ELTE LAW JOURNAL

2019/1

ELTE LJ

ELTE LAW
EÖTVÖS LORÁND UNIVERSITY

ELTE Law Journal, published twice a year under the auspices of ELTE Faculty of Law since 2013

Contact • eltelawjournal@ajk.elte.hu
Eötvös Loránd University, Faculty of Law • 1053 Budapest, Egyetem tér 1–3, Hungary
For submission check out our submission guide at www.eltelawjournal.hu

Recommended abbreviation for citations: ELTE LJ

ISSN 2064 4965

Editorial work • Eötvös University Press
18 Királyi Pál Street, Budapest, H-1053, Hungary

EÖTVÖS UNIVERSITY PRESS www.eotvoskiado.hu

Executive Publisher: the Executive Director of Eötvös University Press
Layout: Tibor Anders
Cover: Ildikó Csele Kmotrik
Printed by: Multiszolg Bt.

Contents

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The European Succession Regulation from the Perspective of the First Three Years of Its Application**

I A Selection of Practical Problems

For the fourth year now, the European Succession Regulation[1] (hereafter the ESR) has been applied, which has provided novel solutions from several points of view in inheritance cases containing foreign elements, and at the same time requires a different mind-set from practising lawyers dealing with succession.

One such novel solution is the application of the principle of *unity of succession* in the area of jurisdiction. Although the former Hungarian autonomous private international law was based on this principle in the field of conflict-of-laws regulation of succession,[2] the principle of unity of succession in the area of jurisdiction had little opportunity to prevail. This was because our former jurisdictional rules had already excluded domestic jurisdiction over foreign immovable estate and also for the foreign property of those deceased with foreign citizenship.[3] In practice, however, even in respect of the foreign movable estate of the deceased of Hungarian citizenship, conducting the succession proceedings was carried out in Hungary relatively rarely, given the fact that there was only a limited scope for recognition of the Hungarian decree on transferring the estate. In contrast to that, the ESR treats the estate as a single asset in terms of jurisdiction, irrespective of the location and legal nature of each of its assets. Thus, if domestic jurisdiction exists over the estate, it will, as a rule, cover the entire estate, including the foreign immovable estate, which was previously unimaginable.

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** This paper is an output of GoinEUPlus Project Co-funded by European Union's Justice Programme 2014–2020. The European Commission's support for the production of this publication does not constitute an endorsement of the contents, which reflect the views only of the authors, and the Commission cannot be held responsible for any use, which may be made of the information contained therein.

1 Regulation (EU) No 650/2012 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., 27.7.2012, 107).

2 See the text of Section 36 (1) of Law-decree No. 13 of 1979 on Private International Law (old PIL) in effect before 17 August 2015.

3 See Section 62/C. *a)–b)* of old PIL.

This has created a completely new challenge in the legal settlement of inheritance cases: the problem of 'involving' the estate assets located abroad in the domestic succession proceedings (see below, Chapter V).

The practice has also been obliged to get used to the *universal scope* of the new international succession regulation. In our earlier international inheritance law, there also used to be international rules of jurisdiction and conflict-of-laws norms. However, although they were given priority over the rules of the international private law code, they did not entirely supersede it. A significant part of our bilateral treaties on legal assistance in civil matters contains conflict-of-laws and jurisdictional norms for inheritance relationships; however, their personal and material scope is limited to the estate of the deceased of the nationality of the contracting states and to the estate of such deceased persons in the two contracting states; in other cases, the rules of the international private law code prevailed. Compared to that, the ESR has brought into the legislative framework governing succession matters the phenomenon that Professor Lajos Vékás referred to as 'the twilight of conflict of laws of the Member States'[4]. The Regulation regulates both the issues of jurisdiction and applicable law universally; that is, the scope of this regime also extends to those inheritance cases where the facts are only linked to a third state and not to another EU member state.[5] As far as conflict-of-laws rules are concerned, the 'Rome-type' regulations that were drafted years ago also provide universal regulation.[6] However the universal regulation of jurisdiction, i.e. to cover the situations related to third countries by supplementary jurisdictional rules, is a relatively new phenomenon in the EU legislative process itself.[7]

In many ways, the regulation of *temporal scope* is also a novum. A typical regulatory solution to EU acts concerning jurisdiction and recognition is that the temporal scope of the jurisdictional regime laid down therein covers proceedings starting after the application of the given regulation begins. The ESR however, focusing on the date of the substantive legal relationship to be considered, pursues the solution that the entire regulatory regime of the Regulation, including the jurisdictional rules, extends to succession matters of those deceased who have died after the application[8] of the Regulation began. The consequence of this is that,

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4 Vékás Lajos, 'A tagállami kollíziós nemzetközi magánjog alkonya Európában' [The twilight of the national conflict of laws in Europe] in Raffai Katalin (ed), A *nemzetközi gazdasági kapcsolatok a XXI. században. Ünnepi tanulmánykötet a nyolcvanéves Bánrévy Gábor tiszteletére* (Pázmány Press 2011, Budapest) 129.

5 The system of rules of the ESR answers e.g. the question whether it is possible to carry out domestic succession proceedings for the estate of a deceased person of Swiss citizenship; or which law is applicable to the deceased's domestic estate who was an Irish citizen living in Ireland (also considered a 'third state').

6 See Art. 2 of the Regulation (EC) No 593/2008 on the law applicable to contractual obligation (hereinafter Rome I Regulation); Art 3 of the Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (hereinafter Rome II Regulation); and Art. 4 of the Regulation (EU) No 1259/2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (hereinafter: Rome III Regulation).

7 Before the ESR jurisdictional regulation of universal scope only existed on matters concerning family law maintenance obligations; see Art. 6–7 of the Regulation (EC) No. 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.

8 17 August, 2015.

in succession cases, the period of time in which the conflict-of-law rules, as well as the jurisdiction norms of the previous legislation, 'coexist' with the rules laid down in the EU Regulation is relatively long. Although in decreasing numbers, there are still succession cases arising that are only to start now for the deceased who died before 17 August 2015. As regards such succession proceedings, Member States have continued to have their own legislation on jurisdiction. This explains why our new Act on International Private Law (PIL Act) adopted in 2017[9] explicitly upheld the jurisdictional rules for succession proceedings.[10] Considering the fact that even today, in practice, succession cases do arise from time to time in which settlements must be made decades after the death of the deceased, we can expect that our jurisdictional rules in the PIL Act will also be needed in the long term, even if they are obviously losing their practical significance.

Today, in view of the limited time-frame, I would like to deal with certain specific issues related to some of the regulatory core points of the ESR. These are admittedly the result of subjective selection, namely some issues that have been raised on a number of occasions during the four years of application of the Regulation and where, in my opinion, EU legislation leaves something to be desired, and can be considered less successful. Three of these issues tackle conflict of laws and one of them relates to international succession proceedings.

II The Uncertainty of Determining the Law Applicable to the Admissibility of Joint Wills

It is well-known that the European legal systems have a markedly differing attitude to the institution of a joint will. Certain legal systems categorically prohibit the making of a joint will;[11] in contrast to this, in other countries, the joint will is a widespread means of estate planning; this is the situation in Germany in particular. German spouses very often use the type of testament referred to as the 'Berliner Testament' in commentaries and other legal literature sources;[12] in which the testifying spouses can mutually appoint each other as sole heir and also decide the order of succession to the estate of the surviving spouse. It was possible to meet such joint wills of German spouses in the Hungarian practice of succession proceedings relatively often, already years before the application of the ESR. It is also permitted to make a joint will under the Nordic legal systems, where the circle of persons who can declare their will in the same document is not even limited to spouses (or registered partners).

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[9] Act XXVIII of 2017 on Private International Law (PIL Act)

[10] See Section 88 *b)*, Section 89 *b)*, and Section 98 of the PIL Act. In effect, these provisions took over the jurisdictional rules (in force before 17 August 2015) of the old PIL without any changes as to content.

[11] As, for example French law (Art. 968 of the Code civil), Italian law (Art. 589 of the Codice civile), Romanian law (Art.1036 of the Noul cod civil), and Greek law (Civil Code of 1940. Art. 1717).

[12] Karlheinz Muscheler, *Erbrecht* Band I (Mohr Siebeck Verlag 2010, Tübingen) 1065; Dieter Leipold, *Erbrecht* (19. Auflage, Mohr Siebeck Verlag 2012, Tübingen) 174; Dietmar Weidlich in *Palandt Bürgerliches Gesetzbuch (Kommentar)* (75. Auflage, C. H. Beck Verlag 2016, München) § 2269, Rz. 1.

Regrettably, the ESR has undermined this legal institution, since the law applicable to the admissibility of joint wills cannot be established with sufficient certainty under the conflict-of-laws rules laid down in the Regulation.

1 Conceptual Incoherence in the Definitions of the ESR Regarding the Joint Will

The legal term 'joint will' is only mentioned in two places in the definitions of Article 3, but none of the conflict-of-laws rules explicitly provides for this type of will. In the early stages of the drafting of the Regulation, there was a text version[13] that would have provided specific conflict-of-laws rules for joint wills by appropriately applying the conflict-of-laws rules of agreement as to succession regarding the succession of several persons. This rule disappeared from the draft at a later stage of preparation for reasons that cannot be discovered. This is presumably due only to a technical-editorial mistake, as there were no longer any serious opponents from the Member States regarding conflict-of-laws rules on joint wills.

However, uncertainty remains as to which rule; Article 25 (concerning the agreements as to succession) or Article 24 (concerning the disposition of property upon death 'other than an agreement as to succession') applies to joint wills. The clarity on this issue is not exactly facilitated by the definitions in Article 3 of the Regulation, either.

The starting point is, in principle, the definition in Article 3 (1) *d),* which distinguishes three categories of disposition of property upon death, namely wills, joint wills and agreements as to succession. It can already be seen from this that the Regulation treats joint wills as a self-contained *sui generis* type of disposition of property upon death in its autonomous system of terms.

Article 3 *c)* contains a definition of the 'joint will', despite the fact that the joint will is not mentioned elsewhere in the rules of the Regulation. Accordingly, a joint will is 'a will drawn up in one instrument by two or more persons'. However, the definition of *b)* of the 'agreement as to succession' makes the classification of joint wills completely uncertain. According to the latter provision, an agreement as to succession within the scope of the Regulation 'means an agreement, *including an agreement resulting from mutual wills,* which […] creates, modifies or terminates rights to the future estate or estates of one or more persons party to the agreement'.

This definition under *b)* is quite confusing since it makes the boundary between joint wills and agreement as to succession pliable within the scope of the Regulation. That is, it leads us to the conclusion that at least certain types of joint wills may even be considered agreements as to succession within its scope; namely, the cases of joint wills in which the testators have made mutually beneficial provisions for each other. The dilemma can also be

[13] See Art. 18 of the working paper of the Council's working committee (Committee on Civil Law Matters) 6198/10 (JUSTCIV 26, CODEC 95).

described as whether the definition in Article 3 *c)* of the ESR encompasses agreements as to succession, in particular the wording of the phrase 'including an agreement resulting from mutual wills' contained therein; and also the wills made by two persons in the same instrument in which the benefits are mutual.

2 Attempts to Find the Solution – Is Article 24 or Article 25 Applicable?

This is the decision for which the ESR text does not provide further guidance. It is therefore uncertain whether the disposition of property upon death on mutual benefits contained in the same instrument may be classified as an 'agreement as to succession' and thus whether the law governing the admissibility of such a disposition of property upon death is governed by the conflict-of-laws rule under Article 25 (agreement as to succession) or Article 24 ('a disposition of property upon death other than an agreement as to succession'). That is, the two conflict-of-laws rules may lead to a very different result, as illustrated by the following example:

> The testators are siblings. One of them lives in Finland and is a Finnish-Hungarian dual citizen. The habitual residence of the other sibling is in Hungary and he is a Hungarian citizen. The siblings mutually appoint each other as sole heirs; their dispositions of property upon death are made in a joint will. (Note: It is not only spouses for whom Finnish law allows to make a joint will.) The question arises as to whether the joint will of the siblings in question is allowed.

a) If we assume that this joint will with the testators mutually appointing each other as sole heir *can be classified as an agreement as to succession* in the system of the ESR, the law applicable to the issue of admissibility must be determined on the basis of Article 25, subsection (2) regarding the agreement for the succession of several persons. In this case, the cumulative assessment rule applies: the agreement as to succession of several persons is only permitted if the legal conditions thereof are in accordance with the hypothetical succession law[14] of both parties (at the time of the disposition of property upon death). In this example, the joint will of the siblings would only be permissible if it were allowed by both Finnish law and Hungarian law. Although the Finnish law is in line with the joint will of the siblings, it can get stuck in the prohibition under Hungarian law as provided for by Section 7:23 (1) of the Civil Code.

At the same time, Article 25 (3) provides for the freedom of choice of law as to the admissibility (and substantive validity) of the agreement as to succession. The national law of any one of the persons whose estate is involved can be chosen; thus, in the case of an agreement as to succession containing a mutual appointment of each other as sole heirs, the law of the nationality of any of the contracting parties may be chosen. If we also apply this provision to the question of the admissibility of a joint will, then the siblings concerned may place the issue of the admissibility of their joint will under the control of a single law instead

[14] See Chapter III of the present study on what is called *'hypothetical succession law'*.

of a cumulative examination: they may choose Finnish law; their joint will would have to be considered admissible by their choice of law.

Thus, the classification of the joint will as an agreement as to succession and the application of the conflict-of-laws rule of Article 25 would have the above-mentioned result.

b) If, on the other hand, we assume that a joint will cannot be regarded as an 'an agreement as to succession' and only the conflict-of-laws rule under Article 24 is applicable to it, the determination of the law applicable to the admissibility of joint wills becomes much more uncertain. The conflict-of-laws rule in Article 24 merely stipulates that the 'disposition of property upon death other than an agreement as to succession' is governed by the hypothetical succession law of the person making the disposition (at the time the disposition is made). However, this conflict-of-laws rule does not unequivocally cover situations where the disposition of property upon death involves the dispositions of several persons. It does not answer whether, in such a case, the rule of cumulative assessment is applicable [as foreseen in Article 25 (2)], or whether the admissibility of the same will is to be examined separately for each testator. The latter solution, however, may lead to situations called 'limping legal relationships' *(hinkende Rechtsverhältnisse)* where the dispositions of one of the parties in the same document are valid and those of the other party are not. If, in the example of the above-mentioned Finnish-Hungarian siblings, the admissibility of the joint will were to be examined separately for the two testators, it would have the consequence that a joint will would be permitted for the sibling living in Finland, so his disposition (if he were to die earlier) would be able to produce legal effects. In contrast to this, that of his sibling living in Hungary would not, as Hungarian law [being the hypothetical succession law of this sibling under Article 24 (1)] does not allow siblings to draw up joint wills.

3 Standpoints in Legal Literature

There is a marked contradiction in foreign legal literature on whether joint wills can be considered as agreements as to succession for the purposes of the Regulation, i.e. whether they are subject to the conflict-of-laws rule under Article 24 or Article 25. There is a consensus on whether simultaneous joint wills (in which the testators' dispositions of property upon death are completely independent of each other in content and are linked only by being drawn up in the same instrument) cannot in any way be regarded as agreements as to succession; these are governed by the conflict-of-laws rule of Article 24. The debate is on the assessment of joint wills with mutual provisions.

One part of the standpoints[15] represents the *'agreement as to succession' approach*, according to which the types of joint wills that contain mutual or reciprocal provisions are covered by the extended concept of an agreement as to succession under Article 3 (1) *b).*

[15] This standpoint is represented by Andrea Bonomi, Azadi Öztürk, 'Das Statut der Verfügung von Todes wegen (Art. 24 ff. EuErbVO)' in Anatol Dutta, Sebastian Herrler (Hrsg.), *Die europäische Erbrechtsverordnung. Tagungsband zum wissenschaftlichen Symposium anlässlich des 20-jährigen Bestehens des Deutschen Notarinstituts*

Once this concept encompasses the two testators' wills in separate documents drawn up on the basis of a reciprocal and mutual disposition (for example, mutual wills under English law), it is difficult to see why the dispositions of the same content of two persons should not fall under the concept of an agreement as to succession if they are included in the same instrument.[16] This position regards the formation of the *agreement* between the persons declaring the disposition of property upon death and the resulting binding force thereof *(Bindungswirkung)* as the decisive factor in the concept of the agreement as to succession. If a joint will is binding on the testators (that is, none of the parties can unilaterally revoke or modify its will) then it shall be considered an agreement as to succession for the purposes of the application of the Regulation and therefore fall under Article 25; however, joint wills not having such binding force are governed by Article 24.

Some of the authors who represent this position also raised practical aspects for the applicability of Article 25: Article 25 (2) explicitly provides for a type of agreement as to succession which includes the will of several persons ('agreement as to succession regarding the succession of several persons'), with this provision being more appropriate in terms of content and structure for the conflict of laws handling of joint wills than Article 24, drawn up for the sole purpose of one person's disposition of his property upon death.[17] The truth of this argument is also accepted by authors who otherwise object to the applicability of Article 25 to joint wills.[18] Since Article 3 of the Regulation defines the agreement as to succession in substantive terms [agreement between the parties, point *b)*], while the joint will is defined purely on the basis of formal criteria ['one instrument by two or more parties' *c)*]; all cases of joint wills where dispositions are binding on the parties are excluded from the

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am 11. Oktober 2013 in Würzburg (C. H. Beck Verlag 2014, München) 47–69; Christoph Döbereiner, 'Das internationale Erbrecht nach der EU-Erbrechtsverordnung' (Teil II.) (2013) (5) MittBayNot 358; Kurt Lechner, 'Erbverträge und gemeinschaftliche Testamente in der neuen EU-Erbrechtsverordnung' (2013) (1–2) NJW 27; Christian Hertel, 'Verordnung (EU) Nr. 650/2012 des Europäischen Parlaments und des Rates vom 4. Juli 2012 über die Zuständigkeit, das anzuwendende Recht, die Anerkennung und Vollstreckung von Entscheidungen und die Annahme und Vollstreckung öffentlicher Urkunden in Erbsachen sowie zur Einführung eines Europäischen Nachlasszeugnisses' in Thomas Rauscher (Hrsg.), *Europäisches Zivilprozeß- und Kollisionsrecht. Kommentar* Band V. (4. Auflage, Otto Schmidt Verlag 2016, Köln) Art. 24 Rz. 6, Art. 25 Rz. 7.; Anatol Dutta, 'Die europäische Erbrechtsverordnung vor ihrem Anwendungsbeginn: Zehn ausgewählte Streitstandsminiaturen' (2005) (1) IPrax 32 (35); Frank Bauer in Anatol Dutta, Johannes Weber (Hrsg.), *Internationales Erbrecht. EuErbVO, Erbrechtliche Staatsverträge, EGBGB, IntErbRVG, IntErbStR, IntSchenkungsR. (Beck'sche Kurz-Kommentare).* (C. H. Beck Verlag 2016, München) Art. 25. Rz. 3; Juliana Rodríguez Rodrigo in Alfonso-Luis Caravaca, Angelo Davì, Heinz-Peter Mansel (eds), *The EU Succession Regulation. A Commentary* (Cambridge University Press 2016, Cambridge) Article 24, 371.

16 Döbereiner (n 15) 438; Lechner (n 15) 27.

17 Hertel (n 15) Art. 25 Rz. 7.

18 E.g. Katharina Hilbig-Lugani, 'Das gemeinschaftliche Testament im deutsch-französischen Rechtsverkehr – Ein Stiefkind der Erbrechtsverordnung' (2014) (6) IPRax 480; Markus Buschbaum, 'Grenzüberschreitendes Erbrecht Gestaltungsmöglichkeiten nach der Europäischen Erbrechtsverordnung (Fallbeispiele nach der ZEV-Jahresarbeitstagung am 24. Oktober 2015 in München und 23. Januar 2016 in Berlin)' Fn. 9. <https://www.stbk-koeln.de/service-fuer-mitglieder/seminare-und-sonstige-veranstaltungen/download-vortraege/grenzueberschreitendes-erbrecht-erbschaftsteuerrecht.html> accessed 2 May 2019.

definition under point *c)* and placed under the definition of an agreement as to succession under *b)*.[19]

Other views, however, categorically reject any extension of Article 25 to joint wills. This *'will approach'*[20] starts from the grammatical interpretation of the ESR, emphasising that Article 3 (1) *d)* distinguishes joint wills and agreements as to succession conceptually. Representatives of this position consider it unjustified to make a distinction between the various forms of joint wills on the basis of binding force. That is, the question of whether there is binding force for the joint will, or whether the dispositions contained therein can be regarded as reciprocal can only be answered on the basis of a particular legal system. The standpoints following the 'agreement as to succession' approach, by including the types of joint wills to which binding force is attached and which contain reciprocal provisions in the concept of agreement as to succession, already start from the concept and rules of a given law of succession (e.g. German law), although the law applicable to the legal effects of joint wills and their interpretation can only be determined after finding the appropriate conflict-of-laws rule. Consequently, according to this criticism, the 'agreement as to succession' approach creates a kind of 'vicious circle', thus becoming inapplicable. According to the authors of the 'will' approach, in all events joint wills are in any case covered by Article 24; they are not covered by the wording of Article 3 (1) *b)*: 'including the agreement based on mutual wills'. The latter reference should be interpreted narrowly, covering only contractual agreements (in the form of wills) in which the parties commit themselves to refuse to revoke it ('not to revoke').

4 Summary

The legal institution of the joint will, from the conflict-of-laws regulation point of view, has somehow 'fallen between two stools' during the drafting of the ESR. The uncertainty in the regulation outlined above has unfortunately undermined a 'well-established' estate planning tool widely used in many Member States. It is no mere chance that, in the years since the adoption of the Regulation, legal advice, especially in Germany, for spouses who may have a potential foreign element arising in their lives, due to the uncertainties in determining the applicable law, has warned against making a joint will, recommending instead they form of an agreement as to succession, which, at least under German law, is usually suitable for the same effects.

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[19] Claudia Rudolf, Brigitta Zöchling-Jud, Gabriel Kögler in Walter Rechberger, Brigitta Zöchling-Jud (Hrsg.), *Die EU-Erbrechtsverordnung in Österreich* (Verlag Österreich 2015, Wien) 157.

[20] This standpoint is represented by Rembert Süß, 'Nachlassbezogene Verfügungen' in Rembert Süß (Hrsg.), *Erbrecht in Europa* (3. Auflage, Zerb Verlag 2015, Würzburg) Rz. 49ff; Ulrich Simon, Markus Buschbaum, 'Die neue EU-Erbrechtsverordnung' (2012) (33) NJW 2393 (2396); Carl Friedrich Nordmeier, 'Neues Kollisionsrecht für gemeinschaftliche Testamente' (2012) (9) ZEV 513; Daniel Schaal, 'Aktuelles im IPR/aus dem Ausland' (2013) (1) BWNotZ 29 (30); Stefan Stade, 'Die EU-Erbrechtsverordnung aus französischer Sicht' (2015) (3) Zerb 69 (74).

III The Scope of the Law Governing the Substantive Validity of Wills

As I have mentioned above, the ESR, along with the general conflict of laws rule of inheritance *(lex successionis)* lays down specific rules on the law governing the admissibility and substantive validity of disposition of property upon death in Articles 24–25. The latter legal issues are subject to a special Private International Law rule, the law of the 'establishing of the last will' (called the *Errichtungsstatut*). The law applicable to these legal issues is what is called the *hypothetical succession law* of the deceased at the time of making the will. The latter, the law which 'under this Regulation, would have been applicable to the succession of the person who made the disposition if he had died on the day on which the disposition was made' is nothing else than the law of the habitual residence of the person at the time of making the disposition[21] (unless he has specified the law of the country of his nationality to be applied). The purpose of this regulatory solution is to ensure that the change of the applicable law after the disposition due to the change of the testator's habitual residence *(Statutenwechsel)* does not affect the validity of the disposition already made.

It arises as a fundamental question concerning the application of Articles 24 and 25: exactly which inheritance legal issues fall within the scope of the special rules laid down in these articles; what can be considered as a *matter of 'substantive validity'* in the system of the Regulation? In other words, how can we distinguish between the scope of the special rule concerning the 'establishing of the last will' and the scope of the general conflict-of-laws rules in Articles 24–25?

The answer seems to be simple: Article 26 lists the legal issues that are considered to be those concerning the substantive validity of the disposition of property upon death; the article identifies five such legal issues.[22] At first sight, any other legal issue related to the disposition of property upon death is normally governed by the law that usually governs inheritance, unless it is a formal validity question according to Article 27.

However, the question arises as to which law governs the validity of *certain, particular testamentary dispositions* contained in the last will. This issue is particularly sensitive to the kind of testamentary dispositions which are not considered valid by all legal systems, or which are subject to distinctly different terms of validity under certain legal systems. This is the case for example with the question of the validity of the appointment of a subsequent heir *(Nacherbe, fideikommissarische Substitution).* For example, the latter is allowed more widely by Austrian and German law than by Section 7:28 of the Hungarian Civil Code. It is not at all irrelevant whether the validity of the appointment of a subsequent heir is governed by the

[21] See recital (51) of the ESR.

[22] Namely, the issues of the capacity to make a disposition of property upon death, of the 'incompatible' benefits (i.e. the legal issues of whether the person making the disposition can dispose validly in favour of particular persons taking part in the making of the disposition as witnesses or in another capacity, and if yes, on what conditions can such persons receive such succession property), of the admissibility of representation for the purposes of making a disposition of property upon death, of the interpretation of the disposition, and questions relating to defects in consent of the person making the disposition.

general conflict of law rule based on the habitual residence of the deceased at the time of death [Article 21 (1)] or by the special rule concerning the establishment of a disposition upon death based on the habitual residence at the time of making the disposition [Article 24 (1)]. This is also illustrated by the following example:

> The deceased was a German citizen who, in December 2015, when he was habitually resident in his country of origin, made a public will before a German notary. He appointed his sibling as his sole heir therein, with the stipulation that after the sibling's death, the inheritance should be transferred to a particular Catholic parish. Later, the testator settled in Hungary at the beginning of 2017, where he bought a family house and had his habitual residence there until his death. The question is: which law governs the substantive validity of the subsequent heirship appointed in the will?

If we accept the approach that the validity of particular testamentary dispositions should also be classified as a matter of 'substantive validity', then the validity of the subsequent heirship in question is governed by the special rule concerning the establishment of a disposition upon death, referred to in Article 24 (1). In this case, the deceased's appointment of a subsequent heir will be considered as a valid testamentary disposition, since the heir was habitually resident in Germany at the time of making the disposition; therefore, the hypothetical succession law under Article 24 (1) is German law. The appointment of the subsequent heir in question was in accordance with the provisions of German law.[23]

On the other hand, if we assume that the substantive validity of the particular testamentary dispositions, since they are not specified among legal issues falling within the scope of substantive validity by Article 26 of the ESR, falls within the scope of the general conflict-of-laws *(lex successionis)* rule then the validity of the appointment of the subsequent heir in question (similarly to most of the inheritance legal issues arising in succession cases) must be assessed in accordance with the law of the habitual residence of the deceased at the time of his death, i.e. Hungarian law in the present case. This then would lead to the invalidity of the appointment of the subsequent heir, as the appointment of a subsequent heir under the conditions mentioned in the example does not comply with the requirements of Section 7:28 of the Hungarian Civil Code.

So we could ask the question in the following way: when Article 26 of the ESR enumerates five types of legal issues, which are considered to be matters of 'substantive validity' in the context of disposition of property upon death, are these *of an exhaustive or merely exemplary nature?*

In the legal literature related to the regulation, contradictory positions have also emerged on this issue.

Some authors[24] are of the opinion that Article 26 contains an exhaustive list and that all other legal issues related to disposition of property upon death (with the exception of formal

[23] On the basis of BGB Section 2100.

[24] Constanze Fischer-Czermak in Astrid Deixner-Hübner, Martin Schauer (Hrsg.), *EuErbVO. Kommentar zur EU-Erbrechtsverordnung* (Manz'sche Verlags- und Universitätsbuchhandlung 2015, Wien) Art. 26. Rz. 1.

validity questions within the scope of Article 27) are governed by the general conflict-of-laws rule, including the validity of particular testamentary dispositions encompassed in the disposition of property upon death. This view seems undoubtedly to be supported by the grammatical interpretation of the Regulation, since Article 26, unlike Article 23 (2), which defines the scope of the general conflict-of-laws rule, does not use the term 'in particular' to enumerate legal issues related to the scope of validity.

The vast majority of legal literary views,[25] however, take the view that, despite the literal wording of the Regulation, the list in Article 26 cannot be regarded as exhaustive; in addition to the five types of law referred to there, there are issues that can be classified as 'substantive validity' ones and are therefore subject to the law of habitual residence at the time of making the disposition. That is, the opposite solution, as these authors believe, would clearly *undermine the security of estate planning,* as it would result in the disposition of property upon death made validly at a given point in time, at the time of the establishing the last will, becoming invalid due to the change of the applicable law (because of the subsequent change of the testator's habitual residence). The explicitly stated fundamental objective of the Regulation, mentioned in several places in the Preamble,[26] is the legal certainty of estate planning. Thus, the majority position would, in essence, disregard the grammatical interpretation of the Regulation, bearing in mind a *superior maxima, the legal certainty of estate planning*. They would put the validity of certain testamentary dispositions that may be included in the disposition of property upon death under the scope of the law referred to by Articles 24–25, since this is the law that the testator may be expected to respect and take into account at the time of making the disposition.

There is no doubt that the distinction between the scope of the two conflicting statutes, the general conflict-of-laws rule *(lex successionis)* and the 'disposition of property upon death' rule as a special of conflict-of-laws rule has been less successful in the final text of the Regulation. This can be attributed to the fact that the issue of the law applicable to the substantive validity of the disposition of property upon death itself came to the fore at a relatively late stage of the drafting and, as a result, the solution to the question is not yet sufficiently mature.

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[25] See in particular Bonomi, Öztürk (n 15) Rz. 45–50; Bauer (n 15) Art. 26. Rz. 2.; Süß (n 20) Rz. 6.; Hertel (n 15) Art. 26 Rz. 3.; Celia M. Caamiña Domínguez in Caravaca, Davì, Mansel (n 15) Art. 26 p. 395; Ulrich Pesendorfer in Alfred Burgstaller, Matthias Neumayr, Andreas Geroldinger, Gerhard Schmaranzer (Hrsg.), *Die EU-Erbrechtsverordnung* (LexisNexis 2016, Wien) Art. 26 Rz. 15.

[26] See recital (7) of ESR according to which 'in the European area of justice, citizens must be able to *organise their succession in advance*,' and recital (37) according to which 'in order to allow citizens to avail themselves, with all legal certainty, of the benefits offered by the internal market, this Regulation should enable them *to know in advance* which law will apply to their succession.' The same is emphasized in the reasoning of the original proposal drafted by the European Commission (14722/09 JUSTCIV 210 CODEC 1209; see point 1.2 of the Explanatory Memorandum of the proposal).

IV Renvoi in the Rules of the Regulation

The third issue I will address in this study still belongs to the subject of conflict-of-laws rule; this is the problem of renvoi (reference). As is well known, the Rome-type regulations consolidating conflict of laws exclude renvoi in its entirety.[27] This concept was followed by the original draft of the ESR.[28] Accordingly, the law referred to by the conflict-of-laws rules under the Regulation would have been 'the rules of law in force in that State *other than its rules of private international law*', that is to say, the substantive rules of the legal system in question. However, this changed during the drafting of this Regulation. The majority of the Member States supported the view that, in some respects, it is justifiable to take account of the outcome of the reference to the conflict-of-laws rules of the referred third-country legal system. The outcome of the final compromise on the issue is shown in Article 34 of the adopted text, according to which the reference to the conflict-of-laws rules of the referred third State has to be taken into consideration insofar as it refers to either a law of a Member State or the law of another third State which accepts this reference. (i.e. 'which would apply its own law').

The main argument of the Member States supporting the renvoi to be taken into consideration was that the circumstance that the rules of jurisdiction of the (intended) Regulation would have universal effect must be taken into account; the uniform rules of jurisdiction (including supplementary jurisdictional rules) also cover factual situations when the habitual residence of the deceased was in a third State. In such cases, however, the coincidence of jurisdiction and applicable law as a goal[29] becomes disintegrated.[30] In the view of the Member States with a majority support, this may be helped by requiring the renvoi to be taken into account in cases where the third-country conflict-of-laws rule refers back to the national law of a Member State. This is because considering this reference where appropriate may also result in the Member State forum dealing with the succession case being able to apply its own law.

The regulation has not come out the best. In my opinion, the main disability is that it did not take into account the fact that a significant part of the world's legal systems observes the principle of the scission system of inheritance in the field of conflict-of-laws rules of succession. This, in effect includes the entire common law world. The common practice of Anglo-Saxon legal systems is to apply different laws to succession in respect of movable and immovable property: while the succession to movable property is to be governed by the law of the deceased's domicile, the succession to immovable property by the law of the country where the estate is situated *(lex rei sitae).*

[27] See Article 20 of Rome I Regulation, Article 24 of Rome II Regulation and Article 11 of Rome III Regulation.

[28] See Article 26 of the original proposal drafted by the European Commission (14722/09 JUSTCIV 210 CODEC 1209).

[29] See recital (27) of ESR.

[30] Thus, for example, if a Hungarian citizen had his habitual residence in the USA but he also left some domestic estate then, under the subsidiary jurisdiction rules, the succession proceedings may be carried out in Hungary as well. However, the applicable law (if renvoi is not taken into account) would be the law of the third country, the country of the habitual residence (i.e. the law of one of the states of the USA).

The provision in the final text, which requires taking the reference back to the law of a Member State into account (but not necessarily the law of the forum!) has had the effect of *returning 'through the back door' the scission system* of inheritance to the conflict-of-laws rules of the Regulation. That is so since, if the conflict-of-laws rules of the referred third-country law in question, following this principle, renders a different connecting rule to govern the inheritance of movable and immovable property, the reference to the law of the Member State will in many cases be only partial.

Such cases occur daily in domestic practice.[31] For example, if the deceased was a British citizen, who had always lived in England (his habitual residence and domicile were there), left estate assets of different legal natures in Hungary, e.g. a flat purchased for investment purposes, as well as domestic bank accounts, the law applicable to each asset will be different. The Hungarian notary who has jurisdiction (limited to domestic inheritance) under Article 10 (2) of the ESR, has to apply partly English law (in respect of movable property) and partly Hungarian law (in respect of immovable property); due to the partial reference by the common law conflict-of-laws rules.

There is hardly any need for further explanation that such a result is not in line with the stated goal. The fact that Article 34 of the Regulation, under pressure from the Member States, provides for taking renvoi into account under certain conditions, would have had the practical consequence of the acting forum being allowed to apply its own law; moreover, with some luck, being able to avoid the application of foreign inheritance law. Far from that being realised, it has even brought new problems in the event of partial reference. That is because, in such cases, the acting authority (notary, court) should in principle *treat the estate as two (or more) legally separate part-estates,* the inheritance of which will be governed by completely different substantive succession regimes. What may be different in terms of the two asset parts, for example are:

– eligibility for the compulsory share (its conditions, scope of eligible persons, extent of the compulsory share);
– the legal order of transferring two part-estates (e.g. *ipso iure* inheritance for one, while the other one takes on 'inactive status' *(hereditas iacens)* for the time being, until acceptance or transferring);
– rules of waiver (deadline, method, etc.);
– the extent and rules of liability for the debts under the succession;
– conditions of sharing-out; etc.

In such cases, taking renvoi into account, far from making it easier, makes it even more difficult and very complicated to settle the succession case.

All in all, this, not the best-thought-out regulation for taking renvoi into account, has essentially sacrificed the principle of unity of succession and has brought with it many problems that are difficult to handle in practice.

[31] As it occurred in the jurisprudence before the ESR, during the application of the second sentence (which provides for the reference back to be taken into consideration) of Section 4 of the old PIL.

In the course of a future comprehensive review of the ESR, consideration should be given to rethinking the regulation of renvoi and finding a solution that is better suited to the specificities of inheritance relationships. The Spanish (pre-ESR) judicial practice can be worth paying attention to;[32] this allowed the reference to Spanish law to be taken into account only on condition that it would not disrupt the unity of law applicable to succession covering the whole estate.[33]

V Procedural Issues

Among the issues of international succession procedures, the Regulation regulates jurisdiction, the free circulation of decisions and authentic instruments among Member States, and the procedural core points of a brand new institution, the European Certificate of Succession (hereinafter: ECS). However, in the following I would like to briefly mention another segment of succession procedures, namely the difficulties of international cooperation in *obtaining information on succession matters*. Its institutional system is rather disordered; the ESR has also failed to regulate it properly.

For us, one of the central problems of obtaining cross-border information in inheritance matters is obtaining information about *foreign inheritance assets*. It is a relatively recent problem: as we have already mentioned in the introduction, the fact that the legal fate of the inheritance assets located in a foreign country is also to be settled in domestic proceedings is now a daily practice within the scope of the new jurisdictional rules of the ESR. In the period prior to the Regulation, however, the Hungarian notary only rarely had to confront the problem of foreign estate property.

The existence of foreign assets in the succession case is a *multi-layered, complex problem* in itself. Obtaining information about the existence of the property itself and the fact that it forms part of the estate is only one aspect of this. However, there are additional difficulties, for example determining the value of the foreign asset (e.g. in the case of a foreign immovable property); it is also necessary to clarify the precise requirements of the manner in which the asset in question is to be properly marked in the decree transferring the estate (or in the ECS issued) in such a way that it is accepted abroad, in particular so that its recording in a foreign public register should not be a problem for the heir.

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[32] See decision STS 6401/1996 of 15 November, 1996 of the Tribunal Supremo (ECLI: ES:TS:1996:6401). The same court ruled similarly in its decision STS 3532/1999 of May 21,1999 (ECLI: ES:TS:1999:3532), and in its decision STS 6053/2002 of September 23, 2002 (ECLI: ES:TS:2002:6053).

[33] Pursuant to Subsection 2 of Article 12 of the Spanish *Codigo civil* the reference under the conflict-of-laws rules shall be interpreted solely as the reference of the substantive legal norms of the referred legal system; however the reference back to Spanish law shall be taken into consideration. At the same time, pursuant to Subsection 8 of Article 9 of the Codigo civil the domestic law of the deceased [was, before the ESR] applicable, 'regardless of the nature of the estate property and the state where it is located' *(cualesquiera que sean la naturaleza de los bienes y el país dónde se encuentren).* According to the standpoint of the Spanish courts this 'universal nature' *(carácter universalista*) of the applicable inheritance should prevail over the rule providing for the reference to Spanish law.

The domestic procedural regulation primarily places on the persons interested in the inheritance the burden of proof of the existence of the foreign property assets and the fact of their forming a part of the estate; but leaves open the possibility for the acting notary to take steps to clarify this.[34] In particular, the neuralgic point is the question of obtaining information on foreign succession assets for which there is a *duty of confidentiality,* such as obtaining data relating to a foreign bank account or other assets held with a foreign financial institution. For the disclosure of information about such property, the person interested in the inheritance will usually turn to a foreign financial institution in the course of the succession proceedings to no avail. Since he is not able to provide authentic proof of his legal status as an heir at this stage of the proceedings, the foreign financial institution will generally reject the disclosure of data covered by bank secrecy (existence of the account, its balance at the deceased's death and at the time of submitting the application). In the established practice, therefore, in many cases, the acting notary submits a request abroad to obtain data related to the account during the succession proceedings; in many cases, however, granting a request for information made directly by a notary to a foreign financial institution is also refused on the grounds that it can only provide information to its own domestic courts or authorities. Thus, according to the experience gained so far, obtaining data by a civil law notary is only possible indirectly, i.e. by means of a *request for international legal assistance* when the notary requests the *competent court* of the Member State where the account-keeping financial institution (or branch) operates, to provide the information on the account for the purposes of the pending succession case. In many cases, the practice of making such a request for international legal assistance is based on the European Taking Evidence Regulation.[35] Nothing in this Regulation precludes its applicability in non-litigious proceedings or in succession matters; however, the experience of using it in the succession proceedings is still rather mixed; not to mention the time-consuming nature of obtaining information in such an indirect way.[36]

A reassuring solution to obtaining information on the deceased's bank accounts left in another Member State would, in my opinion, be the (partial) *harmonization of the rules of the Member States on bank secrecy,* and that there would generally be a possibility for the Member State body (succession courts, notaries) having jurisdiction over the succession case to obtain information on the deceased's bank accounts in another Member State's financial institution in the same way, indirectly, as on domestic accounts.

There are also other aspects of obtaining information from abroad in succession proceedings, which I mention only in an indicative manner:

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[34] See Section 43/A of Act XXXVIII of 2010 on succession proceedings (Hetv.).

[35] Council Regulation (EC) No 1206/2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters.

[36] On this topic, see for more detail Szőcs Tibor, 'Az európai öröklési rendelet hazai alkalmazását érintő legújabb rendelkezések – A hagyatéki eljárási törvény egyes nemzetközi vonatkozású rendelkezései módosításának hátteréhez' [The most recent provisions related to the domestic application of the European Succession Regulation – For the background of the amendment of particular provisions with an international dimension of the Act on succession porceedings] (2019) (1) Európai Jog 3–4.

– In many cases, it is necessary to obtain information on *the existence of the disposition of property upon death* and obtain the disposition itself. There are already aspirations among European states to create some forms of interoperability of the registers of wills. Such an initiative is the European Network of Registers of Wills Association (ARERT);[37] certain states that have particularly close relations with each other (France and the Benelux countries) have already interconnected their national registers of wills electronically. However, despite these initiatives, it is still not self-evident that a Member State's notary (or succession court) can obtain data directly from the register of wills of any other Member State.
– It is not uncommon for a notary to have to obtain information about *the existence of unknown heirs and their data* in another Member State. Although a public notice issued for the unknown heirs to come forward is published electronically,[38] there is little likelihood that the deceased's relatives, possibly living abroad and entitled to the succession or a compulsory share, could be informed of the succession proceedings in this way. This is especially the case if the deceased had his habitual residence in Hungary, but was a foreign national and had spent most of his life abroad (e.g. a German, Dutch or Finnish deceased person who had settled as a pensioner in Hungary), since in such cases there is reason to assume that the relatives entitled to succession have remained in their country of origin. At the same time, there is no international cooperation mechanism between Member States under which the cooperation of the judicial authorities of the Member State of the likely residence of the potential heirs (i.e. the Member State of origin of the deceased) could be requested in having the public notice published there.
– Articles 17–18 of the ESR lay down procedural rules on *lis alibi pendens* and related actions; however, there is a lack of an effective and reliable mechanism for allowing the authorities of the Member States to obtain information in a fast and easy way on *succession proceedings related to the same deceased that have possibly started in another Member State*. The elimination of parallel proceedings is essential in order to prevent several decisions (or European Certificates of Succession) certifying succession rights to the same estate of the same deceased and issued in different Member States from getting into cross-border circulation. Within the scope of this regulation, given the relatively pliable nature of the habitual residence as the main grounds for jurisdiction, there is a greater risk that the authorities of two Member States will reach a different conclusion as to the whereabouts of the habitual residence of the deceased.

[37] *Association du Réseau Européen des Registres Testamentaires* / The European Network of Registers of Wills Association (www.arert.eu).
[38] See Hetv., Section 59.

VI Summary

This brief study may be outlining a darker picture of the first experience of the application of the ESR in practice than reality would suggest. However, I deliberately wanted to highlight some of the core points in which I believe the EU regulation has been unfortunate. There is plenty of room for the Court of Justice of the European Union to find a solution to the aforementioned neuralgic issues in a preliminary ruling procedure. At the same time, the future comprehensive review of the Regulation[39] will also provide an opportunity to develop more mature solutions for some regulatory core points.

Overall, in my opinion, it can be considered a success in itself that, in circumstances where there are considerable differences between the inheritance law of the Member States, and perhaps even more so in their systems of succession proceedings, EU legislation has succeeded in creating a single system of the conflict-of-laws in the field of inheritance covering (nearly) all the Member States.

[39] This will be due in 2025; see Article 82 of the ESR.

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