

## THE OPTION TO CHOOSE THE LAW APPLICABLE TO SUCCESSION UNDER THE EU SUCCESSION REGULATION

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The EU Succession Regulation<sup>2</sup> (hereinafter: ‘Regulation’) applies to the succession of persons who died on or after 17 August 2015 [Art. 83(1)]. The Regulation standardises international succession law provisions within the European Union.<sup>3</sup> This paper focuses on the conflict-of-laws provisions offered by the Regulation. The Regulation provides a limited possibility of choice of law. However, the established choice of law regime is anything but easy to understand and its application proves to be complex. The first part of this paper outlines in general some of the features of the European conflict-of-laws rules as under the Regulation. The second part provides a comprehensive overview of the choice of law regime under the Regulation. The third part addresses particular constellations of choice of law.

### 1. Determining the law applicable to succession under the Regulation

#### 1.1. General

One of the ‘guiding principles’ of the Regulation is the so-called ‘unitary approach’ or ‘unity of the *lex successionis*’, laid down in Art. 23(1): ‘The law determined pursuant to Art. 21 or Art. 22 shall govern the succession as a whole.’ The unitary approach

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<sup>1</sup> The author would like to express his sincere gratitude to Professor László Burián (Budapest) for his attentive proofreading of the manuscript and his useful comments. The author is also grateful to Janet G. Reznicek (Salzburg) and to Jacob Hardman (Newcastle upon Tyne) for the linguistic support.

<sup>2</sup> 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 of a European Certificate of Succession, OJ L 201, 27. 07. 2012, p. 107–134. (ELI: <http://data.europa.eu/eli/reg/2012/650/oj>).

<sup>3</sup> Except Denmark, Ireland (and UK).

means that all the matters related to succession are subject to a single legal system, thus governing succession from its inception to the distribution of the estate, including liability for debts under succession (Art. 23(2)). The applicable law can be any law, whether it is the law of a Member State or not (universal application, Art. 20). A novelty of the Regulation is its rule designating the applicable law for transnational succession cases *in absence* of a choice of law. In this respect, the Regulation favours the law of the State in which the deceased had their habitual residence at the time of death. This is a deviation from the ‘nationality rule’ (i.e. the law applicable to succession is the law of the State whose nationality the deceased held), which, apparently, has been the most applied national conflict-of-laws resolution in Europe, before the Regulation replaced such national rules as of 17 August 2015. Accordingly, *in absence of choice of law*, Art. 21(1) provides that the law applicable to succession is the *law of the State of habitual residence at the time of death of the deceased*. The term ‘habitual residence’ is, like all other terms under the Regulation, an autonomous concept of EU law and thus subject to autonomous interpretation.<sup>4</sup> The ‘law of the State of habitual residence’ is not limited to Member States’ laws but can also be the law of a state which does not fall under the territorial scope of the Regulation (hereinafter: ‘third States’). Thus, having regard to Art. 21(1), the last habitual residence of the deceased has become the main conflict of laws rule in European international succession law. Nevertheless, Art. 21(2) contains an escape clause from this, defining that ‘by way of exception’, the law applicable might be the law of another State if ‘it is clear from all the circumstances of the case that, at the time of death, the deceased was manifestly more closely connected’ [with another State][...].<sup>5</sup> The ‘nationality rule’ as a connecting factor has been regarded as outdated, considering that nowadays EU nationals are moving with increasing frequency from one Member State to another. As a result – and especially in the context of the EU – nationality can no longer be regarded a reliable indicator of the connectedness of a person to their home country’s law. The ‘nationality rule’ does not take this contemporary reality into consideration, nor does it reflect the willingness of citizens in Europe to integrate.<sup>6</sup> In accordance with this, the Commission’s legislative proposal stated that “The Regulation retains this law [of habitual residence], instead of the law of nationality, as it coincides with the centre of interest of the deceased and often with the place where most of their property is located. Such a connection is more favourable to integration into the Member State of habitual residence and avoids any discrimination regarding persons who are resident there without possessing the relevant nationality.”<sup>7</sup>

<sup>4</sup> Cf. Case C-80/19 Opinion of Advocate General Campos Sánchez-Bordona: Request for a preliminary ruling from the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania) [ECLI:EU:C:2020:230] para. 46.; Rolf WAGNER: Aktuelle Rechtsprechung zur EU ErbVO. *Zeitschrift für Erbrecht und Vermögensnachfolge (ZEV)*, vol. 27., no. 4. (2020) 205.

<sup>5</sup> A direct consequence of this escape clause will be that the forum has to apply foreign law, even third State law.

<sup>6</sup> Melanie SCHMITZ: *Die Rechtswahlfreiheit im europäischen Kollisionsrecht*. Berlin, Duncker & Humblot, 2017. 99., 100.

<sup>7</sup> 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

Opting for the law of the state of habitual residence was, however, also criticised. It is contended that this rule creates space for misuse. For example, the testator could change the unfavourable applicable law simply by moving to another country, which can interfere with the interests of family members entitled to the so-called ‘reserved share’. But family members can also misuse this rule, in that they might dictate the testators’ movement between countries, with an eye to more favourable rules on ‘reserved share’ under that country’s law.<sup>8</sup> Furthermore, the habitual residence has to be determined on a case-by-case basis, which is not always an easy task.<sup>9</sup>

In this context, granting the option of choice of law can be considered as a kind of compromise between the habitual residence rule as a ‘modern’ interpretation of succession and the ‘nationality rule’ as the traditional connecting factor in the field of international succession law. The option of choice of law thus makes the paradigmatic switch from the ‘nationality’ to the ‘habitual residence’ rule easier (or perhaps more precisely: *more acceptable*). It balances the objective of stronger integration of people at the place where they actually live and the legitimate expectations of testators with a strong connection to the country whose nationality they possess.<sup>10</sup>

## 1.2. European international succession law under the Regulation

The conflict-of-laws rules in the Regulation can be separated into two blocks: The rules on the law applicable to *govern succession as a whole* (Art. 21 and Art. 22, *Erbstatut*) and the rules on the validity of dispositions upon death (Art. 24–27, *Errichtungsstatut*). The latter includes the rules on the *law applicable regarding the admissibility and substantive validity, and the conditions of its modification as far as unilateral dispositions of property upon death are concerned* (Art. 24), and the *binding effects*

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creation of a European Certificate of Succession COM(2009) 154 final, p. 6. (4.3. Chapter III: Applicable law, Art. 16) – (hereinafter: ‘*Proposal*’).

<sup>8</sup> Patrick RICHTERS: Anwendungsprobleme der EuErbVO im deutsch-britischen Rechtsverkehr. *Zeitschrift für Erbrecht und Vermögensnachfolge (ZEV)*, vol. 19., no. 11. (2012) 579.; SCHMITZ op. cit. 100–101; Peter MANKOWSKI: Der gewöhnliche Aufenthalt des Erblassers unter Art. 21 Abs. 1 EuErbVO. *Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)*, vol. 35 no. 1. (2015) 43., 45.

<sup>9</sup> Dieter MARTINY: Internationale Zuständigkeit und gewöhnlicher Aufenthalt des verstorbenen Grenzpendlers (zu KG, 26.4.2016 – 1 AR 8/16). *Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)*, vol. 38., no. 1. (2018) 31–33.; Thomas PREIFFER: Ruhestandmigration und EU-Erbrechtsverordnung. *Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)*, vol. 36 (2016) 310–312.; Heinz Jürgen STEINIGER: Neues Europäisches Erbrecht in Kraft getreten – der Beratungsbedarf ist nicht einmal ansatzweise gedeckt. *juris – Die Monatszeitschrift (JM)* 2/2016. 47–48.; Stefan STADE: Die EU-Erbrechtsverordnung aus französischer Sicht. *Zeitschrift für die Steuer- und Erbrechtspraxis (ZErB)*, vol. 17., no. 3. (2015) 71. On the peculiarities of the assessment of the habitual residence with regard to the role of the intention to stay permanently and the stay to be considered ‘center of interests’ see Alexander STEINMETZ: EuErbVO: Beibehaltung des letzten gewöhnlichen Aufenthalts ohne Unterkunft im Herkunftsstaat? – Überlegungen zur Maßgeblichkeit des Erblasserwillens und zum „Mallorca-Rentner“. *Zeitschrift für Erbrecht und Vermögensnachfolge (ZEV)*, vol. 25., no. 6. (2018) 317–319.; with regard to the requirement that the change of habitual residence must result from the testator’s own free will and is not possible if the testator is legally incapable, see WAGNER op. cit. 205.

<sup>10</sup> SCHMITZ op. cit. 102.

between the parties and conditions of its dissolution as far as agreements to succession are concerned, respectively (Art. 25) (hereinafter: *matters of creation*). Furthermore, Art. 26 defines substantive validity for the purposes of Art. 24 and Art. 25, whilst Art. 27 addresses the law applicable to the formal validity of dispositions upon death.

By this distinguished tackling of the law applicable to govern the succession as whole on the one hand, and the rules on the validity of dispositions upon death on the other hand, the European legislator ensures the stability of the law applicable to the creation of a disposition of property upon death.<sup>11</sup> In contrast, the law applicable to succession as a whole (Art. 21) is subject to change, in conjunction with the testator's habitual residence. However, this stability is not of absolute nature, as it will not work alongside the public policy (*ordre-public*) of the forum Member State (Art. 35).

The Regulation makes a distinction between 'admissibility'<sup>12</sup> and 'substantive validity',<sup>13</sup> whereas these two concepts can also overlap. This is because 'admissibility' is an aspect of 'substantive validity': If for example the agreement to succession is inadmissible under the applicable law, this will, at the same time, mean that the agreement is null and void.<sup>14</sup>

'Admissibility' for the purposes of the Regulation should mean the possibility, under the applicable law, to make the particular unilateral disposition of property upon death or to conclude the particular agreement to succession.<sup>15</sup> Nonetheless, a provision which allows for a minor testator to draw up his will only in the form of a notarial will, is considered a formal requirement under Art. 27(3).<sup>16</sup> The meaning of substantive validity under the Regulation is defined in Art. 26. However, the list provided in Art. 26 should not be considered exhaustive.<sup>17</sup>

<sup>11</sup> Anatol DUTTA: Succession Regulation Art. 24. mn. 1. In: *Münchener Kommentar zum BGB*. Vol. 12. München, C. H. Beck, 2018.

<sup>12</sup> The German term is 'Zulässigkeit', the French term is 'recevabilité'.

<sup>13</sup> The German term is 'materielle Wirksamkeit', the French term is 'validité au fond'.

<sup>14</sup> Christos ZOUMPOULIS: Succession Regulation Art. 25, mn. 10. In: Haris P. PAMBOUKIS (ed.): *EU Succession Regulation No 650/2012: A Commentary*. Athens–München–Oxford–Baden-Baden, Nomiki Bibliothiki–C. H. Beck–Hart Publishing–Nomos, 2017.; Andrea BONOMI – Patrick WAUTELET (avec la collaboration d'Ilaria PRETELLI – Azadi Öztürk): *Le droit européen des successions: Commentaire du Règlement (UE) no 650/2012 du 4 juillet 2012, 2ème édition*. Bruxelles, Bruylant, 2016. 434–435.

<sup>15</sup> Georges KHAIRALLAH: La détermination de la loi applicable à la succession. In: Georges KHAIRALLAH – Mariel REVILLARD – Pascal CHASSAING (sous la direction de G. KHAIRALLAH, M. REVILLARD): *Droit européen des successions internationales: le règlement du 4 juillet 2012*. Paris, Defrénois, 2013. 63. mn. 141.; Felix ODERSKY: § 15. Anwendbares Erbrecht nach der Europäischen Erbrechtsverordnung, mn. 194. In: Rainer HAUSMANN – Felix ODERSKY (ed.): *Internationales Privatrecht in der Notar- und Gestaltungspraxis*. (Revised by the editors and Daniel SCHÄUBLE and Fabian WALL.) München, C. H. Beck, 2017.

<sup>16</sup> Constanze FISCHER-CZERMAK: Succession Regulation Art. 21, mn. 7. In: Astrid DEIXLER-HÜBNER – Martin SCHAUER (eds.): *Kommentar zur EU-Erbrechtsverordnung (EuErbVO)*. Wien, Manz, 2015.; ODERSKY op. cit. § 15, mn. 206.

<sup>17</sup> Andrea BONOMI – Azadi Öztürk: Das Statut der Verfügung von Todes wegen (Art. 24 ff. EuErbVO). In: Anatol DUTTA – Sebastian HERRLER (eds.): *Die Europäische Erbrechtsverordnung: Tagungsband zum wissenschaftlichen Symposium anlässlich des 20-jährigen Bestehens des Deutschen Notarinstituts am 11. Oktober 2013 in Würzburg*. München, C. H. Beck, 2014. 56–57. Cf. Tibor Szöcs: The European

In the wider context of this paper, the *regulation technique* regarding the law applicable on the *admissibility and substantive validity of unilateral dispositions of property upon death* (Art. 24), and on the *binding effects between the parties and the conditions of its dissolution as far as agreements as to succession are concerned* (Art. 25), is of particular importance and shall be addressed below.

### *1.2.1. Admissibility and substantive validity, as well as the binding effects between the parties and conditions of dissolution*

Regarding the aforementioned issues, the Regulation distinguishes between unilateral (testamentary) dispositions ('dispositions of property upon death', Art. 24) and testamentary agreements ('agreements as to succession', Art. 25). 'Agreements as to succession', presents a broad provision under the terms of the Regulation,<sup>18</sup> which includes, among others, the contractual appointment of heirs (contracts of inheritance)<sup>19</sup> and anticipated succession waiver agreements (see below 1.2.3.).

In absence of choice of law regarding *admissibility and substantive validity as well as the binding effects between the parties and conditions of dissolution* [cf. Art. 24(2) and Art. 25(3)], the law applicable in both cases will be the so-called hypothetical *lex successionis*, i.e. the law which would have been applicable to the succession of the testator if he had died on the day on which the disposition was made [Art. 24(1)], or when the agreement was concluded [Art. 25(1), Art. 25(2)]. The hypothetical law applicable can be either, *in absence of a choice of law*, the law of the state in which the testator has their habitual residence at the time the disposition is made or the agreement as to succession is concluded [Art. 21(1)], or the testator's national law, including future national law *on the basis of the testator's choice of law* (Art. 22). Nevertheless, to assess the hypothetical law applicable in circumstances where the disposition of property upon death was made several years before will not be an easy task for the court. Therefore, it is also advisable for the testator to specify their habitual residence in their disposition of property upon death. Though not binding for the court, such specification helps to assess the hypothetical law. Whilst assessing the hypothetical law applicable to succession as a whole, as well as the law applicable to the creation (admissibility and substantive validity) of the disposition of property upon death, a possible *renvoi* has also to be taken into consideration.<sup>20</sup> Nonetheless, pursuant to Art. 34(2), there will be no *renvoi* if the hypothetical law to govern succession as a whole has been determined by the testator through choice of law pursuant to Art. 22. A *renvoi*

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Succession Regulation from the Perspective of the First Three Years of its Application. *ELTE Law Journal (ELTE LJ)*, 1/2019. 54–55. (<https://eltelawjournal.hu/the-european-succession-regulation-from-the-perspective-of-the-first-three-years-of-its-application/>).

<sup>18</sup> Art. 3(1) lit. ( 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.”

<sup>19</sup> Evident, for example, under German law (§§ 2274–2302 GerCC), French law (Art. 1082, 1083, 1093 FraCC), Spanish law fArt. 1341(2) EspCC), or Hungarian law (§§ 7:48–7:53 HunCC), etc.

<sup>20</sup> DUTTA op. cit. Succession Regulation Art. 24, mn. 7.

is correspondingly excluded in cases where a choice of law is available regarding admissibility and substantive validity of a disposition of property upon death pursuant to Art. 24(2).<sup>21</sup>

The Regulation provides a more elaborate approach as regards agreements to succession and differentiates between agreements to succession concluded by one testator [Art. 25(1)] and those concluded by several testators [Art. 25(2)]. If there are *several testators for the agreement to succession*, the Regulation splits between the law applicable to the *admissibility* of the agreement [*first* subparagraph of Art. 25(2)] and the law applicable to the substantive validity of the agreement, including its binding effects between the parties, and the conditions of its dissolution of the agreement [*second* subparagraph of Art. 25(2)]. The *admissibility* is assessed for each testator individually on the basis of the *hypothetical applicable law at the time of conclusion of the agreement* (applicable on the basis of choice of law to govern succession as a whole pursuant to Art. 22, or in absence of such a choice pursuant to Art. 21). It is possible that only one party will choose the law applicable. In such a case, the law applicable in relation to admissibility for the other party, or parties, will be determined according to the general rule (habitual residence at the time of the agreement's conclusion). It is also possible that multiple testators choose different laws. However, it is an established prerequisite that the agreement to succession is admissible according to each applicable law. If the admissibility of an agreement has to be assessed according to more than one law, and the agreement is *admissible* regarding each testator involved (i.e. under each applicable law in accordance with Art. 25(2) *first* subparagraph, the substantive validity of the agreement, its binding effects between the parties and the conditions for its dissolution are satisfied), it will be governed by the law with which the agreement as to succession *has the closest connection*. A possible objection to 'the closest connection' principle is that it is not easy to predict and is not certain at the time the agreement is concluded.<sup>22</sup> Nevertheless, the 'closest connection' rule as a 'final ballot' ('Stichentscheid') for the European legislator is the preferred solution. A less preferable solution would be to assess substantive validity (etc.) *for each testator individually* on the basis of *each hypothetical lex successionis* in accordance with the second subparagraph of Art. 25(2).<sup>23</sup>

Furthermore, it is important to point out the 'tension' which might arise between the law governing admissibility, substantive validity and the binding effects of the agreement as to succession and the 'law governing succession as a whole', if these two are not one and the same. Such a situation can arise if the testator (or testators), at the time of concluding the agreement as to succession, lives (or live) in the participating EU Member State X, while living in the participating EU Member State Y at the time of death. In case of a choice of law pursuant to Art. 25(3), which is *limited* to matters of admissibility, substantive validity and its binding effects between the parties of an agreement as to succession (i.e. in absence of *any* choice of law), the law governing

<sup>21</sup> DUTTA op. cit. Succession Regulation Art. 24, mn. 13.

<sup>22</sup> ZOUMPOULIS op. cit. Succession Regulation Art. 25, mn. 24.

<sup>23</sup> Kathrin KROLL-LUDWIGS: Rechtswahl- und Gerichtsstandvereinbarungen nach der Europäischen Erbrechtsverordnung. In: *Notar – Monatsschrift für die gesamte notarielle praxis*, 3/2016. 78.

admissibility, substantive validity and binding effects as between the parties [Art. 25(1)-(3)] will differ from the ‘law governing their succession as a whole’ [Art. 21(1)]. It is possible that the dispositions of property upon death contained in the agreement and drafted in accordance with law X may contradict provisions of substantive law of law Y, applicable to govern succession as a whole pursuant to Art. 21(1), as a consequence of an individual moving into participating EU Member State Y. As a result, the dispositions of property upon death drafted according to law X have to be recharacterised and adopted within law Y as far as possible. Nevertheless, it is also possible that certain dispositions (e.g. appointment of an heir for provisional succession or reversionary inheritance) will become ineffective.<sup>24</sup> Such difficulties are essentially pre-programmed, since agreements as to succession are unknown in many legal systems (specifically the contractual appointment of an heir in the form of a contract of inheritance), or their binding effects are considered differently. Thus, there is a lack of a *comparable basis necessary* for such a legislative solution.<sup>25</sup>

### 1.2.2. Joint will with binding effect

The correct legal classification of joint wills with binding effect, in the context of the Regulation, is a question raised and discussed especially in German legal literature.<sup>26</sup> 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”, falls under the category of ‘agreements as to succession’ [Art. 3(1) lit. (b)]. Generally speaking, the binding effect can be assessed if, although a unilateral revocation or withdrawal from agreement is possible, the hypothetical applicable law to govern succession sets out additional requirements, which go beyond the freedom to revoke a testamentary disposition.<sup>27</sup>

There is little doubt that *joint wills of spouses with binding effect* – e.g. in the form of the so-called ‘Berliner Testament’ – can also fall under this category.<sup>28</sup> It is the binding effect which makes joint wills suitable to be considered ‘agreements as to succession’. However, relying on Art. 25(1) or Art. 25(2) does not seem possible without giving rise to a vicious circle.<sup>29</sup> The joint will with *binding effect* and the requirement of ‘reciprocity’ within this categorisation is a particularity of certain legal systems, e.g. German law. The ‘reciprocity’ requirement means that the testators involved have disposed of their property reciprocally, each for the benefit of the other, meaning that each testator disposed of their property upon consideration of the other testator’s disposition. On the

<sup>24</sup> ODESKY op. cit. § 15, mn. 262.

<sup>25</sup> KROLL-LUDWIGS op. cit. 78.

<sup>26</sup> For an overview of the difficulties arising from the unclear status of joint wills under the Succession Regulation as well as possible approaches for a solution to the arising difficulties, see Szócs (2019) op. cit. 47–52.

<sup>27</sup> ODESKY op. cit. § 15, mn. 225.

<sup>28</sup> SCHMITZ op. cit. 210.; KROLL-LUDWIGS op. cit. 80.

<sup>29</sup> KROLL-LUDWIGS op. cit. 80.

one hand, the *prevailing view* in German legal literature considers such joint wills by implying reciprocity as ‘agreements to succession’ pursuant to Art. 3(1) lit. b) of the Regulation.<sup>30</sup> The reciprocity of the dispositions is considered a satisfactory attribute of the joint will to qualify as an ‘agreement as to succession’ under the Regulation. The binding effect, as an essential ‘feature’ of an agreement to succession, shall exist if in the particular (national) law, the conditions set out for the unilateral revocation or the unilateral modification of the disposition *are more restrictive* than the conditions set out for the revocation or modification of a testamentary disposition.<sup>31</sup> § 2271(1) GerCC in conjunction with § 2296(2)<sup>32</sup> GerCC requires that for a revocation of a disposition in a joint will to be effective, the revocation must be received by the other testator (spouse). As such, the joint will with reciprocal dispositions under German law shall be considered an agreement as to succession, to which Art. 25 of the Regulation will apply.<sup>33</sup> On the other hand, the minority opinion argues that, having regard to the definitions in Art. 3(1) lit. (c) and lit. (d), the term ‘disposition of property upon death’ appears to be used as an umbrella term, including (individual) wills, joint wills and agreements as to succession. However, Art. 24 reads ‘dispositions of property upon death other than agreements as to succession’, indicating that only agreements as to succession are excluded from its scope of application, while joint wills are obviously not. It is further argued that the binding effect in case of joint wills under German law does not result from an agreement, but is the legal consequence of the reciprocity of the dispositions.<sup>34</sup>

Hungarian law also advocates admissible joint wills *of spouses* (§ 7:23(2) HunCC).<sup>35</sup> The dispositions made by the spouses in the joint will are considered reciprocal<sup>36</sup>,

<sup>30</sup> Karsten THORN: Succession Regulation Art. 25, mn. 2. In: Otto PALANDT (ed.): *Bürgerliches Gesetzbuch mit Nebengesetzen*. München, C. H. Beck, <sup>75</sup>2016.; DUTTA op. cit. Succession Regulation Art. 3, mn. 9.; Wolfgang BURANDT – Stefan SCHMUCK: Succession Regulation Art. 25, mn. 2. In: Wolfgang BURANDT – Dieter ROJAHN (eds.): *Beck'scher Kurz-Kommentare. Band 65, Erbrecht*. München, C. H. Beck, <sup>3</sup>2019.

<sup>31</sup> ODESKY op. cit. § 15, mn. 230.

<sup>32</sup> § 2271(1) GerCC “The revocation of a disposition which is related to a disposition of the other spouse in the way described in § 2270 is to be effected during the lifetimes of the spouses in accordance with the provision of § 2296 GerCC governing revocation of a contract of inheritance. A spouse may not, during the lifetime of the other, make a new disposition *mortis causa* unilaterally revoking his original disposition.” § 2296(2) GerCC (2) “The revocation is effected by declaration to the other party to the contract. The declaration requires notarial recording.” ([https://www.gesetze-im-internet.de/englisch\\_bgb/index.html](https://www.gesetze-im-internet.de/englisch_bgb/index.html)).

<sup>33</sup> ODESKY op. cit. § 15, mn. 230.

<sup>34</sup> Ulrich SIMON – Markus BUSCHBAUM: Die neue EU-Erbrechtsverordnung. *Neue Juristische Wochenschrift (NJW)*, vol. 65., no. 33. (2012) 2396.; ODESKY op. cit. § 15, mn. 229.

<sup>35</sup> § 7:23(2) HunCC “The written will of spouses made during their conjugal cohabitation and executed in the same document shall be considered valid if: [...]”

<sup>36</sup> Lajos VÉKÁS: Commentary on § 7:23. HunCC In: VÉKÁS, Lajos – GÁRDOS, Péter (eds.): *Kommentár a Polgári Törvénykönyvhöz*. 2. kötet. (Commentary for the Civil Code. Vol. 2.) Budapest, Wolters Kluwer, <sup>2</sup>2018. 2567.



and a binding effect follows from § 7:43(3)–(4) HunCC.<sup>37</sup> Thus, the categorisation of joint wills is a topic which is also discussed in Hungarian legal literature relating to the Regulation.<sup>38</sup> As a consequence, the particularity following from the requirement of reciprocity *cannot be reflected at the level of conflict-of-laws provisions*. Such a reflection would contradict the ‘mechanism of categorisation’, i.e. the requirement to categorise concepts of foreign law which are unknown in domestic law.<sup>39</sup> Therefore, joint wills in the form of the so-called ‘Berliner Testament’, within the context of the Regulation, *shall be considered as ‘agreements as to succession’ under Art. 25*, even without a prior assessment of reciprocity. As a consequence, it can be stated that the ‘Berliner Testament’ in German law and the joint will in Hungarian law rather correspond to the concept of ‘mutual will’, than to the concept of ‘joint will’ under English law.<sup>40</sup> In consistence with this, Art. 3(1) lit. (b) also lists ‘an agreement resulting from mutual wills’ to fall under the concept of agreement as to succession in terms of the Regulation.

### 1.2.3. Agreements for the relinquishment of inheritance and/or of reserved share

Although not addressed explicitly by the Regulation, agreements for the relinquishment of inheritance and/or of reserved share (as, for example, §§ 2346–2352 GerCC, §§ 7:7–9 HunCC) shall be covered by Art. 3(1) lit. (b), and therefore be considered agreements as to succession.<sup>41</sup> This provision defines agreements as to succession as ‘an agreement [...] 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*’. From this, it follows that with respect to agreements for the relinquishment of inheritance and/or of reserved share, the law applicable to admissibility, substantive validity and its binding effects between the parties is determined on the basis of Art. 25. In absence of choice of law, and if there is one party to the agreement whose succession is concerned (‘future testator’), in accordance with Art. 25(1), these issues are governed by the hypothetical applicable law to govern succession as a whole on the day on which the agreement was concluded. If there are several future testators, the *admissibility* of such an agreement has to be assessed for each testator individually on the basis

<sup>37</sup> § 7:43(3) HunCC “The unilateral revocation of a testamentary disposition made in a joint will shall have no effect if the revocation was precluded in the will, or if carried out without notifying the other testator.” § 7:43(4) “If either spouse revokes his/her disposition contained in the joint will unilaterally, the disposition of the other spouse shall remain in effect, unless it can be established from the will that neither of the parties would have made his/her disposition without the other’s disposition.”

<sup>38</sup> Cf. Szócs, Tibor: V. Fejezet: Öröklési jog (Chapter V: Succession law). In: CSEHI, Zoltán (ed.): *Magyarázat a nemzetközi magánjogról* [Commentary on international private law]. Budapest, Wolters Kluwer, 2020. 528–530.

<sup>39</sup> KROLL-LUDWIGS op. cit. 80.

<sup>40</sup> Cf. Rebecca PROBERT – Maebh HARDING: *Family and Succession Law in England and Wales*. Alphen aan den Rijn, Wolters Kluwer, 2015. 223., 232.

<sup>41</sup> DUTTA op. cit. Succession Regulation Art. 3, mn. 9; THORN op. cit. Succession Regulation Art. 25, mn. 2; BURANDT–SCHMUCK op. cit. Succession Regulation Art. 25, mn. 1.

of the *hypothetical applicable law at the time of conclusion of the agreement* [first subparagraph of Art. 25(2)]. Alternatively, substantive validity and the binding effects between the parties shall be governed by the law with which the agreement has the closest connection [cf. second subparagraph of Art. 25(2)]. In contrast, the substantive law effect of the agreement for the relinquishment of inheritance and/or of reserved share is determined by the law applicable to govern succession as a whole [Art. 21(1), and Art. 22, respectively]. As an example, in determining the ‘effect in terms of substantive law’, a relevant question over whether such relinquishment extends to descendants of relinquishing persons (potential heir) may be submitted. If a testator concludes an agreement for the relinquishment of inheritance and/or of reserved share with a person entitled to a reserved share *after* having chosen to govern the succession as a whole within national law pursuant to Art. 22, and in doing so omits to make a choice of law with regard to the admissibility, substantive validity and binding effects of such an agreement pursuant to Art. 25(3), these aspects will be governed by the (chosen) national law as in accordance with Art. 25(1). Furthermore, tension might arise between the future testator’s (chosen) national law *and* the law applicable to govern succession as whole in the absence of any choice of law [Art. 21(1)]. This may occur, for example, in a situation where, as a result of moving to another participating EU Member State, changes to domestic law generally prohibit succession agreements, e.g. ‘common’ Spanish law (Art. 1271 Código Civil).<sup>42</sup> A different (non-prevailing) opinion might be found in German law. According to this opinion, the waiver agreement is ‘special’ in the sense that its effect is purely ‘negative’ (giving up rights), and for this reason its effects in terms of substantive law cannot be separated from its admissibility. Otherwise, the admissibility would be downgraded to an ‘empty’ box. Thus, the waiver must prevail even if there is a change of the law applicable to govern succession as a whole [as in accordance with Art. 21(1) or Art. 22(1)].<sup>43</sup> Nevertheless, it is highly questionable whether such a solution can be accepted from the European perspective, especially with regard to the fundamental structure of the Regulation, purporting that the ‘law governing the succession as whole’ [Art. 21(1)] applies to any aspect of the succession. Consequently, in contrast to agreements to succession directed by the appointment of an heir (contract of inheritance), a succession waiver agreement might not be so easily ‘transferred’ under the law of another participating EU Member State.<sup>44</sup>

<sup>42</sup> Alexander STEINMETZ – Erhard HUZEL – Rocío GARCÍA ALCÁZAR: Spanien, mn. 114. In: Rember Süß (ed.): *Erbrecht in Europa*. Bonn, zerb Verlag, 32015. 1273–1353.

<sup>43</sup> Johannes WEBER: Erb- und Pflichtteilverzichtsverträge im Spiegel der EuErbVO. *Zeitschrift für Erbrecht und Vermögensnachfolge (ZEV)*, vol. 22., no. 9. (2015) 506–507.; cf. ODERSKY op. cit. § 15, mn. 278.

<sup>44</sup> Cf. ODERSKY op. cit. § 15, mn. 279.

## 2. Choice of law under the Regulation

### 2.1. Policy considerations

Allowing choice of law in the field of succession law cannot be regarded a common approach amongst individual EU Member State laws. Before the entering into force of the Regulation, the Netherlands was the only state in Europe whose conflict-of-laws rules also allowed a choice of law to apply in governing the succession of a person. This feature of Dutch law was a consequence of the transposition of the Hague Succession Convention<sup>45</sup> (hereinafter: Succession Convention) into the national conflict-of-laws regime, permitting the testator to choose the law applicable to succession. Art. 1 of the Act transposing the Succession Convention<sup>46</sup> provides that the provisions of the Succession Convention *determine* the law applicable to the succession of the estate of a deceased person. Thus, Art. 5<sup>47</sup> of the Succession Convention became part of the Netherlands national conflict-of-laws rules. This article has also served as a model for Art. 22(1) of the Regulation.<sup>48</sup> But the idea of granting the option to choose the law applicable to govern succession is not new. The Resolution No VI 2 on international matrimonial and succession law of the International Union of Latin Notaries, adopted on its VII Congress 1963 in Brussels, stated that the testator shall be granted the option to choose via will the law of the country of their last residence as the law applicable to govern their succession.<sup>49</sup> Nevertheless, views supporting choice of law with regard to succession can also be found in Hungarian legal literature.<sup>50</sup>

The main reason for allowing choice of law for the testator(s) is to facilitate preliminary estate planning and thus to avoid possible legal difficulties.<sup>51</sup> This promotes legal certainty with regard to succession.<sup>52</sup> Estate planning by choice of law provides a reliable and stable alternative to the default conflict-of-laws provision of ‘habitual residence’. In exemplifying this, a testator who changes the country of their habitual

<sup>45</sup> Convention of 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons (<https://assets.hcch.net/docs/5af01fa4-c81f-4e99-b214-64421135069f.pdf>).

<sup>46</sup> Act of 4 September 1996 on conflicts of laws regarding succession to and apportionment of an estate of a deceased person, also in connection with the ratification of the Convention on the Law Applicable to Succession to the Estate of Deceased Persons, concluded at the Hague on 1 August 1989 (<http://www.dutcheivilaw.com/actconflictlawsuccession.htm>).

<sup>47</sup> Art. 5 “A person may designate the law of a particular State to govern the succession to the whole of his estate. The designation will be effective only if at the time of the designation or of his death such person was a national of that State or had his habitual residence there.”

<sup>48</sup> Cf. SCHMITZ op. cit. 205.

<sup>49</sup> Franz Josef DUMOULIN: Vereinheitlichung des internationalen Ehegüter- und Erbrechts. Die Vorschläge der Internationalen Union des lateinischen Notariats. *Rebels Zeitschrift für ausländisches und internationales Privatrecht (RebelsZ)*, vol. 28., no. 3 (1964) 432.

<sup>50</sup> BURIÁN, László: A magyar nemzetközi magánjog a rendszerváltás után (Hungarian private international law after the change of the system). *Magyar Jog*, vol. 39., no. 12. (1992) 714.

<sup>51</sup> Recital (38) (first sentence) “This Regulation should enable citizens to organise their succession in advance by choosing the law applicable to their succession.”

<sup>52</sup> *Proposal* op. cit. 6. (4.3. Chapter III: Applicable law, Art. 17).

residence regularly (e.g. related to their professional duties), could find themselves in a situation where the law applicable for their estate, in absence of choice of law, would also change with the same frequency. By offering a choice of law, the testator can avoid such difficulties which are likely to arise when ascertaining the conflict-of-laws connection in the particular case.<sup>53</sup> The same is true with regard to difficulties arising due to differences between national substantive succession laws. Moving to another country will require the adjustment of succession planning to the new country's law. Considering this, one could even say that a choice of law gives the testator flexibility, at least if the testator is moving to another participating Member State. Spouses can, for instance, overcome characterisation problems, i.e. the difficulties which derive from the fact that Member State laws do not always interpret the same question in the same way, e.g. as a matter of succession law as opposed to a matter of matrimonial property law.<sup>54</sup> Choice of law enables spouses moving to another Member State to obtain access to both the succession and matrimonial property regime, hence allowing for governance by what becomes, in essence, one and the same law, i.e. their *common* home country's law.<sup>55</sup> Another supporting reason for a choice of law, as pointed out in the Commission's Proposal, is that choice of law gives the testator, who exercises the right of free movement under EU law, but is keen to preserve close links with their home country, an opportunity to maintain these cultural links with regard to succession.<sup>56</sup>

There is, however, a conflict between (limited) party autonomy, allowing the testator the choice of law applicable to succession and the *legitimate expectations of persons entitled to a reserved share*.<sup>57</sup> For this reason, the party autonomy provided in the

<sup>53</sup> SCHMITZ op. cit. 99.

<sup>54</sup> SCHMITZ op. cit. 99.; Gerard-René DE GROOT: Auf dem Wege zu einem europäischen (internationalen) Familienrecht. *Zeitschrift für europäisches Privatrecht (ZEuP)*, vol. 9., no. 3. (2001) 624. An example is § 1371(1) German Civil Code. If the matrimonial property regime (the so-called 'Zugewinnngemeinschaft' – 'community of accrued gains') is terminated upon the death of one of the spouses, the accrued gains (Zugewinn) will be split according to a fix scheme: The surviving spouse's intestate share in the estate of the deceased spouse will be increased by 1/4 of the estate, irrespective of the actual gains realised during their marriage. The quarter added to the surviving spouse's intestate share constitutes a lump sum. This is intended to prevent difficulties and disputes with other heirs inherent in connection with the calculation of the accrued gains; see Reinhard ZIMMERMANN: Intestate Succession in Germany. In: Kenneth G.C. REID – Marius J DE WAAL – Reinhard ZIMMERMANN (eds.): *Intestate Succession. Comparative Succession Law*. Vol. 2. Oxford, Oxford University Press, 2015. 212–213.

<sup>55</sup> Cf. Janeen CARRUTHERS: Party Autonomy in the Legal Regulation of Adult Relationships: What Place for Party Choice in Private International Law. *International Comparative Law Quarterly (ICLQ)*, vol. 61., no. 4. (2012) 905. The spouses can choose their joint home country's law to govern their matrimonial property regime in accordance with Art. 22(1)(b) (effect only for the future) of the Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes (ELI: <http://data.europa.eu/eli/reg/2016/1103/oj>).

<sup>56</sup> *Proposal* op. cit. 6. (4.3. Chapter III: Applicable law, Art. 17).

<sup>57</sup> Recital 38 (second sentence) "That choice should be limited to the law of a State of their nationality in order 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.": SCHMITZ op. cit. 206.

Regulation is *limited (restricted)* to the law of the state of whom the testator is a national at the time of making the choice or at the time of death [Art. 22(1)]. Nevertheless, this also means that even if the persons entitled to a reserved share are disadvantaged as a result of the testator's choice of the testator's national law, this choice won't fail – at least in case of Member States applying the Regulation – on the basis of the public policy (*ordre public*) exception.<sup>58</sup>

As pointed out by *Dutta*, granting the choice of law makes 'justice in the particular case' possible: The testator is able to coordinate the applicable law, if there exists an international jurisdiction in a third State, for example, because assets of the testator are located in that state. If that third State's law applies the nationality rule as a default rule, acknowledges a choice of law or refers to the law of an EU Member State, with further consideration for *renvoi*, the testator, by choice of law, is able to coordinate the law applied by the courts of EU Member States and the courts of the third State.<sup>59</sup>

## 2.2. Option to choose the own national law rather than the *freedom* of choice of law to govern succession

The testator may choose the law of the state whose nationality the testator has at the time of making the choice or at the time of death, *to govern the own succession as a whole* (*lex successionis*). Where the testator has multiple nationalities, they may choose the law of any of the states of nationality (Art. 22, second subparagraph), or a third State's law.<sup>60</sup> By enabling this option, the European legislator strengthens the rights of dual (multiple) nationals. In fact, this option undermines certain national provisions which appear to instruct individuals to neglect their other nationalities, in favour of adopting that particular country's nationality when applying national laws. Conclusively, if a German-Turkish testator living in Germany has chosen Turkish law pursuant to Art. 22 to govern the succession, the German court has to apply Turkish law despite the testator's German citizenship.<sup>61</sup> This restriction to national law can be 'overcome' in cases of *renvoi* according to Art. 34(1), if the choice of law under Art. 22 is invalid and as a consequence pursuant to the default rule [Art 21(1)] the law of a third State is applicable, and the law of this third State has a more generous approach regarding the freedom of choice of the law to govern succession (see below 2.10).<sup>62</sup>

The *restriction* to the law of the state of actual or future nationality can be seen as a compromise between the benefits of such a choice for the testator (e.g. greater freedom to plan the succession, legal certainty) and the legitimate interests of relatives entitled to a reserved share (in particular the surviving spouse and children of the

<sup>58</sup> ODESKY op. cit. § 15, mn. 98.

<sup>59</sup> DUTTA op. cit. Succession Regulation Art. 22, mn. 1.

<sup>60</sup> BURANDT–SCHMUCK op. cit. Succession Regulation Art. 22, mn. 8.

<sup>61</sup> SZŐCS, Tibor: Az állampolgárság szerepének változása a nemzetközi öröklési viszonyok terén, különös tekintettel a közböön álló reformra (The change of the role of nationality in the field of international successions with special regard to the upcoming changes). *Közjegyzők közlönye*, 1/2015. 49.

<sup>62</sup> DUTTA op. cit. Succession Regulation Art. 22, mn. 2.

deceased).<sup>63</sup> Therefore, it seems less prudent to speak about the freedom of choice of the applicable law to govern succession under the Regulation, than to discuss the option of a ‘constrained’ choice of law.<sup>64</sup> Such a restriction should tackle the risk of ‘reserved share shopping’.<sup>65</sup> Otherwise, a testator who has their habitual residence in a State whose succession law provides relatives and the spouse with generous ‘reserved share’ rights, could easily avoid the application of this state’s law to govern their succession by choice of another law to govern succession (i.e. by choosing a law which is less generous as regards ‘reserved share’).<sup>66</sup> However, the justification for such a policy (restriction of choice of law) is questionable, especially with regard to the principle of ‘neutrality of conflict-of-laws rules’: Private international law provisions *shall not serve to export* policy decisions of national substantive law *to international level*.<sup>67</sup> As such, private international law should only be used to adjudicate on the applicable law. International consistency is jeopardised if policy considerations and decisions of national substantive law have a strong influence on the design of the conflict-of-laws rules.<sup>68</sup> Consequently, conflict-of-laws rules shall remain rules of *technical character*. The ‘reserved share’, as an institution characteristic of succession laws of continental Europe, has the function of mitigating the tension and provide some kind of balance between the freedom to dispose of property upon death and the idea of care and solidarity towards family members, and retaining the assets in the family, respectively.<sup>69</sup> As *Schmitz* points out, the rationale behind the ‘reserved share’ has become weak in the current climate.<sup>70</sup> The traditional idea that family members have contributed towards the wealth (assets) of a deceased person and are therefore entitled to a certain share from the deceased’s

<sup>63</sup> Recital (38) Regulation, *Proposal* op. cit. 6. (4.3. Chapter III: Applicable law, Art. 17). In this sense JUHÁSZ, Gábor: Az örökhatyó szabad rendelkezési jogának korlátjaként megjelenő kötelekrész a spanyol jogban. II. rész (The reserved share under Spanish law appearing as a restriction of the testator’s freedom to dispose of their property. Part II.). *Közjegyzők közlönye*, 1/2015. 12–13.; BURANDT–SCHMUCK op. cit. Succession Regulation Art. 22, mn. 3.

<sup>64</sup> See SCHMITZ op. cit. 205., who speaks about the possibility of a ‘bound’ choice of law (“Möglichkeit der gebundenen Rechtswahl”).

<sup>65</sup> Term inspired by *forum shopping*.

<sup>66</sup> For example English law (England and Wales) – cf. Mariusz ZALUCKI: Impact of the EU Succession Regulation on Statutory Inheritance. *Comparative Law Review (Nicolaus Copernicus University)*, 23/2017. 235–236. (<http://dx.doi.org/10.12775/CLR.2017th010>).

<sup>67</sup> SCHMITZ op. cit. 285.; Christian SCHRÖDER: *Das Günstigkeitsprinzip im internationalen Privatrecht*. Frankfurt am Main, Lang, 1996. 115.

<sup>68</sup> SCHMITZ op. cit. 285. Regarding the benefit of ‘neutral’ international private law rules, see: István ARATÓ: Zur Kodifikationstechnik des internationalen Privatrechts: besonders im ungarischen Entwurf von 1948. *Zeitschrift für ausländisches und internationales Privatrecht*, vol. 17., no. 1. (1952) 6–9.

<sup>69</sup> Lajos VÉKÁS: Behind the European Succession Regulation: Differences in the Substantive Law of Succession of Member States. *ELTE Law Journal (ELTE LJ)*, 1/2019. 33. ([https://eltelawjournal.hu/wp-content/uploads/2020/06/ELJ-2019-1\\_Vekas\\_.pdf](https://eltelawjournal.hu/wp-content/uploads/2020/06/ELJ-2019-1_Vekas_.pdf)). See also Reinhard ZIMMERMANN: Pflichtteil und Noterbenrecht in historisch-vergleichender Perspektive. *Rabels Zeitschrift für ausländisches und internationales Privatrecht (RabelsZ)*, Vol. 84., Iss. 3. (2020) 466–467.

<sup>70</sup> SCHMITZ op. cit. 284.

estate might be regarded as outdated.<sup>71</sup> Today, the majority of heirs (particularly: the children of the deceased person) have their own financial livelihood at the time that the testator dies. The estate inherited no longer serves as the financial livelihood for the next generation.<sup>72</sup> In modern times it is also evident that spouses (partners) more often keep their own financial livelihood in marriages. Nonetheless, in adhering to the conclusion of *Schmitz*, the protection of family members entitled to a reserved share by limitation of choice of law to the testator's current or future national law is justified. In fact, it is not just about protecting the interests of the family members, it is also about protecting the state's social security and welfare systems. Both family law and succession law have the role of upholding private social security. It is important that the testator is unable to evade their maintenance and care responsibilities at the expense of the general public.<sup>73</sup>

The connection to the national law of the testator, which is based on the voluntary choice of the testator, does not interfere with the prohibition of discrimination on the grounds of nationality pursuant to Art. 18 TFEU.<sup>74</sup> Nevertheless, restricting the option to choose the law of nationality can indeed raise doubts over freedom of movement, as stated in Art. 21(1) TFEU: Due to the fact that the testator cannot choose the law of the Member State in which the habitual residency is, the testator might be demotivated to exercise the right of free movement for fear that there may be a restriction of freedom to dispose of property upon death, if the law of the Member States where the testator intends to move has more severe rules on reserved share than the law of the Member State where the testator actually lives.<sup>75</sup>

Especially with regard to increasing migration, the question that might be raised is which law can be chosen by stateless persons, persons with unclear nationality, asylum seekers or recognised refugees. The law governing matters related to the personal status of these persons, designated by the conflict-of-laws regimes of the Member States, is the law of the state of domicile or habitual residence.<sup>76</sup> A European solution for this would be desirable. Considering the understandable interest of these persons in the stability of the law applicable to their succession, as *Dutta* suggests, they should be allowed to either choose the law of the state they are residing in at the time of choice, or

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<sup>71</sup> Cf. ZIMMERMANN (2020) op. cit. 545.; Barbara DAUNER-LIEB: Pflichtteilrecht und Pflichtteilsentziehung auf dem Prüfstand. *Forum Familienrecht (FF)*, vol. 5., no. 3. (2001) 79 et seq. For an alternative view, i.e. 'defending' the reserved share, see Gerhard OTTE: Das Pflichtteilsrecht – Verfassungsrechtsprechung und Rechtspolitik. *Archiv für die civilistische Praxis (AcP)*, vol. 202., no. 2. (2002) 317–362.

<sup>72</sup> SCHMITZ op. cit. 285.; cf. Gerhard OTTE: Introduction to §§ 2303 et seq. German Civil Code, mn. 20 (revised text 2017). In: *Julius von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen*. Berlin, Sellier–De Gruyter, <sup>16</sup>2017.

<sup>73</sup> SCHMITZ op. cit. 285.

<sup>74</sup> DUTTA op. cit. Succession Regulation Art. 22, mn. 1.

<sup>75</sup> DUTTA op. cit. Succession Regulation Art. 22, mn. 2.

<sup>76</sup> Peter MANKOWSKI: Die Reaktion des Internationalen Privatrechts auf neue Erscheinungsformen der Migration. *Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)*, vol. 37., no. 1. (2017) 40 et seq.

the law of the state of nationality.<sup>77</sup> For the testator, the option to incorporate provisions of foreign succession law is also available, e.g. rules of intestate succession into the disposition of property upon death, within the parameters outlined by the applicable law. Following this rationale, the choice of law might be interpreted as invalid if the incorporation of the provisions of that law, on the basis of the rules on interpretation of the law applicable to admissibility and substantive validity in absence of a choice of law, are not applied correctly. An exception to this, however, is evident in the form of *renvoi*.<sup>78</sup>

### 2.3. The content of choice of law dispositions

With regard to the choice of law pursuant to Art. 22, two aspects shall be addressed: the meaning of choice of ‘the law to govern succession as a whole’ and of ‘the law of a state whose nationality the testator has (*could have*) at the time of death’.

The wording ‘to govern succession as a whole’ excludes the possibility of a partial choice of law. Conclusively, choice of law limited to certain assets or parts of the estate is not possible.<sup>79</sup> This approach also follows on from the guiding principle of ‘unity of *lex successionis*’. The law chosen by the testator (the law linked to nationality) will govern any question related to the succession of the estate. The choice is invalid if the only intention is to apply for particular assets (e.g. to apply *lex rei sitae* with regard to certain movables or real estate). Another example of an invalid choice of law would be where the testator chooses their national law to only govern certain issues in connection with the succession (e.g. liability for succession debts, reserved shares of relatives, admissibility of agreements as to succession, etc.).<sup>80</sup> There are *two exceptions* to the principle of unity of *lex successionis*. One exception is captured by Art. 30, which is also explained in Recital (54): Where certain immovable property items, certain enterprises or other special categories of assets are subject to special rules of the State in which they are located, and these rules, for economic, family or social reasons, impose restrictions concerning or affecting the succession in respect of those assets, these special rules shall apply to the succession in so far as they are applicable, irrespective of the law applicable to the succession. The *other exception* is a consequence of Art. 75: Since the Regulation does not affect the application of international conventions concluded by participating Member States with third States, it might be possible that such conventions will, for instance, designate the applicable law on the basis of the location of the particular asset (as in line with the *lex rei sitae* doctrine).<sup>81</sup> Another

<sup>77</sup> DUTTA op. cit. Succession Regulation Art. 22, mn. 5.

<sup>78</sup> DUTTA op. cit. Succession Regulation Art. 22, mn. 34.

<sup>79</sup> BURANDT–SCHMUCK op. cit. Succession Regulation Art. 22, mn. 4.

<sup>80</sup> Dimitrios STAMATIADIS: Succession Regulation Art. 22, mn. 47. In: PAMBOUKIS (ed.) op. cit.

<sup>81</sup> An example for this approach delivers the Hungarian–Vietnamese Convention on Legal Assistance (1985): Art. 43(1) determines that the law of the State whose national the deceased had been will be applicable to the succession with regard to the personal (movable) estate; Art. 43(2) determines that with regard to immovable (real) estate, the law of the State in which these are located will be applicable to succession [1986. évi 8. törvényerejű rendelet a Magyar Népköztársaság és a Vietnami Szocialista



approach in international conventions is to designate the deceased's national law (providing they are a national of one of the signatory states) as the applicable law to govern succession in all matters.<sup>82</sup>

Art. 22(1) allows the testator to choose the law of the state in which they *will be* a national at the time of their death. The rationale behind this rule is to enable a testator who is anticipating the acquisition of a new citizenship or changing the country of their residence, to choose their home country's law to govern their succession as a whole.<sup>83</sup> However, the choice of a law linked to a *future nationality* also holds uncertainty, as the acquisition of a nationality *in the future* may not be realised for several unforeseeable reasons (e.g. the testator no longer fulfils the conditions to acquire the new nationality by naturalisation, i.e. the testator dies before being able to acquire the nationality applied for). A so-called 'dynamic' or 'abstract' choice of law disposition ("I choose the law of the state whose national I am at the time of my death") should advisably be avoided, rather than considered a proper solution for lack of legal certainty.<sup>84</sup> Nevertheless, it would be wrong to consider such 'dynamic' choice of law automatically invalid,<sup>85</sup> provided that the chosen law is clearly determinable in the case of the testator's death. Obviously, this will not work if the testator has two nationalities at the time of death. A further reason that we cannot deem a 'dynamic' choice of law automatically invalid is demonstrated by the Regulation, where both implicit choice of law and choice of law upon condition are possible.<sup>86</sup>

One important advantage of choosing the law of the state of actual nationality is that such choice of law will remain valid in a case where the testator loses this nationality at a later time.<sup>87</sup>

Where the law of the state of nationality is a state with more than one legal system, Art. 36 provides assistance. In such an event, generally, the internal conflict-of-laws rules of that state will determine the applicable law [Art. 36(1)]. It is important to note that the testator may only choose *the law of the entire state* of nationality, not

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Köz társaság között a polgári, a család jogi és a büntető jogsegély tárgyában Hanoi-ban 1985. január 18. napján aláírt szerződés kihirdetéséről (Decree-Law No. 6 of 1986 on the promulgation of the Convention on Legal Assistance in Civil, Family Law and Criminal Matters concluded between the People's Republic of Hungary and the Socialist Republic of Vietnam in Hanoi on 18 January 1985)]. The same approach with regard to immovable property as in Art. 20 § 14(2) of the German – Turkish Consular Convention (Konsularvertrag zwischen der Türkischen Republik und dem Deutschen Reiche vom 28. 05. 1929 – Anlage zu Artikel 20 des Konsularvertrages: Nachlassabkommen) [Consular Convention between the Republic of Turkey and the German Empire of 28 May 1929 – Annex to Art. 20 of the Consular Convention: Succession Convention].

<sup>82</sup> An example is the § 8(3) of the German – Persian Establishment Convention [Niederlassungsabkommen zwischen dem Deutschen Reich und dem Kaiserreich Persien vom 17. Februar 1929 (Establishment Convention between the German Empire and the Persian Empire of 17 February 1929)].

<sup>83</sup> SCHMITZ op. cit. 206.; SZŐCS (2015) op. cit. 48.; ODERSKY op. cit. § 15, mn. 106.

<sup>84</sup> STAMATIADIS op. cit. Succession Regulation Art. 22, mn. 53.

<sup>85</sup> According to the majority view such choice of law shall be regarded invalid: BURANDT–SCHMUCK op. cit. Succession Regulation Art. 22, mn. 6.

<sup>86</sup> ODERSKY op. cit. § 15, mn. 131.

<sup>87</sup> ODERSKY op. cit. § 15, mn. 108.

the law of a particular territorial unit. The applicable law must be assessed according to the internal conflict-of-laws rules at the time of death. In absence of such internal conflict-of-laws rules, pursuant to Art. 36(2) lit. b), the law applicable will be the law of the territorial unit to which the deceased had the closest connection. The time of the assessment of the applicable law will vary depending on whether the testator has chosen the law of their actual nationality or of their future nationality to govern the succession. In the first case, the law applicable has to be assessed at the time when the choice of law was made, whilst in the second case, this assessment is made at the time of the death of the testator.<sup>88</sup> The situation is less complicated if the internal conflict of laws recognises a choice of law, since the testator may choose the applicable law simultaneously to the choice of law to govern the succession under Art. 22 Regulation.<sup>89</sup> Of limited importance, but nevertheless noteworthy, is that Art. 37 addresses the situation of different systems of law applying for different groups of persons within a state (e.g. India, Pakistan, etc.). There must be a connection (e.g. religion, race, etc.) which determines the affiliation of a person with the relevant group of people (e.g. religious community). This affiliation will determine which system of law will govern the succession to the estate of the deceased person.<sup>90</sup> The solution provided in Art. 37 is similar to that in Art. 36, which is applied for interlocal conflicts: In absence of national rules which determine the applicable system of law, the system of law with which the deceased had the ‘closest connection’ shall apply.

*Renvoi* is also excluded if the testator chooses a third State’s law. Considering this, a choice of law can even take effect if the testator is a national of the third State in which the testator also lives.<sup>91</sup>

#### 2.4. In which respect is choice of law possible?

To choose the applicable law is possible *in two* respects. *On the one hand*, the testator may choose the law of the state of their current or future nationality to govern their succession as a whole (Art. 22) (*Erbstatut*). This choice will imply *ipso iure* the choice of law to govern the admissibility and substantive validity, revocation and modification

<sup>88</sup> DUTTA op. cit. Succession Regulation Art. 22, mn. 6.

<sup>89</sup> The internal conflict-of-laws rules must provide the option of choice of law. With regard to Spain, a typical example for a multi-unit state in Europe, this is not the case. See Olaf MEYER: Parteiautonomie bei Mehrrechtsstaaten. *Rabels Zeitschrift für ausländisches und internationales Privatrecht (RabelsZ)*, vol. 83., no. 4. (2019) 747. See also Alexander STEINMETZ – Jan LÖBER – Rocío GARCÍA ALCÁZAR: Die EuErbVO und ihre Anwendbarkeit im Mehrrechtsstaat Spanien. *Zeitschrift für Erbrecht und Vermögensnachfolge (ZEVI)*, vol. 20., no. 10. (2013) 537.

<sup>90</sup> István SZÁSZY: Interpersonal Conflicts of Laws. In: Josef TITTEL (ed): *Multitudo legum, ius unum. Festschrift für Wilhelm Wengler zu seinem 65. Geburtstag. Vol. 2. Kollisionsrecht und Rechtsvergleichung*. Berlin, Inter-Recht, 1973. 793–816.; and István SZÁSZY: Chapitre III: Le conflit de lois interpersonnel dans les pays en voie de développement. *Recueil des Cours de l’Académie de Droit International de La Haye (RCADI)*, vol. 138. (1973-I) 107–123.

<sup>91</sup> DUTTA op. cit. Succession Regulation Art. 22, mn. 29.

of disposition of property upon death [Art. 24(1)],<sup>92</sup> and, with regard to agreements as to succession, to govern admissibility, substantive validity and its binding effects between the parties including the conditions for its dissolution [Art. 25(1) and (2)] (*Errichtungsstatut*).

On the other hand, the testator may choose the law to govern *the admissibility and substantive validity of unilateral dispositions of property upon death* separately [Art. 24(2)], and to govern the admissibility, substantive validity and binding effects between the parties, and the conditions of dissolution of an *agreement as to succession*, respectively. In the case of *several testators in an agreement as to succession*, the *national law of one of the testators* may be chosen to govern these matters [Art. 25(3)]. Thus, if there are several testators with different nationalities, they *can opt for one of the legal systems* (linked to the nationality of one of them) to govern the matters of *Errichtungsstatut*. A restriction with regard to choice of law to govern matters of the *Errichtungsstatut*, is that the testator (testators) may only choose the law of nationality which the testator has (they have or one of them has) *at the time of making the unilateral disposition of their property upon death*, meaning the *conclusion* of the agreement as to succession.<sup>93</sup> However, it is possible that a testator (the testators) chooses (choose) the law of the state of the nationality with respect to the *Errichtungsstatut* at the time of making the choice, and the law of the state of the future nationality to govern succession as a whole. Such a division of the succession (*dépeçage*) may result in difficulties, e.g. in the case of the legitimate expectations of persons entitled to a reserved share.

## 2.5. Rationale behind a separate choice of the law applicable to matters of creation of dispositions of property upon death

In reference only to the choice of the law applicable to govern *admissibility and substantive validity of dispositions of property upon death* [Art. 24(2)], the testator can make the admissibility and substantive validity of a disposition of property upon death ('will') independent from the law to govern succession as a whole, which is changeable, as it means the law of the state of the testator's current habitual residence (in absence of choice of the law applicable to govern succession as a whole). It is also possible that a testator who has multiple nationalities may choose, in relation to the law applicable to matters of admissibility and substantive validity, the law of one of the states which is more convenient with regard to these issues. In contrast, the testator may choose the law of the state of another nationality to govern succession as a whole.

Choice of the law applicable to matters related to the creation of an *agreement as to succession* [Art. 25(3)] makes it possible for the testator (respectively the testators) to

<sup>92</sup> ODESKY op. cit. § 15, mn. 236.

<sup>93</sup> This follows from the simple rationale that the admissibility, substantive validity and binding effects between the parties, including the conditions for the dissolution of an agreement as to succession, logically, has to be assessed on the basis of the law which would have been applicable to govern succession *at the time* when the agreement was made. Assessing these issues on the basis of the law of the State of nationality which the testator has at the time of death (i.e. on basis of the hypothetical *lex successiois* at the time of death) would be pointless. Cf. ODESKY op. cit. § 15, mn. 236., 260.

legitimately conclude an agreement to succession under their national law, even if this is not possible under the law of state of their habitual residence. Where there are *several testators*, a motivation to refer matters of *creation (Errichtungsstatut)* to the national law of one of the testators might be the preferable approach in making an agreement to succession under that national law. Conclusively, in cases where spouses are the testators in a single agreement as to succession, it is sufficient if it is admissible and substantively valid under the national law chosen to govern matters of the *creation* of the agreement pursuant to Art. 25(3).<sup>94</sup> Another reason for a choice of law on the basis of Art. 25(3) is to overcome the legal uncertainty resulting from the factor of ‘*closest connection*’ defined in the second subparagraph of Art. 25(2), with regard to matters of substantive validity and its binding effects between the parties, as well as conditions of dissolution of an agreement as to succession where there are several testators as parties to that agreement. Choice of law in accordance with Art. 25(3) to govern matters of the creation of an agreement as to succession also displaces the first subparagraph of Art. 25(2), which, for the admissibility of an agreement to succession – in absence of such choice of law – requires the agreement to succession to be admissible under all the laws which would govern (hypothetically) the succession on the day of concluding such an agreement.<sup>95</sup>

The possibility to choose one of the testators’ national laws pursuant to Art. 25(3) to govern matters of creation of the agreement as to succession is an option which essentially considers *two constellations*. In one constellation, the testators reciprocally appoint each other as heir to the other. In this case, there is no third person party to the agreement to succession. Under Hungarian law, this will take the form of a joint will of spouses<sup>96</sup>, due to the specific concept of the agreement to succession in the Hungarian Civil Code.<sup>97</sup> In the other constellation, there is *more than one testator* as party to the agreement to succession and a third person (or third persons) is (are) appointed as their heir(s). Under Hungarian law, such an agreement to succession (in terms of the Hungarian Civil Code) is only possible if it is concluded by spouses during their marital cohabitation [§ 7:51(1) HunCC]. Apparently, there is no comparable restriction under German law. All combinations (i.e. where both several testators and several heirs are parties to an agreement to succession) are possible. A specific relation of the testators to each other, as seen under Hungarian law, is not required.<sup>98</sup> As a consequence, whether

<sup>94</sup> Cf. STADE op. cit. 74.

<sup>95</sup> ZOUMPOULIS op. cit. Art. 25, mn. 26.; Szöcs (2020) op. cit. 532–533.

<sup>96</sup> To be considered as an agreement as to succession in accordance with Art. 3(1) lit. (b) (see 1.2.2. above).

<sup>97</sup> § 7:48(1) HunCC “An agreement as to succession [contract of inheritance] means an agreement where the testator names the other party to the agreement his/her heir in exchange for maintenance, annuity or care to be provided to the testator him/herself or to a third person specified in the agreement for his entire estate or a specific part thereof, or in respect of certain property, and the other party undertakes the commitment to provide said maintenance, annuity or care.”

<sup>98</sup> Hans-Joachim MUSIELAK: Introduction to §§ 2274 et seq German Civil Code, mn. 24. In: *Münchener Kommentar zum BGB*. Vol. 11. München, C. H. Beck, 2017; Rainer KANZLEITER: Introduction to §§ 2274 et seq German Civil Code, mn. 21. In: *Julius von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einföhrungsgesetz und Nebengesetzen*. Berlin, Sellier-de Gruyter, revised edition 2019.; Christoph

the option provided in Art. 25(3) to decide for one of the testators' national laws to govern matters of creation works, will depend on the national law purported to be chosen. If, under that national law, agreements to succession with several testators are not regarded admissible, the option to choose one of the testators' national laws to govern matters of creation of the agreement to succession, pursuant to Art. 25(3), will prove useless.

Nonetheless, it is important to note that such a choice of law is possible exclusively in relation to matters of the *creation* of the agreement to succession. Determining one applicable law 'to govern succession as a whole' by choice of law, with regards to the succession of several testators with different nationalities, is not possible. In this respect, the Regulation brings nothing new compared to the actual legal regime. As referenced in legal literature<sup>99</sup>, this outcome (*dépeçage*) can be attributed to the testator's decision-making, in the sense of having wilfully changed the habitual residence which led to the change in the law applicable to govern succession as a whole [Art. 21(1)].

## 2.6. Choice of law to govern intestate succession ('choice of law only')

It is also possible to make a choice of law [Art. 22(1)] which determines the law to govern succession as a whole (*Erbstatut*) 'only', without making a disposition of property upon death (for example: "I choose Hungarian law to govern my succession as I am a Hungarian citizen").<sup>100</sup> In such cases, the admissibility and substantive validity of the unilateral disposition of property upon death containing the choice of law is governed by the law of the state in which the testator has their habitual residence [i.e. default rule Art. 21(1) and Art. 24(1)].<sup>101</sup> Such 'isolated' choice of law must be clearly demonstrated by the respective including document<sup>102</sup>, making it an explicit choice of law (see 2.7. below). This 'choice of law to govern succession only' also seems possible in connection with agreements to succession. A corresponding choice seems reasonable if the testator's national law is unfavourable *vis-à-vis* agreements as to succession, but, in contrast, the law of the state in which the testator has their habitual residence is permissible. Thus, the testator may choose their national law 'to govern succession only' pursuant to Art. 22(1). Nevertheless, as to matters of admissibility, substantive validity and binding effects between the parties and the conditions of dissolution of the

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RÖHL: Commentary § 2274 BGB, mn. 19. In: Beate GSELL – Wolfgang KRÜGER – Stephan LORENZ – Christoph REYMANN (general eds.): *beck-online. GROSSKOMMENTAR zum Zivilrecht* as of 1. 3. 2020.

<sup>99</sup> KROLL-LUDWIGS op. cit. 79.

<sup>100</sup> Cf. STAMATIADIS op. cit. Succession Regulation Art. 22, mn. 47.; DUTTA op. cit. Succession Regulation Art. 22, mn. 16.; Christoph DÖBEREINER: Das internationale Erbrecht nach der EU-Erbrechtsverordnung (Teil I). *Mitteilungen des Bayerischen Notarvereins, der Notarkasse und der Landesnotarkammer Bayern (MittBayNot)*, 5/2013. 363.; Mario LEITZEN: Die Rechtswahl nach der EuErbVO. *Zeitschrift für Erbrecht und Vermögensnachfolge (ZEV)*, vol. 20., no. 3. (2013) 129.; without statement BURANDT-SCHMUCK op. cit. Succession Regulation Art. 24, mn. 5.

<sup>101</sup> KROLL-LUDWIGS op. cit. 77.; THORN op. cit. Succession Regulation Art. 24, mn. 4.

<sup>102</sup> Cf. SCHMITZ op. cit. 132–133.

agreement as to succession, the law of the state of the testator's habitual residence will apply according to Art. 21(1).<sup>103</sup>

## 2.7. Requirements towards a choice of law disposition

The choice of law is a *juridical act*<sup>104</sup> of private international law<sup>105</sup> (i.e. in the sense of a conflict-of-laws regime): Pursuant to Art. 22(2), the choice of law can be either *explicit* (express declaration in form of disposition of property upon death) or *implicit* (demonstrated by the terms of such a disposition).<sup>106</sup> From a doctrinal point of view, and in particular with regard to German law (and *also* Hungarian law), the choice of law disposition constitutes, in principle, a so-called unilateral *juridical act*. An implicit choice of law raises the issue of how to assess it. Implicit choice of law is nothing new in EU private international law legislation. Both the Rome I Regulation [Art. 3(1) second sentence] and the Rome II Regulation [second sentence of Art. 14(1)] recognise the possibility of implicit choice. However, it seems that the level of certainty required for the acceptance of such choice under the Regulation is lower than under the Rome I<sup>107</sup> and the Rome II<sup>108</sup> Regulation. What exactly 'implicit choice' under the Regulation means, has to be determined *by way of autonomous interpretation*, as it is a concept of EU law.<sup>109</sup> For this purpose, Recital (39) might serve with some references. However, it is not entirely clear how the requirement of autonomous interpretation of 'implied choice' is compatible with the requirement according to which the law chosen determines the interpretation of the disposition of property upon death (will).<sup>110</sup> Indicators for implicit choice of law in the will might be the referring to legal instruments particular for a certain legal system, language together with a reference to the nationality, while language alone is a rather weak indicator<sup>111</sup> etc. Testators residing or having their habitual residence in their home country most probably do not intend to choose the law of another country.<sup>112</sup> It might be interpreted implicit choice of law if the testator explicitly refuses the application of the law of the state of habitual residence, provided the choice of law can be determined clearly enough, e.g. the testator has only

<sup>103</sup> KROLL-LUDWIGS op. cit. 79.

<sup>104</sup> Most probably corresponding to the German legal term of 'Willenserklärung' or to the Hungarian legal term of 'jognyilatkozat' (translated as: 'legally relevant declaration').

<sup>105</sup> A. WYSOCKA: How can a valid *professio iuris* be made under the EU Succession Regulation. *Nederlands Internationaal Privaatrecht (NIPR)*, 2012. 573.

<sup>106</sup> BURANDT-SCHMUCK op. cit. Succession Regulation Art. 22, mn. 6.

<sup>107</sup> Art. 3(1) second sentence "The choice shall be made expressly or clearly demonstrated by the terms of the contract [...]."

<sup>108</sup> Art. 14(1) second sentence "The choice shall be expressed or demonstrated with reasonable certainty by the circumstances [...]."

<sup>109</sup> Jessica SCHMIDT: Succession Regulation Art. 22, mn. 21. In: GROSSKOMMENTAR op. cit.

<sup>110</sup> Thomas PFEIFFER: Ruhestandsmigration und EU-Erbrechtsverordnung. *Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)*, vol. 36., no. 4. (2016) 313.

<sup>111</sup> STAMATIADIS op. cit. Art. 22, mn. 61.

<sup>112</sup> This corresponds to the connecting factors in Art. 24(1) and Art. 25(1) anyway. PFEIFFER op. cit. 313.

one nationality.<sup>113</sup> As a summary, it can be stated that a generous interpretation and approach is needed to ensure a broad acceptance of implicit choice of law. Assessing implicit choice of law will be even more complicated where the testator has multiple nationalities. To avoid an implicit choice of law ‘by coincidence’ it is advisable for a testator to make it clear in the disposition of property upon death that there was no intention to make a choice of the law applicable to govern the succession.<sup>114</sup>

*Substantive validity* of the choice of law is governed by the law chosen [Art. 22(3)], which is in line with the solution under other EU private international law legislation.<sup>115</sup> Thus, the choice of law disposition has to be considered as a disposition of property upon death under the chosen law. In this respect, the chosen law is in fact the law applicable to the substantive validity of a choice of law disposition, furthermore to the *admissibility* of a revocation or modification, and conclusively, if relevant under the chosen law, it is also deciding upon a binding effect of such choice of law.<sup>116</sup> However, such binding effect in the conflict-of-laws sense only exists if the choice of law is made in an agreement as to succession pursuant to Art. 25(3) (see 2.8. below).<sup>117</sup>

As already stated above, the *formal validity* of the choice of law (clause) requires that it be made in the form of disposition of property upon death. However, the Regulation does not set up autonomous rules on the formal requirements. Instead, the law applicable regarding the *formal validity* of the choice of law, and of the modification or revocation of such choice, respectively, is determined by Art. 27.<sup>118</sup> As it is stipulated in Art. 34(2), *renvoi* is excluded with regard to the laws referred to in Art. 27. Art. 27(1) regulates a number of alternative connecting factors to determine the applicable law to decide upon formal validity of a disposition upon death.<sup>119</sup> As a result, the choice of law, as (a constituent of) the deceased person’s disposition of property upon death, shall be kept, as far as possible, effective and taken into consideration (in accordance with the *favor testamenti* principle). The choice of law made by a deceased person shall not fail for non-fulfilment of the required formalities determined under a particular law assigned to govern matters of formal validity. The conditions for the formal validity of the disposition fulfil both alerting and probative purposes: On the one hand, the formal requirements shall make the testator aware of the significance and implications of their choice of law disposition. On the other hand, the formal requirements ensure the publicity of the choice of law, and therewith of the deceased person’s last will, vis-à-vis third persons by documentary evidence.<sup>120</sup> In fact, in Art 27(1), the European legislator has adopted one-to-one the connecting factors defined in Art. 1 of the Hague

<sup>113</sup> ODESKY op. cit. § 15, mn. 123.

<sup>114</sup> DUTTA op. cit. Succession Regulation Art. 22, mn. 14.

<sup>115</sup> Rome I Art. 3(5), Rome III Art. 6(1), Council Regulation (EU) 2016/1103 in matters of matrimonial property regimes Art. 24(1).

<sup>116</sup> DUTTA op. cit. Succession Regulation Art. 22, mn. 18–19., 31.

<sup>117</sup> DUTTA op. cit. Succession Regulation Art. 22, mn. 31.

<sup>118</sup> Cf. STAMATIADIS op. cit. Art. 22, mn. 65.; SIMON–BUSCHBAUM op. cit. 2396.

<sup>119</sup> Rome I Art. 3(5) in conjunction with Art. 11; law applicable to divorce Rome III Art. 7(1).

<sup>120</sup> SCHMITZ op. cit. 172.

Convention on the Form of Testamentary Dispositions from 1961.<sup>121</sup> The background is easy to explain: More than half of the participating Member States further apply the Convention in relation to third States on the basis of Art. 75(1). As pointed out above, ‘habitual residence’ can be considered as (one of) the main connecting factor(s) in the Regulation, however, Art. 27 lit. (c) is the only provision in the Regulation where the ‘domicile’ as connecting factor appears. Presumably, this is due to the ‘one-to-one’ integration of Art. 1 of the Hague Convention in Art. 27. ‘Habitual residence’ can be considered as modern ‘competitor’ vis-à-vis ‘domicile’ as connecting factor. ‘Domicile’, in contrast to ‘habitual residence’ as connecting factor, cannot be interpreted in an autonomous manner, it can only be defined on basis of conflict-of-laws rules: Whether the testator has their domicile in a particular state is to be determined on basis of the definition of domicile in that state.<sup>122</sup>

One may notice that neither the chosen law<sup>123</sup>, nor the law of the forum<sup>124</sup>, is listed among the connecting factors. Nevertheless, not listing the chosen law among the connecting factors has no negative impact, since the testator can anyway only choose their national law, which is listed as connecting factor under Art. 27(1) lit. (b). Completing the list of connecting factors defined in Art. 27(1) by ‘chosen law’ as a new connecting factor would make sense if, for example, the testator could choose the law of the state of their habitual residence to govern their succession.<sup>125</sup> Such an extension of the laws eligible to be chosen by the testator would, of course, require the amendment of Art. 22(1) and thus legislative action.

Furthermore, Art. 27(1) lit. (e) appears to be a kind of misfit among the connecting factors. Pursuant to this provision, a disposition of property upon death is formally valid in so far as immovable property is concerned, if it complies with the law of the state in which that property is located. However, referring to the *lex rei sitae*, if immovable property is concerned, does not appear to be a successful solution. In the unlikely event that the disposition of property upon death would be formally valid only on the basis of the *lex rei sitae*, this could result in the *partial validity* of the disposition of property upon death, meaning that the disposition is only valid as regards to the real estate concerned.<sup>126</sup>

The choice of law can also be made on conditions or with a time limit.<sup>127</sup> The possibility of choice of law subject to a condition or time limit can be deduced from

<sup>121</sup> Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions (<https://assets.hcch.net/docs/b67e23f7-bcf7-4cc6-aea9-26ea825c56c4.pdf>).

<sup>122</sup> Cf. SZÖCS (2020) op. cit. 538.

<sup>123</sup> Cf. LEITZEN op. cit. 129.

<sup>124</sup> SZÖCS (2020) op. cit. 536–537.

<sup>125</sup> SCHMITZ op. cit. 173.

<sup>126</sup> SZÖCS (2020) op. cit. 538.

<sup>127</sup> Cf. Peter KINDLER – Michael KRÄNZLE: § 41 Erbstatut, II. Bestimmung des Erbstatuts bei Rechtswahl, 1. Wählbares Recht, mn. 41.38. In: Klaus Michael GROLL – Anton STEINER (eds.): *Praxis-Handbuch Erbrechtsberatung*. Köln, Otto Schmidt Verlag, 2019.; Winfried KÖSSINGER: § 5 Grundzüge des internationalen Erbrechts, mn. 20. In: Heinrich NIEDER – Reinhard KÖSSINGER (eds.): *Handbuch der Testamentsgestaltung*. München, C. H. Beck, 2020.



Art. 22(4), which enables the revocation or change of the choice of law disposition. Furthermore, Art. 22(1) allowing to choose the future law of the state of future nationality, might also be seen as an instance of choice of law upon condition.<sup>128</sup> Thus, for example, the testator may choose their national law to govern succession only in the case of dying at the same time or after their spouse,<sup>129</sup> or for the event of a prospective future change of nationality (e.g. when a naturalisation procedure is initiated at the time of choice of law).<sup>130</sup>

It is not necessary for the choice of law clause to be included in a per se disposition of property upon death, it is only necessary to fulfil the applicable requirements as to the form of a disposition of property upon death. Thus, the choice of law clause can be valid if included in the articles of incorporation, or a statute of association.<sup>131</sup>

## 2.8. Modification, revocation and binding effect of a choice of law clause

A testator may revoke or modify their previous choice of law at any time. Pursuant to Art. 22(4), revocation and modification of the choice of law shall meet the requirements as to form applicable for the modification and revocation of a disposition of property upon death. Subsequently, concerning *formal validity* of the modification or revocation of a choice of law, the alternatives stipulated in Art. 27(2) will apply.

As regards modification or revocation of the choice of law disposition it is necessary to distinguish *between two stages*: The law governing ‘*admissibility*’ (not in the technical sense as used under the Regulation) of the modification or revocation as the first stage [as *modificability* and *revocability* of a choice of law clause are an issue of substantive validity and according to Art. 22(3) these are governed by the law chosen], and the law applicable to the *substantive validity* of the *conclusive* modification or revocation as the second stage (i.e. *a*) as the substantive validity of the *modification* is governed by the law of the State of the new/another nationality which has been chosen, and *b*) as to the substantive validity of the *revocation* the law of the State of the testator’s habitual residence will apply, since Art. 21 is ‘re-activated’ as a consequence of the revocation). If the two stages lead to different results, the more restrictive law will prevail, and the purported modification or revocation will fail.<sup>132</sup> Concerning the first stage, in accordance with Art. 22(3), the *law applicable to the admissibility* of a modification or revocation is the law chosen by the testator (originally).<sup>133</sup> A new choice of law at a later time includes the revocation of all<sup>134</sup> previous choices of law since a

<sup>128</sup> ODERSKY op. cit. § 15, mn. 129.

<sup>129</sup> STEINIGER op. cit. 49.

<sup>130</sup> To be distinguished from a so-called ‘dynamic choice of law’, meaning that the testator is *thinking about* the acquisition of another (or additional) nationality. See 2.3. above.

<sup>131</sup> DUTTA op. cit. Succession Regulation Art. 22, mn. 15.

<sup>132</sup> DUTTA op. cit. Succession Regulation Art. 22, mn. 33.

<sup>133</sup> ODERSKY op. cit. § 15, mn. 161.

<sup>134</sup> A partial choice of law might exist in conjunction with the continuing validity of choices of law pursuant to Art. 83(2), second alternative, made on the basis of prior private international law rules – see 2.11. below.

choice of law under the Regulation is, in accordance with Art. 22, only possible to govern succession as a whole (no partial choice of law). A practical example might be the ‘global’ revocation of all previous dispositions of property upon death in the latest disposition of property upon death. Such ‘global’ revocation will, in case of doubt, also include the revocation of a previous choice of law.<sup>135</sup> Concerning the second stage, following Art 22(3) *mutatis mutandis*, the law applicable to the substantive validity of modification (i.e. ‘new choice’) of a previous choice of law is the newly chosen law (law of the testator’s actual or future nationality).<sup>136</sup> The views differ regarding the law applicable to the substantive validity of revocation of a choice of law. Some authors support the view that in such a case the substantive validity is governed by the previously chosen law, i.e. ‘the law to be revoked’.<sup>137</sup> A more supportable view suggests that by the revocation, the testator had the intention to apply the law of the state of their habitual residence. This view is also supported by the fact that such revocation will usually be combined with a new disposition of property upon death, the substantive validity of which is governed already by the law of the state of habitual residence.<sup>138</sup>

The Regulation includes no explicit provision on the *substantive validity* of the revocation or modification of a choice of law, nonetheless, this question is addressed in Recital (40): *Substantive validity* is governed, as in accordance with Art. 22(3), by the chosen law. This outcome can also be concluded from Art. 24(3), and Art. 25(1) as well as Art. 25(3), respectively. As a consequence of the *revocation* of the choice of law, the default rule (Art. 21) will apply, i.e. the succession will be governed by the law of state of habitual residence of the deceased at the time of death. This outcome does not pose any problem so far. In legal literature, however, the possible inconsistency of this result is pointed out if the revocation occurs a long time before the testator dies, meaning that the ‘habitual residence at the time of death’ cannot be determined at the time of revocation. This shall render Art. 21 ineffective and lead to either the application of law chosen which is subject of the revocation, or of the law of habitual residence at the time of revocation.<sup>139</sup> Difficulties can arise in case of a *modification of the choice of law*, for example, if opting out of the chosen law is considered, as under that law, invalid, while opting for the testator’s other national law (or future national law), as under that law, is valid.<sup>140</sup> The situation is a bit complicated in case of *agreements as to succession*. What has to be pointed out first is the difference between the binding effect *as between the testators* in case of an agreement as to succession with several testators (see previously) resulting potentially from the chosen law applicable to govern succession as a whole (as according Art. 22) on the one hand, and the binding effect of the agreement of the

<sup>135</sup> ODESKY op. cit. § 15, mn. 161.

<sup>136</sup> LEITZEN op. cit. 129.; DUTTA op. cit. Succession Regulation Art. 22, mn. 32.

<sup>137</sup> DENNIS SOLOMON: Die allgemeine Kollisionsnorm (Art. 21, 22 EuErbVO). In: ANATOL DUTTA – SEBASTIAN HERRLER (eds.): *Die Europäische Erbrechtsverordnung: Tagungsband zum wissenschaftlichen Symposium anlässlich des 20-jährigen Bestehens des Deutschen Notarinstituts am 11. Oktober 2013 in Würzburg*. München, C. H. Beck, 2014. 43.; DÖBEREINER op. cit. 363.

<sup>138</sup> ODESKY op. cit. § 15, mn. 163.

<sup>139</sup> DÖBEREINER op. cit. 363.

<sup>140</sup> STAMATIADIS op. cit. Succession Regulation Art. 22, mn. 74.

choice of law on the other hand. In accordance with Art. 25(3), the choice of law is an agreement between the testator, and testators, respectively, on the one side, and the appointed heir, and heirs, respectively, on the other side. From this follows conclusively that a revocation or modification of this *choice of law agreement* requires to be done *in form of an agreement of the parties*, meaning that the choice of law *agreement* to govern the admissibility, substantive validity, etc. pursuant to Art. 25(3) *has a binding effect as between the testator(s) and the appointed heir(s)*. This binding effect results from the *agreement character* of the choice of law, which has to be distinguished from the binding effect resulting from the (chosen) law applicable to succession as a whole.<sup>141</sup> A case of this kind is the agreement as to succession *with several testators* or *joint wills comprising reciprocity*, and subsequently with binding effect, with the latter to be considered an ‘agreement as to succession’ under the Regulation (e.g. joint will of spouses in form of ‘Berliner Testament’, see 1.2.2 above). To answer this question it is necessary to distinguish between the case where the parties made a choice of law with regard to the ‘law applicable to govern succession as a whole’ pursuant to Art 22 (choice of the *Erbstatut*) on the one hand, and the case where they *also made a separate choice* as regards to admissibility, substantive validity, binding effects including the conditions for the dissolution of the agreement as to succession pursuant to Art. 25(3) (choice of the *Errichtungsstatut*), and where they made a choice *only* with regard to *the latter* pursuant to Art. 25(3), respectively, on the other hand. As substantive validity of the revocation or modification is governed by the law chosen (either as result of the choice of *Erbstatut*<sup>142</sup>, or the separate, and ‘only’ choice of the *Errichtungsstatut*<sup>143</sup>, respectively), and provided that under the applicable law the *unilateral* modification or revocation of the disposition of property upon death made in form of agreement as to succession or joint will comprising reciprocity under certain conditions (e.g. after death of the co-testator as provided in § 2271(2) GerCC) becomes impossible, the revocation or modification of the choice of law could be also rendered not possible (binding effect of the choice of law). Under German law, for example, where the issue of the binding effect of a choice of law clause could arise, the binding effect of the choice of law in a joint will comprising reciprocity or an agreement as to succession follows from the relevant provisions of the German Civil Code: The choice of law clause in a joint will of spouses is considered a reciprocal disposition [§ 2270(3) GerCC], and in an agreement as to succession, respectively, a contractual term [§ 2278(2) GerCC], and therefore to have binding effect.<sup>144</sup>

<sup>141</sup> DUTTA op. cit. Succession Regulation Art. 25, mn. 6.

<sup>142</sup> Choice of the *Erbstatut* pursuant to Art. 22(1), and in conjunction with that, the *ipso iure* ‘adjustment’ of the *Errichtungsstatut* pursuant to Art. 25(2).

<sup>143</sup> As in accordance with Art. 25(3) Succession Regulation.

<sup>144</sup> Cf. KROLL-LUDWIGS op. cit. 82.

## 2.9. The effect of choice of law and possible restrictions of the effects

One important (mandatory) effect of the choice of law is the exclusion of *renvoi* (reverse reference). The choice of law results always, also in case of third State law [Art. 34(2)], in a *transmission* (reference) to the domestic law of the state whose national the testator is or will be at the time of death. This means that any rule of the domestic law under which, in deciding the relevant question, reference is made to the law of another state, is disregarded. The exclusion, on the one hand, protects the testator who would omit to exclude *renvoi* when choosing the law applicable to govern the succession.<sup>145</sup> On the other hand, the testator can neither use the choice of law for the purpose of achieving, by way of *renvoi*, the application of a desired third State law, nor can the testator use the choice of their national law to achieve a durable reference to the law of the state of their habitual residence.<sup>146</sup> Nonetheless, pursuant to Art. 34(2), Art. 30 constitutes an exception to the acceptance of *renvoi* as under Art. 34(1), deeming those special rules of the state which impose restrictions concerning or affecting the succession in respect of certain assets applicable. The underlying reason is that accepting *renvoi* would undermine the policy of such restrictions.<sup>147</sup> It is important to note that merely a private international law provision stipulating a special rule with regard to the succession of immovable property situated in third States cannot be considered as an *exception* covered by Art. 30.<sup>148</sup> Additionally, invoking public policy against the application of the chosen law by a Member State pursuant to Art. 35 as an exceptional tool can also restrict, respectively eliminate the effect of the choice of law.<sup>149</sup>

## 2.10. Invalid choice of law becoming valid as result of *renvoi*

Like other EU private international law instruments<sup>150</sup>, European international succession law – the Regulation – follows the principle of general prohibition of *renvoi*. This means that the law of the state designated to govern succession does, in principle, not include the conflict-of-laws rules of that state (exclusion of *renvoi* or *global reference*<sup>151</sup>). Under the Regulation *renvoi* might happen (be admissible) only

<sup>145</sup> Cf. Geert VAN CALSTER: *European Private International Law*. Oxford–Portland, Hart Publishing, 2016. 335.

<sup>146</sup> ODERSKY op. cit. § 15, mn. 164.

<sup>147</sup> SCHMIDT op. cit. Succession Regulation Art. 34, mn. 23.

<sup>148</sup> ODERSKY op. cit. § 15, mn. 165.

<sup>149</sup> ODERSKY op. cit. § 15, mn. 165; cf. SCHMIDT op. cit. Succession Regulation Art. 35, mn. 7.

<sup>150</sup> Art. 20 Rome I; Art. 24 Rome II; Art. 11 Rome III; Art. 32 Rome V; Council Decision 2009/941/EC on the conclusion by the European Community of the Hague Protocol of 23 November 2007 on the law applicable to maintenance obligations (ELI: <http://data.europa.eu/eli/dec/2009/941/oj>) in conjunction with Art. 15 Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (ELI: [http://data.europa.eu/eli/reg/2009/4\(1\)/oj](http://data.europa.eu/eli/reg/2009/4(1)/oj)).

<sup>151</sup> As a translation of the German legal term *Gesamtverweisung*, as a correspondent to *renvoi*.

in a few cases.<sup>152</sup> As a starting point, Art. 34(1) makes *renvoi* in relation to third States admissible if the applicable third State law makes a *renvoi* to the law of a Member State<sup>153</sup> or to the law of another third State which would apply its own law.<sup>154</sup> With regard to the settlement of the inheritance, international succession law pays special attention to ensure international consistency as regards *renvoi*.<sup>155</sup> Nonetheless, Art. 34(2) defines a number of exceptions from this.<sup>156</sup> The choice of their national law by a third State national testator pursuant to Art. 22 is one of these exceptions, as also stated explicitly in Recital (57).<sup>157</sup> There are two reasons evident for the exclusion of *renvoi* in case of the choice of third State law. One reason is a possible collision with the principle of ‘unity of *lex successionis*’.<sup>158</sup> By allowing *renvoi*, the principle of ‘unity of *lex successionis*’ could be circumvented if the conflict-of-laws of the third State do not follow that principle, but instead make a difference between personal (movable) estate and immovable (real estate).<sup>159</sup> Another reason for exclusion of *renvoi* is the possible impairment of legitimate interests of persons entitled to a reserved share. Allowing *renvoi* would mean an indirect extension of choice of law restricted to the law of the state of the nationality of the testator. This restriction, as outlined above, serves to protect the interests of persons entitled to a reserved share.

In her monograph, Schmitz is analysing a case where the testator makes a choice of law which is invalid, because the chosen law does not correspond to the actual nationality, and the future nationality, respectively (Art. 22). Subsequently, the law to govern succession will be designated based on the default rule (Art. 21). If Art. 21 designates a third State law to govern succession, Art. 34(1) will apply, providing an exception from the principle of the prohibition of *renvoi* in so far as, under the Regulation, a third State law is applicable. It is possible that the choice of law is now

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<sup>152</sup> *Renvoi* is possible (admissible under Art. 34) in relation to the subsidiary jurisdiction of the courts of a Member State, when the deceased had their habitual residence in a third State, while there are assets in that Member State. The courts of that Member State have jurisdiction to rule on the succession as a whole if the deceased was a national of that Member State or had their habitual residence in that Member State and if, at the time the court is seised, not more than five years have elapsed since their habitual residence changed, and to rule on the assets located in that Member State (Art. 10), respectively.

<sup>153</sup> It shall be assumed that in case of this remission private international law rules of the Member State are excluded, see VAN CALSTER op. cit. 335.

<sup>154</sup> The rationale behind this provision traces back to Art. 4 Succession Convention, which, in relation to non-contracting states, has also adhered to *renvoi* – see SCHMITZ op. cit. 254.

<sup>155</sup> Third sentence of Recital (57): If those rules provide for *renvoi* [...], such *renvoi* should be accepted in order to ensure international consistency.

<sup>156</sup> Art. 34(2): “No *renvoi* shall apply with respect to the laws referred to in Art. 21(2), Art. 22, Art. 27, point (b) of Art. 28 and Art. 30.”

<sup>157</sup> Recital (57), fourth sentence: “*Renvoi* should, however, be excluded in situations where the deceased had made a choice of law in favour of the law of a third State.”

<sup>158</sup> Recital (37), fourth sentence: “For reasons of legal certainty and in order to avoid the fragmentation of the succession, that law should govern the succession as a whole, that is to say, all of the property forming part of the estate, irrespective of the nature of the assets and regardless of whether the assets are located in another Member State or in a third State.”

<sup>159</sup> Cf. Szócs (2019) op. cit. 56–57.

nevertheless valid under the conflict-of-laws rules of that third State law. Since this outcome can be interpreted as an *indirect extension* of the testator's *restricted autonomy* provided under the Regulation to choose the law applicable to the succession, the issue of whether such 'resurgence of the choice of law' has to be accepted or not, arises. In the context of private international law such extension could constitute *fraude à la loi*, meaning the evasion of the law by the parties. Applying the *fraude à la loi*, a mechanism recognised by customary law to tackle the evasion of the law, will result in a reduction of the scope of the conflict-of-laws rule on teleological grounds, where the parties attempt to achieve the conditions of the application of this conflict-of-laws rule fraudulently.<sup>160</sup> The Regulation explicitly acknowledges the possibility for the court to resort to "mechanisms designed to tackle the evasion of the law, such as *fraude à la loi*."<sup>161</sup> However, as concluded by *Schmitz*, the 'resurgence' of an initially (i.e. under Art. 22 Regulation) invalid choice of law clause as a result of the *renvoi* in accordance with Art 34(1), and the application of the private international law rules of the third State will not constitute an abuse of private autonomy of the parties and conclusively no *fraude à la loi*. The reason for this is that the European legislator explicitly allows *renvoi* [Art. 34(1)]. Whether and under which condition the law of the third State designated to govern succession will consider the choice of law valid, is a (policy) decision of that third State law, which has to be respected. *Schmitz* points out that the 'resurgence' of an initially invalid choice of law clause as result of *renvoi* has been an issue also known in German legal doctrine as connected to Art. 25(2) Introductory Act to the GerCC ('EGBGB') (version effective before 15. August 2015). Under this provision, the testator could choose German law as the law applicable in the form of disposition of property upon death as regards to the immovable (real) estate located in Germany. Otherwise, pursuant to Art. 25(1) Introductory Act to the GerCC (version effective before 15. August 2015), the law applicable to the succession *as a whole* would have been the law of the state whose nationality the deceased had at the time of death.<sup>162</sup> The 'resurgence' of an initially invalid choice of law clause as result of *renvoi*, as in conjunction with Art. 25(2) Introductory Act to the GerCC (version effective before 15. August 2015), was *accepted* in German legal doctrine.<sup>163</sup> Moreover, Art. 34(2) prohibits *renvoi* only if the third State's law is applicable based on, and in conjunction with the testator's choice of law disposition (Art. 22).<sup>164</sup>

<sup>160</sup> SCHMITZ op. cit. 255.

<sup>161</sup> 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.

<sup>162</sup> Cf. Karsten THORN: Introductory Act to the German Civil Code Art. 25, mn. 7. In: Otto PALANDT (ed.): *Bürgerliches Gesetzbuch mit Nebengesetzen*. München, C. H. Beck, <sup>69</sup>2010.

<sup>163</sup> Heinrich DÖRNER: Introductory Act to the German Civil Code Art. 25, mn. 7. In: *Julius von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen*. Berlin, Sellier-de Gruyter, revised edition 2007.

<sup>164</sup> SCHMITZ op. cit. 255.

### 2.11. Choice of law made before 17 August 2015

Whether or not a choice of law made prior to 17 August 2015 is valid has to be assessed according to Art. 83(2). This provision might be helpful in two aspects. According to the first alternative, a choice of law made prior to 17 August 2015 “shall be valid if it meets the conditions laid down in Chapter III”. This means that even an invalid choice of law is valid, provided that such choice is in line with the Regulation (Art. 22 et. seq.). Conclusively, such choice does not even have to be explicit.<sup>165</sup>

The second alternative in Art. 83(2) stipulates the continuing validity of choices of law made validly under the law of the State of habitual residence or any of the nationalities of the testator. These choices are valid even if they are inadmissible under the Regulation and remain valid also if the testator changes their habitual residence at a later time.<sup>166</sup> However, this continuing validity of the earlier choice of law most likely does not entitle the testator to make new dispositions of property upon death under that chosen law.<sup>167</sup> The State of habitual residence or nationality in terms of Art. 83(2) can be both an EU Member State and a third State. It is the prevailing view that the possibility of the choice of law must not result from the private international law rules of these states, but can also result from the law of the state to which the private international law rules of these states refer.<sup>168</sup> Partial choices of law also remain valid, which might lead to *dépeçage*.<sup>169</sup> The choice of law can be also revoked and changed in accordance with Art. 22(4); a change, however, is subject to Art. 22.<sup>170</sup> Following from the nature of ‘continuing validity’, the choice of law made under previous private international law rules cannot be considered as the basis for the application of the specific jurisdiction rules stipulated in Art. 5–9.<sup>171</sup>

Art. 83(4) provides a ‘rescue’ for invalid dispositions of property upon death made before the Regulation became applicable. It establishes a fictitious choice of law: Any invalid disposition of property upon death *is* valid if it meets the validity criteria of the law which the testator could have chosen under Art. 22 et. seq. Regulation as the law to govern the succession. From the point of view of legislative technique, this provision is a retroactive substantive private international law rule. This fictitious choice means a global choice of the law applicable and not a partial one.<sup>172</sup> An example for the application of Art. 83(4) could be a testator who, when disposing of their property on death, acted in accordance with the law of the State of their nationality, in line with Art. 22. It is important to note that the fictitious choice under Art. 83(4) *is not* an implicit

<sup>165</sup> ODESKY op. cit. § 15, mn. 146.

<sup>166</sup> Cf. ODESKY op. cit. § 15, mn. 153.

<sup>167</sup> ODESKY op. cit. § 15, mn. 159. Alternative view: THORN (2016) op. cit. Succession Regulation Art. 83, mn. 5.

<sup>168</sup> SCHMIDT op. cit. Succession Regulation Art. 83, mn. 2.

<sup>169</sup> DUTTA op. cit. Succession Regulation Art. 83, mn. 7.

<sup>170</sup> THORN (2016) op. cit. Succession Regulation Art. 83, mn. 5.

<sup>171</sup> ODESKY op. cit. § 15, mn. 160; DUTTA op. cit. Succession Regulation Art. 5, mn. 5.

<sup>172</sup> Haris P. PAMBOUKIS: Succession Regulation Art. 83, mn. 17–19. In: PAMBOUKIS (ed.) op. cit.

choice. The fictitious choice pursuant to Art. 83(4) has to be assessed on the basis of objective connective factors, while in the case of an implicit choice of law under Art. 22, the focus lies on the intention of the testator to choose the law of the state of their nationality, although this choice has not been declared explicitly. Under the fictitious choice pursuant to Art. 83(4), the testator had simply not given any thought to the choice of law.<sup>173</sup> The requirement stipulated in Art. 83(4) that the “disposition of property upon death was made [...] in accordance with the law which the deceased could have chosen in accordance with this Regulation”, leaving also plenty of space for interpretation. It is all but not easy to delimitate from the implicit choice of law pursuant to Art. 22. The fictitious choice under Art. 83(4) shall apply if the testator has made a disposition of property upon death and on the basis of the private international law rules applicable to them at that time the law of state of their nationality would apply to govern the succession.<sup>174</sup> In this respect, the option to choose the law applicable to govern succession under the Regulation has retroactive effect.<sup>175</sup> Uncertainties are pre-programmed in case of testators with multiple nationalities. Nevertheless, it is also possible that the intention of the testator was to avoid the application of their national law, which is recognisable based on their disposition of property upon death, for instance by clearly complying with specific conditions set out for dispositions of property upon death under the law of the state of their habitual residence.<sup>176</sup> In such a case, the fictitious choice pursuant to Art. 83(4) will not apply. Revocation or change of the disposition of property upon death will terminate the fiction of choice of law.<sup>177</sup> Since the fictitious choice is equivalent to a choice of law pursuant to Art. 22, it also enables the parties involved (in the proceedings) to influence jurisdictional issues within the aspects set out in Art. 5–9.<sup>178</sup>

### 3. Constellations of choice of law

From the point of estate planning, *Odersky* lists five possible reasons for a choice of law.<sup>179</sup> A first reason might be the testator’s attachment to their home country (country of nationality), focusing on the familiarity with one legal system, i.e. that of the country of origin. As *Odersky* points out, first generation immigrants might still have the intention to return to their home country. A *second* reason listed is ‘legal certainty’ in the sense that choice of law prevents uncertainties related to the assessment of ‘habitual residence’, especially if the testator frequently changes their residence or the testator’s residence is regularly spread over two or more states, or if the testator has the intention to move abroad at a later time for a longer period of time. A *third* reason is the possibility

<sup>173</sup> ODERSKY op. cit. § 15, mn. 146.

<sup>174</sup> ODERSKY op. cit. § 15, mn. 147.

<sup>175</sup> SCHMIDT op. cit. Succession Regulation Art. 83, mn. 22.

<sup>176</sup> ODERSKY op. cit. § 15, mn. 150.

<sup>177</sup> DUTTA op. cit. Succession Regulation Art. 83, mn. 8.

<sup>178</sup> DUTTA op. cit. Succession Regulation Art. 5, mn. 5.

<sup>179</sup> ODERSKY op. cit. § 15, mn. 98.



of estate planning on behalf of the testator, e.g. more convenient rules for the testator under the law of nationality regarding reserved share, and rules regarding mandatory heirs, respectively. Conciliating the outcome on an international level is listed as a *fourth* reason for choice of law if assets are located or the testator has their habitual residence in a third country. This can be helpful if the third country is applying the ‘nationality rule’ instead of the habitual residence or domicile principle to determine the law applicable to govern succession. If the testator is a national of an EU Member State, a *fifth* reason for choice of law could be to enable the parties (heirs) to conclude a choice of court agreement under Art. 5, or to enable the parties to the proceedings to ask the court seised at the testator’s habitual residence to choose the law applicable to the succession under Art. 6(a).

### 3.1. Unilateral dispositions of property upon death

#### 3.1.1. Choice of law to govern the succession as a whole [Art. 22, Art. 24(1)]

A testator living in a Member State which is not their home country may choose, at the time of setting up their will, their current or future national law to govern their ‘succession as a whole’ pursuant to Art. 22. This choice of law, according to Art. 24(1), will also ‘extend’ to the admissibility and substantive validity of the will. Such linking usually corresponds to the intention of the testator. However, if the testator chooses the law of the state of their future nationality to govern their succession as a whole (as according to Art. 22), this cannot be considered as hypothetical law as under Art. 24(1), which governs admissibility and substantive validity of the disposition of property upon death.<sup>180</sup> As stated above (2.7), the choice of law can be both expressly declared in the will (choice of law clause), or tacitly (i.e. the choice of law follows with satisfactory certainty from the content of the will). At the same time, it is desirable that the testator *is aware* with regard to the *scope and coverage* of the choice of law, i.e. of the fact that the choice of law is not only about governing legal aspects of the will, but about governing all legal aspects of the succession, including entitlements of reserved share. The testator should also be aware that in absence of a choice of law the law of the state of their habitual residence will apply to (almost)<sup>181</sup> all aspects of the succession. Revocation or modification of the choice of law applicable to govern succession as a whole will, in general, not affect the law applicable to admissibility and substantive validity as determined pursuant to Art. 24(1).

From the practical point of view, the choice of the law of the state of the future nationality shall be considered an option if the testator intends to acquire that future nationality in the near future. The choice of the law of the future nationality becomes effective *only* if the testator is actually possessing that nationality at the time of death. The choice of the future national law makes sense if, on other grounds, that law is

<sup>180</sup> Following from Recital (51).

<sup>181</sup> For example, certain immovable property, certain enterprises or other special categories of assets located in Member States other than the Member State of the habitual residence (cf. Art. 30).

the law governing the disposition of property upon death anyway, e.g. as a result of reverse reference or on grounds of the habitual residence of the testator in that state.<sup>182</sup> A good example for this is an EU citizen living and working in another Member State for decades, fulfilling the conditions to acquire the nationality of that country and planning to apply for that nationality. Nevertheless, the person intends to return to their home country upon retirement. From the point of view of their estate planning, the EU citizen favours the law of the EU Member State in which life and work take place. The testator can, by choice of their future national law, secure the application of the law of state of their habitual residence to govern their succession also for the long term.<sup>183</sup> Another issue might be the choice of law if the testator has multiple nationalities. In such case attention should be paid to the determinability of the chosen law. The chosen law must be sufficiently determinable, i.e. which national law has actually been chosen, otherwise the choice of law is ineffective.<sup>184</sup> A so-called 'dynamic choice' (i.e. the testator has multiple nationalities and it is not 'exactly' specified which country's law has been chosen) shall be considered valid if the chosen national law is determinable by way of interpretation.<sup>185</sup>

Where the testator is a national of a state with more than one laws applicable to govern succession, difficulties arise if the choice of law refers directly to a particular law, and not to the law of the state of nationality in general, as required under Art. 22. On the one hand, the situation is less problematic if the particular law chosen corresponds to the law to which the testator objectively has the closest connection pursuant to Art. 36(2) lit. b (in case of interlocal conflict), and second sentence of Art. 37 (in case of interpersonal conflict), respectively. On the other hand, if the particular law 'chosen' by the testator is not the law to which the testator objectively has the closest connection, there might be good arguments not to deem such choice invalid, but to consider it, by way of interpretation, as 'general' choice of the law of state of nationality. As a consequence, the applicable particular law will be determined according to Art. 36, Art. 37 Regulation.<sup>186</sup>

As stated above (see 2.7), the choice of law can be made upon condition or with a time limit. A choice of law upon condition might be useful if the testator's wish is to apply different laws to govern the succession in case of different possible groups of relations. An example for this is the choice of law depending on the question whether the deceased has children or not at the time of death. Another example is that the choice

<sup>182</sup> ODERSKY op. cit. § 15, mn. 106.

<sup>183</sup> BURANDT-SCHMUCK op. cit. Succession Regulation Art. 22, mn. 1.

<sup>184</sup> ODERSKY op. cit. § 15, mn. 110.

<sup>185</sup> Michael SONNENTAG: Succession Regulation Art. 22, mn. 8.. In: Maximilian HERBERGER – Michael MARTINEK – Helmut RÜSSMANN – Stephan WETH – Markus WÜRDINGER (eds.): *juris Praxiskommentar-BGB (jurisPK-BGB)*, Vol. 6. (Internationales Privatrecht und UN-Kaufrecht) 9th edition as of 01. 03. 2020.

<sup>186</sup> ODERSKY op. cit. § 15, mn. 138.

of national law shall only apply if the testator and their spouse die at the same time, or if the testator dies after their spouse's death.<sup>187</sup>

Nevertheless, according to the prevailing view, it is required for the choice of law upon condition to be clearly determinable at the time of death whether the condition has been fulfilled or not, i.e. whether the choice of law is effective or not.<sup>188</sup>

Under the aspect of today's increased mobility, and especially in the case of people with multiple nationalities, a choice of law might be advisable even if the testator lives in a participating EU Member State whose national the testator is. In German legal literature this is called the 'precautionary choice of law'.<sup>189</sup> By such choice the testator can make sure that their (specified) national law will be applied in the event of moving to another participating EU Member State, and, if the testator has multiple nationalities, to prevent the assumption of an implicit choice of law in favour of one of the other national laws, respectively.

An invalid choice of law – for whatever reason – will result in the application of the law of the state of the testator's habitual residence. If, for example, the choice of law is invalid under the national law allegedly chosen by the testator because he or she lacks the capacity to make a will, this has to be assessed under the law of the state of their habitual residence and, where applicable, the terms under which the testator's disposition of property upon death has been *recharacterised under* or *incorporated into* that law.

Complications or even disadvantages might arise if the nationalities of spouses differ and each of them or one of spouses chooses their national law as the law applicable under Art. 22, and if they later die at the same time ('it is uncertain in what order their deaths occurred'). As a consequence, two different laws will apply and pursuant to Art. 32 Regulation, none of them will have any rights to the succession of the other.<sup>190</sup> In the absence of choice of law the succession of each of them would have been governed by the same law, i.e. the law of the State of their common habitual residence as in accordance with Art. 21.

### 3.1.2. *Choice of law to govern the admissibility and substantive validity of unilateral dispositions of property upon death [Art. 24(2)]*

Admissibility and substantive validity, and modification or revocation of a *unilateral disposition of property upon death*, respectively, are assessed according to the

<sup>187</sup> Ingo LUDWIG: Die Wahl zwischen zwei Rechtsordnungen durch bedingte Rechtswahl nach Art. 22 der EU-Erbrechtsverordnung. *Deutsche Notar-Zeitschrift (DNotZ)*, vol. 109., no. 1. (2014) 15.

<sup>188</sup> ODERSKY op. cit. § 15, mn. 129.; LUDWIG op. cit. 14–15.; BURANDT–SCHMUCK op. cit. Succession Regulation Art. 22, mn. 6.

<sup>189</sup> Cf. ODERSKY op. cit. § 15, mn. 126.

<sup>190</sup> Cf. Cristina GRIECO: The role of party autonomy under the regulations on matrimonial property regimes and property consequences of registered partnerships. Some remarks on the coordination between the legal regime established by the new regulations and other relevant instruments of European private international law. *Cuadernos de Derecho Transnacional (CDT)*, vol. 10., no. 2. (2018) 472. (<https://doi.org/10.20318/cdt.2018.4384>)

(hypothetical) law applicable to succession, i.e. the law which would apply to succession at the time when such a disposition is made [Art. 24(1), see 1.2.1. above].<sup>191</sup> By also enabling a choice of law restricted to matters of admissibility and substantive validity of a unilateral disposition of property upon death, the law governing these two issues becomes independent from the ‘law governing succession as a whole’, which is subject to change if the testator changes their habitual residence. As stated above (2.4.), the issues of admissibility and substantive validity of a unilateral disposition of property upon death will only be governed, in accordance with Art. 24(1), by the law chosen to govern the ‘succession as a whole’ pursuant to Art. 22, if the testator chooses the law of the state of nationality *the testator possesses at the time making the unilateral disposition of property upon death*. In contrast, if the testator chooses the law of state of their nationality at the time of their death [second alternative of Art. 22(1)], admissibility and substantive validity of that unilateral disposition upon death will be governed, as in accordance with Art. 24(1) in conjunction with Art. 21(1), by the law of the state of the habitual residence.

Anyway, a separate choice of law ‘limited’ to govern matters of admissibility and substantive validity of a unilateral dispositions of property upon death pursuant to Art. 24(2) makes only sense if the testator has not made a ‘general’ choice of law pursuant to Art. 22(1) in conjunction with Art. 24(1).<sup>192</sup>

Nevertheless, it will be anything but easy to determine whether the testator has made a choice of law to govern the succession as whole pursuant to Art. 22, or a choice of law restricted to the admissibility and substantive validity of the disposition of property upon death as under Art. 24(2). As a non-written default principle, there shall be a ‘presumption’ in favour of an interpretation for a choice of law applicable to succession as a whole in the sense of Art. 22.<sup>193</sup> In contrast, a ‘separate’ choice of law restricted to admissibility and substantive validity pursuant to Art. 24(2) shall only be assumed if there is a clear manifestation of such intention of the testator. One cannot expect from a testator who is not a legal expert to recognise or identify the difference between the choice of law to ‘govern the succession as a whole’ according to Art. 22 and a choice of law restricted to govern matters of admissibility and validity of the unilateral disposition of property upon death in accordance with Art. 24(2).

If the disposition of property upon death is not admissible, and valid, respectively, it shall be assumed, as in accordance with the principle of *favor testamenti*, that the choice of law is restricted to the law applicable to govern succession as under Art. 22 only.<sup>194</sup> In such case the law governing admissibility and substantive validity of the disposition shall be determined autonomously in accordance with the default rule in Art. 24(1), as in absence of a choice of law. The law designated in this way is not subject to change.<sup>195</sup>

<sup>191</sup> Cf. Recital 51; BURANDT–SCHMUCK op. cit. Succession Regulation Art. 24, mn. 1.

<sup>192</sup> KROLL-LUDWIGS op. cit. 77.

<sup>193</sup> DUTTA op. cit. Succession Regulation Art. 24, mn. 14.; ODERSKY op. cit. § 15, mn. 240.

<sup>194</sup> ODERSKY op. cit. § 15, mn. 240.

<sup>195</sup> DUTTA op. cit. Succession Regulation Art. 24, mn. 14.

It is, of course, also possible to choose the *same law* both regarding admissibility and validity of the unilateral disposition of property upon death (Art. 24(2)) and regarding the law applicable to govern 'succession as a whole' [Art. 22(1)]. Nevertheless, in order to avoid difficulties in interpretation, such 'double' opting for one and the same law in both respects must be clearly and expressly demonstrated by the document containing the will.<sup>196</sup>

A reason for a separate choice of law might be a more favourable national law with respect to admissibility and/or substantive validity of a disposition of property upon death. That might be the case for example if the testator's national law has a more 'generous approach' with regard to testamentary capacity,<sup>197</sup> which, for instance, under Scottish law starts at the age of 12,<sup>198</sup> while under German law it starts at the age of 16 (§ 2229 GerCC), and under Hungarian law, at the age of 14 [§ 7:14(4) HunCC], but under both German and Hungarian law, until reaching the age of majority, only in form of a notarial will.<sup>199</sup> This means that a UK national (domicile of origin in Scotland) living in Hungary at the age of 13 might choose Scottish law to govern admissibility and substantive validity of the unilateral disposition of property upon death pursuant to Art. 24(2), while Hungarian law as the law of state of the habitual residence will govern the succession as a whole according to the general rule in Art. 21(1). It is important to note that the requirement under Hungarian law that a testator aged 14-18 years must draw up their will as a notarial will is a question of formal of validity under Art. 27(3). In accordance with this, as in our case, if the testator is 14 years of age, there would be no reason to choose their national law to govern matters of admissibility and/or substantive validity pursuant to Art. 24(2), since the restriction imposed by Hungarian law (i.e. only in form of notarial will) is considered a question of 'formal validity', and Scottish law applies here according to Art. 27(1)(b).<sup>200</sup>

In the case of testators with multiple nationalities it is also possible to choose one of the laws to govern matters of admissibility and substantive validity in the sense of Art. 24(2), and another one to govern their succession as a whole in the sense of Art. 22. The choice of law to govern matters of admissibility and substantive validity pursuant to Art. 24(2) will remain effective even in case the testator revokes or modifies the choice of law made with respect to the law to govern the succession as a whole pursuant to Art. 22.<sup>201</sup>

A choice of law *ex post*, i.e. *after* the creation of the disposition of property upon death shall be also accepted, especially if the creation of a modifying or revoking disposition by means of a choice of law in the sense of Art. 24(2) is regarded possible. By an *ex post* choice of law to govern admissibility and substantive validity pursuant to Art. 24(2), the testator could avoid a repeated disposition of property upon death,

<sup>196</sup> ODESKY op. cit. § 15, mn. 240.

<sup>197</sup> ODESKY op. cit. § 15, mn. 206.

<sup>198</sup> Section 2(2) Age of Legal Capacity (Scotland) Act 1991.

<sup>199</sup> The will is drafted and authenticated by a notary public.

<sup>200</sup> The source of inspiration for this example: ODESKY op. cit. § 15, mn. 206.

<sup>201</sup> ODESKY op. cit. § 15, mn. 237.

probably also saving notarial costs on a repeated creation. Nonetheless, a choice of law as regards to admissibility and substantive validity made *ex ante*, i.e. before the disposition of property upon death is made, seems also possible.<sup>202</sup>

The choice of law as regards admissibility and substantive validity of the disposition might also be brought about indirectly if the testator modifies or revokes their choice of law made pursuant to Art. 22 (law applicable to govern succession as a whole). In such case the modification or revocation *might be interpreted* as a choice of the law to govern the admissibility and substantive validity of the disposition of property upon death, provided that the testator has also intended these matters to be submitted to the new law.<sup>203</sup>

It is also possible for the *modification or revocation of the choice of law* to govern admissibility and substantive validity only. In accordance with the second sentence of Art. 24(3), the substantive validity of a modification or revocation of the unilateral disposition of property upon death shall be governed by the law chosen to govern admissibility and substantive validity. An example for this case is a Hungarian citizen with their habitual residence in Spain, who has drawn up a last will in March, in which the son is appointed as only heir, and in which Hungarian law has been explicitly chosen to govern admissibility and substantive validity of the last will. Later in November another last will is drawn up, in which the son and a newly born daughter are appointed as coheirs half each. The admissibility and substantive validity of these modifications are governed by Hungarian law.<sup>204</sup> In fact, there will be very rarely a practical need for a modification or revocation of such choice, which would make sense, for instance, if it turns out that the disposition of property upon death is not admissible or is invalid under the law chosen.<sup>205</sup>

However, as *Dutta* suggests, Art. 24(3) second sentence might be interpreted as a mere ‘presumption’, thus allowing the testator to choose, as regards substantive validity of the modification or revocation of their disposition of property upon death, the law which could have been chosen at the time of modification or revocation. If the law applicable to the admissibility and substantive validity of the *original* disposition of property upon death differs from the hypothetical law applicable to the admissibility and substantive validity [Art. 24(3) in conjunction with Art. 24(1)]<sup>206</sup> of the *modifying and revoking* disposition of property upon death, an implicit choice of law could be assumed with regards to the admissibility and substantive validity of the *modifying or revoking* disposition of property upon death.<sup>207</sup>

<sup>202</sup> DUTTA op. cit. Succession Regulation Art. 24, mn. 12.; SCHMIDT op. cit. Succession Regulation Art. 24, mn. 22–24.

<sup>203</sup> DUTTA op. cit. Succession Regulation Art. 24, mn. 8.

<sup>204</sup> Slightly modified example in: SCHMIDT op. cit. Succession Regulation Art. 24, mn. 32.1.

<sup>205</sup> DUTTA op. cit. Succession Regulation Art. 24, mn. 13.

<sup>206</sup> Pursuant to the first sentence of Art. 24(3), the substantive validity of the modifying or revoking disposition is linked to the hypothetical law to govern succession as a whole at the time of modification or revocation.

<sup>207</sup> DUTTA op. cit. Succession Regulation Art. 24, mn. 17.

### 3.1.3. *Choice of the law to govern intestate succession (choice of law only)*

As stated above (2.6.), it seems acceptable that a choice of law in the sense of the law only regulates intestate succession. In this case, the admissibility and substantive validity of the unilateral disposition of property upon death, which is the form of the choice of law, will be governed by the law of the state of the testator's habitual residence pursuant to Art. 21(1). Such choice of the national law 'to govern intestate succession only' makes sense, for example, if the testator does not want to draw up a will but instead wants that the succession is governed based on the rules of intestate succession under their national law. A choice of law in this sense must be clearly demonstrated by the document (unilateral testamentary disposition).

## 3.2. Agreements as to succession

### 3.2.1. *Choice of law to govern succession as a whole in case of a contractual appointment of an heir [Art. 22, Art. 25(1)–(2)]*

The main argument for a choice of law to 'govern succession as a whole' pursuant to Art. 22(1) in connection with the conclusion of a contract regarding the appointment of an heir is identical to that outlined in the case of a choice of law in connection with setting up a unilateral disposition of property upon death (see above 3.1.1.). The main reason is 'to fixate' the testator's (the testators') national law(s) as applicable law to govern *all aspects* of their succession, provided that national law is favoured with regard to their estate planning, *and* their national law has a friendly approach towards a contractual appointment of heirs. By choosing their national law 'to govern the succession as a whole', the testator(s), at the same time, ensures (ensure) the admissibility and substantive validity of the contractual appointment of the heirs, since their national law is friendly towards such agreements, while ensuring the greatest possible effect for the contractual appointment, meaning that there will be no need for recharacterisation due to a change of the law applicable 'to govern succession as a whole', which might occur if the testator is moving to another participating EU Member State (Art. 21). However, it is important to note that if there are several testators (with different nationalities) as parties to the agreement (e.g. spouses), a choice of law in the sense of Art. 22(1) alone is not likely to make the agreement on legal succession subordinate to one's own national law and thus to overcome the rather unfriendly approach of the other party's national law towards such agreements. Several testators with different nationalities may subordinate *only* matters of creation of the contractual appointment to one's national law, as in accordance with Art. 25(3), but not the law applicable 'to govern succession as a whole'. This requires a separate choice of law as regards the law to govern admissibility (and, in addition, a choice of law by each testator 'to govern the succession as a whole', respectively), substantive validity and the binding effects as between the parties pursuant to Art. 25(3).

A choice of law pursuant to Art. 22 (to govern the testator's succession as a whole) *upon condition or time limit* seems useful, for example, for reasons of optimal estate planning, in case of reciprocal dispositions of property upon death (which might be

considered as agreements as to succession, cf. above 1.2.2.), if the law governing the succession of the testator who dies first differs from the law governing the succession of the testator who dies last.<sup>208</sup> A German married couple living in France is intending to appoint each other as exclusive heir to the other. None of them has descendants. Furthermore, after the death of the longest living of them, their parents, or potential descendants, shall be appointed as heirs in the form of ‘executorship’. In contrast to German law, parents are not entitled to a reserved share under French law, and the ‘executorship’ is unknown in French law. Therefore, the favoured solution is to apply French law to govern the succession of the spouse who dies earlier (i.e. the law of the state of habitual residence) and German law to govern the succession of the spouse who dies later (i.e. to apply the spouse’s national law on the basis of choice of law). Subsequently, each of the spouses will choose their national law upon the condition that this choice of law shall be effective if the other spouse is no longer alive at the time of one own’s death.<sup>209</sup>

The choice of law to govern succession as a whole can be also useful if testators living in different participating EU Member States have the same nationality. As an example, a German national living in Hungary intends to conclude an agreement as to succession with a sibling, a German national living in Germany. The agreement as to succession shall contain reciprocal dispositions of property upon death: Each of them shall appoint the other as heir. The simplest way to make this legally possible is for the sibling living in Hungary to choose German law (the own national law) as applicable law to govern the succession as a whole pursuant to Art. 22, with effect also on matters of creation of the agreement as to succession in accordance with Art. 25(1).

### 3.2.2. *Choice of the law applicable to the admissibility, substantive validity and binding effects between the parties of a contract on the appointment of an heir [Art. 25(3)]*

As stated above under 1.2.1. and 2.5., according to Art. 25(2), the substantive validity and binding effect of an agreement as to succession involving several testators is governed by the law of the country with which the closest connection exists, in the absence of a choice of law, and if the hypothetical law that should govern these matters is different in relation to the testators involved.

Beside this, a general prerequisite is that the agreement as to succession is admissible under *each* applicable hypothetical law [first subparagraph of Art. 25(2)]. In order to have the option to deal with possible difficulties arising in conjunction with Art. 25(2), the European legislator makes it possible for the testators to choose *the national law of one of them* to govern admissibility, substantive validity and binding effects between the parties of the agreement as to succession. This means, from the practical point of view, that if at least one of testators is a national of a country whose law has a ‘positive stance’ towards agreements as to succession (e.g. German law with its *Erbvertrag*,

<sup>208</sup> DUTTA op. cit. Succession Regulation Art. 22, mn. 12.

<sup>209</sup> Example by LUDWIG op. cit. 13–15.



Hungarian law with its *öröklési szerződés*, etc.), through the choice of law, the testators have the option to conclude an agreement as to succession under the respective national law of one of them, irrespective in which participating EU Member State they actually live or will be living in the future.<sup>210</sup> It is important to note that the law applicable to govern ‘succession as a whole’ of the testators is a different question, to be determined *for each testator individually* according to Art. 21, and Art. 22, respectively.<sup>211</sup> Each of the testators may choose the law in accordance with Art. 22. Subsequently, it is possible that the testators opt for different laws (i.e. if they have different nationalities), and it is also possible that not all of them will make use of the option provided in Art. 22 to choose the applicable law. With respect to the latter testator, the law governing their ‘succession as a whole’ will be the law of the state of their current habitual residence as in accordance with Art. 21. Nevertheless, the law to govern ‘succession as a whole’ is subject to change either in connection with a later change of the place of habitual residence, or a new choice of law pursuant to Art. 22.<sup>212</sup> In case of change of the law applicable to govern ‘succession as a whole’ the binding clauses of the agreement shall be, as far as possible, recharacterised within the context/terms of the new applicable law, while it is also possible that, under the new law, certain clauses become partially or entirely ineffective.<sup>213</sup>

A good example are spouses concluding an agreement as to succession. One of them is a German national, the other one of Greek nationality, and they both live in Greece. They choose German law to govern admissibility, substantive validity and binding effects between the parties of the agreement as to succession as pursuant to Art. 25(3), furthermore the German national spouse chooses German law to ‘govern the succession as a whole’ pursuant to Art. 22). As a consequence, the agreement as to succession has to be acknowledged by the Greek law (e.g. law of the state of habitual residence of the spouses), even if this law does not accept agreements as to succession. With respect to the other spouse (the Greek national), the law of the state of their habitual residence is the law applicable to ‘govern the succession as a whole’. In case the spouses move to another country, the law applicable to succession for the other spouse will be law of the new habitual residence.

An agreement of choice of law to govern admissibility, substantive validity (etc.) of an agreement as to succession in the sense of Art. 25(3) might be interpreted as if the testator also made a choice of law applicable to govern succession as a whole pursuant to Art. 22. In this case, with regard to a revocation or modification of the choice of law, the distinction has to be made between the binding effect under the chosen law to govern succession as a whole in sense of Art. 22, on the one hand, and the binding effect under the chosen law to govern admissibility, substantive validity (etc.) pursuant to Art. 25(3), on the other hand. A unilateral revocation or modification

<sup>210</sup> ODESKY op. cit. § 15, mn. 261.

<sup>211</sup> Cf. Robert SIEGHÖRTNER: § 9 Internationale Testamentvollstreckung, mn. 52. In: Manfred BENGEL – Wolfgang REIMANN (eds.): *Handbuch der Testamentvollstreckung*. München, C. H. Beck, 2017.

<sup>212</sup> ODESKY op. cit. § 15, mn. 262.

<sup>213</sup> Ibid.

of the choice of law by the testator may only affect the law chosen to govern succession as a whole, provided that under that law revocation or modification of the choice of law is admissible. The chosen law to govern admissibility, substantive validity and binding effects between the parties of the agreement as to succession pursuant to Art. 25(3) will remain unaffected *as this constitutes an agreement* (contract) between the testator and the appointed heirs (see above 2.8.).<sup>214</sup>

### 3.2.3. *Agreements for the relinquishment of inheritance and/or of reserved shares*

It follows from Art. 25(1) that substantive validity of an agreement for the relinquishment of inheritance and/or of reserved shares must be linked to the law of the future testator. The future testator may choose their national law, and the future testators, respectively, the national law of one of them, to govern admissibility, substantive validity and binding effects as between the parties (matters of creation) of such an agreement pursuant to Art. 25(3).<sup>215</sup> If the agreement concerns the estate of several future testators, as pointed out in German legal literature, it is important to note that the option provided in Art. 25(3) to opt for the national law of one of them to govern admissibility, substantive validity and binding effects as between the parties will only work if there is some kind of interdependency between the dispositions of the future testators. An example could be the case where spouses reciprocally waive their reserved share to which they are entitled in relation to the other spouse. However, an agreement in which a child waives their reserved shares to which the child is entitled vis-à-vis the parents shall rather be considered as two separate agreements contained in one document (in sense of being concluded with *each* of the parents separately), and therefore the option to choose one of the parents' national law to govern matters of creation shall not be possible.<sup>216</sup> Beside this, as pointed out above (1.2.3.), a choice of law *limited* to matters of creation as between the parties pursuant to Art. 25(3) *implies the risk* to become ineffective in case of change of the applicable law 'to govern succession as a whole', if the future testator moves to another participating EU Member State. Therefore, a separate choice of law regarding admissibility, substantive validity and binding effects as between the parties of a succession waiver agreement does not make much sense. Rather, it is advisable to choose the future testator's actual national law pursuant to Art. 22(1) 'to govern the succession as a whole', which, according to Art. 25(1), will also govern matters of creation of a succession waiver agreement.

<sup>214</sup> DUTTA op. cit. Succession Regulation Art. 25, mn. 6.

<sup>215</sup> KROLL-LUDWIGS op. cit. 81.; ODESKY op. cit. § 15, mn. 262.

<sup>216</sup> KROLL-LUDWIGS op. cit. 81.; WEBER op. cit. 505.