticipated on the day of its revocation?

? *Exemple*

A French national establishes a will while a resident in the Netherlands. He then returns to France and intends to revoke the will: is the law applicable to the revocation the Dutch law of the place of residence on the day the will was established or the French law of the place of residence on the day of its revocation?

Article 24(3) makes a distinction as to whether the testator made a choice of law or not in testamentary matters:

If the deceased did not make a choice of law, we must apply Paragraph 1 and therefore the anticipated law on the succession. But the article does not state whether we must place ourselves on the day the initial will was established or on the day of its revocation. In principle, it would seem that we should place ourselves on the day of the revocation. Point 51 of the Preamblep.149 suggests this. Some authors, however, believe that the possibility of revocation should remain governed by the law applicable to the will.

If the deceased has made a choice of law, modifications or revocations will be governed by the law he has chosen.

Complément

We will take the causes of the revocation:

- revocation of the will by subsequent marriage (United Kingdom),
- revocation of the will on grounds of divorce (Germany),
- Revocation of the will on grounds of the arrival of children...

Are such causes of revocation governed by the succession law that would have applied on the day the will was established or by the succession law anticipated on the day when the event in question

occurred.

The text does not clearly answer this question.

Complément

The effects of dispositions of property upon death are not referred to by Article 24[p.124] of the Regulation. It must therefore be deduced that the question is subject to Article 23[p.123] of the Regulation and therefore to the anticipated law on the succession.

Likewise, the content of the will - obligations attached to legacies, appointment of a testamentary executor - are subject to the law governing the succession.

Adjustments are no doubt to be expected in the future between the jurisdiction of the anticipated law governing the succession and the effective law.

e) Binding effects of agreements as to succession

Article 26[p.124] makes the binding effects between the parties to agreements as to succession subject to the anticipated succession law, “including the conditions for its dissolution.”

As the question of the revocability or irrevocability of the agreement is of the essence to it, the jurisdiction of the succession law on the day of the agreement is necessary.

Likewise, and contrary to wills, a change of residence will have no effect on the law applicable to the dissolution of the agreement. The law to which it is connected is fixed once and for all. The law applicable to the agreement will have jurisdiction to define the conditions for rescinding or terminating the agreement, which are perceived as nuancing the irrevocability of the agreement.

Attention

The law applicable to the agreement will have to fit in which the law governing the succession. This law must not neutralise the agreement. This implies that succession law (and its binding rules) will be set aside to some extent.

Exemple

A French national obtains a waiver of any proceedings relating to a reserved share (Article 929 et seq. Civil Code) from one of his children. He then dies in Italy. The Italian law that is applicable to the succession awards a reserved share to the children, which share may not be waived. However, given that the agreement as to succession was concluded in compliance with the French law of residence on the day of the agreement, it must be effective and the author of the waiver will not be entitled to claim his reserved share.

3.3. On matters of form: Law applicable to the formal validity of dispositions of property upon death

3.3.1. Area of application

a) Qualification problems yet to come...

Reminder:

While Article 27[p.125] of the Regulation will apply to the formal validity of wills and agreements as to succession in certain Member States, in others that are bound by the Hague Convention of 5 October 1961, Article 27[p.125] will apply only to agreements as to succession.

Focus on joint wills

There is no clear response in the Regulation to the question of whether the legality of a joint will is governed by the law applicable to the substance of the matter (and therefore by Article 24) or the law applicable to the form (and so Article 27[p.125] or the Hague Convention).

This is a problem of qualification. The Member States do not all adopt the same approach to this.

In France and Luxembourg, the prohibition of joint wills is *analysed in case law as a formal rule*.

In Belgium, Austria and Spain, the substantive qualification prevails.

The only certainty to date is that the question of whether, for example, the joint will must be established in notarial form or may also be in holograph form, is a question of form (Article 75[p.144]) and therefore subject to the law applicable to the form of wills.

Suggestion

The question of the prohibition of joint wills will perhaps be linked in, in the future, with that of the admissibility of wills and therefore become subject to the anticipated law applicable to the succession.

Focus on formal requirements in matters of advance waivers of proceedings

Any advance waiver of proceedings relating to reserved shares is surrounded by very strict formal requirements in France (presence of two notaries, the second of whom is appointed by the Chamber of Notaries – *article 930 Code civil*), in order to ensure the the consent of the heir making the waiver is entirely free and properly informed.

Some experts consider that these formal requirements rule out any possibility of such a waiver being established abroad.

For others, although these formal requirements are guided by substantive considerations, these are nonetheless formal rules that should benefit from the liberal system set out in Article 27[p.125] of the Regulation. In this view, an advance waiver of any such proceedings could be valid if established

abroad without the presence of two notaries.

b) Dispositions

i Provisions that are common to Article 27 and to the Hague Convention of 5 October 1961

Article 2 of the Hague Convention and Article 27(2) of the Regulation

The formal validity of the revocation or modification of a disposition of property upon death is subject to a very liberal conflict of laws regime. The range of laws that may end up being applied will therefore be considerably extended. The criteria of Article 27p.125 of the Regulation may be implemented not only on the day of the modifying instrument but also on the day of the initial instrument.

In other words, the following may apply, among others:

- The law of the nationality on the day of the initial will, on the day of its revocation, on the day of death.
- The law of the domicile on the day of the initial will, on the day of its revocation, on the day of death.
- The law of the residence on the day of the initial will, on the day of its revocation, on the day of death.

? *Exemple*

A Portuguese national established a holograph will while a resident in France. A few years later, he decides to revoke it while a resident in Portugal. He is entitled to respect the formal requirements of French law (Article 27p.125) and to revoke it in holograph form, despite the fact that under Portuguese law, it is not possible to make a will in holograph form.

NB: The new dispositions contained in the will shall be formally valid only if they comply with the criteria of the law applicable on the day when the new will is established.

Article 5 of the Hague Convention and Article 27(3) of the Regulation

Any provision of law which limits the permitted forms of dispositions of property upon death by reference to the age, nationality or other personal conditions of the testator shall be deemed to pertain to matters of form.

The same rule shall apply to the qualifications to be possessed by any witnesses.

? *Exemple*

The German rule requiring the will of a minor to be established in notarial form (§2233 BGB) is subject

to Article 27[p.125] of the Regulation. See also Point 51 of the Preamble[p.149].

Dépeçage in matter of conflict of laws may result in a situation being considered valid when it would not have been considered valid if the laws applied to the disputed matter had been applied to it in full.

? *Exemple*

A German national residing in Germany established a will during a stay in Italy. The will is valid because:

- The substantive validity of the will is subject to German law which allows a minor to make a will.
- The formal validity of the will is subject to Italian law which does not impose any restrictions relating to age.

If only German law had been applied, however, the will would have been invalid because it was not established in notarial form. If Italian had applied to the whole of the will, it would have been invalid because established by a minor.

⚠ *Attention*

In certain States, prior to the entry into force of the Regulation, there were rules prohibiting the nationals of such States from making wills in forms that were not known to their national laws. Such was the case in particular of Portuguese law (Article 65 and 2223 of the Civil Code). In the future, such rules may not be qualified as being substantive rules or special overriding rules (restrictive definition of special rules in Article 30). They are rules pertaining to matters of form.

ii Specific provisions of the Hague Convention of 5 October 1961 (solely for wills and for those States that are parties to the Convention)

The questions of dispositions made orally

The formal validity of dispositions made orally is excluded from the scope of application of the Regulation (Article 1(2) f[p.118]). The conflict rules of the Member States will therefore apply.

Regarding the States bound by the Hague Convention of 5 October 1961: Article 10 of the Convention stipulates that “Each Contracting State may reserve the right not to recognise testamentary dispositions made orally, save in exceptional circumstances, by one of its nationals possessing no other nationality.”

In other terms, if the oral disposition was established by a national of a State that had made that reserve and outside of extraordinary circumstances, then that State may choose not to recognise dispositions made orally. On the other hand, if the disposition was made in extraordinary circumstances, then the State that made that reserve must apply the Hague Convention to it.

The following countries have made the reserve in Article 10[p.119]: Belgium, Estonia, France, Luxembourg and the Netherlands

The question of testamentary clauses which do not relate to successions

The formal validity of dispositions contained in the will which do not relate to successions are not subject to Article 27[p.125] of the Regulation.

Article 12 of the Hague Convention reserves the rights for States that are parties to the Convention to exclude the application of the Convention to testamentary clauses which, under their law, do not relate to matters of succession.

Luxembourg and Austria have made the reserve mentioned in Article 12.

The formal validity of the recognition of a child or of the appointment of a tutor contained in a will may - if the State that is a party to the Hague Convention has not made the reserve in Article 12 - benefit from the alternatives set out in Article 1.

3.4. Jurisdiction and recognition

3.4.1. Jurisdiction

The grounds for jurisdiction contained in the Regulation tend to determine the courts that have jurisdiction to rule on the succession of the deceased as a whole (link to explanations of jurisdiction rules).

If, on the death of the person making the disposition, the question of the validity of the disposition of property upon death is discussed, can we implement the rules of jurisdiction contained in the will?

The answer is yes. Articles 4 p.130 et seq. tend to determine the rules of jurisdiction in matters of succession and Article 3(1) a p.127 proposes a definition of successions that encompasses dispositions of property upon death.

If, on the death of the person making the disposition, the latter did specify that the disposition would be subject to his national law in accordance with Articles 24(2) and 25(3), does this choice of law allow his heirs to invoke Articles 5 and 6 of the Regulation.

The answer must be no whenever that choice of law concerned only the disposition of property upon death and did not encompass the succession.

If a dispute begins as to the validity of the instrument during the lifetime of the person making the disposition, which rules of jurisdiction apply?

The question is only meaningful when there is an instrument which is intended to produce its effect during the lifetime of the person making the disposition. This will be the case of an inter vivos distribution. In this case, the jurisdiction rules specific to each State must be applied and not the provisions of the Regulation.

3.4.2. Recognition

Whenever the disposition of property upon death is contained in an authentic instrument, Articles 59 p.134 et seq. of the Regulation will apply

II Successions outside Europe

1. Circulation of instruments and judicial decisions outside Europe

1.1. Circulation of instruments between third States and Europe

Ordinary private international law should be applied to the treatment of an instrument established in a third State (civil status documents, notarial instruments) in the legal system of a State participating in the Succession Regulation.

Usually, the foreign public instrument must be legalised by the authorities of its State of origin.

Likewise, instruments from a State participating in the Regulation will be treated in the legal system of a third State according to the rules of private international law set down by the State in question.

There is no particular system for the European Certificate of Succession, which is similar to a statutory declaration and therefore subject to the ordinary rules on legalisation.

However, the *States that are parties to the Hague Convention of 5 October 1961,* abolishing the requirement of legalisation for foreign public documents, must apply it.

1.2. Circulation of judicial decisions between third States and Europe

1.2.1. Recognition of judgements

Ordinary private international law should be applied to the treatment of a judgement given in a third State in the legal system of a State participating in the Successions Regulation.

Likewise, a third State would apply its own rules of private international law to recognise (or otherwise) a judgement given in a State participating in the Successions Regulation in its legal system.

Any bilateral conventions that might exist between the States in question should be applied.

1.2.2. Enforcement of judgements

Judgements given in third States will only be enforced on the territory of a State participating in the Successions Regulation after complying with the exequatur procedure organised in that State.

Likewise, a judgement given in a State participating in the Regulation will only be enforced on the territory of a third State after complying with the exequatur procedure organised in that State.

Certain decisions given in a third State may not be recognised in a State participating in the Regulation if they are contrary to its international public policy.

In that case, exequatur of the judgement may be refused if it results in discrimination between the heirs on grounds of gender, religion or the nature of their filial relationship.

2. Determining jurisdiction in relations with third States

En principe, il convient d'appliquer les règles de droit international privé, les conventions internationales ou bilatérales liant des Etats membres avec des Etats tiers, et non le règlement

succession, qui ne lie pas les Etats tiers.

Le règlement évoque cependant les relations avec les Etats tiers aux ////articles 10 à 12.////

2.1. Subsidiary jurisdiction: Article 10

2.1.1. Article 10.1

By the terms of Article 10.1[p.119], the succession of a person residing in a third State may fall, as a whole, within the jurisdiction of a court in a State participating in the Regulation:

- if the deceased had the nationality of a Member State at the time of his death, and the assets of the estate are located in that State.

- or, failing this, if the deceased had the nationality of a third State, the assets of the estate are located in a Member State and his previous habitual residence was in that State, provided that at the time the court is seised, a period of not more than 5 years has lapsed since that habitual residence changed

2.1.2. Article 10.2

Article 10.2[p.119] also makes provision for the jurisdiction of the courts of a Member State when the deceased was a resident in a third State and some of the assets of the estate are located in a Member State.

If only these two conditions are fulfilled, the jurisdiction of the court of the Member State will be limited to the sole assets located on its territory.

There may therefore be several parallel procedures if the assets of the estate are located in several member States.

Or, failing this, if the deceased had the nationality of a third State, the assets of the estate are located in a Member State and his previous habitual residence was in that State, provided that at the time the court is seised, a period of not more than 5 years has lapsed since that habitual residence changed

2.1.3. In further detail

At what point in time should the location of the property be assessed?

There can be no discussion as to the location of immovable property.

The location of movable property, however, may pose difficulties, especially when that property can easily be moved (financial assets, shares in a company, works of art, ships or aircraft).

Remarque : Is it the date of death or the date when the court was seized that should be taken into account?

The Regulation does not answer this question.

2.2. Forum necessitatis: Article 11

If there is no criterion allowing the jurisdiction of a court of a Member State to be established, such a court may become competent in exceptional cases and settle a succession if no procedure is possible in a third State.

The purpose of this article is to avoid a denial of justice and to guarantee access to the judge specified by *Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms.*

2.3. Assets located in a third State: Article 12

Exemple

A Finnish citizen whose last residence was in Finland has died. Among other assets, he owned an apartment in London.

How can that asset be shared out?

The Finnish decision on sharing out the estate will not be applied in Great Britain. The heirs must follow the English procedure regarding this apartment in London.

Article 12 makes allowance for this situation.

By the terms ofArticle 12p.120, where the estate comprises assets located in a third State and it may reasonably be thought that the Finnish decision will not be recognised or enforced in England, a party may apply to the court seised in a Member State not to rule on that asset.

The parties and the judge must examine the scope and enforceability of the decision abroad.

If such enforcement proves to be impossible, it will be necessary to ask the Finnish judge not to rule on the apartment in London, and to initiate particular proceedings in England, with those proceedings being limited to that immovable property only.

3. Applicable law and third States

L'objectif est de mesurer les enjeux de l'application du Règlement dans les rapports avec les Etats tiers.

Il s'agit ici :

- de bien identifier les frontières d'application du règlement
- de souligner le caractère universel du Règlement
- d'apprécier les conséquences liées à l'application de la loi d'un Etat tiers

3.1. Le champ d'application du Règlement

3.1.1. Definition of a trust

Définition

A trust can be defined as “the legal relationships created - inter vivos or on death - by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose.”

(*Art. 2 of the Hague Convention of 1st July 1985 on the law applicable to trusts and their recognition*).

A flexible instrument

A trust is a very flexible instrument that can fulfil a wide range of functions. It has connections with law on successions in two ways.

A way of making a gift

First of all, it is a means of making a gift A trust can be constituted inter vivos or to dispose of property upon death (testamentary). It is always an express trust.

Exemple

By a will, the deceased has made provision for a part of their estate to be held in a trust. The income from the trust will be attributed to his spouse, with the children receiving the capital at term.

A way of holding the assets of the deceased.

In the common law States, it is also a way of holding the goods of the deceased once the succession administration phase is at an end. Once he has completed his mission, the personal representative or administrator of the estate becomes the trustee of the balance to be distributed.

The implementation of the trust thus marks the completion of the settlement of the succession in certain legal systems.

This is a statutory trust.

3.1.2. Limits of exclusion

a) Definition of a trust

The extent of the exclusion must be measured.

By the terms of Article 1(2) j[p.119], "the creation, administration and dissolution of trusts" are excluded from the scope of application of the Regulation.

In other words, the validity of a trust must continue to be governed by the national rules of conflict of the Member States.

If the validity of a trust was subject to autonomy law in a Member State prior to the entry into force of the Regulation, that rule will continue to apply after the Regulation enters into force.

? *Exemple*

An American national set up a trust when he was a resident in New York. He was a resident in Belgium when he died.

The validity of the trust is subject to *Articles 122 to 125 of the Belgian Private International Law Code*, and in principle it is American law that will apply.

The succession regime of the trust, however, will be subject to Article 21 of the Regulation[p.122], and therefore to Belgian law in the case at hand.

Remarque

The question that is certain to arise is that of what to do if in the requested Member State, trusts were subject hitherto to the rule of conflict on successions.

In the future, will it be possible to make trusts subject to the provisions of the Regulation?

The doctrine provides an affirmative answer in considering that Article 1-2[p.119] does not prohibit the application of the Regulation to the trust.

Unilateral extension is possible via legislation or case law.

Although the creation, the administration and the dissolution of the trust are not within the scope of application of the Regulation, the effects of the trust on the succession are within that scope.

Ultimately, trusts are treated in the same way as donations. The validity of donations is subject to the national rules of conflict, but the question of their succession regime (Article 23 i[p.123]) is subject to the Regulation.

In those Member States of the European Union that have the notion of a reserved share, the trust may not provide a way of bypassing that share.

b) For statutory trusts

The extent of the exclusion must be measured.

Concerning statutory trusts, the Regulation should apply to their validity. This is at least suggested by recital 13 in the Preamble.*p.148*

But there will only be such trusts if the law applicable to the succession is that of a *common law* State that requires such a trust to be set up for the benefit of the heirs on completing the settlement of the succession.

Such trusts are included in the devolution process.

3.2. La détermination de la loi applicable

3.2.1. The principle

The conflict of law rules contained in the Regulation will apply in the Member States bound by the Regulation to all successions with a foreign element.

The choice was made when drafting the Regulation not to limit it to those cases in which the specified law is that of a Member State.

This is stated inArticle 20[p.122] of the Regulation: « *"any law specified by this Regulation shall be applied whether or not it is the law of a Member State »*."

For the conflict of law rules contained in the Regulation to apply, the following conditions are necessary and sufficient:

- an authority (court or not) of a Member State must be seised,
- the question must fall within the substantive scope of the Regulation.

3.2.2. Examples

? *Exemple*

A French national residing in Switzerland has died.

The notary in charge of settling the succession must, pursuant toArticle 21[p.122] apply the Swiss law of the last habitual residence of the deceased.

All the conflict of law rules contained in the Regulation will apply in relations with third States.

Such is the case of

Article 21

A Belgian residing in Canada has died. It is the Belgian law of his last habitual residence that must apply.

Article 22

A Frenchman residing in New York dies there after opting for the application of French law to his succession. This choice of law must produce its effects provided that it complies with the conditions set out in Article 22[p.122].

It is of no account that "the chosen law does not provide for a choice of law in matters of succession"

as pointed out in recital 40 in the Preamble to the Regulation[p.149]..

Article 27

In 2013, a French national residing in Mexico established a holograph will. He returned to France in 2016. He died there.

Although French law applies to his -succession, the substantive validity of his will must be assessed pursuant to Mexican law and the formal validity of the will shall be subject to Article 27[p.125] of the Regulation (unless the *Hague Convention of 5 October 1961 on the law applicable to the form of testamentary dispositions* applies).

Article 21

A Swiss national obtained a waiver of their succession from his children in return for compensation. He decided to retire to Barcelona. He died there.

Pursuant to Article 21[p.122], Spanish law applies to the settlement of his succession. But the Swiss law of his residence on the day the agreement was established applies to the validity of that agreement.

3.3. Le régime de la loi applicable

3.3.1. Renvois

a) The principle of the renvoi

Définition

The renvoi arises when the foreign law specified by the rule of conflict of the forum refuses to apply and specifies that it is either the law of the forum (first degree renvoi) or the law of a third State (second degree renvoi) that must apply.

The renvoi provides a response to a divergence between the rules of conflict of the State of the forum and the State whose law was specified by the rules of conflict of the forum.

In the case of the Regulation, a renvoi is only possible in cases where the law specified pursuant to the Regulation is that of a Member State not bound by the Regulation (Denmark, United Kingdom, Ireland) or that of a third State.

By definition, if the specified law is that of a Member State, the conflict of law rules necessarily correspond. The question of a renvoi will therefore not arise.

Article 34p.130 of the Regulation admits the renvoi in certain hypotheses and subject to certain conditions.

b) When should a renvoi be admitted?

The Regulation explicitly rules out the renvoi mechanism in 4 hypotheses:

A renvoi must be ruled out if the law specified to apply to the succession was specified pursuant to the exception clause set out in Article 21(2)p.122.

Exemple

If we imagine an elderly American national living in Belgium in a retirement home. If the bulk of their family and assets are in the United States, the judge might be tempted to give preference to American law over Belgian law.

It is of little importance here that American law rules that it is the law of the residence of the deceased that applies.

The refusal can be explained as follows: **the exception clause expresses an imperative of**

proximity that the application of the renvoi would be likely to reduce to nothing.

c) Not in the event of a choice of law

Fondamental

A renvoi may not be made in the event of a choice of law (Article 22p.122).

Exemple

We will imagine an Englishman who died when domiciled in Italy and had opted for English law in a disposition of property upon death. In this case, it is of little importance that English law specifies that the Italian law of his domicile should apply.

We will stick to the choice of the deceased, as to do otherwise would be contrary to his legitimate wishes and to the aim of the Regulation which is to provide security.

Attention

We must weigh the full importance of the refusal of a renvoi:

Different laws will be applied according to whether it is the courts of the Member State of the habitual residence of the deceased (Italy) that are seised or those of the third State of the nationality of the deceased (United Kingdom). This might tend to encourage forum shopping.

It should also be added that the choice of law in question here is not only that serving to determine the law applicable to the succession.

It can also concern the law applicable to a disposition of property upon death: the deceased may indeed decide to make his will subject to the law of his nationality.

Finally, the parties to an agreement as to succession may opt for the law of the nationality of one of them.

In all these hypotheses, the renvoi must be ruled out.

d) Formal validity of an instrument?

Fondamental

A renvoi is excluded in matters of the formal validity of an instrument.

This means that when the question arises of the formal validity of a will, it matters little that the law specified pursuant to the Regulation declines the offer of jurisdiction made to it (Article 27p.125).

The same applies to the formal validity of a declaration accepting the succession or not (Article 28 b p.127).

The idea here is as follows

The legislator has decided to establish an alternative rule of conflict with a view to favouring the formal validity of the will. By accepting the renvoi, there is a risk of reducing the terms of the alternative and therefore failing to achieve the objective of the rule.

e) Excluded in the presence of special overriding rules

Fondamental

A renvoi is excluded in the presence of overriding mandatory provisions within the meaning of Article 30p.129 of the Regulation.

It is obvious here that the renvoi must be refused. The law of the location of the assets should be applied in light of the interests it protects.

By definition, there is therefore no place for a renvoi.

f) Hypotheses not referred to by Article 34

Fondamental

In all the other hypotheses not referred to by Article 34p.130, the working of the renvoi must be accepted.

Hypothesis 1 – Article 21.1

If a Spanish national dies while a resident in Marrakesh. Article 21p.122 of the Regulation requires the application of the Moroccan law of his habitual residence.

The rule of conflict under Moroccan law stipulates that Spanish law should be applied as the nationality of the deceased. The renvoi must be accepted if the conditions of Article 34(1)p.130 are fulfilled.

Hypothesis 2 – Articles 24 and 25

In the presence of a disposition of property upon death, the Regulation invites us to bring forward the date of determination of the law applicable to the succession and to apply the law of the residence on the date of the instrument.

If the specified law is that of a third State whose rule of conflict specifies the law of the place of residence on the date of the death, a renvoi is possible.

Attention

Some may query the adequacy of this literal application of the Regulation which may result in a solution that is contrary to the spirit of the Regulation.

By defining the applicable law on the date of the instrument, the aim of the authors of the Regulation was to secure any projects to prepare for the succession, and the renvoi may go against this objective.

3.3.2. In which conditions can a renvoi be admitted?

a) What the Regulation says

Admission of a renvoi is subject to certain conditions

The rules of conflict of the State whose law has been specified pursuant to the Regulation must make a renvoi either:

- to the law of a Member State.
- to the law of a third State which will then apply its own law.

Renvoi to the law of a Member State.

The first hypothesis must not be reduced to that of a renvoi in the first degree.

The law specified in this way may be that of the State of the forum or that of another Member State.

Admitting the renvoi here will facilitate the task of the authority that has been seised. In the one case, its role will be to apply its own law while in the other, it will be that of a Member State, for which we can hope that information will be more easily accessible.

? *Exemple*

A German who was a resident in Japan died leaving immovable property in France. The French courts were seised pursuant to Article 10p.119 of the Regulation.

Pursuant to Article 21p.122, Japanese law is applicable to the succession.

But Japanese law makes a renvoi to the law of the nationality of the deceased. The French courts must admit the renvoi in favour of the law of a Member State.

Renvoi to the law of a third State which will then apply its own law.

The second hypothesis is that of a renvoi that results in specifying the law of a third State that accepts to apply.

This is a renvoi of the second degree.

However, if the law of the third State refuses to apply, the renvoi must not be admitted.

? *Exemple*

A Japanese national died in Morocco leaving immovable property in Belgium. The Belgian courts have jurisdiction pursuant to Article 10p.119.

Article 21p.122 of the Regulation specifies the application of Moroccan law as the last residence of the

deceased. The Moroccan rules of conflict make a renvoi to Japanese law as the nationality of the deceased.

The Japanese rules of conflict also give jurisdiction to the national law of the deceased. The French judges will therefore apply Japanese law.

Méthode : Admission of the renvoi

Article 21 of the Regulation p.122	Law of the last residence	Moroccan law
Moroccan rule of conflict	The law of the nationality	Japanese law
Japanese rule of conflict	The law of the nationality	Japanese law

Exemple

A Brazilian died in Morocco leaving immovable property in Belgium. The Belgian courts have jurisdiction pursuant to Article 10p.119.

Article 21p.122 of the Regulation specifies the application of Moroccan law as the last residence of the deceased. The Moroccan rules of conflict make a renvoi to Brazilian law as the nationality of the deceased.

The Brazilian rules of conflict, meanwhile, give jurisdiction to the Moroccan law of the last domicile of the deceased. The French judges will apply Moroccan law.

Méthode : Renvoi set aside

Article 21 of the Regulation p.122	Law of the last residence	Moroccan law
Moroccan rule of conflict	The law of the nationality	Brazilian law
Japanese rule of conflict	Law of the last domicile	Moroccan law

b) What the Regulation does not say

The Regulation says nothing about the hypothesis in which the conflict rule of a third State might make the movable and immovable property subject to different rules of conflict.

According to the assets of the deceased, we might find ourselves in a situation where the rule of conflict of the third State makes a partial renvoi.

Accepting such a renvoi will result in the different assets that make up the estate of the deceased being subject to two different laws, thereby abandoning the principle of unity that is one of the foundations of the Regulation.

Exemple

An Austrian died in the United Kingdom, leaving behind immovable property in Austria. Article 21[p.122] of the Regulation specifies English law. English private international law tends to make a distinction between movable and immovable property.

The former is subject to the law of the last domicile of the deceased. The latter is subject to the law of its location. English law therefore accepts that it applies to the movable property, but specifies that Austrian law must apply as the location of the immovable property.

Neither theletter of Article 34,[p.130] nor the terms of the Preamble can set aside the renvoi in this case. The majority of the doctrine argues in favour of it being accepted.

3.3.3. Public policy

The public policy exception is set out in Article 35[p.130] of the Regulation. This exception can result in the specified law being that of a Member State or not.

However, it is no doubt in relations with third States that this exception will be invoked most frequently.

The European Union Member States share the same values and the same legal tradition.

They are all bound by the Charter of Fundamental Rights of the European Union and parties to the *European Convention on Human Rights*. *Risks of breaching the public policy of the forum are therefore more limited. - p.24*

Some third States, however, do not share the same values.

Such is the case of Muslim states, more particularly. A wife is less well protected there than a husband, or daughters receive half as much as their brothers and religion may be of decisive importance to status as an heir.

If the rules of conflict contained in the Regulation result in specifying such a discriminatory law, it should be possible to set it aside on the grounds that it is contrary to public policy.

Remarque : In further detail...

In the future, the question will be to know the terms on which we are entitled to invoke the public policy exception.

In other words, from what point can it be considered that the foreign law breaches the fundamental principles of the forum?

Should we demand that the deceased should have the nationality of or his residence in the State whose authorities are in charge of settling the succession?

Can we consider the fact that the assets of the deceased are located in that Member State to be sufficient?

Ressources annexes

> Comment exécuter dans un État membre un acte authentique, à l'exclusion du CSE, établi dans un autre État membre ?

Cf. "Comment exécuter dans un État membre un acte authentique, à l'exclusion du CSE, établi dans un autre État membre ?"

> Comment exécuter dans un État membre un jugement ou une transaction judiciaire rendu dans un autre État membre ?

Cf. "Comment exécuter dans un État membre un jugement ou une transaction judiciaire rendu dans un autre État membre ?"

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Abréviations

CJEU : Court of Justice of the European Union

ECS : European Certificate of Succession

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Références

Article 1 § 1

"This Regulation shall apply to succession to the estates of deceased persons. It shall not apply to revenue, customs or administrative matters."

Article 1 §2

The following shall be excluded from the scope of this Regulation:

- a) the status of natural persons, as well as family relationships and relationships deemed by the law applicable to such relationships to have comparable effects;
- b) the legal capacity of natural persons, without prejudice to point (c) of Article 23(2) and to Article 26;
- c) questions relating to the disappearance, absence or presumed death of a natural person;
- d) questions relating to matrimonial property regimes and property regimes of relationships deemed by the law applicable to such relationships to have comparable effects to marriage;
- e) maintenance obligations other than those arising by reason of death;
- f) the formal validity of dispositions of property upon death made orally;
- g) property rights, interests and assets created or transferred otherwise than by succession, for instance by way of gifts, joint ownership with a right of survivorship, pension plans, insurance contracts and arrangements of a similar nature, without prejudice to point (i) of Article 23(2);
- h) questions governed by the law of companies and other bodies, corporate or unincorporated, such as clauses in the memoranda of association and articles of association of companies and other bodies, corporate or unincorporated, which determine what will happen to the shares upon the death of the members;
- i) the dissolution, extinction and merger of companies and other bodies, corporate or unincorporated;
- j) the creation, administration and dissolution of trusts;
- k) the nature of rights in rem; and
- l) any recording in a register of rights in immovable or movable property, including the legal requirements for such recording, and the effects of recording or failing to record such rights in a register.

article 1 § 2 a,b,c,d.

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The following shall be excluded from the scope of this Regulation:

- a) the status of natural persons, as well as family relationships and relationships deemed by the law applicable to such relationships to have comparable effects;
- b) the legal capacity of natural persons, without prejudice to point (c) of Article 23(2) and to Article 26;
- c) questions relating to the disappearance, absence or presumed death of a natural person;
- d) questions relating to matrimonial property regimes and property regimes of relationships deemed by the law applicable to such relationships to have comparable effects to marriage

article 1 § 2 f,g,h,i,j,k

The following shall be excluded from the scope of this Regulation:

- f) the formal validity of dispositions of property upon death made orally;
- g) property rights, interests and assets created or transferred otherwise than by succession, for instance by way of gifts, joint ownership with a right of survivorship, pension plans, insurance contracts and arrangements of a similar nature, without prejudice to point (i) of Article 23(2);
- h) questions governed by the law of companies and other bodies, corporate or unincorporated, such as clauses in the memoranda of association and articles of association of companies and other bodies, corporate or unincorporated, which determine what will happen to the shares upon the death of the members;
- i) the dissolution, extinction and merger of companies and other bodies, corporate or unincorporated;
- (j) the creation, administration and dissolution of trusts;
- k) the nature of rights in rem; and

Article 1 §2 l

- "any recording in a register of rights in immovable or movable property, including the legal requirements for such recording, and the effects of recording or failing to record such rights in a register."

Article 10

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Subsidiary jurisdiction

1. Where the habitual residence of the deceased at the time of death is not located in a Member State, the courts of a Member State in which assets of the estate are located shall nevertheless have jurisdiction to rule on the succession as a whole in so far as:
    - a) the deceased had the nationality of that Member State at the time of death; or, failing that,
    - b) | the deceased had his previous habitual residence in that Member State, provided that, at the time the court is seised, a period of not more than five years has elapsed since that habitual residence changed.
2. Where no court in a Member State has jurisdiction pursuant to paragraph 1, the courts of the Member State in which assets of the estate are located shall nevertheless have jurisdiction to rule on those assets.

Article 11

Forum necessitatis

Where no court of a Member State has jurisdiction pursuant to other provisions of this Regulation, the courts of a Member State may, on an exceptional basis, rule on the succession if proceedings cannot reasonably be brought or conducted or would be impossible in a third State with which the case is closely connected.

The case must have a sufficient connection with the Member State of the court seised.

Article 12

Limitation of proceedings

1. Where the estate of the deceased comprises assets located in a third State, the court seised to rule on the succession may, at the request of one of the parties, decide not to rule on one or more of such assets if it may be expected that its decision in respect of those assets will not be recognised and, where applicable, declared enforceable in that third State.
2. Paragraph 1 shall not affect the right of the parties to limit the scope of the proceedings under the law of the Member State of the court seised.

Article 13

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- **Acceptance or waiver of the succession, of a legacy or of a reserved share**

In addition to the court having jurisdiction to rule on the succession pursuant to this Regulation, the courts of the Member State of the habitual residence of any person who, under the law applicable to the succession, may make, before a court, a declaration concerning the acceptance or waiver of the succession, of a legacy or of a reserved share, or a declaration designed to limit the liability of the person concerned in respect of the liabilities under the succession, shall have jurisdiction to receive such declarations where, under the law of that Member State, such declarations may be made before a court

Article 14

Seising of a court

For the purposes of this Chapter, a court shall be deemed to be seised:

- a) at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the applicant has not subsequently failed to take the steps he was required to take to have service effected on the defendant;
- b) if the document has to be served before being lodged with the court, at the time when it is received by the authority responsible for service, provided that the applicant has not subsequently failed to take the steps he was required to take to have the document lodged with the court; or
- c) if the proceedings are opened of the court's own motion, at the time when the decision to open the proceedings is taken by the court, or, where such a decision is not required, at the time when the case is registered by the court.

Article 15

Examination as to jurisdiction

Where a court of a Member State is seised of a succession matter over which it has no jurisdiction under this Regulation, it shall declare of its own motion that it has no jurisdiction.

Article 17

Lis pendens

1. Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.
2. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.

Article 18

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Related actions

1. Where related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings.
2. Where those actions are pending at first instance, any court other than the court first seised may also, on the application of one of the parties, decline jurisdiction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof.
3. For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable decisions resulting from separate proceedings.

Article 19

Provisional, including protective, measures

Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that State, even if, under this Regulation, the courts of another Member State have jurisdiction as to the substance of the matter.

Article 20

Universal application

Any law specified by this Regulation shall be applied whether or not it is the law of a Member State.

Article 21

General rule

1. Unless otherwise provided for in this Regulation, the law applicable to the succession as a whole shall be the law of the State in which the deceased had his habitual residence at the time of death.

2. Where, by way of exception, it is clear from all the circumstances of the case that, at the time of death, the deceased was manifestly more closely connected with a State other than the State whose law would be applicable under paragraph 1, the law applicable to the succession shall be the law of that other State.

Article 21 § 2

- "Where, by way of exception, it is clear from all the circumstances of the case that, at the time of death, the deceased was manifestly more closely connected with a State other than the State whose law would be applicable under paragraph 1, the law applicable to the succession shall be the law of that other State."

Article 22

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Choice of law

1. A person may choose as the law to govern his succession as a whole the law of the State whose nationality he possesses at the time of making the choice or at the time of death.
   A person possessing multiple nationalities may choose the law of any of the States whose nationality he possesses at the time of making the choice or at the time of death.
2. The choice shall be made expressly in a declaration in the form of a disposition of property upon death or shall be demonstrated by the terms of such a disposition.
3. The substantive validity of the act whereby the choice of law was made shall be governed by the chosen law.
4. Any modification or revocation of the choice of law shall meet the requirements as to form for the modification or revocation of a disposition of property upon death.

Article 23

The scope of the applicable law

1. The law determined pursuant to Article 21 or Article 22 shall govern the succession as a whole.

2. That law shall govern in particular:

- a) the causes, time and place of the opening of the succession;
- b) the determination of the beneficiaries, of their respective shares and of the obligations which may be imposed on them by the deceased, and the determination of other succession rights, including the succession rights of the surviving spouse or partner;
- c) the capacity to inherit;
- d) disinheritance and disqualification by conduct
- e) the transfer to the heirs and, as the case may be, to the legatees of the assets, rights and obligations forming part of the estate, including the conditions and effects of the acceptance or waiver of the succession or of a legacy;
- f) the powers of the heirs, the executors of the wills and other administrators of the estate, in particular as regards the sale of property and the payment of creditors, without prejudice to the powers referred to in Article 29(2) and (3);
- g) liability for the debts under the succession;
- h) the disposable part of the estate, the reserved shares and other restrictions on the disposal of property upon death as well as claims which persons close to the deceased may have against the estate or the heirs;
- i) any obligation to restore or account for gifts, advancements or legacies when determining the shares of the different beneficiaries; and
- j) the sharing-out of the estate.

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- That law shall govern in particular: [...] any obligation to restore or account for gifts, advancements or legacies when determining the shares of the different beneficiaries;

Article 24

Dispositions of property upon death other than agreements as to succession

1. A disposition of property upon death other than an agreement as to succession shall be governed, as regards its admissibility and substantive validity, by the law which, under this Regulation, would have been applicable to the succession of the person who made the disposition if he had died on the day on which the disposition was made.
2. Notwithstanding paragraph 1, a person may choose as the law to govern his disposition of property upon death, as regards its admissibility and substantive validity, the law which that person could have chosen in accordance with Article 22 on the conditions set out therein.
3. Paragraph 1 shall apply, as appropriate, to the modification or revocation of a disposition of property upon death other than an agreement as to succession. In the event of a choice of law in accordance with paragraph 2, the modification or revocation shall be governed by the chosen law.

Article 25

Agreements as to succession

1. An agreement as to succession regarding the succession of one person shall be governed, as regards its admissibility, its substantive validity and its binding effects between the parties, including the conditions for its dissolution, by the law which, under this Regulation, would have been applicable to the succession of that person if he had died on the day on which the agreement was concluded.
2. An agreement as to succession regarding the succession of several persons shall be admissible only if it is admissible under all the laws which, under this Regulation, would have governed the succession of all the persons involved if they had died on the day on which the agreement was concluded.

   An agreement as to succession which is admissible pursuant to the first subparagraph shall be governed, as regards its substantive validity and its binding effects between the parties, including the conditions for its dissolution, by the law, from among those referred to in the first subparagraph, with which it has the closest connection.
3. Notwithstanding paragraphs 1 and 2, the parties may choose as the law to govern their agreement as to succession, as regards its admissibility, its substantive validity and its binding effects between the parties, including the conditions for its dissolution, the law which the person or one of the persons whose estate is involved could have chosen in accordance with Article 22 on the conditions set out therein.

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Article 26

Substantive validity of dispositions of property upon death

1. For the purposes of Articles 24 and 25 the following elements shall pertain to substantive validity:

- a) the capacity of the person making the disposition of property upon death to make such a disposition;
- b) the particular causes which bar the person making the disposition from disposing in favour of certain persons or which bar a person from receiving succession property from the person making the disposition;
- c) the admissibility of representation for the purposes of making a disposition of property upon death;
- d) the interpretation of the disposition;
- e) fraud, duress, mistake and any other questions relating to the consent or intention of the person making the disposition.

2. Where a person has the capacity to make a disposition of property upon death under the law applicable pursuant to Article 24 or Article 25, a subsequent change of the law applicable shall not affect his capacity to modify or revoke such a disposition.

Article 27

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Formal validity of dispositions of property upon death made in writing

1. A disposition of property upon death made in writing shall be valid as regards form if its form complies with the law:
    - a) of the State in which the disposition was made or the agreement as to succession concluded;
    - b) of a State whose nationality the testator or at least one of the persons whose succession is concerned by an agreement as to succession possessed, either at the time when the disposition was made or the agreement concluded, or at the time of death;
    - c) of a State in which the testator or at least one of the persons whose succession is concerned by an agreement as to succession had his domicile, either at the time when the disposition was made or the agreement concluded, or at the time of death;
    - d) of the State in which the testator or at least one of the persons whose succession is concerned by an agreement as to succession had his habitual residence, either at the time when the disposition was made or the agreement concluded, or at the time of death; or
    - e) in so far as immovable property is concerned, of the State in which that property is located.

    The determination of the question whether or not the testator or any person whose succession is concerned by the agreement as to succession had his domicile in a particular State shall be governed by the law of that State.

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2. Paragraph 1 shall also apply to dispositions of property upon death modifying or revoking an earlier disposition. The modification or revocation shall also be valid as regards form if it complies with any one of the laws according to the terms of which, under paragraph 1, the disposition of property upon death which has been modified or revoked was valid.
3. For the purposes of this Article, any provision of law which limits the permitted forms of dispositions of property upon death by reference to the age, nationality or other personal conditions of the testator or of the persons whose succession is concerned by an agreement as to succession shall be deemed to pertain to matters of form. The same rule shall apply to the qualifications to be possessed by any witnesses required for the validity of a disposition of property upon death.

Article 28

Validity as to form of a declaration concerning acceptance or waiver

A declaration concerning the acceptance or waiver of the succession, of a legacy or of a reserved share, or a declaration designed to limit the liability of the person making the declaration, shall be valid as to form where it meets the requirements of:

- a) the law applicable to the succession pursuant to Article 21 or Article 22; or
- b) the law of the State in which the person making the declaration has his habitual residence.

Article 3

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Definitions

1. For the purposes of this Regulation:

- a) ‘succession' means succession to the estate of a deceased person and covers all forms of transfer of assets, rights and obligations by reason of death, whether by way of a voluntary transfer under a disposition of property upon death or a transfer through intestate succession;
- b) ‘agreement as to succession' means an agreement, including an agreement resulting from mutual wills, which, with or without consideration, creates, modifies or terminates rights to the future estate or estates of one or more persons party to the agreement;
- c) ‘joint will' means a will drawn up in one instrument by two or more persons;
- d) ‘disposition of property upon death' means a will, a joint will or an agreement as to succession;
- e) ‘Member State of origin' means the Member State in which the decision has been given, the court settlement approved or concluded, the authentic instrument established or the European Certificate of Succession issued;
- f) ‘Member State of enforcement' means the Member State in which the declaration of enforceability or the enforcement of the decision, court settlement or authentic instrument is sought;
- g) ‘decision' means any decision in a matter of succession given by a court of a Member State, whatever the decision may be called, including a decision on the determination of

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costs or expenses by an officer of the court;

- h) ‘court settlement' means a settlement in a matter of succession which has been approved by a court or concluded before a court in the course of proceedings;
- (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.

2. For the purposes of this Regulation, the term ‘court' means any judicial authority and all other authorities and legal professionals with competence in matters of succession which exercise judicial functions or act pursuant to a delegation of power by a judicial authority or act under the control of a judicial authority, provided that such other authorities and legal professionals offer guarantees with regard to impartiality and the right of all parties to be heard and provided that their decisions 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.

The Member States shall notify the Commission of the other authorities and legal professionals referred to in the first subparagraph in accordance with Article 79.

Article 30

Special rules imposing restrictions concerning or affecting the succession in respect of certain assets

Where the law of the State in which certain immovable property, certain enterprises or other special categories of assets are located contains special rules which, for economic, family or social considerations, impose restrictions concerning or affecting the succession in respect of those assets, those special rules shall apply to the succession in so far as, under the law of that State, they are applicable irrespective of the law applicable to the succession.

Article 31

Adaptation of rights in rem

Where a person invokes a right in rem to which he is entitled under the law applicable to the succession and the law of the Member State in which the right is invoked does not know the right in rem in question, that right shall, if necessary and to the extent possible, be adapted to the closest equivalent right in rem under the law of that State, taking into account the aims and the interests pursued by the specific right in rem and the effects attached to it.

Article 32

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Commorientes

Where two or more persons whose successions are governed by different laws die in circumstances in which it is uncertain in what order their deaths occurred, and where those laws provide differently for that situation or make no provision for it at all, none of the deceased persons shall have any rights to the succession of the other or others.

Article 35

Public policy

The application of a provision of the law of any State specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (ordre public) of the forum.

Article 35

Renvoi

1. The application of the law of any third State specified by this Regulation shall mean the application of the rules of law in force in that State, including its rules of private international law in so far as those rules make a renvoi:
   a) to the law of a Member State; or
   b) to the law of another third State which would apply its own law
2. No renvoi shall apply with respect to the laws referred to in Article 21(2), Article 22, Article 27, point (b) of Article 28 and Article 30.

Article 39

Recognition

1. A decision given in a Member State shall be recognised in the other Member States without any special procedure being required.
2. Any interested party who raises the recognition of a decision as the principal issue in a dispute may, in accordance with the procedure provided for in Articles 45 to 58, apply for that decision to be recognised.
3. If the outcome of the proceedings in a court of a Member State depends on the determination of an incidental question of recognition, that court shall have jurisdiction over that question.

Article 4

- "**General jurisdiction**
  The courts of the Member State in which the deceased had his habitual residence at the time of death shall have jurisdiction to rule on the succession as a whole."

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Article 40

Grounds of non-recognition

A decision shall not be recognised:

- a) if such recognition is manifestly contrary to public policy (ordre public) in the Member State in which recognition is sought;
- b) where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the decision when it was possible for him to do so;
- c) if it is irreconcilable with a decision given in proceedings between the same parties in the Member State in which recognition is sought;
- d) if it is irreconcilable with an earlier decision given in another Member State or in a third State in proceedings involving the same cause of action and between the same parties, provided that the earlier decision fulfils the conditions necessary for its recognition in the Member State in which recognition is sought.

Article 41

No review as to the substance

Under no circumstances may a decision given in a Member State be reviewed as to its substance.

Article 42

Staying of recognition proceedings

A court of a Member State in which recognition is sought of a decision given in another Member State may stay the proceedings if an ordinary appeal against the decision has been lodged in the Member State of origin.

Article 45

Jurisdiction of local courts

1. The application for a declaration of enforceability shall be submitted to the court or competent authority of the Member State of enforcement communicated by that Member State to the Commission in accordance with Article 78.
2. The local jurisdiction shall be determined by reference to the place of domicile of the party against whom enforcement is sought, or to the place of enforcement.

Article 46

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Procedure

1. The application procedure shall be governed by the law of the Member State of enforcement.
2. The applicant shall not be required to have a postal address or an authorised representative in the Member State of enforcement.
3. The application shall be accompanied by the following documents:
    - a) a copy of the decision which satisfies the conditions necessary to establish its authenticity;
    - b) the attestation issued by the court or competent authority of the Member State of origin using the form established in accordance with the advisory procedure referred to in Article 81(2), without prejudice to Article 47.

Article 5

Choice-of-court agreement

1. Where the law chosen by the deceased to govern his succession pursuant to Article 22 is the law of a Member State, the parties concerned may agree that a court or the courts of that Member State are to have exclusive jurisdiction to rule on any succession matter.

2. Such a choice-of-court agreement shall be expressed in writing, dated and signed by the parties concerned. Any communication by electronic means which provides a durable record of the agreement shall be deemed equivalent to writing.

Article 50

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Appeal against the decision on the application for a declaration of enforceability

- 1. The decision on the application for a declaration of enforceability may be appealed against by either party.
- 2. The appeal shall be lodged with the court communicated by the Member State concerned to the Commission in accordance with Article 78.
- 3. The appeal shall be dealt with in accordance with the rules governing procedure in contradictory matters.
- 4. If the party against whom enforcement is sought fails to appear before the appellate court in proceedings concerning an appeal brought by the applicant, Article 16 shall apply even where the party against whom enforcement is sought is not domiciled in any of the Member States.
- 5. An appeal against the declaration of enforceability shall be lodged within 30 days of service thereof. If the party against whom enforcement is sought is domiciled in a Member State other than that in which the declaration of enforceability was given, the time for appealing shall be 60 days and shall run from the date of service, either on him in person or at his residence. No extension may be granted on account of distance.

Article 51

Procedure to contest the decision given on appeal

The decision given on the appeal may be contested only by the procedure communicated by the Member State concerned to the Commission in accordance with Article 78

Article 54

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Provisional, including protective, measures

1. When a decision must be recognised in accordance with this Chapter, nothing shall prevent the applicant from availing himself of provisional, including protective, measures in accordance with the law of the Member State of enforcement without a declaration of enforceability under Article 48 being required.
2. The declaration of enforceability shall carry with it by operation of law the power to proceed to any protective measures.
3. During the time specified for an appeal pursuant to Article 50(5) against the declaration of enforceability and until any such appeal has been determined, no measures of enforcement may be taken other than protective measures against the property of the party against whom enforcement is sought.

Article 55

Partial enforceability

1. Where a decision has been given in respect of several matters and the declaration of enforceability cannot be given for all of them, the court or competent authority shall give it for one or more of them.

2. An applicant may request a declaration of enforceability limited to parts of a decision.

Article 59

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Acceptance of authentic instruments

1. An authentic instrument established in a Member State shall have the same evidentiary effects in another Member State as it has in the Member State of origin, or the most comparable effects, provided that this is not manifestly contrary to public policy (ordre public) in the Member State concerned.

   A person wishing to use an authentic instrument in another Member State may ask the authority establishing the authentic instrument in the Member State of origin to fill in the form established in accordance with the advisory procedure referred to in Article 81(2) describing the evidentiary effects which the authentic instrument produces in the Member State of origin.
2. Any challenge relating to the authenticity of an authentic instrument shall be made before the courts of the Member State of origin and shall be decided upon under the law of that State. The authentic instrument challenged shall not produce any evidentiary effect in another Member State as long as the challenge is pending before the competent court.
3. Any challenge relating to the legal acts or legal relationships recorded in an authentic instrument shall be made before the courts having jurisdiction under this Regulation and shall be decided upon under the law applicable pursuant to Chapter III. The authentic instrument challenged shall not produce any evidentiary effect in a Member State other than the Member State of origin as regards the matter being challenged as long as the challenge is pending before the competent court.
4. If the outcome of proceedings in a court of a Member State depends on the determination of an incidental question relating to the legal acts or legal relationships recorded in an authentic instrument in matters of succession, that court shall have jurisdiction over that question.

Article 6

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Declining of jurisdiction in the event of a choice of law

Where the law chosen by the deceased to govern his succession pursuant to Article 22 is the law of a Member State, the court seised pursuant to Article 4 or Article 10:

- (a) may, at the request of one of the parties to the proceedings, decline jurisdiction if it considers that the courts of the Member State of the chosen law are better placed to rule on the succession, taking into account the practical circumstances of the succession, such as the habitual residence of the parties and the location of the assets; or
- (b) shall decline jurisdiction if the parties to the proceedings have agreed, in accordance with Article 5, to confer jurisdiction on a court or the courts of the Member State of the chosen law.

Article 6

Declining of jurisdiction in the event of a choice of law

Where the law chosen by the deceased to govern his succession pursuant to Article 22 is the law of a Member State, the court seised pursuant to Article 4 or Article 10:

- a) may, at the request of one of the parties to the proceedings, decline jurisdiction if it considers that the courts of the Member State of the chosen law are better placed to rule on the succession, taking into account the practical circumstances of the succession, such as the habitual residence of the parties and the location of the assets; or
- b) shall decline jurisdiction if the parties to the proceedings have agreed, in accordance with Article 5, to confer jurisdiction on a court or the courts of the Member State of the chosen law.

Article 60

Enforceability of authentic instruments

1. An authentic instrument which is enforceable in the Member State of origin shall be declared enforceable in another Member State on the application of any interested party in accordance with the procedure provided for in Articles 45 to 58.
2. For the purposes of point (b) of Article 46(3), the authority which established the authentic instrument shall, on the application of any interested party, issue an attestation using the form established in accordance with the advisory procedure referred to in Article 81(2).
3. The court with which an appeal is lodged under Article 50 or Article 51 shall refuse or revoke a declaration of enforceability only if enforcement of the authentic instrument is manifestly contrary to public policy (ordre public) in the Member State of enforcement.

Article 61

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Enforceability of court settlements

1. Court settlements which are enforceable in the Member State of origin shall be declared enforceable in another Member State on the application of any interested party in accordance with the procedure provided for in Articles 45 to 58.
2. For the purposes of point (b) of Article 46(3), the court which approved the settlement or before which it was concluded shall, on the application of any interested party, issue an attestation using the form established in accordance with the advisory procedure referred to in Article 81(2).
3. The court with which an appeal is lodged under Article 50 or Article 51 shall refuse or revoke a declaration of enforceability only if enforcement of the court settlement is manifestly contrary to public policy (ordre public) in the Member State of enforcement.

Article 62

Creation of a European Certificate of Succession

1. This Regulation creates a European Certificate of Succession (hereinafter referred to as 'the Certificate') which shall be issued for use in another Member State and shall produce the effects listed in Article 69.

2. The use of the Certificate shall not be mandatory.

3. The Certificate shall not take the place of internal documents used for similar purposes in the Member States. However, once issued for use in another Member State, the Certificate shall also produce the effects listed in Article 69 in the Member State whose authorities issued it in accordance with this Chapter.

Article 63

Purpose of the Certificate

1. The Certificate is for use by heirs, legatees having direct rights in the succession and executors of wills or administrators of the estate who, in another Member State, need to invoke their status or to exercise respectively their rights as heirs or legatees and/or their powers as executors of wills or administrators of the estate.

2. The Certificate may be used, in particular, to demonstrate one or more of the following:

- a) the status and/or the rights of each heir or, as the case may be, each legatee mentioned in the Certificate and their respective shares of the estate;
- b) the attribution of a specific asset or specific assets forming part of the estate to the heir (s) or, as the case may be, the legatee(s) mentioned in the Certificate;
- c) the powers of the person mentioned in the Certificate to execute the will or administer the estate.

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Article 64

Competence to issue the Certificate

The Certificate shall be issued in the Member State whose courts have jurisdiction under Article 4, Article 7, Article 10 or Article 11. The issuing authority shall be:

- a) a court as defined in Article 3(2); or
- b) another authority which, under national law, has competence to deal with matters of succession.

Article 65

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Application for a Certificate

1. The Certificate shall be issued upon application by any person referred to in Article 63(1) (hereinafter referred to as 'the applicant').
2. For the purposes of submitting an application, the applicant may use the form established in accordance with the advisory procedure referred to in Article 81(2).
3. The application shall contain the information listed below, to the extent that such information is within the applicant's knowledge and is necessary in order to enable the issuing authority to certify the elements which the applicant wants certified, and shall be accompanied by all relevant

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documents either in the original or by way of copies which satisfy the conditions necessary to establish their authenticity, without prejudice to Article 66(2):

- a) details concerning the deceased: surname (if applicable, surname at birth), given name (s), sex, date and place of birth, civil status, nationality, identification number (if applicable), address at the time of death, date and place of death;
- b) details concerning the applicant: surname (if applicable, surname at birth), given name (s), sex, date and place of birth, civil status, nationality, identification number (if applicable), address and relationship to the deceased, if any;
- c) details concerning the representative of the applicant, if any: surname (if applicable, surname at birth), given name(s), address and representative capacity;
- d) details of the spouse or partner of the deceased and, if applicable, ex-spouse(s) or ex-partner(s): surname (if applicable, surname at birth), given name(s), sex, date and place of birth, civil status, nationality, identification number (if applicable) and address;
- e) details of other possible beneficiaries under a disposition of property upon death and/or by operation of law: surname and given name(s) or organisation name, identification number (if applicable) and address;
- f) the intended purpose of the Certificate in accordance with Article 63;
- g) the contact details of the court or other competent authority which is dealing with or has dealt with the succession as such, if applicable;
- h) the elements on which the applicant founds, as appropriate, his claimed right to succession property as a beneficiary and/or his right to execute the will of the deceased and /or to administer the estate of the deceased;
- i) an indication of whether the deceased had made a disposition of property upon death; if neither the original nor a copy is appended, an indication regarding the location of the original;
- j) an indication of whether the deceased had entered into a marriage contract or into a contract regarding a relationship which may have comparable effects to marriage; if neither the original nor a copy of the contract is appended, an indication regarding the location of the original;
- k) an indication of whether any of the beneficiaries has made a declaration concerning acceptance or waiver of the succession;
- l) a declaration stating that, to the applicant's best knowledge, no dispute is pending relating to the elements to be certified;
- m) any other information which the applicant deems useful for the purposes of the issue of the Certificate.

Article 66

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Examination of the application

1. Upon receipt of the application the issuing authority shall verify the information and declarations and the documents and other evidence provided by the applicant. It shall carry out the enquiries necessary for that verification of its own motion where this is provided for or authorised by its own law, or shall invite the applicant to provide any further evidence which it deems necessary.
2. Where the applicant has been unable to produce copies of the relevant documents which satisfy the conditions necessary to establish their authenticity, the issuing authority may decide to accept other forms of evidence.
3. Where this is provided for by its own law and subject to the conditions laid down therein, the issuing authority may require that declarations be made on oath or by a statutory declaration in lieu of an oath.
4. The issuing authority shall take all necessary steps to inform the beneficiaries of the application for a Certificate. It shall, if necessary for the establishment of the elements to be certified, hear any person involved and any executor or administrator and make public announcements aimed at giving other possible beneficiaries the opportunity to invoke their rights.
5. For the purposes of this Article, the competent authority of a Member State shall, upon request, provide the issuing authority of another Member State with information held, in particular, in the land registers, the civil status registers and registers recording documents and facts of relevance for the succession or for the matrimonial property regime or an equivalent property regime of the deceased, where that competent authority would be authorised, under national law, to provide another national authority with such information.

Article 69

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Effects of the Certificate

1. The Certificate shall constitute a valid document for the recording of succession property in the relevant register of a Member State, without prejudice to points (k) and (l) of Article 1(2).
2. The Certificate shall be presumed to accurately demonstrate elements which have been established under the law applicable to the succession or under any other law applicable to specific elements. The person mentioned in the Certificate as the heir, legatee, executor of the will or administrator of the estate shall be presumed to have the status mentioned in the Certificate and /or to hold the rights or the powers stated in the Certificate, with no conditions and/or restrictions being attached to those rights or powers other than those stated in the Certificate.
3. Any person who, acting on the basis of the information certified in a Certificate, makes payments or passes on property to a person mentioned in the Certificate as authorised to accept payment or property shall be considered to have transacted with a person with authority to accept payment or property, unless he knows that the contents of the Certificate are not accurate or is unaware of such inaccuracy due to gross negligence.
4. Where a person mentioned in the Certificate as authorised to dispose of succession property disposes of such property in favour of another person, that other person shall, if acting on the basis of the information certified in the Certificate, be considered to have transacted with a person with authority to dispose of the property concerned, unless he knows that the contents of the Certificate are not accurate or is unaware of such inaccuracy due to gross negligence.
5. The Certificate shall constitute a valid document for the recording of succession property in the relevant register of a Member State, without prejudice to points (k) and (l) of Article 1(2).

Article 71

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Rectification, modification or withdrawal of the Certificate

1. The issuing authority shall, at the request of any person demonstrating a legitimate interest or of its own motion, rectify the Certificate in the event of a clerical error.
2. The issuing authority shall, at the request of any person demonstrating a legitimate interest or, where this is possible under national law, of its own motion, modify or withdraw the Certificate where it has been established that the Certificate or individual elements thereof are not accurate.
3. The issuing authority shall without delay inform all persons to whom certified copies of the Certificate have been issued pursuant to Article 70(1) of any rectification, modification or withdrawal thereof.

Article 72

Redress procedures

1. Decisions taken by the issuing authority pursuant to Article 67 may be challenged by any person entitled to apply for a Certificate.

Decisions taken by the issuing authority pursuant to Article 71 and point (a) of Article 73(1) may be challenged by any person demonstrating a legitimate interest.

The challenge shall be lodged before a judicial authority in the Member State of the issuing authority in accordance with the law of that State.

2. If, as a result of a challenge as referred to in paragraph 1, it is established that the Certificate issued is not accurate, the competent judicial authority shall rectify, modify or withdraw the Certificate or ensure that it is rectified, modified or withdrawn by the issuing authority.

If, as a result of a challenge as referred to in paragraph 1, it is established that the refusal to issue the Certificate was unjustified, the competent judicial authority shall issue the Certificate or ensure that the issuing authority re-assesses the case and makes a fresh decision.

Article 73

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Suspension of the effects of the Certificate

1. The effects of the Certificate may be suspended by:
   - a) the issuing authority, at the request of any person demonstrating a legitimate interest, pending a modification or withdrawal of the Certificate pursuant to Article 71; or
   - b) the judicial authority, at the request of any person entitled to challenge a decision taken by the issuing authority pursuant to Article 72, pending such a challenge.
2. The issuing authority or, as the case may be, the judicial authority shall without delay inform all persons to whom certified copies of the Certificate have been issued pursuant to Article 70(1) of any suspension of the effects of the Certificate.
   During the suspension of the effects of the Certificate no further certified copies of the Certificate may be issued.

Article 74

Legalisation and other similar formalities

No legalisation or other similar formality shall be required in respect of documents issued in a Member State in the context of this Regulation.

Article 75

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Relationship with existing international conventions

1. This Regulation shall not affect the application of international conventions to which one or more Member States are party at the time of adoption of this Regulation and which concern matters covered by this Regulation.
   In particular, Member States which are Contracting Parties to the Hague Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions shall continue to apply the provisions of that Convention instead of Article 27 of this Regulation with regard to the formal validity of wills and joint wills.
2. Notwithstanding paragraph 1, this Regulation shall, as between Member States, take precedence over conventions concluded exclusively between two or more of them in so far as such conventions concern matters governed by this Regulation.
3. This Regulation shall not preclude the application of the Convention of 19 November 1934 between Denmark, Finland, Iceland, Norway and Sweden comprising private international law provisions on succession, wills and estate administration, as revised by the intergovernmental agreement between those States of 1 June 2012, by the Member States which are parties thereto, in so far as it provides for:
   - a) rules on the procedural aspects of estate administration as defined by the Convention and assistance in that regard by the authorities of the States Contracting Parties to the Convention; and
   - b) simplified and more expeditious procedures for the recognition and enforcement of decisions in matters of succession.

Article 78

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Information on contact details and procedures

1. By 16 January 2014, the Member States shall communicate to the Commission:
    - a) the names and contact details of the courts or authorities with competence to deal with applications for a declaration of enforceability in accordance with Article 45(1) and with appeals against decisions on such applications in accordance with Article 50(2);
    - b) the procedures to contest the decision given on appeal referred to in Article 51;
    - c) the relevant information regarding the authorities competent to issue the Certificate pursuant to Article 64; and
    - d) the redress procedures referred to in Article 72.

    The Member States shall apprise the Commission of any subsequent changes to that information.
2. The Commission shall publish the information communicated in accordance with paragraph 1 in the Official Journal of the European Union, with the exception of the addresses and other contact details of the courts and authorities referred to in point (a) of paragraph 1.
3. The Commission shall make all information communicated in accordance with paragraph 1 publicly available through any other appropriate means, in particular through the European Judicial Network in civil and commercial matters.

Article 78 de la loi belge du 16 juillet 2014

1. La succession est régie par le droit de l'État sur le territoire duquel le défunt avait sa résidence habituelle au moment de son décès.
2. La succession immobilière est régie par le droit de l'État sur le territoire duquel l'immeuble est situé.

Toutefois, si le droit étranger conduit à l'application du droit de l'État sur le territoire duquel le défunt avait sa résidence habituelle au moment de son décès, le droit de cet État est applicable.

Article 8

"**Closing of own-motion proceedings in the event of a choice of law**

- A court which has opened succession proceedings of its own motion under Article 4 or Article 10 shall close the proceedings if the parties to the proceedings have agreed to settle the succession amicably out of court in the Member State whose law had been chosen by the deceased pursuant to Article 22."

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Article 83

Transitional provisions

1. This Regulation shall apply to the succession of persons who die on or after 17 August 2015.
2. Where the deceased had chosen the law applicable to his succession prior to 17 August 2015, that choice shall be valid if it meets the conditions laid down in Chapter III or if it is valid in application of the rules of private international law which were in force, at the time the choice was made, in the State in which the deceased had his habitual residence or in any of the States whose nationality he possessed.
3. A disposition of property upon death made prior to 17 August 2015 shall be admissible and valid in substantive terms and as regards form if it meets the conditions laid down in Chapter III or if it is admissible and valid in substantive terms and as regards form in application of the rules of private international law which were in force, at the time the disposition was made, in the State in which the deceased had his habitual residence or in any of the States whose nationality he possessed or in the Member State of the authority dealing with the succession.
4. If a disposition of property upon death was made prior to 17 August 2015 in accordance with the law which the deceased could have chosen in accordance with this Regulation, that law shall be deemed to have been chosen as the law applicable to the succession.

Article 83 § 1

- "This Regulation shall apply to the succession of persons who die on or after 17 August 2015.

Article 83 § 2

- "Where the deceased had chosen the law applicable to his succession prior to 17 August 2015, that choice shall be valid if it meets the conditions laid down in Chapter III or if it is valid in application of the rules of private international law which were in force, at the time the choice was made, in the State in which the deceased had his habitual residence or in any of the States whose nationality he possessed."

Article 83 § 3

- "A disposition of property upon death made prior to 17 August 2015 shall be admissible and valid in substantive terms and as regards form if it meets the conditions laid down in Chapter III or if it is admissible and valid in substantive terms and as regards form in application of the rules of private international law which were in force, at the time the disposition was made, in the State in which the deceased had his habitual residence or in any of the States whose nationality he possessed or in the Member State of the authority dealing with the succession."

Article 83 §4

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

Article 9

Jurisdiction based on appearance

1. Where, in the course of proceedings before a court of a Member State exercising jurisdiction pursuant to Article 7, it appears that not all the parties to those proceedings were party to the choice-of-court agreement, the court shall continue to exercise jurisdiction if the parties to the proceedings who were not party to the agreement enter an appearance without contesting the jurisdiction of the court.
2. If the jurisdiction of the court referred to in paragraph 1 is contested by parties to the proceedings who were not party to the agreement, the court shall decline jurisdiction.
   In that event, jurisdiction to rule on the succession shall lie with the courts having jurisdiction pursuant to Article 4 or Article 10.

Point 10 of the recital of the Regulation

- This Regulation should not apply to revenue matters or to administrative matters of a public-law nature. It should therefore be for national law to determine, for instance, how taxes and other liabilities of a public-law nature are calculated and paid, whether these be taxes payable by the deceased at the time of death or any type of succession-related tax to be paid by the estate or the beneficiaries. It should also be for national law to determine whether the release of succession property to beneficiaries under this Regulation or the recording of succession property in a register may be made subject to the payment of taxes.

Point 11of the recital of the Regulation

- "This Regulation should not apply to areas of civil law other than succession. For reasons of clarity, a number of questions which could be seen as having a link with matters of succession should be explicitly excluded from the scope of this Regulation. "

Point 13 of the recital of the Regulation

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- Questions relating to the creation, administration and dissolution of trusts should also be excluded from the scope of this Regulation. This should not be understood as a general exclusion of trusts. Where a trust is created under a will or under statute in connection with intestate succession the law applicable to the succession under this Regulation should apply with respect to the devolution of the assets and the determination of the beneficiaries.

Point 40 of the recital of the Regulation

- A choice of law under this Regulation should be valid even if the chosen law does not provide for a choice of law in matters of succession. It should however be for the chosen law to determine the substantive validity of the act of making the choice, that is to say, whether the person making the choice may be considered to have understood and consented to what he was doing. The same should apply to the act of modifying or revoking a choice of law.

Point 48 of the recital of the Regulation

- In order to ensure legal certainty for persons wishing to plan their succession in advance, this Regulation should lay down a specific conflict-of-laws rule concerning the admissibility and substantive validity of dispositions of property upon death. To ensure the uniform application of that rule, this Regulation should list which elements should be considered as elements pertaining to substantive validity. The examination of the substantive validity of a disposition of property upon death may lead to the conclusion that that disposition is without legal existence.

Point 50 of the recital of the Regulation

- The law which, under this Regulation, will govern the admissibility and substantive validity of a disposition of property upon death and, as regards agreements as to succession, the binding effects of such an agreement as between the parties, should be without prejudice to the rights of any person who, under the law applicable to the succession, has a right to a reserved share or another right of which he cannot be deprived by the person whose estate is involved.

Point 51 of the recital of the Regulation

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- Where reference is made in this Regulation to the law which would have been applicable to the succession of the person making a disposition of property upon death if he had died on the day on which the disposition was, as the case may be, made, modified or revoked, such reference should be understood as a reference to either the law of the State of the habitual residence of the person concerned on that day or, if he had made a choice of law under this Regulation, the law of the State of his nationality on that day.

Point 7 of the recital of the Regulation

- "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."

Recital 23

- In view of the increasing mobility of citizens and in order to ensure the proper administration of justice within the Union and to ensure that a genuine connecting factor exists between the succession and the Member State in which jurisdiction is exercised, this Regulation should provide that the general connecting factor for the purposes of determining both jurisdiction and the applicable law should be the habitual residence of the deceased at the time of death. In order to determine the habitual residence, the authority dealing with the succession should make an overall assessment of the circumstances of the life of the deceased during the years preceding his death and at the time of his death, taking account of all relevant factual elements, in particular the duration and regularity of the deceased's presence in the State concerned and the conditions and reasons for that presence. The habitual residence thus determined should reveal a close and stable connection with the State concerned taking into account the specific aims of this Regulation.

Recital 24

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- In certain cases, determining the deceased's habitual residence may prove complex. Such a case may arise, in particular, where the deceased for professional or economic reasons had gone to live abroad to work there, sometimes for a long time, but had maintained a close and stable connection with his State of origin. In such a case, the deceased could, depending on the circumstances of the case, be considered still to have his habitual residence in his State of origin in which the centre of interests of his family and his social life was located. Other complex cases may arise where the deceased lived in several States alternately or travelled from one State to another without settling permanently in any of them. If the deceased was a national of one of those States or had all his main assets in one of those States, his nationality or the location of those assets could be a special factor in the overall assessment of all the factual circumstances.

Recital 26

- Nothing in this Regulation should 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.

Recital 54

- For economic, family or social considerations, certain immovable property, certain enterprises and other special categories of assets are subject to special rules in the Member State in which they are located imposing restrictions concerning or affecting the succession in respect of those assets. This Regulation should ensure the application of such special rules. However, this exception to the application of the law applicable to the succession requires a strict interpretation in order to remain compatible with the general objective of this Regulation. Therefore, neither conflict-of-laws rules subjecting immovable property to a law different from that applicable to movable property nor provisions providing for a reserved share of the estate greater than that provided for in the law applicable to the succession under this Regulation may be regarded as constituting special rules imposing restrictions concerning or affecting the succession in respect of certain assets.

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