

## NEW REVOLUTIONARY EUROPEAN REGULATION ON SUCCESSION MATTERS. KEY ISSUES AND DOUBTS<sup>1</sup>

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TÍTULO: El nuevo y revolucionario Reglamento Europeo de Sucesiones. Cuestiones clave y dudas.

ABSTRACT: European Regulation No. 650/2012 on succession matters begins to be applied. Across most of Europe, it is anticipated that «the new rules will make life easier». Its subject matter is concerned with the private international law issues which arise in the context of succession and wills. It contains uniform rules concerning jurisdiction, choice of law, and the international recognition and enforcement of judgments and related instruments in this field. As it can be best judged, in the nearest future the Regulation will cause some controversy. In this text the author tries to present the key issues of the Regulation and outlines the first doubts that may arise from the application of this act.

RESUMEN: *El Reglamento (UE) 650/2012 de Sucesiones comienza a ser aplicado. En la mayor parte de Europa se espera que «las nuevas reglas harán la vida más fácil». Su materia es el Derecho Internacional Privado relativo a la sucesión mortis causa y al testamento. Contiene reglas uniformes sobre competencia, elección de ley aplicable y reconocimiento y ejecución de resoluciones judiciales y documentos relacionados con esta materia. Como puede apreciarse, el Reglamento causará cierta controversia en un futuro próximo. El autor trata de presentar en este texto las cuestiones clave del Reglamento y de esbozar las primeras dudas que pueden surgir de la aplicación de esta norma.*

KEY WORDS: Inheritance law; Succession law; Regulation 650/2012, EU law

PALABRAS CLAVE: *Derecho de sucesiones; Reglamento (UE) 650/2012.*

SUMMARY: 1. INTRODUCTION. 2. THE SCOPE OF THE REGULATION. 3. JURISDICTION. 4. APPLICABLE LAW. 5. EUROPEAN CERTIFICATE OF SUCCESSION. 6. WHAT'S NEXT?

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### 1. INTRODUCTION

17 August 2015 is a date that is important for all inheritance matters in the European Union. That day is the starting date for the application of the Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation

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of a European Certificate of Succession<sup>2</sup>, which revolutionizes this area of the European Union law<sup>3</sup>. As an act of private international law, the regulation breaks with the connector to the national law as the law applicable to the succession of the deceased's estate<sup>4</sup>. At the same time, the Regulation introduces some significant changes in the jurisdiction area where it provides some mechanisms allowing harmonization of the rules for dealing with cases of succession in all the countries of the European Union. It establishes a new instrument for documenting the inheritance rights of Europeans. With such a wide range, the Regulation replaces the existing national regulations in the field of international law of succession, which is a major achievement of the EU legislature in this area<sup>5</sup>.

This success, however, is strewn with thorny roses. This act, even before coming into force, has caused a lot of controversy<sup>6</sup>. The first doubts were related to, among others, the competence of the European Union to harmonize legislation in this area<sup>7</sup>. However, due to the increasing migration within the European Union and the increasing acquisition by Europeans of assets in foreign countries, outside the State of their origin, prevailing were the views, according to which standardization of the rules to indicate the material law applicable in the case of cross-border inheritance is essential<sup>8</sup>. The Regulation No 650/2012 is therefore a response to the expectation of this group of researchers and practitioners who support the idea of unification of succession law in Europe<sup>9</sup>. Another controversy concerned the scope of the Regulation and the legal implications of its individual instruments. Despite the relatively broad discussion, not all these doubts were removed, but despite them, this act was enacted<sup>10</sup>. Today, when too

<sup>2</sup> Official Journal of the European Union No. L 201/107.

<sup>3</sup> Cf. Max Planck Institute for Comparative and International Private Law, «Comments on the European Commission's Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession», 74 *RabelsZ* (2010), pp. 522-720.

<sup>4</sup> Eleanor C. Ritaine, «National succession laws in comparative perspective», 14 *ERA Forum* (2013), pp. 131-154.

<sup>5</sup> Angelo Davi, Alessandra Zanobetti, «Il nuovo diritto internazionale privato delle successioni nell'unione Europea», 5 *Cuadernos de Derecho Transnacional* (2013), pp. 5-139.

<sup>6</sup> Elizabeth B. Crawford, Janeen M. Carruthers, «Speculation on the Operation of Succession Regulation 650/2012: Tales of Unexpected» 22 *European Review of Private Law* 2014, pp. 847-878.

<sup>7</sup> Paul Terner, «Perspectives of a European Succession Law», 14 *Maastricht Journal of European and Comparative Law* (2007), p. 151.

<sup>8</sup> Cf., among others, Mariusz Załucki, *Uniform European Inheritance Law. Myth, Dream or Reality of the Future*, Kraków 2015, pp. 7 et seq.

<sup>9</sup> Cf., for example, Walter Pintens, *Towards a Ius Commune in European Family and Succession Law?*, Cambridge-Antwerp-Portland 2012, pp. 6 et seq.; However, see: Alain Verbeke, Yves-Henri Leleu, 'Harmonisation of the Law of Succession in Europe', [in:] Artur S. Hartkamp, Martijn W. Hesselink, Ewoud H. Hondius, Chantal Mak, C. Edgar du Perron (Eds.), *Towards a European Civil Code*, Nijmegen 2011, pp. 459 et seq.

<sup>10</sup> The lack of the doubt removing is proved by the fact that three EU countries (the United Kingdom, Ireland and Denmark) will not apply this act. See, for example: Caroline Davidson, *The Consequences of England's Decision not To Opt into the Proposed EU Regulation on Succession and Wills*, Lund 2010, pp. 30-36.

much time has not passed yet from the entry of this law into force, and basically, there is no practice of its application, it is difficult to predict what will be the fate of European inheritance law. However, one can believe that due to the significant differences in substantive law of national regulations, the application of the Regulation No 650/2012 will result in a number of difficulties that may contribute to a further unification of law of succession at the level of the European Union<sup>11</sup>. Thus, paradoxically, the act in the field of international private law, which is to organize it, may cause so much controversy that it will enforce further integration work, and will eventually lead to sorting out of substantive law, although in a different way than it was originally expected.

With this in mind, the purpose of this article is to present the basic legal constructions of the new European legislation and an attempt to outline the issues, which in the future might give rise to practical doubts.

## 2. THE SCOPE OF THE REGULATION

The regulation divergence of national inheritance law between countries belonging to the EU has constituted for a long time a significant practical problem. Determining what law (the law of which country) is applicable for a given inheritance case and which body should settle the dispute concerning it not always is an easy task<sup>12</sup>. This practical problem has become a growing challenge, both for the authorities applying the law and for the doctrine. In the European Union more than half a million cases a year are the cases of cross-border succession. In some countries, residents coming from foreign countries constitute a significant part of the population<sup>13</sup>. For this reason, it was recognized, among others, that the rules of inheritance law in this context might be the subject of many questions<sup>14</sup>. Unification of the inheritance law rules has so far taken place primarily at the level of international conventions (international treaties), but this has not been sufficient. As the EU has set as an objective for itself to offer an area of freedom, security and justice, in which the free movement of persons is ensured (Art. 3 Par. 2 of TEU), so for the proper functioning of such an area, it was necessary to adopt some measures in the field of private law having cross-border implications. It is necessary for the proper functioning of the common market. Hence, there is a justification for the introduction to the European Union law of a legal act ordering these issues<sup>15</sup>.

<sup>11</sup> As I indicated before: Mariusz Załucki, „Perspektywy rekodyfikacji polskiego prawa spadkowego”, [in:] Piotr Stec, Mariusz Załucki (Eds.), *Pięćdziesiąt lat kodeksu cywilnego. Perspektywy rekodyfikacji*, Warszawa 2014, p. 359.

<sup>12</sup> Cf. Christian H. Kälin, *International Real Estate Handbook*, Chichester 2005, pp. 1 et seq.

<sup>13</sup> Cf. Press Release of the European Commission of 26 July 2012 (IP /12/851).

<sup>14</sup> Cf. Deutsches Notarinstitut, *Étude de droit comparé sur les règles de conflits de juridictions et de conflits de lois relatives aux testaments et successions dans les Etats membres de l'Union Européenne*, Heinrich Dörner, Paul Lagarde (Eds.), Würzburg 2002, passim.

<sup>15</sup> Jonathan Harris, «The Proposed EU Regulation on Succession and Wills: Prospects and Challenges», 22 *Trust Law International* (2008), pp. 181-188.

The Regulation is therefore to be a legal instrument that will comprehensively regulate matters of international inheritance law of the European Union<sup>16</sup>. According to Regard 9 of the Preamble to the Regulation, it should include all civil-law aspects of succession to the estate of a deceased person, namely all forms of transfer of assets, rights and obligations due to death, whether by way of a voluntary transfer under a disposition of property upon death or a transfer through intestate succession<sup>17</sup>.

Such a definition of «succession» contains, moreover, the content of Art. 3 Par. 1 letter a) of the Regulation. In contrast, the Regulation is not applicable to the areas of civil law other than inheritance. For reasons of full clarity, a number of issues that could be seen as connected with matters of succession were excluded from its scope (Art. 1, Par. 1 Sentence 2 - General exclusions and Art. 1 Par. 2 - Detailed exclusions). The list of exclusions is relatively extensive<sup>18</sup>. Hence, speaking of the application of the new act one should keep in mind the areas of jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession.

The scope of the regulation, determined like that and referring to the name of this legislation, already *prima facie* indicates what mechanisms of private international law this act refers to. The main adjustments of the Regulation are primarily those relating to jurisdiction in matters of cross-border succession and the law applicable to the succession case, that is, the areas in which certain chaos has hitherto prevailed in the European Union<sup>19</sup>.

### 3. JURISDICTION

One must start with the fact that in Art. 4 of the Regulation No. 650/2012, the European Union legislature established the general principle on the jurisdiction of the courts of the Member States in matters of succession<sup>20</sup>. According to this provision, 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. Jurisdiction is thus determined by the habitual residence of the deceased at the time of his death<sup>21</sup>. This

<sup>16</sup> P.A.M. Lokin, «De verwijzingsregels van de Erfrechtverordening : een vergelijking met huidige Nederlandse erfrechtelijke verwijzingsregels», 63 *SEW: Tijdschrift voor Europees en economisch recht* (2015), pp. 173-181.

<sup>17</sup> Reinhold Geimer, «Die europäische Erbrechtsverordnung in Überblick», [in:] Johannes Hager (Ed.), *Die europäische Erbrechtsverordnung*, Baden-Baden 2013, pp. 9 *et seq.*

<sup>18</sup> Jadwiga Pazdan, [in:] Maksymilian Pazdan (Ed.), *System prawa prywatnego. Prawo prywatne międzynarodowe*, vol. 3, Warszawa 2015, p. 697.

<sup>19</sup> Mariusz Załucki, [in:] Mariusz Załucki (Ed.), *Unijne rozporządzenie spadkowe Nr 650/2012*, Warszawa 2015, pp. 31-37.

<sup>20</sup> Sarah Geber, *Die internationale Zuständigkeit nach der VO Nr. 650/2012*, Saarbrücken 2014, p. 19.

<sup>21</sup> Richard Frimston, [in:] Ulf Bergquist, Domenico Damascelli, Richard Frimston, Paul Lagarde, Felix Odersky, Barbara Reinhartz, *Commentaire du règlement européen sur les successions*, Paris 2015, pp. 57-62.

principle is undoubtedly the backbone of the system of succession established by the Regulation No 650/2012. The habitual residence becomes in European law of succession –after the entry into force of the Regulation– the basic category<sup>22</sup>. To this term is referred, amongst others, also the adjustment associated with an indication of applicable substantive law (Art. 21 of the Regulation), as below. The term «habitual residence» refers to the place where the testator had his centre of life and thus it becomes the primary connector with the EU international law of succession, which is a circumstance, described in the collision standard, being an expression of the relationship between a particular case and a State and the laws of that State<sup>23</sup>. It should be recalled here that previously in some European countries jurisdiction and especially applicable law were indicated inconsistently. In the case of the law indication not only one connector (usually the nationality) was used, but two, due to the submission of the estate inheritance (or other specified categories of goods, such as businesses) to the law of their location place. That indication of law applicable to the inheritance case using two different connectors depending on the nature of the items included in the succession led to the collision divisibility of the estate, also known as a collision fragmentation of the estate, or a situation in which the succession is divided into separate assets subject to inheritance by different substantive laws, in which cases courts in different countries often ruled<sup>24</sup>. It is the reverse situation to the so-called the collision uniformity of succession (uniformity of the succession status), and thus to the situation where law applicable to the succession case is indicated with a single connector, thereby the succession estate as a whole can be inherited under one substantive law<sup>25</sup>.

In fact, from the very beginning of work on the succession regulation the EU legislator opted for the principle of the collision uniformity of the succession, which was met with the widespread acceptance of the doctrine<sup>26</sup>. Hence, in the Regulation there are provisions based on the connector of the habitual residence of the deceased. The justification for the use of this connector, both for jurisdiction, as well as for substantive law, was included in Regard 27 of the Preamble to the Regulation No 650/2012, where it was indicated that «the rules of this Regulation are devised so as to ensure that the authority dealing with the succession will, in most situations, be applying its own law».

<sup>22</sup> Cf. Janeen Carruthers, «Party Autonomy in the Legal Regulation of Adult Relationships: What Place for Party Choice in Private International Law?», 61 *International & Comparative Law Quarterly* (2012), pp. 886 *et seq.*

<sup>23</sup> Cf. Richard Frimston, „Brussels IV? Conflicts of the Laws of Succession in the European Union: Perspectives for Harmonisation”, *Private Client Business* (2004), pp. 352-354.

<sup>24</sup> Jerzy Pisuliński, „W sprawie rozgraniczenia statutu rzeczowego i spadkowego. Uwagi na tle projektu rozporządzenia w sprawie jurysdykcji, prawa właściwego, uznawania i wykonywania orzeczeń sądowych i dokumentów urzędowych dotyczących dziedziczenia oraz w sprawie utworzenia europejskiego certyfikatu spadkowego”, 10 *Problemy Prawa Prywatnego Międzynarodowego* (2012), pp. 19-32.

<sup>25</sup> Eva Lein, «A Further Step Towards a European Code of Private International Law. The Commission Proposal for a Regulation on Succession», 11 *Yearbook of Private International Law* (2009), p. 116.

<sup>26</sup> Instead of many sources cf. Anna Wysocka-Bar, *Wybór prawa w międzynarodowym prawie spadkowym*, Warszawa 2013, pp. 113 *et seq.*

With this solution, according to the EU legislator, in many cases, there will, therefore, be no need to examine, and then to use foreign legal regulations. If the EU legislature's assumptions are correct (which in fact will be shown only by practice), then essentially courts of a Member State will apply their national law to succession cases.

In light of the foregoing, it should be noted that the rule of Art. 4 of the new EU normative act defines the overall jurisdiction of the courts of the Member State in matters of succession, using at the same time the connector leading to achieving the set goal (creating a situation where the court of a Member State, in principle, will apply its domestic law to the succession case). It regulates at the same time competence of judicial authorities, but also of other authorities and legal professionals with competence in matters of succession and exercising judicial functions (Cf. Art. 3, Par. 2 of Regulation No. 650/2012). Yet the general jurisdiction exclusion of judicial bodies in the Member State of the deceased's habitual residence at the time of death is possible under the Regulation. It may result, e.g. from the content of a prorogation agreement (a choice-of-court agreement), as referred to in the contents of Art. 5 of the Regulation No. 650/2012<sup>27</sup>. According to this provision, in the event when the law chosen by the deceased to govern succession after him in accordance with Art. 22 of the Regulation is the law of a Member State, the parties concerned may agree that the exclusive jurisdiction to rule on any succession matter has the court or the courts of that Member State. It is one of the mechanisms that allow using its own law by the authority dealing with the succession. The choice of such jurisdiction is based on consent, where the interested parties (and therefore primarily the heirs) may agree that the succession proceedings will take place not in the jurisdiction of the last habitual residence of the deceased, but in the Member State whose citizen was the deceased<sup>28</sup>. This is –as it can be judged– a very interesting mechanism, which in the future may play a significant role.

Further reductions in the jurisdiction of the courts of the habitual residence of the deceased at the time of his death may also result from the fact of entrusting by the deceased (*proffessio iuris*) of the total succession matters after him to the law of the country whose national he was at the time of making the choice or at the time of death (Art. 6-9 in conjunction with Art. 22 of the Regulation No. 650/2012)<sup>29</sup>. However, according to Art.10 of the Regulation No 650/2012, where the habitual residence of the deceased at the time of his death is not located in a Member State, the courts of the Member State in which there are assets of the estate, nevertheless have jurisdiction to rule on the total number of cases relating to the inheritance, if: a) the deceased had at the time of death the nationality of that Member State or in cases where there is no such circumstance; b) the deceased had his previous habitual residence in that Member

<sup>27</sup> Felix Oderski, [in:] Ulf Bergquist, Domenico Damascelli, Richard Frimston, Paul Lagarde, Felix Odersky, Barbara Reinhartz, *Commentaire du règlement...*, pp. 63 et seq.

<sup>28</sup> Maciej Rzewuski, [in:] Mariusz Załucki (Ed.), *Unijne rozporządzenie spadkowe...*, pp. 72-79.

<sup>29</sup> *Ibidem*, pp. 81-91.

State, provided that from the time of bringing the case to court there passed not more than five years after the change of the habitual residence<sup>30</sup>. In turn, according to the content of Art. 11 of the Regulation No 650/2012, in the case 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<sup>31</sup>.

A significant limitation of general jurisdiction of judicial authorities is the provision of Art. 12 of the Regulation No. 650/2012, 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<sup>32</sup>. The EU legislator refers in this way to the specific situation of the partial exclusion of jurisdiction when the estate of the deceased is not only in the countries covered by the Regulation No 650/2012, but also in countries where the regulation cannot be applied. This is about situations when, according to the legal order of a third country the exclusive jurisdiction of the court of that State was established. This happens e.g. due to the location of the property. In this respect, the Regulation is therefore an act that in itself contains some mechanisms to rationalize its application<sup>33</sup>.

Basically, the jurisdiction rules of the Regulation are intended to allow a relatively broad jurisdiction in this matter, which is to facilitate the practice and allow conducting the succession case in a convenient place, especially for the heirs of the deceased. The EU legislator did not decide to adopt the doctrine of *forum non conveniens* whose essence boils down to granting the court, which seised a succession case, the power to decide not to rule on it, with a reference to the possibility of a more appropriate judicial forum in another state, e.g. due to the access to the evidence<sup>34</sup>.

#### 4. APPLICABLE LAW

With regard to the mechanisms of indicating the law applicable to the succession under the provisions of the Regulation, they are also, at least from the viewpoint of some

<sup>30</sup> Andrea Bonomi, [in:] Andrea Bonomi, Patrick Wautelet (Eds.), *Le droit européen des successions. Commentaire du Règlement n°650/2012 du 4 juillet 2012*, Brussels 2013, pp. 211 et seq.

<sup>31</sup> Cf. Javier C. González, *El Reglamento Europeo 650/2012 de 4 de Julio 2012. Análisis crítico*, Granada 2014, pp. 100-103.

<sup>32</sup> Ena-Marlis Bajons, „Internationale Zuständigkeit und anwendbares Recht in Erbsachen”, [in:] Martin Schauer, Elisabeth Scheuba (Eds.), *Europäische Erbrechtsverordnung*, Wien 2012, p. 35.

<sup>33</sup> Cf. Jarosław Turtukowski, [in:] Mariusz Załucki (Ed.), *Unijne rozporządzenie spadkowe...*, pp. 96 et seq.

<sup>34</sup> On its historical development see, for example: Paxton Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 Columbia Law Review (1929), pp. 1-34.

European national legal systems, a breakthrough solution. The Regulation breaks, as described above, with the traditional principle, in this area, of the testator's national law competence at the time of his death just for the aforementioned connector of habitual residence. So far, a number of legislations were using in this respect the connector of citizenship. Currently, the Regulation, pursuant to the provisions referred to in the contents of Art. 21 and 22, provides that as a rule 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 (Art. 21 Par. 1 of the Regulation)<sup>35</sup>. The connector of substantive law is therefore the same as in jurisdiction.

The EU legislator, however, does not limit connectors only to the connector of habitual residence. The connector can also be a choice of law made by the testator<sup>36</sup>. According to the content of Art. 22 Par. 1 of the Regulation, every testator 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<sup>37</sup>. This choice of law is, moreover, a very interesting instrument, and the provision of Art. 22 of the Regulation is one of the most important of its provisions<sup>38</sup>.

As it can easily be noted, the choice of law made by the testator affects, among others, also the rules of jurisdiction set out in the Regulation. The law chosen by the testator, if it is the law of a Member State is after all the only basis for the choice of *forum prorogatum*, in accordance with Art. 5 of the Regulation No. 650/2012, and it also gives the ability to decline the general jurisdiction of Art. 4 by the same court seised for the matter, if it considers that the court of the State of the chosen law gives better opportunities to rule on the succession (Art. 6 of Regulation No 650/2012)<sup>39</sup>.

Choice possibilities of the law applicable to the succession by the testator are not great, which results directly from the commented provision<sup>40</sup>. As it can be believed this is because the practice of Member States was not particularly inclined towards using the choice of law applicable to the succession in their regulations concerning conflicts of laws. However, there were some regulations, such as the Polish legislation, where the choice of law was approached a bit more comprehensively<sup>41</sup>. Currently, the EU

<sup>35</sup> Mariusz Załucki, *Uniform European Inheritance Law...*, p. 28.

<sup>36</sup> As can be best judged, there is a tendency to extend the party autonomy in the area of succession law. See, among others, Erik Jayme, «Party Autonomy in International Family and Succession Law: New Tendencies», 11 *Yearbook of Private International Law* (2009), pp. 1-10.

<sup>37</sup> Cf. Anna Wysocka-Bar, *Wybór prawa w międzynarodowym prawie...*, pp. 26 *et seq.*

<sup>38</sup> Eveline Ramaekers, «Cross-border Successions. The New Commission Proposal: Contents and Way Forward. A Report on the Academy of European Law Conference of 18 and 19 February 2010, Trier», 15 *Electronic Journal of Comparative Law* (2011), pp. 4-5.

<sup>39</sup> Cf. Paweł Czubik, [in:] Mariusz Załucki (Ed.), *Unijne rozporządzenie spadkowe...*, pp. 145 *et seq.*; Andrea Bonomi, [in:] Andrea Bonomi, Patrick Wautelet (Eds.), *Le droit européen...*, pp. 298 *et seq.*

<sup>40</sup> Matteo A. Pollaroli, «EU Regulation no. 650/2012 and Access to New Forms of Intergenerational Transfer of Wealth», 2 *Ricerche Giuridiche* (2013), Supplemento, pp. 410-411.

<sup>41</sup> Cf. Art. 64 Par. 1 of *Polish Private International Law Act* of 2011.



legislator has chosen to foresee this possibility for the law of every country of citizenship (held at the time of making the choice or at the time of death). In fact, those who will have more than one nationality will have a wider choice. The EU legislator in the Regards to the Regulation (item 38 of the Regulation Regards) explains the limitation of the choice to the choice of the nationality law by the intention to ensure a connection between the deceased and the law chosen and to avoid a law being chosen with the intention of frustrating the legitimate expectations of persons entitled to a reserved share. These restrictions do not seem to be justified<sup>42</sup>.

Under international law of succession, these are some novelties whose frequent application in practice can be expected in the future. The choice of law clause itself may help to prevent the chaos that would ensue if the law of the habitual residence of the deceased differed significantly in its contents from the national law of the testator. This will depend, however, on the intention of the testator, who either will make the choice of his national law, or will leave the law applicable to his succession to the provisions of Regulation using the connector of the place of habitual residence.

The result of a construction adopted in such a way is the provision indicated in the text of Art. 20 of the Regulation, according to which any law specified by the Regulation shall be applied whether or not it is the law of a Member State<sup>43</sup>. The law applicable to the succession indicated by the connector from Art. 21 or 22 of the Regulation will be *ius*, and thus substantive grounds to govern the succession, irrespective of whether or not it is the national law of any Member State of the European Union or the law of another country. Therefore, if a Member State court will have jurisdiction over the succession (*forum*), which is established pursuant to Art. 4-11 of the Regulation and the case will fall within the scope of the Regulation application (Art. 1, Par. 1 of the Regulation), then this act, as a general regulation of the EU collision law in matters of succession will be the grounds to indicate the applicable substantive law (*ius*). The law indicated in this way will not necessarily be the law of one of the European Union States<sup>44</sup>.

Therefore, it follows from the contents of Art. 20 of the Regulation that there is a prescription to apply the substantive law of succession specified by the Regulation by the courts of the Member States to all succession matters examined by the courts regardless of whether or not it has a connection with any of the European Union countries. The applicable law specified by the Regulation is appropriate for the whole of the succession. This means that the EU legislator has introduced the principle of a uniform succession status, which prevents fragmentation of the succession status because of the application of the Member States' conflict rules in which individual items of the property, included in the inheritance estate, are located. Some problems that

<sup>42</sup> Paweł Czubik, [in:] Mariusz Załucki (ed.), *Unijne rozporządzenie spadkowe...*, p. 146.

<sup>43</sup> Andrea Bonomi, [in:] Andrea Bonomi, Patrick Wautelet (Eds.), *Le droit européen...*, p. 280.

<sup>44</sup> Dennis Solomon, «Das allgemeine Kollisionsnorm (Art. 21, 22 EuErbVO)», [in:] Anatol Dutta, Sebastian Herrler (Eds.), *Die Europäische Erbrechtsverordnung*, München 2014, pp. 20 et seq.

may arise against this background, and which can be predicted today, relate to, for example, some issues of inheritance concerning immovable property or property rights whose nature differs in the different European legal systems. It is true that in this respect the Regulation foresees the concept of adapting property rights, which boils down to covering by its disposition the situation in which a given person invokes his right of property vested in him under the laws applicable to the succession, and this law is not known to the law of the Member State in which it has been invoked. Then this right is subject to, if necessary, and insofar as this is possible, adaptation to the closest equivalent property right under the law of that State, taking into account the objectives and interests, served by this specific property right, and the effects attached to it. In practice, however, this will not be so obvious<sup>45</sup>.

Moreover, as it can be predicted, also in other cases the application of a foreign law for the testator or his relatives in a given succession will be difficult; and certainly difficult to be accepted socially. This will happen, e.g. when a group of heirs prescribed by an alien statute will be different than resulting from their national law, or if the legal mechanisms for the protection of persons close to the deceased will not allow to achieve the goal arising from the national legislation. The intention of the EU legislature, in such cases, however, is the use of the foreign law as far as there is no manifest inconsistency of the law designated by the Regulation as the law applicable with the public policy of the Member State of the court dealing with the succession. Then, there is a possibility, arising from the content of Art. 35 of Regulation No 650/2012, not to apply the applicable law specified by the Regulation. However, this opportunity will need to be more widely explained in the judicial decisions. Today, a number of issues around the situation when to use this clause of public order are not clear.

## 5. EUROPEAN CERTIFICATE OF SUCCESSION

The new solution, and as it can be judged desirable –because of the previous practice of documenting rights to inheritance, which was extremely varied– is a European Certificate of Succession<sup>46</sup>. So far, in the various European legal systems the proof of the heir's status has been established in a different way. In the case of distributed inheritance that is located on the territory of more than one country, an heir to demonstrate his powers often had to initiate several succession proceedings before the authorities of different countries, which obviously was unsatisfactory and could lead to questionable, conflicting decisions in different countries<sup>47</sup>. Identification of the heirs, legatees, executors of wills or administrators of estates has often accounted for a

<sup>45</sup> Cf. Bram Akkermans, «Standardisation of Property Rights in European Property Law», *Maastricht European Private Law Institute Working Paper* (2013), No. 9, pp. 1 *et seq.*

<sup>46</sup> Jens Kleinschmidt, „Optionales Erbrecht: Das Europäische Nachlasszeugnis als Herausforderung an das Kollisionsrecht“, 77 *RabelZ* (2013), pp. 725 *et seq.*

<sup>47</sup> Christian Hertel, „European Certificate of Succession – content, issue and effects“, 15 *ERA Forum* (2014), pp. 393-407.

problem in practice so far, although perhaps not so much in the domestic law of individual Member States, but at the cross-border scale. The international dimension of inheritance significantly complicated and lengthened in time completion of the specific succession case. As it is known, the national documentation of the succession rights issued in accordance with the provisions of the individual Member States as a rule invokes effects only in that Member State, and does not automatically extend to other European Union countries. In the past this required additional procedures. Therefore, identification of heirs and other entities entitled on a transnational scale using a single document was seen as important since the beginning of the legislative work on the regulation<sup>48</sup>.

Pursuant to Art. 62 of the Regulation No 650/2012 a new instrument was created, that is a European Certificate of Succession, which allows, among others, to demonstrate: a) the status or rights of each heir or, as the case may be, each legatee mentioned in the Certificate and their shares of the estate; b) the attribution to the heir(s) to or, as the case may be, to the legatee(s) listed in the Certificate of a specific asset or specific assets forming part of the estate; c) the rights of the person mentioned in the Certificate to execute the will or administer the estate (Art. 63 of the Regulation No. 650/2012)<sup>49</sup>. According to the content of Art. 69 of the Regulation No 650/2012, it produces its effects in all Member States without any special procedure being required. It is presumed to demonstrate accurately some elements that 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 is 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<sup>50</sup>.

The European Certificate of Succession is thus a document of an essentially uniform character across the European Union. It is to facilitate the heirs and other specified therein individuals to document their rights to succession in all European Union countries. In addition, although against its use already today, some problems can be predicted, even concerning the collision of this Certificate content with the content of national documents, as these issues are not obvious at all and they will give rise to interpretation difficulties; yet, it is essentially a tool, which significantly facilitates issues of cross-border succession.

<sup>48</sup> Richard Frimston, «Brussels IV: the Draft Succession (and Revocation of Wills) Regulation», *Private Client Business* (2010), p. 109.

<sup>49</sup> Paul Lagarde, „Les principes de base du nouveau règlement européen sur les successions”, 101 *Revue critique de droit international privé* (2012), pp. 691-732.

<sup>50</sup> Javier C. González, *El Reglamento Europeo 650/2012...*, p. 328.

## 6. WHAT'S NEXT?

The new legal act, described by many as revolutionary, is a solution, which after 17 Aug. 2015, due to the provision of Art. 83 Para. 1 of the Regulation<sup>51</sup> (applicable to the succession of persons who die on or after that day), will be the grounds for all succession decisions of the European Union. It is assumed that it will simplify cross-border inheritance and contribute to the harmonization of practices across Member States. On the other hand, the solutions proposed by the EU legislator may be difficult to be accepted for the society. Indeed, although certain facilities can affect law enforcement authorities, the citizens can be often surprised by the effects of this legislation. Therefore, it is important to raise in the society some awareness of the importance of this act for the planning of their matters mortis causa. Application of the law of habitual residence in lieu of the national law does not necessarily have to be a surprise. Moreover, it can bring unexpected benefits whose achievement has not been allowed by the legal situation so far.

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<sup>51</sup> Cf. Mariusz Załucki, [in:] Mariusz Załucki (ed.), *Unijne rozporządzenie spadkowe...*, p. 358.