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Highlights and Pitfalls of the EU Succession Regulation

Abstract: The EU Succession Regulation constitutes a remarkable achievement of unification of conflict of law rules at the European level. It has importantly changed the landscape for all those interested in succession law, in particular, the notaries and the estate planning practitioners. The present article takes up a number of selected issues that arise under the Regulation. The paper first identifies certain general difficulties that result either from the complex nature of the matters addressed or from a somewhat ambiguous wording of the rules adopted by the EU legislator. The attention is devoted to the exceptions to the principle of the unity of *legis successionis*, the dispositions upon death, and the intertemporal questions resulting from the change of the conflict of laws rules in the Member States which occurred on 17th August 2015 when the Regulation started to be applied. The paper then moves to some of the more specific issues arising under the Regulation. To that effect, it first looks at the Polish Act of 2018 governing the “succession administration” of the enterprise, which forms part of the estate. The argument is made that the rules contained in the 2018 Act should be applied by virtue of Article 30 of the Succession Regulation because they constitute “special rules” in the meaning of this provision. Second, the notion of a “court” under Article 3(2) of the Regulation is discussed in light of the recent judgment of the CJEU in case C-658/17 *WB*, where the European Court found that a Polish notary issuing the deed of certification of succession is not a “court” for purposes of Article 3(2). The paper provides a critical account of the Court’s decision.

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1. The quest for uniform conflict of law rules relating to succession

Already in the XIX century scholars have visualized propositions for the uniform conflict of law rules relating to succession.² Still, it took many years and various efforts so that this vision could come into life in a binding set of rules of law. The Hague Conference on Private International Law³, the Institut de Droit International⁴, and the Groupe européen de droit international privé⁵ played important roles in that process. Among many conventions prepared by the Hague Conference, two are of particular importance here. First, the Convention of 5th October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions⁶, which has been ratified by many states (including most EU

² F.C.V. Savigny: *System des heutigen römischen Rechts*. Bd. 8. “Berlin: Veit & Comp” 1849, vol. 115 and 129. The work of PS Mancini in that regard was noted in (1874). “Journal du Droit International (Clunet)” 221, 285 and 295. In Polish literature see, eg: F. Kasperek: *Z dziedziny prawa międzynarodowego prywatnego*. “Rozprawy Wydziału Historyczno-Filozoficznego Akademii Umiejętności w Krakowie” 1894, vol. 32, No 10, p. 58—59.

³ E. Rabel: *The Conflict of Laws: A Comparative Study*. Ann Arbor 1958, vol. 4, p. 250; H. Lewald: *Questions de droit international des successions*. The Hague 1925, p. 5; F. Kasperek: *Z dziedziny...*, p. 25 and 58; M. Roźnowski: *Prawo spadkowe na warsztacie sesji piątej (1925) i szóstej (1928) Konferencji Międzynarodowego Prawa Prywatnego w Hadze*. “Czasopismo Prawnicze i Ekonomiczne” 1929, vol. 25, p. 132.

⁴ Article VII of the Oxford Resolution of the Institut de droit international of 1880 — published in *Annuaire de l’Institut de droit international*, 1881—1882, p. 56 and in H. Wehberg (ed.): *Résolutions de l’Institut de droit international (1873—1956)*. Bâle 1957, p. 40.

⁵ The Proposal for a Convention concerning jurisdiction and the enforcement of judgments in family and succession matters of 1993, adopted at Heidelberg Session, <https://www.gedip-egpil.eu/documents/gedip-documents-3pe.html> (accessed on 11 December 2019) and the scholarly commentary thereto: E. Jayme: *Entwurf eines EG-Familien- und Erbrechtsübereinkommens*. “Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)” 1994, vol. 14, p. 67.

⁶ About the Convention see, generally F. Majoros: *Les conventions internationales en matière de droit privé. Abrégé théorique et traité pratique*. Paris 1976, vol. 2 (Par-

states) and entered into force on 5th January 1964. Second, there is also a less successful Convention of 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons⁷. Although the latter Convention has never entered into force⁸, it was generally well-received and constituted an important point of reference, both for some of the national legislators, as well as in drafting the EU uniform conflict rules in the area of succession⁹.

The landmark enactment came from the European Union in 2012 and grew to be known as the EU Succession Regulation¹⁰, known also as the Brussels IV Regulation¹¹. Its adoption was preceded by solid *travaux préparatoires*. The road ahead was filled with difficulties given the different legal traditions of the various Member States¹², which are particularly

tie spéciale. I: *Le droit des conflits de conventions*), p. 395. In the Polish literature e.g. A. Maczyński: *Dziedziczenie testamentowe w prawie prywatnym międzynarodowym: ustawowe i konwencyjne unormowanie problematyki formy*. Warszawa 1976, p. 43.

⁷ See, generally P. Lagarde: *La nouvelle convention de La Haye sur la loi applicable aux successions*. “Revue critique de droit international privé” 1989, vol. 78, p. 249; G.A. Droz: *Note Introductive a la Convention de la Haye sur la Loi Applicable aux Successions a Cause de Mort*. “Revue de droit uniforme” 1989, p. 213; H. Van Loon: *The Hague Convention on the Law Applicable to Succession to the Estates of Deceased Persons*. “Hague Yearbook of International Law” 1989, p. 48; A.E. Von Overbeck: *La Convention du 1er août 1989 sur la loi applicable aux successions pour cause de mort*. “Annuaire suisse de droit international” 1989, p. 138; E.F. Scoles: *The Hague Convention on Succession*. “The American Journal of Comparative Law” 1994, vol. 42, p. 85; A. Borrás: *La convention de la Haye de 1989 sur la loi applicable aux successions à cause de mort et l’Espagne*. In: “E Pluribus Unum. Liber Amicorum Georges A.L. Droz”. Eds. A. Borrás, A. Bucher, T. Struycken, M. Verwilghen. The Hague—Boston—London 1996, p. 7; G.A. Droz, B. Martin-Bosly: *Traité multilatéraux relatives aux régimes matrimoniaux, successions et libéralités*. In: “Régimes matrimoniaux, successions et libéralités dans les relations internationales et internes”. Ed. M. Verwilghen. Bruxelles 2003, p. 267. In Polish literature see, generally A. Wysocka-Bar: *Prawo właściwe dla dziedziczenia*. “Kwartalnik Prawa Prywatnego” 2007, p. 561.

⁸ Only the Netherlands expressed intention to ta accede to the Convention.

⁹ See, e.g. P. Lagarde: *La nouvelle...*, p. 252; E.F. Scoles: *The Hague...*, p. 123; A. Borrás: *La convention...*, p. 9 and 22; A. Bonomi: *Conférence de La Haye et Union européenne — Synergies dans le domaine du droit des successions*. In: “A commitment to private international law. Essays in honour of Hans van Loon”. Cambridge—Antwerp—Portland 2013, p. 70.

¹⁰ 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, [2012] OJ L 201/107 (*hereafter*: “the Succession Regulation”).

¹¹ The Regulation entered into force on 16 August 2012 and applies to the succession of persons who die on or after 17 August 2015.

¹² See, e.g. A. Davì, in: A.-L.C. Caravaca, A. Davì, H.-P. Mansel: *The EU Succession Regulation: A Commentary*. 2016, p. 1—2; M. Pfeiffer: *Legal certainty and pre-*

strong in the area of succession law. The first phase of the preparatory works was led by professors Paul Lagarde and Heinrich Dörner under the auspices of the Deutsches Notarinstitut in Würzburg and was presented to the public at the conference in Brussels on 10—11 May 2004¹³. The important steps towards the adoption of the Regulation were the Commission's Green Paper Succession and Wills of 2005¹⁴ and the proposal of the regulation presented by the Commission in 2009¹⁵. These propositions led to an intensive debate in academia and among legal practitioners involved in the area of succession law¹⁶. Looking back from the year 2020 one might express certain disappointment that the representatives from the states that joined EU in 2004 were — for understandable reasons — not involved in the early works that were carried out before the accession of the new states in 2004.

The EU Succession Regulation (applying to a succession of persons who died on or after 17 August 2015¹⁷) is more and more used in daily legal practice. It has become part of the daily routine for the notaries as well as estate planning and succession law practitioners. The courts in

dictability in international succession law. “Journal of Private International Law” 2016, vol. 12, p. 566, 570.

¹³ *Les successions internationales dans l'UE. Perspectives pour une Harmonisation*. Würzburg 2004.

¹⁴ COM (2005) 65 final, SEC (2005) 270.

¹⁵ COM (2009) 154 final, 2009/0157 (COD).

¹⁶ See, e.g. A. Bonomi, C. Schmid: *Successions internationales. Réflexions autour du futur règlement européen et son impact pour la Suisse*. Genève 2010; K. Schurig: *Das internationale Erbrecht wird europäisch: Bemerkungen zur kommenden Europäischen Verordnung*. In: “Festschrift für Ulrich Spellenberg: zum 70. Geburtstag”. Eds. J. Bernreuther. München 2010, p. 343; Max Planck Institute: *Comments on the European Commission's Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession*. “Rabels Zeitschrift für ausländisches und internationales Privatrecht” 2010, vol. 74, p. 522; E. Lein: *A further step towards a European Code of Private International Law: The Commission proposal for a Regulation on succession*. “Yearbook of Private International Law” 2009, vol. 11, p. 107; J. Harris: *The proposed EU regulation on succession and wills: prospects and challenges*. “Trust Law International” 2008, vol. 22, No. 4, p. 181. In Polish literature see, e.g. J. Pazdan: *Ku jednolitemu międzynarodowemu prawu spadkowemu*. “Rejent” 2005, No 3, p. 9; M. Pazdan: *Zielona księga o dziedziczeniu i testamentach — propozycje odpowiedzi na pytania*. “Rejent” 2006, No 5, p. 16; Idem: *Prace nad jednolitym międzynarodowym prawem spadkowym w Unii Europejskiej*. In: “Państwo, prawo, społeczeństwo w dziejach Europy Środkowej. Księga jubileuszowa dedykowana Profesorowi Józefowi Ciągwie w siedemdziesięciolecie urodzin”. Ed. A. Lityński. Katowice 2009, p. 589; A. Wysocka-Bar: *Projekt jednolitego międzynarodowego prawa spadkowego państw Unii Europejskiej*. “Kwartalnik Prawa Prywatnego” 2010, p. 173.

¹⁷ Article 83 of the Regulation.

various European countries¹⁸, including Poland¹⁹, have more and more occasions to apply its provisions. The volume of the case-law of the Court of Justice of the European Union dealing with the interpretation of the Regulation's provisions grows²⁰ and every year new preliminary questions are directed to the Court²¹. The academics all around Europe devote much attention to novelties adopted therein and the difficulties arising in that respect²². This is also true for Poland where the Regulation has spurred considerable interest in the doctrine²³.

¹⁸ See e.g. the analysis of German case law by C. Kohler: *Application of the Succession Regulation by German courts-Selected Issues*. "Problemy Prawa Prywatnego Międzynarodowego" 2020, vol. 26.

¹⁹ See the judgment of the District Court in Gliwice of 19.4.2017, III Ca 391/17 (annulling the decision of the lower court which refused to make entry into the register of immovable property on the basis of the German notarial certificate of succession); judgment of the Regional Court in Biskupiec of 18.7.2017 r., I Ns 148/17 and judgment of the District Court in Gliwice of 31.1.2017, III Cz 1996/16 (rejecting jurisdiction to confirm inheritance in a situation when the deceased had — undisputedly — the habitual residence in Germany); judgment of the District Court in Olsztyn of 29.9.2017, IX Cz 813/17 (rejecting jurisdiction to confirm inheritance in a case where the deceased had her habitual residence in Germany, notwithstanding that the deceased was of Polish nationality, part of assets of the estate was located in Poland, and the applicants had their domicile in Poland); judgment of Regional Court in Olsztyn of 22.11.2017, I Ns 756/14 and the judgment of the District Court in Gdańsk of 27.3.2017, XVI Cz 249/17 (invoking but not applying the Regulation with respect to inheritance of the deceased who passed away before 17.8.2015); judgment of the District Court in Lublin of 20.4.2017, II Ca 990/16 (invoking Article 75(1) of the EU Succession Regulation and applying the Hague Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions to the validity of a will made in Canada by a Polish national habitually resident before death in Canada).

²⁰ C-20/17 *Oberle*, ECLI:EU:C:2018:485; C-102/18 *Brisch*, ECLI:EU:C:2019:34; C-558/16 *Mahnkopf*, ECLI:EU:C:2018:138; C658/17 *WB*, ECLI:EU:C:2019:444; C-404/14 *Matoušková*, ECLI:EU:C:2015:653; C218/16 *Aleksandra Kubicka*, ECLI:EU:C:2017:755; C-80/19 E.E., ECLI:EU:C:2020:569.

²¹ Recent requests for preliminary questions (not yet decided) include: C-277/20 (whether donation mortis causa constitutes an agreement as to succession and whether Regulation applies to choices of applicable law made before 17.8.2015); C-301/20 (validity and effectiveness of a certificate of succession); C-387/20 *OKR* (whether the admissibility of a choice of law under the Regulation prevails over bilateral agreement between a Member State and a non-member, which does not provide for the choice is succession matters; see below).

²² Selected literature will be discussed throughout the present article.

²³ See in particular article-by-article commentaries to the Regulation: M. Załucki (ed.): *Unijne rozporządzenie spadkowe Nr 650/2012. Komentarz*. Warszawa 2018; M. Margoński, in: K. Osajda (ed.): *Prawo i postępowanie spadkowe. Komentarz*. T. IVB. Warszawa 2018, 4th ed., vol. IVB. Other, selected literature will be discussed throughout the present article.

In the present article, we take up a number of selected issues that arise under the Regulation. The paper first identifies certain general difficulties that result either from the complex nature of the matters addressed or from a somewhat ambiguous wording of the rules adopted by the EU legislator. In chapters 3—6, we devote attention to issues relating to the exceptions to the principle of the unity of *legis successionis*, the dispositions upon death, and the intertemporal questions resulting from the change of the conflict of laws rules in the Member States which occurred on 17th August 2015. The paper then moves to some of the more specific issues arising under the Regulation that contains a “Polish component”. To that effect, in chapter 6 we first look at the newly (2018) adopted Polish law governing the “succession administration” of an enterprise, which forms part of the estate (*zarząd sukcesyjny przedsiębiorstwem w spadku*), and argue that the rules contained in the 2018 Law should be applied by virtue of Article 30 of the Succession Regulation. The second issue we pick up (chapter 7) is the notion of a “court” in the meaning of Article 3(2) of the Regulation. The matter was addressed by CJEU in case C-658/17 *WB*, where the European Court found that a Polish notary issuing the deeds of certification of succession is not a “court” for purposes of Article 3(2). We provide a critical assessment of the Court’s decision.

Although the Regulation suffers from certain drawbacks (some of which are discussed below), one should not overlook that it constitutes a remarkable achievement of unification of conflict of law rules at the European level. Accordingly, in chapter 2 we begin with a brief positive assessment of the Regulation.

2. General positive assessment

The EU Succession Regulation is a regional instrument. Nonetheless, since it applies in almost all EU Member States (with exception of Ireland and Denmark²⁴) its territorial impact is relatively wide. Moreover, in many ways it may affect the rights and obligations of the persons domiciled outside EU participating Member States²⁵: foreign nationals

²⁴ United Kingdom also did not participate, when it was still EU Member.

²⁵ See, e.g. M.W. Galligan: *US expatriate persons and property owners, the European Union Succession Regulation and the choice of New York law*. “Trusts & Trustees” 2017, vol. 23, p. 325; J. Crivellaro, S. Herzog, M. Michaels: *The EU Succession Regulation and its impact for non-Member States and non-Member State nationals*. “Trusts & Trustees” 2016, vol. 22, p. 227.

habitually resident in EU or even third countries' residents, if their assets are located in EU²⁶. Therefore, the Regulation is relevant not just for the citizens of the EU, but also to others. Its importance has thus been noticed also on the other side of the Atlantic Ocean²⁷ and elsewhere²⁸.

The EU Regulation introduces some important changes to national solutions existing previously in the Member States. The extent of these variances depends on the state in question and its legal tradition. For the Member States that used the dualistic approach/scission system (e.g. France, Belgium, Luxembourg, Romania) in the conflict of laws relating to succession (i.e. separate laws governing the succession of movables and immovables) it constitutes a true revolution²⁹, given that the European legislator opted for a single law governing all of the assets belonging to the estate of the deceased³⁰ (unitary system/monist principle)³¹.

²⁶ See in particular Article 10, which allows a court in an EU Member State to assume jurisdiction under the Regulation, even if the deceased had his or her habitual residence in a non-member state, provided the assets of the estate are located in that Member State (subsidiary jurisdiction).

²⁷ See, e.g. S. Strong: *The European Succession Regulation and the Arbitration of Trust Disputes*. "Iowa Law Review" 2017, vol. 103, p. 2205; J. Bost: *Nothing certain about death and taxes (and inheritance): European Union regulation of cross-border successions*. "Emory International Law Review" 2013, vol. 27, p. 1145; J. Talpis: *Impact of the European Regulation on Succession in Canada*. "Estates, Trusts & Pensions Journal" 2017, vol. 36 No. 2, p. 116; M. W. Galligan: *US expatriate...*, p. 325.

²⁸ See F.K. Giray: *Possible Impacts of EU Succession Regulation No. 650/2012 on Turkish Private International Law*. "Anali Pravnog fakulteta Univerziteta u Zenici" 2016, vol. 9, p. 235; A. Kaplan, L. Eyal: *The EU Succession Regulation: estate planning in Israel*. "Trusts & Trustees" 2016, vol. 22, p. 504.

²⁹ P. Lagarde: *Les principes de base du nouveau règlement européen sur les successions*. "Revue critique de droit international privé" 2012, vol. 101, p. 691: "Ce règlement [...] constitue pour le droit français actuel une véritable révolution"; C. Kohler: *L'autonomie de la volonté en droit international privé: un principe universel entre libéralisme et étatisme*. "Recueil des Cours" 2013, vol. 359, p. 463: "Il constitue un véritable tournant copernicien pour la matière en ce qu'il institue un régime complet des successions internationales dans l'Union européenne...".

³⁰ With some exceptions that will also be noted below.

³¹ Adoption of a unitary system of succession for the whole EU was generally welcomed with warm comments in the scholarly writing. See, e.g. Max Planck Institute: *Comments*, p. 600; M. Załucki: *Attempts to harmonize the inheritance law in Europe: past, present, and future*. "Iowa Law Review" 2018, vol. 103, p. 2330; A. Bonomi: *Choice-of-Law Aspects of the Future EC Regulation in Matters of Succession — A First Glance at the Commission's Proposal*. In: "Convergence and Divergence in Private International Law. Liber Amicorum Kurt Siehr". Eds. K. Boele-Woelki, T. Einhorn, D. Girsberger, S. Symonides. The Hague—Zürich 2010, p. 162; A. Dutta: *Succession and Wills in the Conflict of Laws on the Eve of Europeanisation*. "Rabels Zeitschrift für ausländisches und internationales Privatrecht" 2009, p. 555; H. Dörner, C. Hertel, P. Lagarde, W. Riering: *Auf dem Weg zu einem europäischen Internationalen Erb- und Verfahren-*

The position is somewhat less ground-breaking in these states in which the law applicable to the succession has long covered all the assets belonging to the deceased, i.e. where the so-called unitary approach³² was adopted (e.g. Germany, Austria, Poland³³). On the other hand, the states that used nationality of the deceased as the main connecting factor (Germany, Austria, Spain, Italy, Greece, Portugal, Sweden, Slovenia, Czech Republic, Slovakia, Lithuania, Hungary, and Poland) experience an important shift to the habitual residence, which is a central notion under the Regulation. This is because the habitual residence is used under the Regulation both to indicate the general jurisdiction of the courts in succession matters, as well as the applicable law.

The EU Succession Regulation in general deserves a most positive appraisal. It is an impressive achievement given the need to overcome important divergencies between the Member States. The uniform succession conflict of law rules introduces more legal certainty and predictability for estate planners³⁴. Some drawbacks and pitfalls that will be discussed below, should not cause skeptics to question the significance of this major achievement.

The highlights of the Regulation include in particular:

srecht. “Praxis des Internationalen Privat-und Verfahrensrechts (IPRax)” 2005, p. 4. In Polish literature see, e.g. Ł. Żarnowiec: *Wpływ statutu rzeczowego na rozstrzygnięcie spraw spadkowych — na styku statutów*. Warszawa 2018, p. 78.

³² For a general outline of unitary and dualistic approaches to the law applicable to succession see A. Bonomi, in: J. Basedow, G. Rühl, F. Ferrari, P.A. De Miguel Asensio: *Encyclopedia of private international law*. Cheltenham 2017, vol. 1, p. 1683—1685.

³³ The Polish Acts on private international law of 1926, 1965, and 2011. The Act of 2011 was published in English in “Yearbook of Private International Law” 2011, vol. 13, p. 641—656 and in “Problemy Prawa Prywatnego Międzynarodowego” 2011, vol. 8, p. 109—138. On the Act of 2011 see, generally: U. Ernst: *Das polnische IPR-Gesetz von 2011: Mitgliedstaatliche Rekodifikation in Zeiten supranationaler Kompetenzwahrnehmung*. “Rabels Zeitschrift für ausländisches und internationales Privatrecht” 2012, vol. 76, p. 597—638; T. Pajor: *Introduction to the New Polish Act on Private International Law of 4 February 2011*. “Yearbook of Private International Law” 2011, vol. 13, p. 381; Idem: *La nouvelle loi polonaise de droit international privé. Présentation générale*. “Revue critique de droit international privé” 2012, vol. 101, p. 5; M. Pazdan: *Das neue polnische Gesetz über das internationale Privatrecht*. “Praxis des Internationalen Privat-und Verfahrensrechts (IPRax)” 2012, p. 77. On the Act of 1965 see, generally J. Rajski: *The New Polish Private International Law, 1965*. “International and Comparative Law Quarterly” 1966, vol. 15, p. 457 and D. Lasok: *The Polish System of Private International Law*. “The American Journal of Comparative Law” 1966, vol. 15, p. 330; K. Przybyłowski: *Principles of Contemporary Polish Private International Law in the Light of the Provisions of the Act of 12 November 1965*. “Polish Yearbook of International Law” 1966, vol. 1, No. 1—2, p. 65—85.

³⁴ M. Pfeiffer: *Legal...*, p. 584.

- Dealing not only with the conflict of laws rules but also with the jurisdiction and recognition and enforcement of decisions and acceptance of authentic instruments,
- Introducing the European Certificate of Succession,
- The universal application of the conflict of laws and jurisdiction rules in the Regulation,
- The unitary approach adopted for the law applicable to the succession
- An identical connecting factor of habitual residence of the deceased for determining the applicable law and jurisdiction,
- Allowing for the choice of law (party autonomy) in succession matters³⁵,
- The legal basis for applying special rules imposing restrictions concerning or affecting the succession in respect of certain immovables, enterprises, or other types of assets,
- Providing for the rule dealing with *commorientes*,
- The precedence of the Regulation over conventions concluded exclusively between two or more Member States,
- Dealing with the *renvoi* and providing for the public policy exception,
- Granting jurisdiction to admit declaration concerning acceptance or waiver of succession, legacy or a reserved share, to the courts of the state, where the person making the declaration has his or her habitual residence, and the solution adopted for the formal validity of such declarations.

3. Exceptions to the principle of the unity of the law applicable to the succession

As already noted, one of the main features of the Succession Regulation is that a single law applies to the whole of the succession (principle of the unity of the *legis successionis*). Nonetheless, the Regulation permits two types of exceptions to that principle. Under the first type, certain issues are excluded from the scope of *legis successionis* and are subjected to the application of some other law (scission). The second type of exception might be referred to as “dismemberment” and usually occurs for certain classes of assets.

³⁵ Which is sometimes also seen as revolutionary. E.g. S. Strong: *The European...*, p. 2211.

The most important examples of the first type of exception are separate rules for the admissibility and substantive validity of the dispositions upon death other than agreements as to succession (Article 24), and for the admissibility, substantive validity, and binding effects between parties, including the conditions for its dissolution of the agreements as to succession (Article 25). In the first place, these rules attempt to preserve the unity of the law applicable to succession, by subjecting the issues specified therein, to the law that would have applied to the succession of the person if he had died on the day on which the disposition was made (or agreement was concluded). Nevertheless, they do not eliminate the possibility that the applicable law under Articles 24 and 25 will differ from *legis successio*nis. Such a scission may occur, on one hand, when the deceased changed his habitual residence after making the disposition (or concluding the agreement), or, on the other hand, by a choice of law for the disposition or agreement permitted under Articles 24(2) or 25(3), which is not coupled with a choice of the law applicable to the succession under Article 22. In such cases, the autonomy of the parties takes priority over the principle of the unity of the *legis successio*nis and the simplicity it offers. It is nevertheless hoped that parties will exercise this autonomy wisely.

Another exception to the unity of the law applicable to succession might occur as a result of the operation of *renvoi* (Article 34). While limited in scope, *renvoi* has been permitted under the Succession Regulation³⁶ although it is excluded under other EU regulations dealing with private international law. Under Succession Regulation, *renvoi* is possible when the law applicable under the Regulation would be the law of a non-Member State, and the conflict of laws rules of that state, provide for the application of the law of a Member State (*renvoi* back to a Member State — the so-called “remission”³⁷), or for the application of the law of another non-Member State, which would apply its law (the “accepted transmission”)³⁸. This solution preserves the international harmony of

³⁶ On the *renvoi* under the Regulation in Polish literature: M. Pazdan: *O zmiennych losach i perspektywach na przyszłość odesłania w prawie prywatnym międzynarodowym*. In: “Oblicze prawa cywilnego. Księga Jubileuszowa dedykowana Profesorowi Janowi Bleszyńskiemu”. Ed. K. Szczepanowska-Kozłowska. Warszawa 2013, p. 349; W. Popiołek, in: M. Pazdan (ed.): “System Prawa Prywatnego”. Vol. 20A: *Prawo prywatne międzynarodowe*. Warszawa 2014, p. 381; L. Żarnowiec: *Odesłanie w ujęciu przepisów rozporządzenia spadkowego*. “Problemy Prawa Prywatnego Międzynarodowego” 2017, vol. 21, p. 7; M. Wojewoda: *Instytucja odesłania w rozporządzeniu spadkowym (UE) nr 650/2012 — geneza i normatywny kształt renvoi w art. 34*. “Europejski Przegląd Sądowy” 2014, No. 3, p. 4 and No. 4, p. 21.

³⁷ Article 34(1)(a).

³⁸ Article 34(1)(b).

decisions and should be appreciated. The downside is that *renvoi* with respect only to some of the issues (assets) governed by the law applicable to the succession (partial or complex *renvoi*) leads to the scission of the *legis successionis*. The scission could, however, be prevented by a person exercising the choice of law. This is because the choice of law always excludes *renvoi* (Article 34(2)).

The dismemberment of the law applicable to the succession may, on the other hand, transpire if a court of a Member State takes advantage of the jurisdiction granted by Article 10(2). This second type of exception from the principle of the unity of the *legis successionis* may occur if such court decides with respect to the assets located in its territory, based on the law determined by the Regulation, while a court in a non-Member State decides in a succession case on the basis of the law determined under its conflict of laws rules. Similar results — legally speaking — may come as a result of the application of Article 12 of the Regulation, if the court in a Member State decides not to rule with respect to one or more of the assets of the deceased that are located in a third state.

The above exceptions from the principle of the unity of the *legis successionis* are justified by practical considerations. It is thought that they will prove useful.

4. Dispositions upon death

Recital 48 contends that the conflict of laws rules concerning the dispositions of property upon death are to “ensure legal certainty for persons wishing to plan their succession in advance”. This goal is, however, impeded by doubts which arise under the Regulation concerning the dispositions of property upon death.

The difficulty rests in deciding what types of dispositions are covered by the term “agreements as to succession” under Article 25 of the Regulation. The definition contained in Article 3(1)(b) — although helpful — does not solve all the problems. The source of doubts is the enormous diversity of the instruments known in different legal systems.

Clearly, the inheritance agreements (agreements under which the deceased establishes the other contracting party as an heir³⁹) are cov-

³⁹ See, eg J. Rodríguez Rodrigo, in: A.-L.C. Caravaca, A. Davì, H.-P. Mansel: *The EU Succession...*, 382; Ch. Zoumpoulis, in: H.P. Pamboukis (ed.): *EU Succession Regulation No. 650/2012. A Commentary*. Athens—München—Oxford—Baden-Baden 2017, p. 302—303.

ered. A lively debate in the literature concerned, however, the closest connection test under Article 25(2), applied to determine the substantive validity and binding effects of the agreements regarding the succession of several persons⁴⁰. We share the view that in applying this test one should take into account all relevant circumstances of the case. None of the factors should be treated as *prima facie* decisive.

It is the task of the scholars and courts to determine what other types of *mortis causa* dispositions are covered by Article 25⁴¹. Doubts concern instruments such as: a) the French *institutions contractuelles* of the family law (*contrat de mariage*), which serve inheritance purposes, as well as analogous institutions known under Spanish, Portuguese, Luxembourg, Belgian and Maltese laws⁴²; b) the *common law* testamentary contracts, such as contracts to make, or not to make a will or contracts not to revoke and not to modify a will⁴³; c) the

⁴⁰ A. Davì: *Riflessioni sul futuro diritto internazionale privato europeo delle successioni*. “Rivista di diritto internazionale” 2005, vol. 88, p. 332; A. Bonomi, C. Schmid: *Successions...*, p. 316, paras 185—86; I. Rodríguez-Uría Suárez: *La ley aplicable a las pactos sucesorios*. Santiago de Compostela 2014, p. 31—32, para 47.

⁴¹ Difficulties with establishing the scope of Article 25 were also discussed in the Polish literature: J. Pazdan: *Umowy dotyczące spadku w rozporządzeniu spadkowym Unii Europejskiej*. Warszawa 2018, p. 173.

⁴² P. Lagarde, in: U. Bergquist, D. Damascelli, R. Frimston, P. Lagarde, F. Odersky, B. Reinhartz: *EU Regulation on succession and wills: commentary*. München 2015, p. 148, para 1; A. Bonomi, A. Öztürk: *Das Statut der Verfügung von Todes wegen (Art. 24 EuErbVO)*. In: “Die Europäische Erbrechtsverordnung”. Eds. A. Dutta, S. Herrler. München 2014, p. 59, para 60; C.F. Nordmeier: *Die französische institution contractuelle im Internationalen Erbrecht: International-privatrechtliche und sachrechtliche Fragen aus deutscher und europäischer Perspektive*. “Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)” 2014, vol. 34, p. 424—425, para 5; E. Fongaro: *L’anticipation successorale à l’épreuve du “règlement successions”*. “Journal du droit international (Clunet)” 2014, vol. 141, p. 494, para 2; S. Frank, C. Döbereiner: *Nachlassfälle mit Auslandsbezug*. Bielefeld 2015, p. 116, paras 410—411; Ch. Zoumpoulis, in: H.P. Pamboukis (ed.): *EU Succession...*, p. 303, Nb 67; D. Bureau, H.M. Watt: *Droit international privé*. T. 2. Paris 2017, p. 316; M. Revillard: *Droit international privé et européen: pratique notariale*. Paris 2018, p. 661, para 1140.

⁴³ In favour of including such instruments within the scope of Article 25: C. Döbereiner: *Das internationale Erbrecht nach der EU-Erbrechtsverordnung (Teil II), Mitteilungen des Bayerischen Notarvereins 2013*. München 2014, p. 439; A. Davì, A. Zanobetti: *Il nuovo diritto internazionale privato europeo delle successioni*. Torino 2014, p. 106, para 18; A. Bonomi, A. Öztürk: *Das Statut...*, p. 59, para 60; S. Frank, C. Döbereiner: *Nachlassfälle...*, p. 126, paras 443, 444; A. Dutta, in: J. Von Hein (ed.): *Münchener Kommentar zum Bürgerlichen Gesetzbuch*. München 2015, vol. 10, p. 1461, para 9; G. Nikolaidis, in: H.P. Pamboukis (ed.): *EU Succession...*, p. 97, para 8. To the contrary: C.F. Nordmeier: *Erbverträge und nachlassbezogene Rechtsgeschäfte in der EuErb-VO—eine Begriffsklärung*. “Zeitschrift für Erbrecht und Vermögensnachfolge” 2013, p. 123—124; G. Hohloch, in: H.P. Westermann, B. Grunewald,

Italian *patto di famiglia*⁴⁴, d) and the contracts for the waiver of succession⁴⁵.

Articles 24 and 25 of the Regulation deal with the “admissibility” of the dispositions upon death. The question is what does the term cover. It seems clear enough that “admissibility” concerns in particular a question whether a given type of disposition upon death is admissible⁴⁶. Moreover, specific limitations as to the personal qualifications of the persons making an agreement would seem to be covered here⁴⁷. Such limitations concerning agreements as to succession are for example known under Austrian law.

A separate question on the other hand is what type of stipulations may be made in a will or other disposition upon death, or — to put it otherwise — what is an admissible content of the disposition⁴⁸. This question is governed by the general law applicable to succession under Article 21 and 22, and not by the law determined by Article 24 and 25 of the Regulation. For example, a question whether a legacy by vindication (*legatum per vindicationem*) is admissible, should be decided under the general *legis successionis*⁴⁹.

G. Maier-Reimer (eds.): *Erman. Bürgerliches Gesetzbuch*. Köln 2017, p. 6789, para 9; J. Pisuliński: *Pojęcie umowy dziedziczenia w prawie prywatnym międzynarodowym oraz umowy dotyczącej spadku w rozporządzeniu spadkowym*. In: “Nowe europejskie prawo spadkowe”. Eds. M. Pazdan, J. Górecki. Warszawa 2015, p. 164.

⁴⁴ P. Kindler: *La legge applicabile ai patti successori nel regolamento UE nr 650/2012*. “Rivista di diritto internazionale private e processuale” 2017, p. 17—18; F. Vismara: *Patti successori nel regolamento (UE) n. 650/2012 e patti di famiglia: in interferenza possibile?* “Rivista di diritto internazionale privato e processuale” 2014, vol. 50, p. 813. To the contrary: D. Damascelli: *Le pacte de famille*. In: “Les pactes successoriaux en droit comparé et en droit international privé”. Eds. A. Bonomi, M. Steiner. Genève 2008, p. 626.

⁴⁵ C.F. Nordmeier: *Erbverträge...*, p. 117; A. Davi, A. Zanobetti: *Il nuovo...*, p. 105; P. Lagarde, in: U. Bergquist, D. Damascelli, R. Frimston, P. Lagarde, F. Odersky, B. Reinhartz: *EU Regulation...*, p. 159; A. Dutta, in: J. Von Hein (eds.): *Münchener...*, p. 1554, para 2; S. Frank, C. Döbereiner: *Nachlassfälle...*, p. 118, para 417; A. Bonomi, in: A. Bonomi, P. Wautelet (eds.): *Le droit européen des successions*. Bruxelles 2013, p. 432, para 6; P. Kindler: *La legge...*, p. 15; G. Hohloch, in: H.P. Westermann, B. Grunewald, G. Maier-Reimer (eds.): *Bürgerliches...*, p. 6809, para 2; M. Pazdan, in: M. Pazdan (ed.): *Prawo prywatne międzynarodowe. Komentarz*. Warszawa 2018, p. 1205, para 31—35.

⁴⁶ I. Rodríguez-Uría Suárez: *La ley...*, p. 35; M. Pazdan, in: M. Pazdan (ed.): *Prawo...*, p. 1209, para 3.

⁴⁷ J. Pazdan: *Umowy...*, p. 268.

⁴⁸ § 2278(2) BGB, which limits dispositions permissible in the contracts of inheritance to appointments of heirs, legacies, testamentary burdens, and recently — the choice of law.

⁴⁹ M. Pazdan: *Aspekty kolizyjnoprawne zapisu windykacyjnego*. “Problemy Prawa Prywatnego Międzynarodowego” 2015, vol. 16, p. 22.

Article 23(2) contains a list of issues governed by the law applicable to succession. It is expressly underlined that the list is non-exhaustive⁵⁰.

Article 26, on the other hand, contains a list of elements pertaining to the substantive validity of the dispositions upon death. We share the view that, although not expressly indicated, the list should also be treated as non-exhaustive⁵¹. An example of an issue not mentioned but covered by Article 26 could be the general requirements for the validity of legal acts, including general clauses referring to standards such as public policy (*ordre public*), good morals (*bonnes moeurs*), or — in Poland — the “principles of social conduct” under Article 58 of the Polish Civil Code (hereafter: “KC”)⁵².

The substantive validity in the meaning of the said provision does not, on the other hand, cover restrictions on whether the deceased is entitled to dispose upon death of the assets belonging to the estate⁵³. The disposable part of the estate is governed by the law applicable to the succession.

5. The intertemporal issues

5.1. General remarks

In applying the rules provided for in the EU Succession Regulation three events are relevant from a temporal point of view: the moment of death of the deceased/testator, the moment of making the choice of law

⁵⁰ The provision uses here the words “in particular” in the English version, “notamment” in the French version, “insbesondere” in the German version, “in particolare” in the Italian version and “in particular” in the Spanish version.

⁵¹ To that effect: A. Dutta, in: J. Von Hein (ed.): *Münchener...*, p. 1557, para 2; A. Köhler, in: W. Von Gierl, A. Köhler, L. Kroiß, H. Wilsch (eds.): *Internationales Erbrecht*. Wien 2015, p. 1232; A. Bonomi, P. Wautelet (eds.): *Le droit...*, p. 452; G. Hohloch, H.P. Westermann, B. Grunewald, G. Maier-Reimer (eds.): *Bürgerliches...*, p. 6813, para 7. To the contrary: J. Heinig: *Rechtswahlen in Verfügungen von Todes wegen nach der EU-Erbrechts-Verordnung*. “Mitteilungen der Rheinischen Notarkammer (RNotZ)” 2014, p. 208; F. Odersky: *Der wirksamwirkungslose Erb- und Pflichtteilverzicht nach der EU-ErbVO “notar”* 2014, p. 14, fn. 8.

⁵² The Act of 23.4.1964 — the Civil Code (uniform text: OJ of 2014, item 121).

⁵³ See A. Bonomi, A. Óztürk: *Das Statut...*, p. 56, para 43; A. Dutta, in: J. Von Hein (ed.): *Münchener...*, p. 1560, para 15; G. Hohloch, in: H.P. Westermann, B. Grunewald, G. Maier-Reimer (eds.): *Bürgerliches...*, p. 6812, para 3 and p. 6813, para 7a.

by the testator (if it was made), and the moment of making a disposition upon death (if there is one). If all these events took place on or after the 17th August 2015, in determining the law applicable to succession one should apply the provisions of Regulation 650/2012 (Article 21, 22, 24, and 25). If one of the above events occurred before the 17th of August 2015 difficulties arise. They shall be discussed below, first concerning situations of the absence of choice and second — for cases when the choice was made, which creates more complex situations. In that regard, we will mention a newly introduced preliminary question brought before the CJEU by a Polish notary in case C-387/20 OKR⁵⁴. However, given the unusual and novel situation, in which the reference is made by a notary, we shall begin with brief comments in that regard.

5.2. Judicial functions of a Polish notary, who refuses to perform a notarial act

The case C-387/20 OKR started with the Polish notary refusing to perform a notarial act, on the ground that the choice of law purported by the testatrix in the will was not permitted under the relevant choice of law rules. The notary then referred questions on the interpretation of the EU Succession Regulation to the CJEU. Thus, the first issue that the European Court must decide is whether a Polish notary is competent to ask preliminary questions under Article 267 TFUE⁵⁵. This depends on whether the notary may be treated as a “court or tribunal” in the meaning of that provision, at least when he or she refuses to perform a notarial act. Only if the answer to this question is positive, will the preliminary questions in case C-387/20 OKR be considered admissible.

Although what classifies as a “court or tribunal” under Article 267 TFUE is in itself a complex matter that goes beyond the scope of the present contribution, one hopes that in deciding case C-387/20 OKR, the European Court will carefully consider the judicial function of the Polish notary in its capacity as the authority who refuses to perform a notarial act. Such a refusal triggers the appeal proceedings before a district court (Sąd Okręgowy) according to Article 83§ 1 of the Law on Notaries of 1991 (hereafter “PrNot”)⁵⁶. The Polish Supreme Court (in an extended panel

⁵⁴ C-387/20 OKR, request for a preliminary ruling (lodged before the Court on 12.8.2020).

⁵⁵ The Treaty on the Functioning of the European Union, O.J. C 326, 26/10/2012, p. 1.

⁵⁶ Prawo o notariacie (O.J. 1991, No. 22, item 91; consolidated text O.J. 2019, item 540).

of seven judges) found in a decision of 7 December 2010⁵⁷ that the notary who refuses to perform a notarial act must be treated as a body hearing the case at first instance. The district court hearing the appeal is, on the other hand, the authority of a second instance. This view was shared by the Constitutional Tribunal in the judgment of 13 January 2015⁵⁸. It was underlined that the appeal against the refusal to perform a notarial act does not mean that there is a dispute between the notary and the party who was refused the notarial act in question. Rather, the notary, who refuses the notarial act, performs a public function, the essence of which is the legal protection of the rights of individuals. Moreover, the Constitutional Tribunal reasoned that entrusting the notary with the matter as a first instance decision-making body meets the standards of procedural justice provided for in the Polish Constitution.

The above seems to favour the judicial nature of the notary's functions — at least when he or she refuses to perform a notarial act. This seems to open the path for the notary to refer preliminary questions to the European Court. The decision of the CJEU on that matter will be eagerly awaited.

5.3. The law applicable to succession in the absence of the choice of law

In case the deceased passed away before the 17th of August 2015 and has not chosen law, the law applicable to succession should be determined based on the conflict of law rules in force before that date. In Poland, if the death occurred after the entry into force of the private international law act of 2011 (which was on 16th May 2011), and before the 17th August 2015, one should apply Article 64(2) of PrPrywM 2011, which subjects succession matters to the national law of the deceased. If the death occurred after the entry into force of the private international law act of 1965 (which was on 1st July 1966), and before the 16th May 2011, the *legis successionis* should be determined under Article 34 of PrPrywM 1965. This last provision also provided for the application of the law of

⁵⁷ III CZP 86/10, “Orzecznictwo Sądu Najwyższego — Izba Cywilna” 2011, No. 5, item 49. To that effect also: R. Kapkowski: *Odmowa dokonania czynności przez notariusza w aspekcie proceduralnym*. “Rejent” 2008, No 7—8, s. 46; A. Oleszko: *Prawo o notariacie. Komentarz*. Cz. 2. T. 1. Warszawa 2012, p. 392 et seq., Nb 17 i n.

⁵⁸ SK 34/12. Cf. judgment of TK of 10.12.2003, K 49/01, “Orzecznictwo Trybunału Konstytucyjnego” — A 2003, No. 9, item 101, where the notary was found to be a “public official”, who performs auxiliary functions to the judicial system.

the state, whose nationality the deceased possessed at the time of death. The international conventions to which Poland is a party should also be taken into account in determining the law applicable to succession.

5.4. The choice of law

The choice made after the date when the Succession Regulation started to be applied (17th August 2015) should be assessed in light of the provisions of the Regulation. For that purpose, it is irrelevant where the choice was made or what is the location of the assets comprising the estate of the deceased. Alike, it does not matter what is the nationality of the deceased.

Article 22 provides that “a person” may choose the law to govern the succession after his or her death. Article 22 permits the choice of law of the State whose nationality the deceased possesses at the time of making the choice or at the time of death. The law of any state may be chosen, which includes a law of a non-EU member. In the case of Poland, one must take into account that the application of the EU Succession Regulation may potentially be excluded in cases when a bilateral convention applies (see Article 75(1) of the Regulation). Poland is a party to a relatively large number of such conventions.

An opportunity to deal with questions of the admissibility of the choice of law made by a national of a third state has recently arisen in a case referred to the European Court by a Polish notary (case C-387/20 OKR)⁵⁹. As mentioned earlier, in that case, the notary refused to carry out the notarial act, which was to contain a choice of law clause in favour of Ukrainian law, where the testatrix purported to modify the legal order of succession provided for in the Ukrainian law⁶⁰. Importantly, Poland is bound by a bilateral convention with Ukraine, which contains rules on the determination of the law applicable to succession but does not permit the choice of law. The issue of the relationship between the EU Regulation permitting for the choice of law, and the bilateral convention which does not, thus arises.

⁵⁹ It is not yet certain whether CJEU will deem the preliminary reference formulated by a notary admissible. The doubts arises whether notary is at all competent to formulate preliminary questions to the European Court. In case C-387/20 *OKR* the referring notary gave reasons why his position in that case under Polish law is equalling to that of a domestic court of first instance, which allowed him to pose questions to the European Court. We shall wait for the response of the Court in that regard.

⁶⁰ See case C-387/20 — summary of the request for preliminary ruling [working document] (available at curia.eurpopa.eu).

In its first question, the notary asks whether Article 22 of the EU Succession Regulation “must be interpreted as meaning that a person who is not a citizen of the European Union is also entitled to choose the law of his or her native country as the law governing all matters relating to succession?”

In our view, it is fairly obvious that the answer to this first question must be positive. Article 22 does not contain any restrictions as to the nationality of “a person” who exercises the choice of law. There are no reasons to preclude a national of a non-Member state from making a choice permitted by the Regulation.

The further question posed to the Court in the case C-387/20 is, however, more problematic. The second preliminary question, in that case, reads as follows:

“Must Article 75, in conjunction with Article 22, of Regulation No. 650/2012 be interpreted as meaning that, in the case where a bilateral agreement between a Member State and a third country does not govern the choice of law applicable to a case involving succession but indicates the law applicable to that case involving succession, a national of that third country residing in a Member State bound by that bilateral agreement may make a choice of law? and in particular:

- must a bilateral agreement with a third country expressly exclude the choice of a specific law and not merely govern the *lex successionis* using objective connecting factors in order for its provisions to take precedence over Article 22 of Regulation No 650/2012?
- is the freedom to choose the law governing succession and to make the applicable law uniform by making a choice of law — at least to the extent determined by the EU legislature in Article 22 of Regulation No 650/2012 — one of the principles underlying judicial cooperation in civil and commercial matters in the European Union, which may not be infringed even where bilateral agreements with third countries apply which take precedence over Regulation No 650/2012?”

A question whether the choice of law is admissible in a situation when the bilateral convention does not provide for such a possibility, but the national conflict of law rules, established after the convention was signed, do allow for such a choice, has been addressed by Polish scholars already some time ago. M. Szpunar contended that to treat the choice of law as ineffective in such a situation would be grossly unfair and would impede legal certainty⁶¹. The signatories to the convention have adhered thereto

⁶¹ M. Szpunar, in: M. Pazdan (ed.): “System Prawa Prywatnego”. Vol. 20A..., p. 156, Nb. 389. To the opposite: M. Czepelak: *Umowa międzynarodowa jako źródło prawa prywatnego międzynarodowego*. Warszawa 2008, p. 156; A. Wysocka-Bar: *Wybór prawa w międzynarodowym prawie spadkowym*. Warszawa 2013, p. 106 (who invoke Article 91(2) of the Polish Constitution).

to remove a conflict between national legislation concerning succession. The signatories' intention did not, however, encompass the choice of law, given that none of the domestic laws have provided for a choice of law at the time when the convention was signed. Only at the later time, was the choice of law accepted in succession matters both in Ukraine (Article 79 1st sentence of the 2005 Law⁶²) and in Poland (Article 64(1) PrPrywM 2011). In Ukraine, it became possible to choose the law of the state whose nationality the deceased possessed, while in Poland — not only the national law but also the law of the state where the deceased had its domicile or habitual residence at the time of making the choice or at the time of death.

A question thus arises: should the possibility of a choice of law in succession matters be excluded given the existence of the Polish-Ukrainian convention of 24 May 1993, or should such choice be allowed taking into consideration the domestic rules adopted in that regard after the convention was signed?

To accept the choice of law is possible only if one assumes that the question of the choice in succession matters was left out from the scope of issues covered by the convention, i.e. that the convention does not exclude the domestic legislation concerning the choice of *legis successionis* of the states parties to the convention. It must further be observed in that regard, that in Poland, the domestic conflict of law rule (Article 64(1) PrPrywM 2011) was replaced by the EU Succession Regulation.

To support his position M. Szpunar underlined that the solution should be found by making a proper interpretation of the bilateral international convention⁶³. The states entering an international agreement generally aim at facilitating legal transactions and enhance legal certainty rather than add complexity⁶⁴. His argument was backed up by J. Pazdan⁶⁵, who invoked the principles of the interpretation of international conventions, in particular a need to take into account the goal behind the given convention and the later developments in the law⁶⁶. This

⁶² A Polish translation of the Ukrainian Act on private international law was prepared by J. Czubał, W. Macokina and I. Kotlyarska, under the supervision of P. Mostowik and published in "Kwartalnik Prawa Prywatnego" 2008, No. 2, p. 587. See also a comment on this Act: A. Dowgert: *Ukraińska kodyfikacja prawa prywatnego międzynarodowego*. "Kwartalnik Prawa Prywatnego" 2008, p. 349 et seq. (succession matters — p. 379).

⁶³ M. Szpunar, in: M. Pazdan (ed.): "System Prawa Prywatnego". Vol. 20A..., p. 156, Nb. 390.

⁶⁴ J. Pazdan: *Umowy...*, p. 142—143.

⁶⁵ M. Szpunar, in: M. Pazdan (ed.): "System Prawa Prywatnego". Vol. 20A..., p. 156, Nb. 391.

⁶⁶ About this proposition, in the Polish literature, see: W. Czaplński, A. Wyrozumska: *Prawo międzynarodowe publiczne. Zagadnienia systemowe*. Warszawa 2014, p. 624, Nb. 509.

opens the path to take into consideration “the change in the circumstances, which the signatories to the convention have not taken into account at the time of signing and which they could not have foreseen, and if they had, they would have given a different content to their agreement”⁶⁷.

It seems difficult, at least *prima facie*, to find the freedom of the choice of law provided for in Article 22 as a “principle which underlies judicial cooperation in civil and commercial matters in the European Union”. Rather, it seems perfectly possible to imagine that the EU Succession Regulation does not provide for a choice of law. The admissibility of the choice of law in succession matters is somewhat a novel possibility in conflict of laws. It thus seems hard to argue that it underlies the very system of judicial cooperation in the Union.

In conclusion, it is submitted that the bilateral conventions, which were signed between Poland and third states, in which the choice of law was not regulated at the time of signing (as in Poland), but was permitted by later amendments in the law, do not address the question whether the choice of law is admissible. Rather, they leave the matter outside the reach of the convention. Therefore, in such countries, the domestic conflict rules allowing for a choice of law may be applied. In Poland, this means that Article 64(1) PrPrywM 2011 is going to permit the choice in succession matters made until 17th August 2015, and the same effect will be achieved under Article 22 of the EU Succession Regulation for choices made on or after 17th August 2015.

One more point that needs to be addressed is the relevance of the so-called “reconciliation clause” (systems’ coherency clause) contained in Article 97 of the Polish-Ukrainian convention. This provision stipulates that the Convention “does not infringe other conventions binding one or both of the Contracting States”. We think that the Convention must not yield to the Succession Regulation⁶⁸. First, the priority of the Convention results from Article 75 of the Regulation. Second, the reconciliation clause provided for in Article 97 of the Convention concerns only compatibility with earlier international agreements⁶⁹.

⁶⁷ J. Pazdan: *Umowy...*, p. 143.

⁶⁸ See J. Pazdan, in: M. Pazdan (ed.): “System Prawa Prywatnego”. Vol. 20C: *Prawo prywatne międzynarodowe*. Warszawa 2015, p. 678; P. Czubik, in: M. Załucki (ed.): *Unijne...*, p. 406, Nb. 6; M. Pazdan: *Zakres zastosowania rozporządzenia spadkowego*. In: “Nowe europejskie prawo spadkowe”. Eds. M. Pazdan, J. Górecki [2015], s. 33; M. Szpunar, K. Pacuła, in: M. Pazdan (ed.): *Prawo...*, p. 1272–1273, Nb. 17. To the contrary — in context of the relationship between the bilateral conventions and Regulations Rome I and Rome II — M. Czepelak: *Międzynarodowe prawo zobowiązań Unii Europejskiej*. Warszawa 2012, p. 99 et seq. Such view was also taken by A. Wysocka-Bar: *Wybór...*, p. 165.

⁶⁹ See M. Szpunar, K. Pacuła, in: M. Pazdan (ed.): *Prawo...*, p. 1273, Nb. 17.

The EU legislator purports to protect the choice of law made before 17 August 2015, in situations when the death occurred on or after that date. According to Article 83(2) of the Regulation, such choice is valid if it meets the conditions laid down in: a) Chapter III of the Regulation (Article 22, 24(2) and 25(3)), or b) in rules of private international law which were in force, at the time the choice was made, in the State in which the deceased had his habitual residence or c) in any of the States whose nationality he possessed, or finally d) in the law of the state, where the court dealing with the succession matter has its seat (competent to deal with the case under Article 4 of the Regulation). The above specified conflict of law regulations apply alternatively⁷⁰.

We share the view that on the basis of Article 83(2) of the Regulation, one can take into account not only the choice made after the entry into force of the Regulation (i.e. 16 August 2012) but also before that date⁷¹. The private international law of the state whose nationality the deceased possessed, or of the state where he or she had the habitual residence, can be both the law of a Member State, as well as that of a third country⁷².

Where the basis for the validity of the choice is in the domestic conflict of law rules, these rules decide as to the extent of the freedom which can be exercised by the deceased in making the choice. The scope of that freedom may be wider than under Article 22 of the Succession Regulation. The example is provided by Article 64(1) of PrPrywM 2011, which permitted to choose not only the law of the state, whose nationality the deceased possessed at the time of death or at the time of making the choice but also the law of the state, in which the deceased had domicile or habitual residence at one of these moments.

Owing to Article 83(2) the choice leading to the dismemberment of the law applicable to the succession may also prove effective (e.g. the

⁷⁰ U. Magnus, in: R. Hüßtege, H.-P. Mansel (eds.): *Rom-Verordnungen*. Baden-Baden 2015, p. 1177, Nb. 11; M. Kłoda: *Europejskie rozporządzenie spadkowe a rozrządzenie na wypadek śmierci dokonane przed 17 sierpnia 2015 r.* "Palestra" 2014, s. 18; M. Załucki, in: M. Załucki (ed.): *Unijne...*, p. 416, Nb. 3.

⁷¹ See C.F. Nordmeier: *Grundfragen der Rechtswahl in der neuen EU-Erbrechtsverordnung—eine Untersuchung des Art. 22 ErbRVO*. "Zeitschrift für Gemeinschaftsprivat Recht" 2013, vol. 10, p. 154; C. Schoppe: *Die Übergangsbestimmungen zur Rechtswahl im internationalen Erbrecht: Anwendungsprobleme und Gestaltungspotential*. "Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)" 2014, p. 29; J. Heinig: *Rechtswahlen...*, No. 5 and 6, p. 213; P. Wautelet, in: A. Bonomi, P. Wautelet (eds.): *Le droit...*, p. 966, Nb. 9.

⁷² Cf. J. Heinig: *Rechtswahlen...*, p. 214—215; U. Magnus, in: R. Hüßtege, H.-P. Mansel (eds.): *Rom...*, p. 1119, Nb. 22; R. Fucik, in: A. Deixler-Hübner, M. Schauer (eds.): *Kommentar zur EU-Erbrechtsverordnung (EuErbVO)*. Wien 2015, p. 588, Nb. 7.

choice of German law for the succession of the immovable property located in Germany — on the basis of Article 25(2) of the German private international law⁷³)⁷⁴.

Article 83(4) of the Regulation provides for an additional method of determining the law applicable to dispositions of property upon death. Under this provision, one needs to determine which law — under Article 22, Article 24(2), or Article 25(3) of the Regulation — could have been chosen by the deceased for the succession or the disposition upon death. Article 83(4) implies a fiction that although he or she did not avail himself of that choice of law, the law which he or she could have chosen in accordance with the EU Succession Regulation is deemed to have been chosen. Here, the drafters of the Regulation relied upon a construction of the irrebuttable presumption (a legal fiction)⁷⁵. The choice of law is inferred although it has not been made.

In determining the law applicable on the basis of Article 83(4) of the Regulation one should take into account only the circumstances relating to the deceased. It does not appear that the application of Article 83(4) should depend on the testator's intention to comply with the requirements of his national law when making a disposition upon death. The intention to make an effective disposition (some form of *animus testandi*) is sufficient⁷⁶.

Articles 6(a) and 7(a) of the EU Succession Regulation, which deal with the jurisdiction of courts in succession matters, presuppose the

⁷³ Introductory Act to German Civil Code (EGBGB) [available at: https://www.gesetze-im-internet.de/englisch_bgbeg/].

⁷⁴ Por. M. Leitzen: *Die Rechtswahl nach der EuErbVO*. "Zeitschrift für Erbrecht und Vermögensnachfolge" 2013, p. 131; I. Ludwig: *Die Wahl zwischen zwei Rechtsordnungen durch bedingte Rechtswahl nach Art. 22 der EU- Erbrechtsverordnung*. "Deutsche Notar — Zeitschrift" 2014, p. 339; S. Nietner: *Erbrechtliche Nachlassspaltung durch Rechtswahl—Schicksal nach der EuErbVO?* "Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)" 2015, vol. 35, p. 83; U. Magnus, in: R. Hüßtege, H.-P. Mansel (eds.): *Rom...*, p. 1177, Nb. 12.

⁷⁵ A. Dutta, in: J. Von Hein (ed.): *Münchener...*, p. 1662, Nb. 8; R. Fucik, in: A. Deixler-Hübner, M. Schauer (eds.): *Kommentar...*, p. 561, Nb. 18; P. Wautelet, in: A. Bonomi, P. Wautelet (eds.): *Le droit...*, p. 977—978; K. Lechner, in: R. Geimer, R. Schütze (eds.): *Europäische Erbrechtsverordnung (EuErbVO). Internationales Erbrechtsverfahrensgesetz (IntErbRVG)*. München 2016, p. 520, Nb. 10; G. Hohloch, in: H.P. Westermann, B. Grunewald, G. Maier-Reimer (eds.): *Bürgerliches...*, p. 6832, Nb. 8; M. Pazdan, in: M. Pazdan (ed.): *Prawo...*, p. 1279, Nb. 21.

⁷⁶ To the contrary A. Dutta, in: J. Von Hein (ed.): *Münchener...*, p. 1663, Nb. 8, who is of the opinion that the fiction considered in Article 83(4) is triggered when the disposition upon death is made in accordance with the given law, both from an objective as well as subjective perspective.

choice of law made pursuant to Article 22. A question thus arises whether, for the application of the said jurisdictional rules, the fiction of the choice of law adopted in Article 83(4) of the Regulation is sufficient. This question has been referred to in yet another preliminary proceedings initiated before the European Court by OLG Köln (case C-422/20⁷⁷).

5.5. Dispositions upon death

The law applicable to dispositions upon death made on or after 17th August 2015 (the starting date for the application of the Succession Regulation) should be determined under the provisions of the EU Succession Regulation. Therefore, the admissibility and substantive validity of such dispositions are to be assessed in light of Articles 24 or 25 (depending on the type of disposition). The formal validity of the dispositions upon death is subject to the Hague Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions (see Article 75(1) of the Regulation) or Article 27 of the Regulation.

On the other hand, the dispositions upon death made before 17th August 2015 are, according to Article 83(3) of the Regulation, admissible and valid in substance and form, if they comply with the requirements: a) specified in Chapter III of the Regulation, or b) set in the law determined by the rules of private international law which were in force, at the time the disposition was made, in the State in which the deceased had his habitual residence or c) in any of the States whose nationality he possessed, or d) in the Member State of the authority dealing with the succession.

The solution adopted in Article 83(3) is guided by an idea to protect the dispositions upon death made by the deceased before 17th August 2015, even if he or she died after that day. It favours the validity of these dispositions⁷⁸. Thus the alternative application of a number of different laws.

It results from Article 83(3), that for the dispositions upon death made after 16th May 2011 and before 17th August 2015 by the deceased, who had his or her habitual residence at the time of making the disposition in Poland (including a foreigner), to be valid, it is sufficient to comply with the requirements of the law determined in accordance with conflict rules in force at that time (i.e. Articles 65 and 66 PrPrywM 2011 and the

⁷⁷ Request for a preliminary ruling in case C-422/20 *RK*, lodged at CJEU on 8 September 2020.

⁷⁸ H. Pamboukis, in: H.P. Pamboukis (eds.): *EU Succession...*, p. 687.

Hague Convention of 1961). If a disposition upon death was made at the time when the PrPrywM 1965 was in force — the conflict rules of the 1965 Law should be applied.

The same refers to a Polish national, who, at the time of making the disposition, did not have his or her habitual residence in Poland.

What is worth noting in this context is the retroactivity of the conflict rules contained in Chapter III of the Regulation, given that under Article 83(3) it is sufficient that a disposition upon death made before 17th August 2015 was admissible and “valid in substantive terms and as regards form” according to the law determined in light of these conflict rules.

6. The administration of the enterprise of the deceased

6.1. The concept of the succession administration of the enterprise in the estate under Polish law

Since 2018 Polish law provides for a special instrument designed to help the enterprise of a physical person to go through the transition period after the death of that individual. The Act of 2018 on “the succession administration of the enterprise of a physical person and other measures facilitating the succession of enterprises”, as amended in 2019⁷⁹ (hereafter “the 2018 Act”)⁸⁰ granted a limited in duration right to administer the enterprise which forms part of the estate of the deceased to three types of individuals. These are: a) the succession administrator of the enterprise, b) a temporary representative of the spouse of the entrepreneur, and c) the persons mentioned in Article 14 of the Act, called the “statutory administrators”. The first type (the succession administrator) plays a central role here. The position of other groups is defined by a reference to the succession administrator.

It must be underlined that the principles of the succession as such were not amended. General rules still apply. This includes the Civil Code rules on the executors of the testament, which allow also for the appointment of a separate executor of an enterprise belonging to the estate (Ar-

⁷⁹ The Law of 31.7.2019. Dz.U. 2019, poz. 1495.

⁸⁰ Ustawa z dnia 5.07.2018 r. o zarządzie sukcesyjnym przedsiębiorstwem osoby fizycznej i innych ułatwieniach związanych z sukcesją przedsiębiorstw (Dz.U. 2018, poz. 1629 with later amendments in Dz.U. 2019, poz. 1495).

ticle 986¹ KC), or for the appointment of the executor of the enterprise subject to legacy by vindication (Article 990¹ KC). It follows, that the succession administrator under the 2018 Act (or other individuals called upon to administer the enterprise under this Act) constitutes an additional instrument to the already existing measures known in the Civil Code, such as the executor of the estate.

The succession administrator is appointed by the entrepreneur (Article 9 of the 2018 Act) and after the death of the entrepreneur — by persons stipulated in Article 12 of the Act⁸¹. A candidate for the administrator must express his or her consent (unless the proxy of the enterprise is called upon to serve as the succession administrator). It is also necessary that the succession administrator is registered in the CEIDG (the Central Registration and Information on Business)⁸². The succession administrator must have the full legal capacity to act (i.e. be over 18 years of age and not be incapacitated; Article 8(1) of the 2018 Act). Obviously, a foreigner may also serve this function.

The entrepreneur's declaration on the appointment of a succession administrator as well as the candidate's consent must be made in writing to be valid (Article 9(2) of the 2018 Act). The appointment of a succession administrator by persons listed in Article 12(1) and (2) of the Act must, on the other hand, be made in the form of a notarial deed (Article 12(7) of the Act). The form of a notarial deed is also required for the consent for appointment of a succession administrator by persons who are jointly entitled to a share in the enterprise in the estate that is greater than 85/100 (Article 12(3) and Article 12(7) of the Act).

The limits on the authority of the succession administrator are set by the law. The administrator is obliged to run the enterprise in the estate and is authorized to perform judicial and extrajudicial acts connected

⁸¹ Article 12 of the 2018 Act reads: "(1) If succession administration has not been established upon the death of the entrepreneur, after the death of the entrepreneur the succession administrator may be appointed by:

- 1) the entrepreneur's spouse who is entitled to a share in the inherited enterprise, or
- 2) a statutory heir of the entrepreneur who accepted the estate, or
- 3) a testamentary heir of the entrepreneur who accepted the estate, or a legatee who accepted a legacy by vindication, if according to the published testament he or she is entitled to a share in the inherited enterprise.

(2) After the decision on the confirmation of succession, the registration of the deed of certification of succession, or the issuance of the European Certificate of Succession becomes final, a successor administrator may be appointed only by the owner of the enterprise, which forms part of the estate".

⁸² The business registry is governed by the Law of 6.3.2018 on the Central Registration and Information on Business and the Business Information Point (Dz.U. 2018, poz. 647, zm. poz. 1544 i poz. 1629).

thereto (Article 18 of the 2018 Act). He or she may independently carry out all actions falling within the limits of “ordinary management” (Article 22(1) of the 2018 Act). Actions exceeding these limits require the consent of all “owners of the enterprise in the estate”⁸³. In the absence of such consent, permission must be obtained from the court (Art. 22(2) of the 2018 Act).

In performing the administration, the succession administrator acts on his behalf, but for the account of the “owner of the enterprise in the estate” (Article 21 (1) of the Act). He or she is thus not a proxy but an intermediary (an “indirect substitute” — *zastępca pośredni*) without a power to represent the owner of the enterprise in a strict sense, although with a power to represent the interests of the enterprise⁸⁴.

In 2019, a further type of representative was introduced — i.e. a temporary representative called upon to carry out the management of

⁸³ Article 3 of the 2018 Act reads: “the owner of the enterprise in the estate within the meaning of the Act is:

- 1) a person who, in accordance with the final decision on the confirmation of succession, the registration of the deed of certification of succession, or the issuance of the European Certificate of Succession, acquired intangible and tangible assets referred to in Article 2(1), on the statutory basis or by virtue of a testament, or acquired an enterprise or a share in the enterprise on the basis of a legacy by vindication;
- 2) the entrepreneur’s spouse in the case referred to in Article 2(2), who is entitled to a share in the enterprise in the estate;
- 3) a person who acquired the enterprise in the estate or a share thereto directly from a person referred to in point 1 or 2, including a legal person or organizational unit referred to in art. 33[1] § 1 of the Act of 23 April 1964 — the Civil Code, which acquired the enterprise by means of a contribution in kind — if after the death of the entrepreneur the enterprise or the share thereto was disposed of.

⁸⁴ This view prevails in the doctrine: R. Blicharz: *Zarząd sukcesyjny przedsiębiorstwem w spadku*. Warszawa 2019, p. 37—38; K. Osajda, in: K. Osajda (ed.): *Kodeks cywilny. Spadki. Komentarz*. T. 4A. Warszawa 2019, p. 844 and 845, Nb. 73, 74; K. Kopiczyńska-Pieczniak: *Status prawny zarządcy sukcesyjnego*. “Przeгляд Prawa Handlowego” 2018, No. 12, p. 6 et seq.; R. Kapkowski, M. Kaufmann: *Charakter prawny zarządcy sukcesyjnego na tle pokrewnych instytucji zarządu masą spadkową*. “Rejent” 2019, No. 7, p. 78; J. Bieluk: *Ustawa o zarządzie sukcesyjnym przedsiębiorstwem osoby fizycznej. Komentarz*. Warszawa 2019, p. 73; A. Szereda: *Przedsiębiorstwo w spadku — odrębna jednostka organizacyjna*. In: “Notarialne poświadczenie dziedziczenia”. Ed. A. Marciniak. Warszawa 2019, p. 225; M. Pazdan: *Zarząd sukcesyjny — aspekty kolizyjnoprawne*. In: “Prawo handlowe. Między teorią, praktyką a orzecznictwem. Księga jubileuszowa dedykowana Profesorowi Januszowi A. Strzeczce”. Eds. E. Zielińska, P. Piniór, P. Relidzyński, W. Wyrzykowski, M. Żaba. Warszawa 2019, p. 69. Some authors, however, argue that the succession administration is a separate instrument of an individual type (*sui generis*). See M. Sieradzka: *Zarząd sukcesyjny przedsiębiorstwem osoby fizycznej — analiza i ocena nowych rozwiązań prawnych (cz. II)*. “Monitor Prawniczy” 2018, p. 1198; R. Wrzcionek: *Zarządca sukcesyjny przedsiębiorstwa w spadku*. Warszawa 2020, p. 203 et seq.

the estate to the extent it concerns the share of the spouse of the entrepreneur in the enterprise (Article 60a(1) of the 2018 Act). One can also appoint a temporary representative to manage the property subject to legacy by vindication. Such a representative performs his or her duties until the property is put in the hands of the legatee (Article 60a(3) of the 2018 Act). The competences of the above mentioned temporary representatives are similar to those enjoyed by the succession administrator (Article 60b of the 2018 Act). The appointment of a temporary representative is governed *mutadis mutandis* by the rules applying to the appointment of the succession administrator (i.e. Article 6(1)(1) and (2), Article 8(1), Article 11(1), and Article 12(1—7) of the Act).

The provision of Article 13 of the 2018 Act grants the persons listed in Article 14 of the Act (the third group called the “statutory administrators”) the narrowly defined and limited in time powers to manage the enterprise in the estate (mainly conservative measures). The statutory administrators include: a) the entrepreneur’s spouse who is entitled to a share in the enterprise in the estate, b) the statutory and testamentary heirs of the entrepreneur, c) the legatee to the legacy by vindication with a share in the enterprise in the estate. Once the decision confirming the succession, the notarial deed of certification of succession, or the European Certificate of Succession, is final, the competences described in Article 13 of the Act may be exercised only by the “owner of the enterprise in the estate” (Article 14(2) of the Law).

Article 15 of the 2018 Act indicates that the statutory administrator of the “enterprise in the estate” acts on his behalf, but for the account of the owner of the enterprise. Thus, he or she is also — similarly to the succession administrator and the temporary representative — an intermediary (an “indirect substitute”) in a broad sense.

6.2. Finding the law applicable to the succession administration of the enterprise

A question arises whether the rules contained in the recently adopted 2018 Act on the succession administrator of the enterprise, form part of the law applicable to the succession or whether a different solution should be adopted in that regard. Under the first option, the succession administration of the enterprise in the estate would be subject to the *legis successioneis* per Article 23(2)(f) of the EU Succession Regulation⁸⁵.

⁸⁵ Applying the rules of the Act 2018 as part of the *legis successioneis* is advocated in another contribution published in the present volume of PPPM, i.e. J. Górecki: *Prawo*

It may be argued that the succession administrators in the meaning of the 2018 Act are “other administrators of the estate” under Article 23(2) (f) of the Regulation. Consequently, the rules adopted in the 2018 Act would apply only if the law applicable to succession under the conflict provisions of the Regulation was Polish law, irrespective of where the enterprise is located.

It is submitted here that the above solution should not be adopted. This is because to subject the succession administration under the 2018 Act to *legis successione* does not take into account the goals and the nature of this special instrument and in particular, how it functions.

In that regard, it is worth reminding the extensive regulation relating to the succession of the farms that once existed (now largely repealed⁸⁶) in Polish law (Articles 1058—1088 KC)⁸⁷. Both in the judiciary⁸⁸ and the doctrine⁸⁹ a view prevailed that the succession of a farm located in Poland was subject to the law applicable to succession⁹⁰, regardless of whether Polish or foreign law applied as a result. Nevertheless, it was agreed that the *legis successione* must be applied with modifications resulting from

właściwe dla czynności prawnych związanych z zarządaniem sukcesyjnym. “Problemy Prawa Prywatnego Międzynarodowego” 2020, vol. 26.

⁸⁶ For the modern account of the special rules applying to the inheritance of farms see e.g. W. Borysiak, in: K. Osajda (ed.): *Kodeks*. Vol. 4A, p. 1470 et seq.; J. Pietrzykowski, in: K. Pietrzykowski (ed.): *Kodeks cywilny*. T. 2: *Komentarz do art. 450—1088*. Warszawa 2018, p. 1288 et seq.

⁸⁷ For the scholarly analysis of these rules see e.g. J.S. Piątowski: *Uwagi o dziedziczeniu ustawowym gospodarstw rolnych według kodeksu cywilnego*. “Studia Prawnicze” 1970, vol. 26—27, p. 171 i n.; S. Breyer: *Nowe przepisy o dziedziczeniu gospodarstw rolnych*. “Palestra” 1972, No. 10, p. 6 et seq.; J. Gwiazdomorski: *Zmiany przepisów o dziedziczeniu gospodarstwa rolnego*. “Państwo i Prawo” 1972, p. 29 et seq.; A. Zieliński: *Dziedziczenie gospodarstw rolnych w świetle nowelizacji kodeksu cywilnego z dnia 26.10.1971 r.* “Palestra” 1973, No. 4, p. 15 et seq.

⁸⁸ SN, 28.5.1969, III CZP 23/69, “Orzecznictwo Sądu Najwyższego. Izba Cywilna” 1970, No. 1, item 3; “Orzecznictwo Sądów Polskich” 1970, No. 10, item 196 (with a note by M. Pazdan); “Nowe Prawo” 1970, No. 12 (with a note by A. Mączyński); “Journal du droit international (Clunet)” 1974, No. 2, p. 367 et seq. (with a note by M. Tomaszewski). Cf. also SN, 6.3.1970, I CR 3/70, “Państwo i Prawo” 1971, No. 12.

⁸⁹ Cf. M. Pazdan: *Dziedziczenie ustawowe w prawie prywatnym międzynarodowym. Metody regulacji własności prawa*. Katowice 1973, p. 133 et seq. and the authors cited therein; W. Ludwiczak: *Międzynarodowe prawo prywatne*. Warszawa 1990, p. 232 i n.; M. Sośniak: *Prawo prywatne międzynarodowe*. Katowice 1991, p. 191—192.

⁹⁰ The law applicable to succession according to Article 34 of the Private International Law Act of 1965 (“PrPrywM 1965”; Dz.U. No. 46, item 290 with later amendments) was the law of the state, whose nationality the deceased possessed at the time of death. The application of the *legis patriae* of the deceased was also maintained in Article 64 (2) of the Private International Law Act of 2011 (“PrPrywM 2011”; Dz.U. No. 80, poz. 432), to the extent that the testator has not exercised the freedom of choice (which was permitted by PrPrywM 2011).

the Polish special regulations on the succession of farms. There was no agreement, however, as to the justification for the latter proposition.

According to the first view, the special rules on the succession of farms were considered part of the Polish public policy. Thus, the intervention against foreign *legis successionis* was to occur with the use of the public policy exception⁹¹. The second position was that the special rules on the succession of farms concerned only the farms located in Poland and so these rules should be applied as a part of *legis rei sitae* (the law applicable to rights *in rem* in the property — as subjected to the law of the state where the property is located; see Article 41 PrPrywM 2011 and Article 24 PrPrywM 1965)⁹². Finally, even in the face of a lack of express regulation in the PrPrywM 1965, a proposition was put forward that the special rules on the succession of farms located in Poland should be applied as the overriding mandatory provisions (*lois de police*). In the law of 2011, the legal basis for this was incorporated in Article 8 of PrPrywM 2011 (which constitutes a general provision on the overriding mandatory rules modeled after Article 7 of the Rome Convention⁹³ and Article 9 of Rome I Regulation⁹⁴).

After the entry into force of the EU Succession Regulation, the Polish special rules on the succession of farms (what is left of it at present) should be applied with the assistance of Article 30 of the Regulation⁹⁵. This provision reads:

⁹¹ SN, 29.5.1969, III CZP 23/69, “Orzecznictwo Sądu Najwyższego. Izba Cywilna” 1970, No. 1, item 3. Cf. J. Fabian: *Statut spadkowy w nowym prawie prywatnym międzynarodowym*. “Państwo i Prawo” 1968, No. 11, p. 806; J.S. Piątowski: *Z zagadnień dziedziczenia gospodarstwa rolnego po cudzoziemcu*. “Państwo i Prawo” 1971, No. 12, p. 995 et seq.

⁹² H. Trammer: *Sprawy czysto majątkowe w polskim prawie prywatnym międzynarodowym*. “Prawo w Handlu Zagranicznym” 1968, No. 19—20, p. 16—17; similarly A. Mączyński: *Nowelizacja przepisów szczególnych o dziedziczeniu gospodarstw rolnych a prawo prywatne międzynarodowe*. “Krakowskie Studia Prawnicze” 1986, vol. 19, p. 121—122 arguing that the restrictions must be applied as part of the *legis causae* and for the farms located in Poland the *legis cause* means Polish law (Article 24 PrPrywM 1965).

⁹³ Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980, OJ L 266, 9.10.1980.

⁹⁴ Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008.

⁹⁵ M.A. Zachariasiewicz, in: M. Pazdan (ed.): *Prawo...*, p. 1232 et seq; M.A. Zachariasiewicz: *Przepisy wymuszające swoje zastosowanie a statut spadkowy*. In: “Nowe europejskie prawo spadkowe”. Eds. M. Pazdan, J. Górecki. [2015], p. 318; M. Mataczyński: *Przepisy wymuszające swoje zastosowanie — wybrane zagadnienia*. “Problemy Prawa Prywatnego Międzynarodowego” 2016, vol. 18, p. 73 et seq. A different view was taken by J. Górecki: *Rozgraniczenie statutu spadkowego i statutu rzeczowego na tle rozporządzenia spadkowego*. In: “Nowe europejskie prawo spadkowe”. Eds. M. Pazdan, J. Górecki. [2015], p. 196, who treats Article 30 as a provision prioritizing the *legis rei sitae* and creating the exception from the principle of the unity of succession. This last view should be rejected.

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

Article 30 purports to give effect to the mandatory rules of the *legis latae*, where the rules in question meet the criteria stipulated in this provision. While it has not been clearly spelled out (unfortunately⁹⁶), Article 30 draws upon the concept of overriding mandatory rules⁹⁷, known e.g. under Article 9 of the Rome I Regulation, i.e. the rules which apply irrespective of the otherwise applicable law because they serve crucial public interests. It follows that the following criteria should be satisfied under Article 30 to trigger the application of the “special rules” mentioned therein.

First, the special rules to be applied under Article 30 must “impose restrictions concerning or affecting the succession”. This requirement should not be understood in an overly narrow fashion. Rather, an important question is whether “special rules” affect the succession matters, as covered by the *legis successionis* under Article 23 of the Regulation⁹⁸. Second, Article 30 relates to rules that provide for a special legal regime concerning particular categories of assets (immovable property, certain enterprises, or other). It does not refer to restrictions that relate to succession as a whole, e.g. as to personal qualifications of the heirs or other beneficiaries⁹⁹. Third, Article 30 lists the considerations, which the special rules envisaged in this provision purport to defend. In that regard, Article 30 mentioned the economic, family, or social considerations. Although it is debatable whether Article 30 limits intervention against *legis successionis* to considerations listed in that provision (we think

⁹⁶ Here, the EU legislator had not followed suggestions of many experts. See in particular: Max Planck Institute: *Comments...*, p. 522.

⁹⁷ See G. Contaldi, in: A.-L.C. Caravaca, A. Davì, H.-P. Mansel: *The EU Succession...*, p. 430; P. Lagarde, in: U. Bergquist, D. Damascelli, R. Frimston, P. Lagarde, F. Odersky, B. Reinhartz: *EU Regulation...*, p. 166. In Polish doctrine: M.A. Zachariasiewicz, in: M. Pazdan (ed.): *Prawo...*, p. 1232; Eadem: *Przepisy...*, p. 336; M. Mataczyński: *Przepisy wymuszające swoje zastosowanie — wybrane zagadnienia...*, p. 299; Ł. Żarnowiec: *Wpływ statutu...*, p. 313.

⁹⁸ Cf. Ł. Żarnowiec: *Wpływ przepisów wymuszających swoje zastosowanie na rozstrzyganie spraw spadkowych pod rządami rozporządzenia Parlamentu Europejskiego i Rady (UE) nr 650/2012*. “Problemy Prawa Prywatnego Międzynarodowego” 2019, vol. 25, p. 48.

⁹⁹ See *ibidem*, p. 49; M.A. Zachariasiewicz: *Przepisy...*, p. 331.

not), it is clear that they must be of crucial importance to the state of the location of assets. Here, it must be stressed that not every succession law rule can be classified as concerned with “economic, family or social” consideration. Rather, the rules in question must defend special considerations that are of interest not only to individual parties involved but also to the society in a wider sense. On the other hand, even if we deem that considerations listed in Article 30 are not exclusive, it is thought that, on a practical level, it makes a *prima facie* easier case if one relies on the considerations expressly mentioned in Article 30.

Finally, the special rules to be applied under Article 30 must possess the quality of the international (overriding) mandatory rules, i.e. they must be “applicable irrespective of the law applicable to the succession”. This means that to qualify for special rules in the meaning of that Article, they must be so important as to justify the intervention against the normally applicable *legis successionis*. This self-imposed will to apply irrespective of the otherwise applicable law may result from the very wording of the rules in question or can be read to them in the process of their careful interpretation (upon which the court must identify the special goals they serve)¹⁰⁰.

It is submitted here that Article 30 can be used to justify the application of the rules of the 2018 Act regarding the succession administration of the enterprise in the estate¹⁰¹. Although the 2018 Act does not impose restrictions on the succession, it does introduce rules which “affect the succession”. By regulating the management of the enterprise they influence the fate of the enterprise after the death of the entrepreneur. The powers to manage the enterprise provided for in the Act allow for a smooth transfer of the enterprise from the deceased to its heirs. They thus affect the succession and consequently fall within the second category of special rules envisaged by Article 30 of the Succession Regulation.

Furthermore, the purpose of the rules incorporated in the 2018 Act is to protect the enterprise from disintegration and to safeguard its continuing functioning as a whole, before it is effectively transferred to the heirs or the legatee under a legacy by vindication. The 2018 Act purports to prevent the break-up of the enterprise by the deceased. The rules pro-

¹⁰⁰ Ł. Żarnowiec: *Wpływ przepisów...*, p. 51.

¹⁰¹ This view is advocated in Poland by M. Pazdan: *Zarząd...*, p. 73 et seq.; Idem: *O rozgraniczaniu statutów i wysianiu regulacji prawnej (na przykładzie prawa stosowanego do oceny różnych aspektów powołania i funkcjonowania wykonawcy testamentu i zarządcy sukcesyjnego przedsiębiorstwem)*. “Problemy Prawa Prywatnego Międzynarodowego” 2020, vol. 27, p. 164 et seq.; and by Ł. Żarnowiec: *Wpływ przepisów...*, p. 53 et seq. Contra J. Górecki: *Prawo...*

vided for therein facilitate also the continuation of the activity within the enterprise in the succession in case the enterprise is disposed of. The 2018 Act may thus be said to serve important economic and social considerations¹⁰².

Other conditions stipulated in Article 30 are also satisfied. First, rules of the 2018 Act apply only to the “enterprises in the succession”, within the meaning of this Act, i.e. enterprises that carry out their business in Poland and are in this way linked to the Polish territory and so — to a particular category of assets subject to succession. This results expressly from Article 1(1) of the 2018 Act, which provides that the Act applies to “temporary management of the enterprise in the estate of an entrepreneur who carried out the business activity on his behalf on the basis of an entry in the Central Registration and Information on Business (CEIDG)”. The entrepreneur might be both a Polish national as well as a foreigner¹⁰³. Particular assets belonging to the enterprise, may be located outside of Poland. It is essential, however, that the enterprise is registered in the Polish CEIDG registry.

Second, although the appointment of a succession administrator or a temporary representative is optional (it is an option the deceased can benefit from), the rules governing the management of the enterprise in the estate provided for in the 2018 Act are of mandatory nature. Once the succession administrator (a temporary representative, a statutory representative) is appointed under the 2018 Act, the rules contained in the Act govern its position and functions in a mandatory manner. Neither the deceased nor the heirs or the administrator are permitted to modify the regulation stemming from the 2018 Act. Thus, the fact that appointing the succession administrator is voluntary is not an obstacle to consider the rules of the 2018 Act under Article 30 of the Regulation¹⁰⁴. Rather, taking into account the purpose of the rules contained in the 2018 Act (to uphold the continuity of an enterprise) and the focus of these rules on the enterprises entered into the Polish public registry (limiting the appointment of the succession administrators to enterprises entered into the CEIDG), it is submitted that they possess their own self-imposed will to apply irrespective of the law otherwise applicable to succession¹⁰⁵.

It follows that the rules contained in the 2018 Act are of such nature that they can be said to constitute special rules which, for considerations

¹⁰² Ł. Żarnowiec: *Wpływ przepisów...*, p. 54.

¹⁰³ This possibility is guaranteed to foreigners by the Act of 6 March 2018 on the principles of participation of foreign entrepreneurs and other foreign persons in businesses on the territory of the Republic of Poland. *Dz.U.* 2018, poz. 649.

¹⁰⁴ To the opposite J. Górecki: *Prawo...*, p. 12—13.

¹⁰⁵ Ł. Żarnowiec: *Wpływ przepisów...*, p. 55.

envisaged in Article 30 (economic and social), modify the administration of the estate, to the extent the administration concerns the enterprise forming part of the estate. Consequently, the basis for the application of the rules of the 2018 Act is in Article 30 of the Regulation.

6.3. The consequences of applying the rules on the succession administration of the estate as special rules under Article 30 of the EU Succession Regulation

The rules on the succession administration of the estate contained in the 2018 Act should be applied both when the law applicable to succession is Polish law, as well as when it is a foreign law. However, they are only applied to enterprises located in Poland. They cannot be applied if the enterprise is located abroad, even if Polish law governs the succession. This is because the said type of rules are not part of the *legis successionis* and so the fact that Polish law constitutes the law applicable to succession is insufficient for the application of the rules contained in the 2018 Act.

Article 30 of the Succession Regulation binds the courts in all the participating Member States and thus mandates that special rules in the meaning of this provision are respected, even if they form part of the legal system of a different Member State. Consequently, it is submitted that if the succession case is decided by a court in a different Member State, such court should honor the succession administration of the enterprise located in Poland. This means the foreign court should respect the powers of the succession administrator with respect to the enterprise in the estate. For example, the succession administrator may request a third party to surrender assets of the enterprise located abroad (e.g. goods acquired by the deceased entrepreneur, funds located on foreign accounts, etc.). The above concerns not only the powers of the succession administrator but also temporary powers of other groups of administrators specified in the 2018 Act, i.e. the temporary representative of the spouse of the entrepreneur (Article 60(b) of the 2018 Act) and the statutory administrators (persons listed in Article 14 of the 2018 Act), who are called upon to manage the enterprise until the succession administrator is appointed.

The provisions of the 2018 Act must be applied to the matters governed by the Act. These provisions, as the “special rules” in the meaning of Article 30 of the Succession Regulation, take precedence over the provisions of the *legis successionis* applicable to the succession matter at

hand, as well as over provisions of other laws, applicable to other matters, which could come up along with the succession case [e.g., the law applicable to the contractual obligation, to the tort, to *negotiorum gestio* (management of the affairs of another without instruction), or to the capacity of a physical person to act, etc].

Doubts concern the relationship between the executor of the testament and the persons entitled to manage the enterprise in the estate on the basis of the 2018 Act. The rapport between the executor of the testament and the succession administrator has only partially been dealt with in Article 24 of the 2018 Act. This provision states that in case the succession administration of the enterprise in the estate is established, the administration of the estate that is to be carried out by the executor of the testament, does not include the enterprise, which forms part of that estate. It follows that Article 24 removes doubts as to the relationship between the executor of the testament and the succession administrator only if the deceased has actually appointed the executor with general powers and the succession administrator to manage the enterprise in the estate. It seems, however, that this provision should also be applied in case the deceased entrepreneur appoints the executor of the testament with competences limited to the management of his or her enterprise and simultaneously appoints another person as a succession administrator of the same enterprise. The result would be that the executor of the testament may exercise the management of the enterprise in the estate only after the succession administration of that enterprise comes to an end.

The appointment of the succession administrator and the temporary representative requires declarations made by persons concerned (i.e. specified legal acts must be taken). The 2018 Act (Article 12 in particular) regulates the prerequisites for the validity and effectiveness of these legal acts, although not exhaustively. The question whether the person who appoints the succession administrator (a temporary representative) or the person who expresses consent for such appointment has the capacity to act required by the 2018 Act is governed by the law applicable to the capacity (the so-called “personal law”), as determined under Article 11 of the PrPrywM 2011. If, on the other hand, a question arises as to who may act on behalf of the above persons as a statutory representative, the answer should be sought in light of Article 22 PrPrywM 2011. Moreover, the issue of whether a candidate for the succession administrator possesses the full capacity to act as required by Article 8(1) of the 2018 Act must also be decided in light of this person’s personal law (the law applicable to the capacity).

The 2018 Act sets the requirements for the formal validity for the appointment of the succession administrator (Article 9(2), Article 12(7)),

and for the consent to that appointment (Article 9(2), Article 12(7)). This regulation is incomplete. The consequences of not adhering to the above requirements have only partially been defined (Article 9(2), Article 52). It thus seems necessary to additionally look into provisions of Polish law that deal with these issues (in particular the provisions of the general part of the Civil Code and the Law on Notaries). The supportive application of these provisions may be referred to as the “absorption of legal rules”¹⁰⁶. There is no need to determine the law applicable to the requirements of formal validity independently under the conflict’s rule dedicated to the formal validity of legal acts contained in Article 25 of the PrPry-wM 2011.

The difficulties may arise concerning the requirement of a notarial deed envisaged in Article 12(7) of the 2018 Act in case the person to make the declaration in question lives abroad. In the Polish doctrine, the view that in such a situation one can benefit from a foreign notary seems more and more accepted, provided that the notary system in the country of origin of the document is equivalent to the Polish system¹⁰⁷. This would normally be the case for the countries belonging to the International Union of the Latin Notaries.

It results from Article 12(5) of the 2018 Act that the succession administrator may be appointed by the statutory representative of a person who does not have the capacity to act or has a limited capacity (a minor, an incapacitated person). Thus, the appointment of the succession administrator is not a personal act. This does not imply, however, that it is permissible to use an agent (proxy) in the appointment of the succession administrator. Such an appointment is based on the trust for a person appointed as the administrator. The choice should thus be made personally by a person competent to appoint the succession administrator (Article 9 and Article 12(1) and (2) of the 2018 Act) or by his or her statutory representative (a parent, a guardian for the incapacitated).

The same refers to the consent of a candidate for the succession administrator, as well as the consent referred to in Article 12(3) of the 2018 Law (assuming that the consent mentioned therein includes also the consent for a specific candidate for the administrator).

The question whether the succession administrator is permitted to derogate its specific management duties to agents was expressly ad-

¹⁰⁶ See, in more detail: M. Pazdan: *O rozgraniczaniu...*, p. 159 et seq.

¹⁰⁷ J. Górecki: *Forma umów obligacyjnych i rzeczowych w prawie prywatnym międzynarodowym*. Katowice 2007, p. 168 et seq.; J. Pazdan, in: M. Pazdan (ed.): “System Prawa Prywatnego”. Vol. 20A..., p. 770, Nb. 82; Eadem, in: M. Pazdan (ed.): *Prawo...*, p. 288, Nb. 33–34; M. Tomaszewski, in: J. Poczobut (ed.): *Prawo prywatne międzynarodowe. Komentarz*. Warszawa 2017, p. 444–445, Nb. 17–18.

dressed by the 2018 Act. According to Article 19(2): “the succession administrator may empower an agent for particular legal acts or a specific type of legal acts”. This, *a contrario*, implies that other forms of empowerment, such as general powers of attorney or permanent business proxies are not permitted.

The law applicable to the authority of an agent should be determined under Article 23 PrPrywM 2011¹⁰⁸. Based on this provision, the principal (the succession administrator) may choose the law applicable to the authority of an agent (the relationship between the principal and the agent). The law of any country may be chosen (the choice of law is unlimited).

If no choice was made, the law applicable will be determined under Article 23(2) PrPrywM 2011. None of the options provided for therein may be excluded from the outset. Thus, the application of the following laws is possible: a) the law of the state in which the agent has a seat where he constantly operates, or b) the law of the state in which the principal’s business is located, or c) the law of the state in which the agent acted while representing the principal (or in which the agent should have acted according to the intention of the principal).

The law applicable to the contract underlying the power of the agent should be determined on the basis of the conflict of law provisions contained in Regulation Rome I.

Article 16 of the 2018 Act provides for specific rules governing the liability of a person listed in Article 14, who, under Article 13, is entitled to carry out the succession administration of the enterprise in the estate. Such a person is liable for the loss caused by transactions to which that person was not empowered. This creates a special basis for seeking damages against such a person. The rule applies in circumstances described therein¹⁰⁹. It constitutes a fragmentary regulation of liability. Consequently, it is necessary to take into account the rules contained in the Civil Code regarding the causal link (Article 361§ 1 KC), the assessment of the loss (Article 361§ 2 KC), and how the loss can be repaired (Article 363 KC). Thus, certain general rules contained in Polish civil law will, in a sense, be “absorbed” to the regulation of the succession administration that applies under Article 30 of Succession Regulation.

The liability provided for in Article 16 of the 2018 Act does not exclude the liability based on general grounds, in particular the tortious

¹⁰⁸ Zob. szerzej J. Pazdan, in: J. Poczobut (ed.): *Prawo...*, p. 415 et seq.; M. Pazdan, in: M. Pazdan (ed.): *Prawo...*, p. 275 et seq.

¹⁰⁹ Zob. M. Pazdan: *Zarządca sukcesyjny a wykonawca testamentu*. In: “Ius est ars boni et aequi. Księga pamiątkowa dedykowana Profesorowi Józefowi Frąckowiakowi”. Eds. A. Wańko-Roesler, M. Leśniak, M. Skory, B. Sołtys. Warszawa 2018, p. 887—888; R. Blicharz: *Zarząd...*, p. 27.

liability of the persons carrying out succession administration of the enterprise in the estate. The law applicable to tortious liability must be determined under Regulation Rome II.

Article 33(3) of the 2018 Act deals in specific terms with liability for the loss caused by the succession administrator who was appointed in violation of requirements stipulated in Article 12 of the Act. The liability for such loss rests jointly on the succession administrator and on the person “who, in bad faith, appointed the succession administrator or has consented thereto, although he or she was not authorized to do so”. Article 34, on the other hand, provides that the Civil Code rules on the *negotiorum gestio* should be applied in case the succession administrator was appointed in violation of Article 12 of the 2018 Act.

The law applicable to all situations falling under the notion of the *negotiorum gestio* that are not covered by Articles 33(3) and 24 of the 2018 Law should be determined under the relevant provisions of the Rome II Regulation.

More doubts concern Article 33(2) of the 2018 Act. This provision states that the “succession administrator is liable for the loss caused as a result of lack of sufficient diligence in performing his or her duties”. If one accepts that Article 33(2) constitutes a specific provision introducing the liability of the succession administrator towards the owner of the enterprise in the estate, resulting from the obligation incurred by the former towards the latter, than the mentioned rule should be applied under Article 30 of the Succession Regulation. Still, it will be necessary to take into account certain general rules from the Civil Code, such as inter alia: Article 354 (standards for performance of obligations), Article 361, Article 363, or Article 472 (the due care standard for liability for non-performance) to support the regulation of the 2018 Act. Again, this will constitute the “absorption” of legal rules in the meaning specified above.

7. The notions of the “court” and the “decision” under the EU Succession Regulation

7.1. Introductory remarks

Member States’ traditions regarding succession law vary considerably. This includes differences on the procedural level in how the succession matters are administered. To reflect this reality, the notion “court”

in the EU Succession Regulation was defined as covering not only judicial authorities but also “all other authorities and legal professionals with competence in matters of succession which exercise judicial functions or act pursuant to a delegation of power by a judicial authority or act under the control of a judicial authority” (Article 3(2)). The idea was clearly to give broad meaning to the term “court” so it could also encompass notaries and registry offices, which exercise judicial functions in succession matters in some of the Member States¹¹⁰.

There are several requirements set out in Article 3(2) that have to be cumulatively¹¹¹ satisfied so that a given authority may be treated as “court” under the Regulation. First, the authority must either: 1) exercise judicial function, 2) act pursuant to a delegation of power by a judicial authority, or 3) act under the control of a judicial authority. The alternative between these three is marked with the use of the conjunction “or”. Second, the authority in question must guarantee impartiality and the right to be heard for all the parties. Third, an appeal or review by a judicial authority must be available (Article 3(2)(a)). Fourth, the decisions of the non-judicial authorities aspiring to be a “court” in the meaning of the Regulation, must have a similar force and effect as the decisions of the judicial authorities (Article 3(2)(b)).

7.2. The decision of the CJEU in C-658/17 *WB*

In Poland, the notaries are entitled to issue deeds of certification of succession (“DCS”), the purpose of which is to confirm the inheritance rights of heirs. Thus, it comes as no surprise that the question soon arose whether the Polish notaries, when exercising the competence to issue the DCS, are “courts” in the meaning of Article 3(2) of the Regulation and whether they render “decisions” in the meaning of Article 3(1)(g). The question was addressed by the Court of Justice in the judgment of 23 May 2019 in case C-658/17 *WB* (a preliminary question from a Polish district court in Gorzów Wielkopolski). In that case the Court of Justice of the European Union ruled as follows:

- 1) failure by a Member State to notify the Commission of the exercise of judicial functions by notaries, as required under Article 3(2) second subparagraph of the Regulation No 650/2012 is not decisive for their classification as a “court”,

¹¹⁰ See recital 20 to the Regulation.

¹¹¹ C-658/17 *WB*, para 62.

- 2) “the first subparagraph of Article 3(2) of Regulation No 650/2012 must be interpreted as meaning that a notary who draws up a deed of certification of succession at the unanimous request of all the parties to the procedure conducted by the notary, such as the deed at issue in the main proceedings, does not constitute a ‘court’ within the meaning of that provision and, consequently, Article 3(1)(g) of that regulation must be interpreted as meaning that such a deed does not constitute a ‘decision’ within the meaning of that provision”,
- 3) Article 3(1)(i) of Regulation No 650/2012, on the other hand, “is to be interpreted as meaning that a deed of certification of succession, such as that at issue in the main proceedings, drawn up by a notary at the unanimous request of all the parties to the procedure conducted by the notary, constitutes an ‘authentic instrument’ within the meaning of that provision, which may be issued at the same time as the form referred to in the second subparagraph of Article 59(1) of that regulation, which corresponds to the form set out in Annex 2 to Implementing Regulation No 1329/2014”.

A conclusion that a Polish notary issuing the deed of the certification of succession is not a “court” for purposes of the Regulation calls for criticism¹¹².

In our view, the Court’s analysis of the functions of the Polish notary public — to the extent he or she issues the deed of the certification of succession (“DCS”) is superficial and the conclusions are rushed. The findings do not take into account the real function played by the Polish notaries in issuing the DCS. The difference between the DCS and other actions undertaken by the notary, and in particular the notarial acts,

¹¹² The reactions to the judgment were mixed. In the Polish doctrine, the findings of the CJEU were put into question by P. Książak: *Charakter prawny aktu poświadczenia dziedziczenia*. In: “Notarialne poświadczenia dziedziczenia”. Ed. A. Marciniak. Warszawa 2019, p. 11 et seq. The judgment is, on the other hand, supported by K. Konieczna: *Pozycja prawna notariusza w sprawach spadkowych o charakterze transgranicznym. Glosa do wyroku Trybunału Sprawiedliwości Unii Europejskiej w sprawie C-658/17 WB*. “Problemy Prawa Prywatnego Międzynarodowego” 2020, vol. 27, p. 303 et seq. A somewhat neutral position towards the judgment was taken by A. Wysocka-Bar: *Polski notariusz nie jest sądem, a akt poświadczenia dziedziczenia nie jest orzeczeniem: glosa do wyroku Trybunału Sprawiedliwości z 23.05.2019 r., C-658/17, WB*. “Europejski Przegląd Sądowy” 2019, No. 12, 30. Among the non-Polish authors, the judgment in C-658/17 WB was welcomed by M. Wilderspin: *The Notion of “Court” under the Succession Regulation*. “Problemy Prawa Prywatnego Międzynarodowego” 2020, vol. 26, p. 45 but criticised by J. Gomez-Riesco De Paz Tabernero: *Reflections on the Concept of ‘Court’ within the Meaning of Article 3.2 of Regulation (EU) No. 650/2012 after the Judgments of the Court of Justice of the European Union Oberle, C-20/17, and WB, C-658/17. Spanish Perspective*. “Cuadernos Derecho Transnacional” 2020, vol. 12, p. 1001.

was omitted¹¹³. To provide an example of a notarial deed that undoubtedly constitutes an authentic instrument in the meaning of Article 3(1) (i) of the Regulation, one could point to a contract on a division of the estate¹¹⁴. Such an act not only reflects the intentions of the parties but also contains the declarations of such intentions. To expect that the rules of international jurisdiction would be respected in making such an act would make no sense. The notarial deed of certification of succession is, however, different.

In the case *WB*, the European Court concentrated on the question whether the notary public, when issuing the DCS, exercises judicial functions in the meaning of Article 3(2) of the Regulation¹¹⁵. The Court omitted, however, another possibility arising under that provision, i.e. “acting under the control of a judicial authority”. There are no considerations regarding this point in the judgment.

The CJEU underlined that “the exercise of judicial functions means that the person concerned has the power to rule of his own motion on possible points of contention between the parties concerned”. Moreover, the Court pointed out that “this is not the case where the powers of the professional concerned are entirely dependent on the will of the parties”¹¹⁶. It is not clear what should be taken from the words: “entirely dependent” used in this context.

According to CJEU, the wording of Article 1027 of the Polish Civil Code supports the finding that the Polish notarial deed of certification of succession is issued in case of a lack of dispute¹¹⁷. This is misguided. The mentioned provision underlines the usefulness of the DCS, inter alia, in a situation when the heirs have disputes with third parties, who have no claims to the estate. Article 1027 KC grants to the DCS the privilege of being the exclusive evidence. The same relates to the confirmation of succession rendered by the court. The discussed provision cannot be read to mean what the Court implies in para 57 of the judgment.

¹¹³ About those differences see e.g. M. Iżykowski: *Notarialne poświadczenie dziedziczenia jako rozstrzygnięcie sprawy cywilnej*. In: “Proces cywilny: nauka—kodyfikacja—praktyka: księga jubileuszowa dedykowana Profesorowi Feliksowi Zedlerowi”. Eds. G. Grzegorzczak, K. Knoppek, M.W. Walasik. Warszawa 2012, p. 179 et seq.; K. Żok, in: M. Gutowski (ed.): *Kodeks cywilny. T. 2: Komentarz do art. 353—626*. Warszawa 2016, p. 1774, Nb. 30; W. Borysiak, in: K. Osajda (ed.): *Prawo*. Vol. IVB..., p. 1044 et seq., Nb. 8 et seq.; P. Książak: *Charakter...*, p. 4 et seq.

¹¹⁴ See recital 63 to the Regulation. Under Polish law, the form of a notarial act is required for this type of the contract whenever the estate of the deceased comprises the immovable property.

¹¹⁵ See C-658/17 *WB*, para 54 et seq.

¹¹⁶ C-658/17 *WB*, para 55.

¹¹⁷ C-658/17 *WB*, para 57.

The functions of the notary public have been laid out in a very limited manner in para 58 of the judgment. It is also inaccurate to conclude that — as the Court does in para 59 — the notaries “have no decision-making powers”. We will return to this point further below.

7.3. The functions of the Polish notary public issuing the DCS

To layout the functions of the Polish notary public a more comprehensive report on this issue is necessary. In the present paper, we elaborate on the Polish notary issuing the DCS to provide a fuller account of the nature of this activity to international, English speaking readers.

The competence to issue deeds of certification of succession was awarded to the Polish notaries by the Act of 24 August 2007¹¹⁸, which amended the Law on Notaries. The change came as a result of the expectations expressed in the Polish scholarly writing¹¹⁹. The reaction thereafter was generally very positive¹²⁰. Next, in the Act of 24 July

¹¹⁸ O.J. 2007, No. 181, item 1287.

¹¹⁹ Por. K. Łaski: *Postępowanie spadkowe. Proponowane kierunki zmian*. “Nowy Przegląd Notarialny” 2001, No. 7—8, p. 76; R. Szytk: *Testament notarialny. Wybrane zagadnienia*. “Rejent” 2005, No. 9, p. 32; K. Grzybczyk, M. Szpunar: *Notarialne poświadczenie dziedziczenia jako alternatywny sposób stwierdzenia prawa do dziedziczenia*. “Rejent” 2006, No. 2, p. 46, 52, and 57; M. Pazdan: *Prawo spadkowe*. In: “Zielona Księga. Optymalna wizja Kodeksu cywilnego w Rzeczypospolitej Polskiej”. Ed. Z. Radwański. Warszawa 2006, p. 184; Idem: *Zielona...*, p. 26 et seq.

¹²⁰ Por. M. Manowska: *Wybrane zagadnienia dotyczące poświadczenia dziedziczenia*. “Nowy Przegląd Notarialny” 2008, p. 45; L. Kwaśnicka, B. Porębska: *Notarialne poświadczenia dziedziczenia*. “Monitor Prawniczy” 2008, p. 1342; R. Kapkowski: *Sporządzenie aktu poświadczenia dziedziczenia*. “Państwo i Prawo” 2009, p. 80; H. Ciepła: *Notarialne akty poświadczenia dziedziczenia*. “Nowy Przegląd Notarialny” 2009, No. 4, p. 17; Z. Truszkiewicz: *Uchylenie aktu poświadczenia dziedziczenia*. “Przegląd Sądowy” 2010, No. 7—8, p. 23; M. Blok: *Notarialny akt poświadczenia dziedziczenia a sądowe stwierdzenie praw do spadku*. “Rejent” 2010, No. 7—8, s. 23; R. Szytk: *Zakres kompetencji notariusza w XXI wieku*. “Łódzki Biuletyn Notarialny” 2010, No. 1, p. 31 (and fn. 49); D. Dończyk: *Notarialne poświadczenie dziedziczenia. Komentarz*. Warszawa 2011, p. 18; P. Borkowski: *Notarialne poświadczenie dziedziczenia*. Warszawa 2011, p. 13 et seq.; M. Pazdan: *Notarialne poświadczenie dziedziczenia a prawo prywatne międzynarodowe*. In: “Rozprawy z prawa prywatnego. Księga dedykowana Profesorowi Aleksandrowi Oleszce”. Eds. A. Dańko-Roesler, J. Jacyczyn, M. Pazdan, W. Popiołek. Warszawa 2012, p. 423 et seq.; M. Iżykowski: *Notarialne...*, s. 175; B. Kordasiewicz, in: B. Kordasiewicz (ed.): “System Prawa Prywatnego”. Vol. 10: *Prawo spadkowe*. Warszawa 2015, p. 582 et seq., Nb. 31 et seq.; E. Skowrońska, J. Wierciński, in: M. Gutowski (eds.): *Kodeks cywilny. Komentarz*. T. 6: *Spadki*. Warszawa 2017, p. 338, Nb. 30; W. Borysiak, in: K. Osajda (eds.): *Prawo*. Vol. 4B..., p. 915—916, Nb. 2; J. Kuźmicka-Sulikowska, in: E. Gniewek,

2015¹²¹ the notaries were empowered to undertake actions regarding the European Certificate of Succession, including issuing these Certificates (“ECS”).

In assessing the position of the notary, the relevant factor is to what extent is the notary bound in issuing the DCS by the will of the interested parties, and to what extent he or she enjoys decision-making powers.

In para 59 of the judgment in case C-658/17 *WB*, CJEU points out that under Polish law the notarial activities relating to the issuing of a deed of certification of succession are exercised at the unanimous request of the “interested parties”. What must be underlined, however, is that the agreement here relates only to the parties’ choosing of the discussed method of confirming the succession and not to the content of the DCS. The content of the DCS is not directly influenced by the “interested parties”. The notary public is not obliged to consult the content of the DCS with them¹²².

Consequently, it is difficult to agree with the contention made in para 59 of the judgment that Polish notaries “have no decision-making powers” and are only obliged to verify that the legal requirements for issuing a deed of certification of succession are complied with. It also missed the point to content that the prerogatives of the court remain intact in case there is a dispute between the parties. The alternative here is different than what was indicated by the Court. If the interested parties are able to uniformly describe the legally relevant circumstances of the succession matter and will do so, they may turn to the notary to undertake steps, the final effect of which will be the deed of the certification of succession. Otherwise, the parties are left with the option to go to the court, where the non-contentious proceedings (*postępowanie nieprocesowe*) will take place. Furthermore, this is the only path to take, if for whatever reason the notarial DCS is not admissible (e.g. if the testamentary succession is based on the specific will — see Article 95a PrNot) or, if the notary effectively refuses to act. Obviously, the parties may also go to court if they so prefer, even if there are no differences between them.

P. Machnikowski (ed.): *Kodeks cywilny. Komentarz*. Warszawa 2019, p. 2097, Nb. 13; P. Księżak: *Charakter...*, p. 1.

¹²¹ O.J. 2015, item 1137 (the Act has entered into force on 17.8.2015).

¹²² See in particular M. Iżykowski: *Notarialne...*, p. 182; P. Księżak: *Charakter...*, s. 11. To the opposite, however, B. Kordasiewicz, in: B. Kordasiewicz (ed.): “System Prawa Prywatnego”. Vol. 10..., p. 587, Nb. 36; M.W. Walasik: *Pozycja prawna polskiego notariusza w sprawach międzynarodowych z zakresu prawa spadkowego*. In: “Znad granicy. Ponad granicami. Księga dedykowana Profesorowi Dieterowi Martiny”. Eds. M. Krzymuski, M. Margoński. Warszawa 2014, s. 341; W. Borysiak, in: K. Osajda (ed.): *Prawo*. Vol. 4B..., p. 955, Nb. 30.

One can thus say, that Polish law provides for two alternative means of confirming the succession. They are — in principle — equivalent. Some manifestations of the priority of the court in this respect will be addressed further below.

Before the notary public issues the DCS a specific proceedings before that notary takes place. In these proceedings, the protocol of the succession is prepared. Such protocol should contain information on the factual circumstances necessary to issue the DCS in the given, individual case. They are listed in Article 95c § 2 PrNot. The list is non-exhaustive. The notary's role in preparing the protocol is an active one. He or she should ensure that all the information necessary to issue the DCS in accordance with the law applicable to succession or to refuse to do so in light of the provisions of the Law on Notaries, are included and that all relevant documents are attached (as listed in Article 95c § 4 PrNot).

The notarial deed of certification of succession can be issued both in a purely domestic succession matter, as well as in a cross-border case. In the latter situation, the notary must look into the conflict of laws rules to determine the law applicable to succession. The foreign law may apply, in which case the notary issues the DCS under that foreign law. If the notary has doubts as to its jurisdiction, the content of the foreign law, the identity of the heirs, or the shares in the estate, he or she can refuse to issue the DCS. The doubts, however, must be justified — of such kind that the notary did not manage to clear them up when investigating with the instruments provided for in Article 95da PrNot (we will discuss these instruments further below).

The protocol of succession should also contain information on the circumstances, based on which the notary determines the applicable law. The examples in that regard are mentioned in Article 95c § 2 point 6 PrNot (the declaration as to the nationality and habitual residence of the deceased as of the moment of his or her death). However, in case the deceased has chosen the law applicable to succession per Article 22 of the Regulation, the nationality of the deceased, as from the moment when the choice was made may also be relevant. This means that notary must stay vigilant throughout the procedure.

The need for the active role of the notary arises also in situations when the foreign applicable law differs from Polish law. Under the foreign law, the relationship between the deceased and the candidates for heirs might be of a type unknown to Polish law. A good example is a partnership (be it between people of the different or same-sex). The differences may also concern actions required from the candidates for beneficiaries, which are necessary to acquire the benefits from the estate, as well as the types of benefits obtained.

The rules governing the notarial deeds of certification of succession originally required that all the interested parties are present when the protocol of succession is being made. This has reduced the practical usefulness of the then-new method of confirming the succession. Thus, the amendment of 2015 introduced a new solution. A draft protocol may now be prepared by the notary with the participation of at least one interested party (Article 95ca § 1 PrNot), while the other parties may comment on the draft in separate declarations made before any other notary. Thereby, the other interested parties may confirm the information included in the draft protocol and express their consent to prepare the final protocol of succession consistent with the draft (Article 95ca § 3 PrNot).

After all the interested parties who did not take part in making the draft protocol carry out the declarations envisaged in Article 95ca § 3 PrNot, the notary should prepare the final protocol with the participation of at least one interested person (Article 95ca § 5). The interested parties, who had no opportunity to make the declarations envisaged in Article 95ca § 3 PrNot earlier, can also do it at the time the notary prepares the protocol of succession (Article 95ca § 6 PrNot).

To achieve this final effect — also under the new procedure — requires cooperation between all the interested parties. Any of the parties may, of course, stop at this goal. In such a case the only option for the interested parties is to go to court.

7.4. Similarities between the position of the notary and the court

The similarity of the position of the notary issuing the DCS and the judge issuing the decision on the confirmation of succession is significant¹²³.

On the basis of Article 95c § 1 PrNot, the notaries enjoy the powers specific to the state court: a) the power to instruct the parties participating in making the protocol of succession (these are the so-called “interested parties”, i.e. according to Article 95ca § 1 PrNot: “persons who may be counted as statutory or testamentary heirs, as well as persons for whom the testator has made the legacies by vindication”) about the obligation to reveal all the circumstances which are covered in the protocol,

¹²³ See M. Iżykowski: *Notarialne...*, p. 179; B. Kordasiewicz, in: B. Kordasiewicz (ed.): “System Prawa Prywatnego”. Vol. 10..., p. 586, Nb. 34; W. Borysiak, in: K. Osajda (ed.): *Prawo*. Vol. 4B..., p. 916, Nt 3; P. Zdanikowski, in: M. Habdas, M. Frasz (eds.): *Kodeks cywilny. Komentarz*. T. 6. Warszawa 2019, p. 646, Nb. 20; P. Książak: *Charakter...*, p. 13 et seq.

and b) the power to instruct the parties about the criminal liability for perjury.

The notaries are entitled to turn to administrative authorities and other entities performing public administration tasks for information or documents, constituting a proof of facts relevant for issuing the deed of certification of succession (Article 95da § 1 PrNot). They may also turn to the Ministry of Justice (similarly as state courts) to provide the content of the foreign applicable law (Article 95da § 2 PrNot) or use other relevant instruments to ascertain the content of the applicable law (such as to call for the expert evidence).

The obligation for the notary to play an active role exists in particular if the estate is to fall to the municipality or the Treasury. In such case, before the notary can issue the DCS, he or she must make a public announcement for any eventual heirs to join the proceedings (Article 95e § 3 PrNot and Article 673 and Article 674 of the Code of Civil Procedure (hereafter: “KPC”).

The power to issue the DCS was granted to the notaries by the legislator. To use this route requires the consent of the “interested parties”, incorporated in the protocol of succession. It also requires that the content of the protocol is accepted. The protocol can only contain information accepted by all of the “interested parties”.

7.5. The nature of the DCS under Polish law

After the protocol of succession has been prepared, the notary issues the deed of certification of succession (Article 95e PrNot).

It is well settled in the Polish literature that the DCS constitutes a notarial act of a specific nature. It is not a regular notarial act nor a simple certification in the meaning of Article 79 point 2 PrNot¹²⁴. An important difference is that a regular notarial act, in case it suffers from procedural deficiencies, is *ex lege* deprived of the feature of the authentic instrument (official document). This can lead to invalidity of the transaction incorporated in the notarial act. The deficiency may be contested

¹²⁴ See M. Iżykowski: *Notarialne...*, p. 178; P. Borkowski: *Notarialne...*, p. 32; B. Kordasiewicz, in: B. Kordasiewicz (ed.): “System Prawa Prywatnego”. Vol. 10..., Nb. 39; M. Pazdan: *Notarialne poświadczenie dziedziczenia po zmianach z 2015 roku*. “Rejent” 2016, No. 5, p. 20; R. Kapkowski: *Sporządzenie...*, p. 85—86; M.W. Walasik: *Pozycja...*, p. 346; B. Kordasiewicz, in: B. Kordasiewicz (ed.): “System Prawa Prywatnego”. Vol. 10..., p. 590 Nb. 37; K. Żok, in: M. Gutowski (ed.): *Kodeks*. Vol. 2..., p. 1774; W. Borysiak, in: K. Osajda (ed.): *Prawo*. Vol. 4B..., p. 1013, Nb. 1; P. Książak: *Charakter...*, p. 4.

in any legal proceedings. The DCS, on the other hand, even if there occurred procedural irregularities in issuing it, can only be challenged in the specifically dedicated for that purpose legal proceedings (provided for in Article 679 KPC¹²⁵; the same that applies for the confirmation of succession by a court). Unless it is challenged, the DCS exists and produces its legal effects. In this, the DCS is similar to a judgment of the court¹²⁶.

According to Article 95j PrNot, a DCS that was entered into the register, has the same legal value as the decision of the court confirming the succession. On this basis, the doctrine finds the DCS to constitute “a specific form of legal protection afforded by the notary in succession matters”, or “a public act applying the law”¹²⁷. The judicial function of the notary is thus underlined¹²⁸.

All of the above has led many scholars in Poland to take a position that the Polish notary public, when issuing the DCS, should be treated as a court under the EU Succession Regulation¹²⁹.

An important argument to support this view is that the DCS has legal effects of a final court decision confirming the succession. One can argue that after the DCS is registered it is “separated” from the notary,

¹²⁵ See below.

¹²⁶ See, in particular, P. Księżak: *Charakter...*, p. 12—13.

¹²⁷ See A. Oleszko: *Prawo o notariacie. Komentarz. Cz. 2. T. 2. Warszawa 2012*, p. 387; Idem: *Prawo o notariacie. Komentarz. T. 1: Ustrój notariatu. Warszawa 2016*, p. 80 (pkt 3.3.2); E. Niezbecka, in: A. Kidyba (ed.): *Kodeks cywilny. T. 4. Warszawa 2015*, p. 342, Nb. 41; J. Kremis, R. Strugała, in: E. Gniewek, P. Machnikowski (eds.): *Kodeks...*, p. 1851 et seq.; R. Kapkowski: *Sporządzenie...*, p. 85—86; Z. Truszkiewicz: *Uchylenie...*, p. 21; M. W. Walasik: *Pozycja...*, s. 346; P. Księżak: *Charakter...*, p. 7.

¹²⁸ See R. Kapkowski: *Sporządzenie...*, p. 85—86; M. Iżykowski: *Notarialne...*, p. 182; P. Borkowski: *Notarialne...*, p. 185; M.W. Walasik: *Pozycja...*, p. 346—347 (classifies the DCS as a specific type of legal protection offered by the notaries in succession law matters, which can be treated as exercising “preventive legal protection”); A. Oleszko: *Ustrój...*, p. 79; W. Borysiak, in: K. Osajda (ed.): *Prawo. Vol. 4B...*, p. 915 (DCS constitutes a type of an out-of-court dispute resolution method; at the same time notary performs “a public service the essence of which is to afford the legal protection”); P. Księżak: *Charakter...*, p. 7 (notaries actions in the discussed field constitute a quasi-judicial activity, and the DCS is close to the confirmation of succession by the court).

¹²⁹ See M.W. Walasik: *Pozycja...*, p. 352—353; T. Kot: *Czy polski notariusz może być sądem na gruncie rozporządzenia spadkowego? Głos w dyskusji*. In: “Nowe europejskie prawo spadkowe”. Eds. M. Pazdan, J. Górecki [2015], s. 91; M. Margoński: *Charakter prawny europejskiego poświadczenia spadkowego. Analiza prawoporównawcza aktu poświadczenia dziedziczenia i europejskiego poświadczenia spadkowego*. Warszawa 2015, p. 78; D. Karkut: *Czy polski notariusz może być objęty zakresem kategorii pojęciowej “sąd” w rozumieniu unijnego rozporządzenia spadkowego*. “Rejent” 2017, No. 3, p. 24 et seq.; A. Oleszko: *Ustrój...*, p. 84.

who issued it. It starts a life of its own. The certification has legal effects in the realm of substantive law (to which we will return later) that are similar to the confirmation of succession rendered by the court. Both have declaratory character. The latter enjoys the claim preclusion (*res judicata*; Article 199 § 1 point 2 KPC). As to the DCS, the scholars usually (although not uniformly) argue that the deed enjoys “the preclusion of the matter declared”¹³⁰, which implies analogous consequences to claim preclusion. Most importantly, the court may not issue a confirmation of succession if there already exists a DCS¹³¹. The court is bound by the DCS in a similar way as it is bound by the judgment confirming the succession. Thus, the DCS must first be abolished. Only then may the court issue anew a judgment which confirms the succession. Consequently, if the motion for confirmation of succession is brought before the court in a situation when the DCS has already been issued and registered, such motion must be rejected.

7.6. The judicial functions of the notary in applying the law

The judicial functions of the notary public in the discussed area must be underlined.

In a transnational matter, the notary must begin with determining the applicable law in accordance with the relevant conflict of law rules. Here, a need to delineate between the provisions of the EU Succession Regulation and the rules set in other sources (e.g. the bilateral conventions to which Poland is a party — see Article 75(1) and 75(2) of the Regulation) might arise. When applying the Regulation, the notary might stumble upon the necessity to take into account of *renvoi* under Article 34(1) of the Regulation or difficulties with the application of the law of the state with more than one legal system (Article 36—37 of the Regulation). What is more, when applying foreign law, the notary may be forced

¹³⁰ See Z. Truskiewicz: *Uchylenie...*, p. 12 et seq.; P. Borkowski: *Notarialne...*, p. 260; M. Margoński: *Charakter...*, p. 64; M.W. Walasik: *Pozycja...*, p. 345; W. Borysiak, in: K. Osajda (ed.): *Prawo*. Vol. 4B..., p. 1050, Nb. 35; P. Księżak: *Charakter...*, p. 14. To the contrary: J. Pisuliński: *Europejskie poświadczenie spadkowe*. In: “Rozprawy cywilistyczne. Księga dedykowana Profesorowi Edwardowi Drozdowi”. Eds. M. Pecyna, J. Pisuliński, M. Podrecka. Warszawa 2013, p. 638, fn. 57 (DCS is equal to the confirmation of succession by the court only on the substantive level but not in terms of procedure); J. Gudowski, in: T. Ereciński, J. Gudowski, K. Weitz (eds.): *Kodeks postępowania cywilnego. Komentarz*. T. 3: *Postępowanie rozpoznawcze*. Warszawa 2012, p. 503; P. Zdanikowski, in: M. Habdas, M. Frasz (eds.): *Kodeks...*, p. 652, Nb. 36.

¹³¹ P. Księżak: *Charakter...*, p. 13.

to consider whether the results of that application are not contrary to fundamental principles of the Polish legal order (the public policy exception, as provided for in Article 35 of the Regulation).

Finally, the notary is entitled to assess the facts from the point of view of the applicable substantive law. In doing so, the notary performs a judicative function, he or she exercises the *imperium* granted by the state.

As a result, the notary issues a deed of certification of succession, which after being registered, has the force of the confirmation of succession. In formulating the DCS, the notary is independent of the parties. He or she is bound only by the law. It follows that in the last phase of the DCS procedure, the notary performs the same function as the judge in the proceedings to confirm the succession.

The differences concern only the earlier phase of the procedure when the evidence is collected. In the proceedings before the notary, the interested parties agree as to the relevant factual circumstances. From the very outset, there is no possibility of a dispute.

The confirmation of succession before the court, on the other hand, is preceded by the actions laid down in Article 669 et seq. KPC. The role of the court is active here (e.g. according to Article 670 § 1 KPC the court examines of its own motion who is the heir).

These differences, however, do not eliminate the importance of the above-mentioned similarities of the decision-making phase of the two proceedings.

7.7. The consequences of the notarial DCS and the confirmation of succession

The similarities concern also the consequences of the notarial DCS and the confirmation of succession by the court. First, it is presumed that the person who has obtained the confirmation of succession from a court or the notarial deed of certification of succession is the heir (Article 1025 § 2 KC). Second, in disputes with third parties, who have no claims to the estate, an heir may prove its succession rights only by the confirmation of succession or the DCS (Article 1027 KC). Finally, Article 1028 KC provides for the protection of the good faith of a third party, if a person who obtained the confirmation of succession or the DCS, but is not an heir, has disposed of an asset belonging to the estate for the benefit of that person.

The notarial deed of certification of succession, similarly to the confirmation of succession by the court, should refer to the entire estate left by the deceased.

The existing rules provide for various means of control of the state court concerning the notarial deed of certification of succession.

According to Article 669¹ § 1 KPC the court overrules the registered DCS if confirmation of succession was issued earlier concerning the same estate¹³².

In case two or more deeds of certification of succession are registered with respect to the same estate, the court on the application of the interested party overrules all the DCS and renders its own decision on the confirmation of succession (Article 669¹ § 2 KPC).

A specific power to review the notarial DCS was granted to the court in Article 679 § 4 KPC. This provision provides a *mutatis mutandis* application of Article 679 § 1 — 3 KPC concerning the confirmation of succession. This is the procedure aimed at proving that the person who obtained the confirmation of succession is not the heir, or its share in the estate is different from the one declared previously. Such finding can — according to Article 679 § 1 KPC — occur only in the proceedings before the court, the subject matter of which is to revoke or amend the earlier decision. This makes possible a request to revoke or amend the DCS before the state court.

In cases provided for in Article 95e § 2 PrNot (and some other instances envisaged in the Law on Notaries), the notary may refuse to issue the deed of certification of succession. Under Article 83 § 1 PrNot the interested party is entitled to challenge the refusal before the district court. Thus, there exists a court review for this type of notary's decisions.

7.8. The impartiality of the notary

The provisions of the Law on Notaries create strong guarantees of the notary's impartiality in exercising the said competences¹³³. According to Article 80 § 2, the notary is obliged to ensure that the rights and legitimate interests of the persons concerned by the DCS are adequately safeguarded. Article 84, on the other hand, excludes the notary if the DCS would concern him or her personally or a person connected with him or her by links specified in that provision (i.e. various relatives). The

¹³² Some authors are in favour of applying Article 669¹ § 1 KPC also in a situation when the confirmation of succession by the court becomes final only after the DCS is registered. See J. Gudowski, in: T. Ereciński, J. Gudowski, K. Weitz (eds.): *Kodeks...*, p. 363.

¹³³ M.W. Walasik: *Pozycja...*, p. 353.

notary is liable for the damage caused in the performance of his or her competences (Article 49 PrNot) and is accountable in disciplinary proceedings (Article 50 et seq PrNot).

In our view, all of the above arguments speak to treat the Polish notary as a court in the meaning of Article 3(2) of the EU Succession Regulation, and the DCS issued by such notary as the decision under Article 3(1)(g) of the Regulation.

7.9. Systemic considerations

Last but not least, it is appropriate to make few general remarks regarding the system established by the EU Succession Regulation concerning notaries' competences in succession law matters. The Polish example of the notaries issuing the DCS sheds light on some problematic features of the Regulation. In our view, the decision of the European Court in C-658/17 *WB* constitutes a step in the wrong direction in warranting the proper functioning of this subtle system. It widens the gap existing in the recognition of the certifications of succession issued by the notaries and strengthens the unpredictability in this field.

To begin with, a most general observation is — as was correctly pointed out in a recent comment to the case¹³⁴ — that is ill-founded to treat “the power to rule of his own motion on possible points of contention between the parties concerned”¹³⁵ as a *conditio sine qua non* for classifying the notary as a “court” under Article 3(2) of the Regulation. Here, the Court transferred its findings from the case-law under Brussels Convention/Regulation¹³⁶. This, however, inadequately reads the functions of the certifications of succession. In issuing such certifications/confirmations, the judicial authority (whether a court or other) most often does not have to decide a dispute between the parties concerned. Still, the authority, including the notary, often makes findings and applies the law (occasionally — a foreign law), which constitutes a judicial function (so much is at least true for the Polish notaries). The certification that the notary issues under Polish law constitutes an equivalent of the court's decision confirming the succession. The whole purpose of providing for a wide definition of the term “court” in Article 3(2) was to cover also authorities producing certificates that are equivalents to the decisions of the courts.

¹³⁴ J. Gomez-Riesco De Paz Tabernero: *Reflections...*, p. 1006.

¹³⁵ C-658/17 *WB*, para 55.

¹³⁶ In para 55 of the C-658/17 *WB* judgment, the Court cites its decision in *Solo Kleinmotoren*, C414/92, EU:C:1994:221.

An overly restrictive interpretation of that notion — towards which the CJEU steers — will deprive Article 3(2) of any real meaning¹³⁷.

Moreover, by misinterpreting the functions of the Polish notaries issuing DCS, the Court aggravates the deficiencies existing in the system established by the Regulation regarding the determination of the jurisdiction of the notaries and the circulation of the certifications of succession.

The authorities qualifying as “courts” under Article 3(2) of the Regulation and rendering “decisions” in the meaning of Article 3(1)(g) are bound by the rules of jurisdiction set out in the Regulation. Conversely, authorities that only produce authentic instruments are not bound by these rules. Thus, “whether or not the notaries in a given Member State are bound by the rules of jurisdiction set out in this Regulation should depend on whether or not they are covered by the term ‘court’”¹³⁸. It follows that in the Member States where the notaries are not considered “courts” under the Regulation, there exists a leeway as to determining their jurisdiction to issue certificates of succession in cross-border cases. The national legislators are entitled to limit their competence to local successions (e.g. by considering the habitual residence of the deceased as the connecting factor), but they are also free to allow the notaries to issue certifications of succession in situations where neither the deceased nor the applicants are linked to the Member State in which the notary performs its actions. The competition for notaries’ services in issuing certificates of succession results. After C-658/17 *WB* we could now have parties asking for the DCS anywhere in Europe, provided that the local legislator does not limit the jurisdiction of its notaries and that these notaries are not considered “courts”. There would be nothing wrong with that but for the fact that in some Member States (e.g. in Poland) the DCS might be considered equivalent to a decision of the court. The certificates of succession issued by the notaries then circulate under the Regulation in the whole European Union¹³⁹ and in principle enjoy — as will be explained below — effects provided to them under the law of the state of their origin¹⁴⁰.

When notaries are considered “courts” in the meaning of Article 3(2), the certificates they issue circulate as “decisions” per Article 39 of the Regulation. When notaries do not exercise “judicial functions”, the certificates they issue are considered merely “authentic instruments” and are subject only to “acceptance” in the other Member States, as provided

¹³⁷ J. Gomez-Riesco De Paz Tabernero: *Reflections...*, p. 1001 et seq.

¹³⁸ Recital 21 to the Regulation.

¹³⁹ Recital 22 to the Regulation.

¹⁴⁰ Recital 61 to the Regulation.

for in Article 59 of the Regulation. The “acceptance” does not constitute “recognition”. Article 59 merely warrants that the authentic instruments from the other Member States shall have the same (or the most comparable) evidentiary effects in the other Member States. To accept a foreign authentic instrument thus means to acknowledge that it constitutes a proof of the circumstances declared therein. The authentic instruments do not enjoy *res iudicata* and consequently they are not subject to recognition.

The difficulty (or maybe a lack of logic) from the Polish perspective (and all Member States similarly positioned) is that the DCS constitutes — under Polish domestic law — an equivalent of a court decision that enjoys the so-called “preclusion of the matter declared”. Although this is considered something different than *res iudicata*, the most important consequences are analogous. Namely, if the DCS is already issued with respect to a given deceased, it bars all authorities (including courts) from issuing a new DCS or confirmation of succession, as long as the old DCS is in force. The motion for a new DCS or confirmation must be rejected. Only after the old DCS is set aside in the special procedure, may the court issue a new confirmation of succession¹⁴¹.

Article 59 mandates that the authentic instruments should have the same (or most comparable) evidentiary effects in another Member State as they have in the Member State of origin. As explained in recital 61 to the Regulation, this means that the evidentiary effects which a given authentic instrument enjoy in another Member State depend on the law of the Member State of origin. The question thus arises whether the Polish DCS should produce in the other Member States all the effects it enjoys under Polish law (the preclusion of the matter declared), or should that be limited to pure acceptance of evidentiary effects. If the latter option is chosen, this would mean that the Polish DCS produces more extensive legal effects in the Polish territory than elsewhere in the Union. Arguably, this is not what was aimed for in the Regulation, which makes deference to the law of the Member State of origin. Obviously, the parties envisaging that they will need to make use of the certification of succession in the other Member States may remedy the situation by requesting a Polish notary to issue the European Certificate of Succession. Still, one is left with an impression that the gap existing under the Regulation (consisting of the notaries issuing a certification of succession that constitutes merely an authentic instrument), which causes the difficulties discussed hereabove, is widened by a narrow reading of the term “court” adopted in C-658/17 *WB*.

¹⁴¹ See above point 7.5 and 7.7.

On the other hand, if one accepts the option that a DCS — producing in the state of its origin effects equivalent to court’s confirmation of succession — also produces the same effects elsewhere in the Union, then the risk of the race to the notary could result (although the gap mentioned above is somewhat minimalised). Any interested party could ask a notary in a Member State with relaxed jurisdictional requirements to issue a certificate. If that certificate enjoys in that State effects similar to the confirmation of succession by a court, then an attempt could be made to transfer those effects to the other Member States, even under Article 59 of the Regulation. This option seems unwelcome.

The Polish legislator requires in its domestic law (Article 95e of the PrNot) that there exists jurisdiction under the EU Succession Regulation for the notary to be entitled to issue the DCS¹⁴². Thus, Polish notaries are not allowed to benefit from the above-defined leeway offered by the Regulation. A rhetoric question could be posed: what if the Polish legislator abandons the requirement of jurisdiction for the notary to issue DCS? Would this be opening a Pandora box of Polish DCSes flooding the EU? Obviously, this risk only arises, if one assumed that the Polish DCS should be given similar legal effects as they enjoy under Polish law, being the law of their origin.

The last point to be made here is that of predictability and certainty. In C-658/17 *WB* the European Court concluded that the failure of a Member State to notify the Commission under Article 79 of the exercise of judicial functions by notaries is inconclusive for their classification as “courts” under Article 3(2) of the Regulation. While this *prima facie* seems sensible for several reasons¹⁴³, such a conclusion raises concerns from the point of view of certainty. If the notification is of merely indicative and not decisive value, then there is no means of being certain as to whether notaries in a given country should be considered courts rendering decisions or merely authorities issuing authentic instruments. For the authority in a Member State where the DCS is to be presented, this question might be difficult to decide. In that Member State, it might be hard to know whether the DCS issued by a notary must be recognized

¹⁴² According to Article Article 95e § 1 PrNot: “[...] the notary issues the deed of certification of succession if there are no doubts as to its domestic jurisdiction”. Furthermore, under Article 95e § 2 point 4) PrNot the notary refuses to issue a certification of succession if there is “no domestic jurisdiction in the case at hand”. There are no doubts that this wording must be understood as a reference to the rules of jurisdiction established under the EU Succession Regulation. See e.g. W. Borysiak, in: K. Osajda (ed.): *Prawo o notariacie. Komentarz*. Warszawa 2021, comments to Art 95e, para 26; A.J. Szereda: *Czynności notarialne. Komentarz do art. 79—112 Prawa o notariacie*. Warszawa 2018, comments to Art 95e, paras 5—7.

¹⁴³ See the analysis of the Court in C-658/17 *WB*, paras 31—64.

under Article 39 of the Regulation as a judgment or only accepted in accordance with Article 59 as an authentic instrument. The authority in a targeted Member State will have to determine this question independently. Its findings can hardly be conclusive for authorities in the other Member States. The risk arises that the DCSes originating from a given state may be treated differently throughout the Union (as decisions in some states and as authentic instruments in others). The incoherency in the system results. Here again, this might be the very feature of the system established by the Regulation. A solution would be to find that the notification under Article 79 is conclusive, but this has downsides of its own. Nevertheless, it is submitted that by offering an overly narrow interpretation of the notion of the “court” under Article 3(2), the CJEU increases the gap in the system and provokes more uncertainty.

7.10. Concluding remarks

The following conclusion is thus justified: the Polish notary, when exercising the competence to issue the deed of certification of succession (granted by the legislator) is a court in the meaning of Article 3(2) of the EU Succession Regulation and the DCS constitutes a “decision” in the meaning of Article 3(1)(g) of the Regulation.

It is regrettable that the CJEU, without an in-depth analysis of the function of Polish notaries in the light of Polish law, has assessed that function in light of Article 3(2). We support a more cautious approach adopted in the recent judgment in case C-80/19 *E.E.*¹⁴⁴ — where the Court has left the ultimate decision as to the status of Lithuanian notaries to the referring court.

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¹⁴⁴ Judgment of CJEU of 16.7.2020 in case C-80/19 *E.E.*, ECLI:EU:C:2020:569.

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