Briefing

European Parliament

LEGAL AFFAIRS

The state of implementation of the EU Succession Regulation's provisions on its scope, applicable law, freedom of choice, and parallelism between the law and the courts

KEY ELEMENTS

- Regulation (EU) No 650/2012 has governed successions opened since its entry into force on 17 August 2015. Soon after, some 200 000 people working as notaries across Europe were faced with these new rules, and it can already be said that the regulation**'s aims of legal certainty, predictability and simplification have for the most part been achieved**.
- This is certainly true from a private international law perspective; replacing 25 systems with one is a major step forward and, in the vast majority of cases, enables a single law to be applied to the succession as a whole. For successions with links to Member States only, problems have been relatively limited in so far as these States have since applied identical rules of conflict. **Most problems have arisen primarily as a result of successions with links to third countries, including Denmark, Ireland and the United Kingdom**, with their own conflict-of-law rules. Attempts were made to take this into account in the regulation by agreeing in particular to include a specific article on *renvoi*, which was welcomed. However in a large number of cases, this does not prevent the fragmentation of the succession.
- Another problem has arisen with respect to notaries of certain Member States now being obliged to apply most times the law of another Member State, and thus raising **specific issues of accessing legal content, especially if this law is of a third country**, where previously a conflict rule would have resulted in the law of the forum being applied more often than not (at least for immovables), as is the case in France.

1. SCOPE: CROSSROADS BETWEEN SUCCESSION LAW AND OTHER BRANCHES OF LAW, IN PARTICULAR MATRIMONIAL PROPERTY REGIMES

Article 1 of the regulation expressly excludes from its scope questions relating to matrimonial property regimes and property regimes. However, in all Member States, the liquidation of the succession depends either on the prior liquidation of the matrimonial property regime or on

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whether it is intertwined with the matrimonial property regime. In the absence of harmonisation, each Member State retains its own conflict-of-law rules in this regard, and thus, its own connecting criteria. When the regulation on matrimonial property regimes enters into force, this issue will not disappear overnight, since it will only apply to married spouses as of 29 January 2019, the date of its entry into force. However, at the present time, the successions of couples who have been married for around 40 or 50 years are being settled. As such, there may be a discrepancy regarding the nature of the applicable matrimonial property regime depending on whether the law of a particular Member State applies. This situation is expected to continue and will likely lead to relative instability for many years in how certain cross-border successions are treated.

Take a Spanish/Catalan couple for example, who married in Barcelona in 1995 without a marriage contract. Pursuant to Catalan law, the couple would be subject to the statutory regime of separation of estate. In 2000, the couple moved to France. Under automatic mutability laid down in the Hague Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes, which applies in France, after living in the country for more than 10 years, the couple is deemed to be married under the French statutory regime of the communal estate comprising only property acquired after their marriage. In 2011, the husband, individually, purchased a secondary residence in Spain, and thereafter a primary residence in France. A Spanish notary would designate Spanish law as applicable (and as such, a separatist regime), whereas a French notary would designate French law as applicable (and as such, a communal regime). If one of the spouses dies, the consequences could be significant: pursuant to Spanish law, the property purchased in France would belong to the husband alone; however, in contrast, pursuant to French law, it would be deemed a common asset. The same would apply to the property purchased in Spain. If a Spanish notary settles the succession, he/she would consider both property assets, in their entirety, as part of the succession. He/she would also state this in the European Certificate of Succession (ECS), which he/she may need to issue for presentation in France. However, if a French notary settles the succession, he/she would consider the community established between the deceased and the surviving spouse as the determining factor for the two property assets.

In this context, it is hardly surprising that one of the first cases brought before the Court of Justice of the European Union (CJEU) referred to the crossroads between succession law and matrimonial property regimes. The question raised in this case was whether the quarter allocated to the surviving spouse pursuant to Section 1371 of the German Bürgerliches Gesetzbuch (BGB, Civil Code) fell under succession law or the law of matrimonial property regimes (Case C-558/16). It should be noted that the German Supreme Court ruled that, under national law, the case fell under the law of matrimonial property regimes. The CJEU was asked in the alternative to assess whether this additional part share of the surviving spouse should nevertheless be recorded in full in the ECS, if it decided that the case fell under the law of matrimonial property regimes.

An example would make it easier to understand the scope of this question. After their marriage in 1988, a German couple established their first family residence in France, where they lived for around 15 years. The couple then returned to live in Germany, where the husband died. There was no marriage contract. The deceased left a surviving spouse and two children. He died intestate. The couple owned property assets in France worth EUR 800 000, in joint ownership, one half each. The succession is subject to the law of the last habitual residence of the deceased pursuant to the regulation, or German law.

On the basis of the CJEU's ruling, the German authority could issue an ECS in which the surviving spouse would appear as heir of half of the assets, and each child a quarter. From the German perspective, the spouses are considered as having married under the law of their common nationality, or the German statutory system of joint ownership of the increase in capital value of assets (Zugewinnegemeinshaft). Furthermore, the succession is subject to the law of the last habitual residence of the deceased, or German law. Pursuant to section 1371(1) of the BGB, the surviving spouse will receive, through intestate succession, one quarter in respect of their succession rights, to which an additional quarter will be added through the flat-rate adjustment of the system of joint ownership of the increase in capital value of assets. In this scenario, the surviving spouse will receive EUR 200 000, and each child EUR 100 000. No inheritance tax is due in France.

However, this scenario does not comply with French international private law. From the French perspective, as the couple established their primary residence in France after their marriage, the couple is considered as having married under the regime of communal estate comprising only property acquired after their marriage. The rights of a surviving spouse are thus limited to the German (statutory) share of one third of the assets (section 1931(4) BGB), with the rest distributed to the two children, each receiving one third. As such, each child receives EUR 133 333. Inheritance taxes due to the French tax authorities are as follows: EUR 133 333 x 20 % - EUR 1 806 = EUR 4 860 x 2 = EUR 9 721.

Since the harmonisation of applicable conflict rules in family matters will only apply in the future, uncertainty regarding this type of situation will continue for a long time to come.

2. DOES THE NOTION OF 'HABITUAL RESIDENCE' IN THE CONTEXT OF INCREASING MOBILITY OF CITIZENS EMERGE AS A CONCEPT UNDER EUROPEAN UNION LAW?

Owing in particular to the United Kingdom's opposition, it was not possible to include a definition for 'habitual residence' in the text of the regulation. Recitals 23 and 24 of the regulation, however, provide guidance on how to interpret the term at best.

In practice, in the vast majority of cases, determining the habitual residence of the deceased is straightforward and should not be sidetracked by a few rare corner case situations.

In particular, we should emphasise the issue faced by elderly persons who are no longer able to validly express their wishes and who are living in retirement homes in another State (which could be a third country), having been moved into a home by their children or for economic reasons. In the absence of expressed will, can their habitual residence truly be said to be the State in which the retirement home is located?

In addition, **habitual residence is defined autonomously in each regulation. The definition of habitual residence can therefore vary from one regulation to another**, and there may be some difference between how it is defined in the Succession Regulation and how it is defined with regard to a testator, a child or a couple. **In all cases, the term must be understood from a European perspective. This calls for the various autonomous definitions of habitual residence to be chosen based on the logic of consistency**

between the European instruments and, as a result, any interpretation deemed to be too 'nationalist' should be disregarded.

3. SUCCESSION PLANNING AND FREEDOM OF CHOICE

Most issues appear to relate to agreements established abroad and the need to present them in a Member State whose law is applicable to the succession. By way of an example, take a French couple who established their habitual residence in Switzerland. A girl was born of their union, and a son was born of a previous relationship of the husband. The two children also resided with them in Switzerland. A Swiss notary received an agreement as to succession in which the spouses and the two children had participated. Under the agreement, the son 'had completely and definitively waived any claim on settlement of the succession of his father'. This waiver was made expressly to benefit his stepmother and half-sister. Each of the spouses appointed the other as the sole and only heir under universal title, with a clause establishing the constitution of a trust under the responsibility of the surviving spouse for the benefit of the daughter born of the marriage. The spouses subsequently established their habitual residence in France, where the husband died in 2016.

In this example, the agreement as to succession does not mean that the deceased has chosen the law (*professio juris*) to govern succession, i.e. Swiss law: he could not choose any law other than his national law. As the last habitual residence of the deceased was in France, the succession is subject to French law. However, as the agreement as to succession was established while the parties resided in Switzerland, Article 25 of the regulation confirms that the agreement benefits from the admissibility and validity accorded to it by Swiss law. Swiss law also recognises the binding effects between the parties of the aforementioned agreement, and the son of the deceased cannot claim any rights as regards the succession of his father.

The difficulty arises from the fact that the regulation appears to make no mention of how a Member State should receive an agreement as to succession established under another law that recognises it, validates it and governs its binding effects.

Recalling how the laws of Member States on agreements as to succession differ, Recital 49 provides that the regulation should determine which law is to govern the admissibility of agreements, their substantive validity and their binding effects between the parties, 'in order to make it easier for succession rights acquired as a result of an agreement as to succession to be accepted in the Member States'. To a certain extent, it is hoped that under the regulation, once the agreement is declared admissible and valid pursuant to the law that governed it when established, its inheritance effects will be recognised in all participating Member States, and in particular in the Member State whose law is required to govern the succession. It does not require the host country to apply the agreement during the settlement of the succession. It is hoped only 'to make it easier' for the Swiss agreement 'to be accepted' by French law.

However, the carefully worded recital leaves scope for wide interpretation.

Rather, should the reasoning be based on equivalence? Could this have led to the same result in the host country, in this case, France? If yes, the agreement should then be applied. If no, the agreement should not be accepted.

There is no doubt that these difficulties make professionals cautious about the use of agreements as to succession, at least as regards those agreements in respect of which they are aware from the outset that they may have to be produced in another

State, all the while unsure of how the agreement will actually be received. This gap in the regulation, however remarkable, continues to attract little comment or attention, reflecting the uncertainty surrounding how these agreements are accepted by another Member State.

4. ESTABLISHMENT OF A CHOICE OF LAW AND A CHOICE OF COURT

Article 5 of the regulation allows the parties to agree on the court which will have exclusive jurisdiction to rule on any succession matter. This article is intended to apply only when designating courts in the Member State of which the deceased was a national, if the deceased died while habitually resident in another Member State and had specified his or her national law as the law to govern the succession. In practice, we are not aware of any such cases: it appears, therefore, that this option is presently exercised very discretely. This is perhaps not surprising in the majority of States in which there is a system of notaries and a judge intervenes only in the event of a dispute, which rarely occur. Nevertheless, this possibility is interesting in that it allows for continuity as regards the law and the judge.

However, it is the establishment of a choice of law which is of greater interest.

The number of cases in which a choice of law has been made since 4 July 2012 shows that this major innovation, introduced by the regulation, is of substantial practical importance. We will not reiterate the applicable rules on the subject, but rather focus on two sets of problems identified in practice: the first concerns the law chosen to govern the succession, and the second the form that choice takes.

The law chosen

Pursuant to Article 22(1), a person may choose as the law governing his or her *succession as a whole* the law of the State whose nationality he or she possesses. It is not possible to choose a law to apply to only part of the succession because that would be contrary to the aim of the regulation, which is to ensure that one and the same law governs the entire succession.

Specific issues arise when there are factors connecting the succession with third countries. Further issues also arise with regard to the law that may be chosen to govern the succession, whether in respect of relations between Member States or with third countries.

1. The law chosen in the event that a succession has factors connecting it to third countries

Let us take the case of a Swiss person residing in France, where she has assets. She is also the owner of a property located in England. In her will, she chooses Swiss law to govern her succession and so organises her succession in accordance with Swiss law.

- For the French notary, the succession as a whole should be subject to Swiss law, in accordance with the regulation.
- Swiss private international law takes the same view because it also permits her to choose her national law as the law governing the succession. There is therefore agreement between French law, as established in the regulation, and Swiss law that this succession as a whole should be subject to Swiss law.
- However, for the property located in England, the UK authorities will apply English law.

We therefore know in advance that, although the deceased's national law has been chosen, the succession as a whole will not be governed by one and the same law.

Of course, there would also be more than one law applicable to the succession if a choice of law had not been made: for both the French notary and the Swiss notary, the succession would be subject to French law on the basis of the last habitual residence, while the UK authorities would apply English law to the property located in England. Yet that would be a default solution. In our case, however, the issue arises in a different way because a choice of law has been made: **can a choice of law (the purpose of which is to ensure that the succession as a whole is subject to the chosen law) be considered valid if we know in advance, at the time the choice of law is made, that this law is not going to govern the entirety of the succession?**
It seems that no definitive answer can be given at this stage. An argument could be made for either solution, but neither can be defended with complete conviction. If we refer to the actual wording of Article 22 – law applicable to the *succession as a whole* – and if we interpret these provisions strictly, such a choice of law should not be permitted since we know at the time the choice is made that the succession will not be governed in its entirety by the same law. But perhaps there should be flexibility in applying the provisions, and a choice of law should nevertheless be allowed in such situations.

The question remains open, and notaries will have an important duty to provide advice in such cases: they must draw their client's attention to the possible risk that the choice of law will be considered invalid and to the certain risk that the succession will be fragmented. They must therefore advise their client to take measures that are compatible with that double risk.

2. Which law can be chosen in cases of a succession with factors connecting it to third countries or just to other Member States? The law which can be chosen is the national law or one of the national laws of the person making the choice. But what happens if the chosen law is that of a State which does not have a unified legal system?

Articles 36 to 38 of the regulation introduce rules both for systems in which there are so-called interpersonal conflicts of laws and for those in which there are territorial conflicts of laws.

a. Systems with interpersonal conflicts of laws

Interpersonal conflicts of laws arise in countries in which particular categories of people are subject to different laws. They mainly occur in multi-community countries, such as those in the Middle East, where each religious community is subject to its own law. Article 37 of the regulation establishes that any reference to the law of such a State '*shall be construed as referring to the system of law or set of rules determined by the rules in force in that State*'. The classification rules of the country in question should therefore be applied. Thus, a national of the United Arab Emirates who resides in France can decide that his succession will be governed by his national Emirian law, and the classification rule provided for in Emirian legislation will determine which particular Emirian law he may choose: in this case, he may specify ordinary Emirian succession law, which is inspired by Islamic law, if he is a Muslim and whichever law governs his religious community if he is not a Muslim.

However, the situation is more complex in the case of States which have established a system in which there are territorial conflicts of law.

b. Systems with territorial conflicts of laws

This is the type of system which exists in Member States such as Spain as well as in third countries such as the United States, Canada and Australia.

Let us take the example of an American who has been living in France for many years and wishes to make her succession subject to 'US' law. She may do so because it is her national law, but which US state's law will she be able to specify?

Article 36(1) states that in order to determine which law may be specified, the internal conflict-of-laws rules of the State in question must be applied. In other words, the US rules governing internal conflicts in the country must be applied.

These rules, which are difficult to interpret (see the concept of *vecindad civil* in Spain), sometimes make it possible to determine which law may be designated. In the United States, the rule on internal conflicts is the same as for international conflicts: the succession to movable property will be subject to the law of the jurisdiction in which the deceased was last domiciled, and the succession to immovable property to the law of the jurisdiction in which the property is located. Consequently, in our example the rule on internal conflicts applicable to the United States designates French law for movable property and for immovable property situated in France. But this does not seem to be an acceptable solution under the regulation because it would render Article 34, which precludes any *renvoi* where a choice of law has been made, devoid of any practical effect. **Should we not then approach the case as though there were no internal conflict-of-laws rules and take the view that the person may designate the law of the** US **state with which she has the closest connection?** A clarification in this respect would be welcome.

The form of the choice of law

In accordance with Article 22, the choice must be expressly made in a declaration through the form of a disposition of property upon death. Article 3 of the regulation defines a disposition of property upon death as '*a will, a joint will or an agreement as to succession*', an agreement as to succession being defined in Article 3(b) as '*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*'. This rather broad definition appears to encompass any agreement which relates to a future succession, such as gifts between spouses upon death, inter vivos distribution, or waivers of inheritance rights. A choice of law could therefore be made as part of such an agreement.

However, there is sometimes cause for doubt. For example, Belgian law currently allows two spouses to include within a marriage contract an alternative allocation clause for common property. In accordance with this clause, each of the spouses stipulates that upon death the surviving partner will be able to exercise one or the other option: either to acquire full ownership of all the assets, or full ownership of half and usufruct of the other half, the stipulation often being accompanied by an explicit reference to Belgian provisions on succession. Are we then to conclude that a choice of law has been made in favour of Belgian law, even though this agreement has been made in a marriage contract which cannot be considered a disposition of property upon death within the meaning of the regulation?

In accordance with Article 22, a choice of law has been made if the choice of the applicable law is '*demonstrated by the terms*' of a disposition of property upon death:

- a gift between spouses with French nationality, received by a French notary, provides that the surviving spouse will opt for the largest disposable part of the estate and will exercise the options permitted by the relevant article of the Civil Code; the last habitual residence of the deceased spouse was in Italy. It could be said that a choice of law has been made in favour of French law, because the reference to provisions of the French Civil Code and the drawing up of an agreement which is common in French practice mean that the choice of French law follows from the terms of that agreement;

- the same could be said of an English person who had established a testamentary trust in accordance with English law;

- but what about an American residing in France who, it is discovered upon his death, has drawn up a will in the 'US' format in which he appoints an executor on whom he confers very wide-ranging powers which are in line with the law of the relevant US state but incompatible with the powers of an executor of a will in French law? Is he considered to have made a choice in favour of that US law? Determining the deceased person's intentions becomes problematic here. If all the heirs are adults and capable of exercising their rights, a fall-back solution could be for them to reach an agreement on the law applicable to the succession and on whether or not a choice of law has been made.

Hence the **importance of advising those who wish to make a choice of law that they must contact their notary, who will explain to them the necessity of clearly and unequivocally stating their intentions. A solution, which was disregarded when the regulation was drafted, could be to require that a choice of the law applicable to the succession be made expressly, failing which, only the law of the jurisdiction in which the deceased was last habitually resident would be applicable to the succession. That would provide a guarantee of predictability and therefore legal certainty.**

The rules are sometimes difficult to understand when the choice of law was made prior to 17 August 2015, as in that case it is subject to the transitional provisions laid down by the regulation. At present these provisions are applied very frequently, and they will continue to be for some years to come. What, then, of a French person who had a holographic will produced in Portugal before 17 August 2015: is she considered to have chosen French law? That is most likely the case, insofar as the French form of a holographic will does not exist in Portuguese law, which indicates that the will was drawn up in accordance with the national law of the testator. Alternatively, a Swiss national living in France who had a holographic will drawn up in 2000, knowing that holographic wills are the same in France and Switzerland: has he really chosen Swiss law? Can it be said that the disposition of property upon death was *drawn up in accordance with* his national law, when the holographic form of a will is the same in Swiss law as it is in French law?

5. RULES ALLOWING FOR PARALLELISM BETWEEN THE COURTS AND THE LAW: IS THERE SUFFICIENT COMMUNICATION BETWEEN THE JUDICIARY AND LEGAL PROFESSIONALS?

As we have observed, in the vast majority of Member States successions are settled out of court by notaries. The regulation entered into force 27 months ago, and we are still not aware of any disputes concerning cross-border succession being brought before a court. If anything, we would suggest that the freedom of choice that underpins the European regulations could most likely be extended in respect to the choice of competent court. That is to say, **it may**

be appropriate to allow the deceased to decide whether only the courts of the State whose law he or she has chosen will be competent to deal with the succession, since it is in fact those courts that will best be able to apply the deceased's chosen law in the event of a dispute.

Finally, given that notaries' *raison d'être* is to apply the rule of law definitively but out of court, communication with the judiciary, while always excellent when it takes place, is by nature rare.

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