Problemy Prawa Prywatnego Międzynarodowego

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Foreword

The current volume of "Problemy Prawa Prywatnego Międzynarodowego" — the leading Polish periodical in the field of private international law — is primarily devoted to the Regulation No 650/2012 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 ("the Succession Regulation").

The Succession Regulation constitutes one of the first EU instruments of private international law inevitably affecting the everyday life of an average European. A well-known saying — attributed to Benjamin Franklin in his letter to Jean-Baptiste Le Roy in 1789 (although the origins of this self-evident statement are disputed) — states that "nothing is certain except for death and taxes". It describes things that are unavoidable for any human being. Tax law, at least as far as direct taxation is concerned, remains predominantly within the competence of the Member States. By adopting the Succession Regulation, the Union legislator established the rules affecting the legal consequences of the other "unavoidable" aspect of human existence.

As the ambiguous origin of the aforementioned saying illustrates, apart from death and taxes, nothing is indeed certain and self-evident. This is also the case of the Succession Regulation. The first experiences with its application in the Member States have made it possible to identify a number of vital legal problems, which go beyond the issues that had been discussed at the moment of the adoption of the Regulation in question. Indeed, the Succession Regulation has turned out to be a goldmine of challenges for practitioners and academics. These challenges range from classical issues of private international law, such as the delimitation of the scopes of applicable laws or preliminary questions, to issues

of a more general character, such as the notions of "Member State" or "court" within the meaning of the Succession Regulation. Moreover, in order to properly identify and explain these challenges, a cooperation of legal experts coming from different legal traditions seems indispensable. For this reason, I would humbly submit that both the conference and the collection of studies contained in the present volume of "Problemy Prawa Prywatnego Międzynarodowego" represent an important step in the consolidation of European Succession Law.

As a former secretary of the Editorial Board of this periodical, I am particularly honoured to host among the authors the most distinguished European scholars in the field. There is no doubt that the voice of Academia continues to inspire both the Court of Justice of the European Union as well as national courts in the interpretation and application of the Succession Regulation. At the same time, judicial decisions should be properly addressed, assessed and, if need be, critically scrutinised in legal writings. This is the only way to consolidate European Succession Law in order to make it equitable and comprehensible for all Europeans who — without any exception — are not immune from dealing with legal aspects of succession. I strongly believe that the studies contained in the present volume of "Problemy Prawa Prywatnego Międzynarodowego" will contribute to this ongoing and lively debate with its enormous practical implications.

Maciej Szpunar (editor of the volume)

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Studia

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La réserve héréditaire dans le règlement 650/2012 sur les successions

Abstract: The article addresses the issues relating to the protection of forced heirs in international context with a particular focus on the provisions of the EU Succession Regulation pertaining thereto. It contrasts common law tradition with the solutions adopted in French law, whereby certain relatives are entitled to the hereditary reserve (*la réserve héréditaire*). The author discusses selected examples taken from a body of French case-law dealing with the issue in question. Amongst the cases touched upon by the author are those concerning the successions of Johnny Hallyday and Maurice Jarre, which were two cases widely discussed in the recent French jurisprudence.

Keywords: forced heirship rights — forced heirs — EU Succession Regulation — hereditary reserve — public policy exception — private international law

La réserve héréditaire est la portion de succession réservée par la loi à certains héritiers (les réservataires). Cette portion ne peut, à peine de réduction, être entamée par des libéralités que le défunt aurait consenties au détriment des réservataires. Le défunt ne peut disposer à titre gratuit que de la quotité disponible.

Cette institution reposait à l'origine sur l'idée de copropriété familiale et elle a évolué vers l'idée de protection des proches du défunt, descendants, ascendants et conjoint. Très étendue dans certains droits, comme en droit français (réserve des 3/4 de la succession quand le défunt laisse

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trois enfants ou davantage), elle est plus limitée dans d'autres, comme en droit allemand et, apparemment, aussi en droit polonais, où la réserve est généralement égale à la moitié de la part légale du réservataire. En revanche, dans les pays de *common law*, comme l'Angleterre et de nombreux États des États-Unis comme New York et la Californie, la réserve est inconnue, mais les membres de la famille et les personnes à charge peuvent demander au tribunal un soutien financier qui sera prélevé sur les biens de la succession.

Cette diversité législative pose évidemment dans les situations à caractère international un certain nombre de questions, dont celle de la loi applicable. Le règlement européen n°650/2012 du 4 juillet 2012 a essayé de les résoudre. Rompant avec le rattachement à la nationalité, traditionnel en Pologne et dans de nombreux États du continent européen, et avec la division de la succession en meubles et immeubles, qui était traditionnelle en France, il a retenu en principe, sauf jeu de la clause d'exception ou choix par le défunt de sa loi nationale, le rattachement de l'ensemble de la succession à la loi de l'État dans lequel le défunt avait sa résidence habituelle au moment de son décès (art. 21).

Le règlement a également donné une précision importante concernant la réserve, en incluant celle-ci dans le domaine de la loi successorale.

«**Article 23**

Portée de la loi applicable

1. La loi désignée en vertu de l'article 21 ou 22 régit l'ensemble d'une succession.

2. Cette loi régit notamment:

[…]

h) la quotité disponible, les réserves héréditaires et les autres restrictions à la liberté de disposer à cause de mort ainsi que les droits que les personnes proches du défunt peuvent faire valoir à l'égard de la succession ou des héritiers; i) le rapport et la réduction des libéralités lors du calcul des parts des différents bénéficiaires;

[…] ».

Ces solutions sont bonnes et utiles, en particulier pour ce qui concerne la réserve. Le principe de l'unité de la succession a le grand avantage d'éviter les difficultés résultant de l'application de lois différentes à la réserve, suivant la nature mobilière ou immobilière des biens de la succession. La limitation de l'*electio juris* à la loi nationale du défunt limite la possibilité pour le testateur de choisir une loi qui lui permettrait de priver de toute part ses enfants ou son conjoint. Enfin la soumission de la réserve à la loi successorale donne une solution claire à la qualification de la réserve, institution successorale et non alimentaire pour le droit international privé de l'Union européenne.

Aussi claires soient-elles, ces solutions ne résolvent pas toutes les questions, comme le montrent quelques développements récents.

Les difficultés tiennent moins au texte du règlement, qui est clair, qu'à la différence des législations des États membres sur l'existence même de la réserve.

Certains d'entre eux, comme indiqué, ignorent l'institution et lui sont hostiles. C'est le cas de l'Angleterre. Lord Collins of Mapusbury explique, dans le dernier supplément du Dicey-Morris, que la raison principale du refus du Royaume-Uni de participer à ce règlement est qu'il n'assure pas suffisamment la protection des bénéficiaires de libéralités *inter vivos,* en particulier les fondations et autres *charities*, contre le risque d'une action en réduction de ces libéralités — ce que les Anglais appellent le *clawback* — intentée par les réservataires en application de la loi successorale[1].

D'autres États membres, les plus nombreux, s'inquiètent de l'éventualité que les héritiers, surtout si ce sont leurs nationaux, soient privés, en application de la loi successorale, de la part de réserve que leur accorde leur propre loi.

Actuellement en France on a deux affaires presque identiques, dont l'une défraie la chronique des réseaux sociaux depuis bientôt deux ans. Il s'agit de la succession du chanteur Johnny Hallyday, décédé en décembre 2017, laissant un testament américain léguant la totalité de ses biens à sa veuve, Lætitia, sans rien laisser à ses enfants nés d'unions précédentes et eux-mêmes artistes connus. La question litigieuse est de savoir si le défunt avait sa dernière résidence habituelle en France ou en Californie, ce qui déterminera la loi successorale et, dans l'hypothèse où ce serait la loi de Californie, si celle-ci ne heurte pas l'ordre public international français.

L'autre affaire, un peu plus ancienne mais non terminée, concerne la succession d'un autre artiste français, Maurice Jarre, compositeur de musique de cinéma, notamment des films *Docteur Jivago* et *Lawrence d'Arabie*, décédé en 2009. Lui aussi, qui vivait effectivement en Californie — donc pas de problème pour la loi applicable — avait déshérité ses enfants au profit de sa veuve, qui n'était pas la mère de ses enfants. Ces derniers avaient soutenu que la loi californienne, ignorant la réserve, était contraire à l'ordre public international français et des auteurs français assez nombreux étaient de cet avis. La Cour de cassation leur a donné tort par un arrêt du 27 septembre 2017[2]. Elle a posé la règle « qu'une loi étrangère désignée par la règle de conflit qui ignore la réserve héréditaire n'est pas en soi contraire à l'ordre public international français

[1] L.A. Collins, J. Harris : *Dicey, Morris & Collins. The Conflict of Laws, 5th Cumulative Supplement to the 15th ed.* Sweet and Maxwell 2019, § 27—136, p. 438.

[2] Civ. Civ., 27.9.2017, n° 16—13151, *AJ Famille*, 2017, p. 595, note A. Boiché (*Revue critique de droit international privé*, 2018, p. 87, note B. Ancel).

et ne peut être écartée que si son application concrète, au cas d'espèce, conduit à une situation incompatible avec les principes du droit français considérés comme essentiels ».

La solution est raisonnable et avait déjà été recommandée. Il faut rappeler que la proposition de la Commission comportait une disposition selon laquelle l'ordre public ne pouvait pas être opposé à la loi successorale « au seul motif que ses modalités concernant la réserve héréditaire sont différentes de celles en vigueur dans le for » (art. 27 § 2), mais le règlement ne l'a pas reprise. On devait donc s'attendre à ce que les juridictions d'un État membre connaissant la réserve héréditaire soient un jour sollicitées d'opposer l'ordre public, dans un souci de protection des enfants ou du conjoint, aux lois étrangères ignorant celle-ci. Faire droit à une telle demande pourrait ruiner l'effectivité du règlement, car l'existence de la réserve ou son absence est un trait caractéristique du droit successoral de chaque État et l'application de l'exception d'ordre public retirerait beaucoup d'intérêt à la règle de conflit. De plus, cette application pourrait conduire à des solutions discriminatoires en fonction de la proximité de la situation avec le for et notamment de la nationalité des intéressés. A supposer que la loi successorale anglaise ignorant la réserve puisse heurter la sensibilité d'un juge français, il est probable qu'elle la heurterait davantage s'agissant de la succession d'un Français ayant eu sa dernière résidence habituelle à Londres que de celle d'un Anglais dans les mêmes conditions.

La solution moyenne adoptée par la Cour de cassation correspond bien mieux à l'esprit de l'exception d'ordre public, qui suppose un examen concret des circonstances concrètes du litige. Avant d'écarter la loi successorale ignorant la réserve, il faut examiner, cas par cas, si son application aboutirait à une situation inacceptable, en laissant par exemple sans ressources des enfants en bas âge ou en cours d'études. Déjà, la convention de La Haye du 1er août 1989 avait prévu la possibilité d'une réserve permettant d'écarter la loi désignée par le défunt lorsque son application « priverait totalement ou dans une proportion très importante le conjoint ou l'enfant du défunt d'attributions de nature successorale ou familiale auxquelles ils auraient eu droit selon les règles impératives de la loi de l'État ayant fait cette réserve » (art. 24, § 1, d, 2ème tiret).

Pourtant, cette affaire Jarre n'est pas terminée. Les enfants déshérités n'ont pas accepté l'arrêt de la Cour de cassation. En août 2018, ils ont saisi la Cour européenne des droits de l'homme pour « manquement au respect des droits de la famille et pour atteinte excessive à notre sécurité juridique ». La procédure est en cours à Strasbourg, mais il paraît douteux que l'on puisse reprocher une violation des droits de l'homme

aux États qui organisent le règlement des successions sur des bases différentes de celles de l'État d'origine des plaignants.

Cette question précise a eu des retombées inattendues tout près de l'Union européenne et de la France, à Monaco[3]. Ce pays a codifié son droit international privé par une loi du 28 juin 2017, préparée par une proposition de loi qui adoptait, en matière de succession, des dispositions proches de celles du règlement européen soumettant la succession à la loi du domicile sauf choix par le testateur de sa loi nationale, et incluant dans le domaine de la loi successorale la réserve et les restrictions à la faculté de disposer à cause de mort.

On s'est alors avisé que les héritiers d'un défunt monégasque domicilié à Londres pourraient être privés de la réserve prévue par le code civil monégasque et à l'inverse que les héritiers d'un Anglais domicilié à Monaco pourraient profiter de la réserve prévue par ce même code civil monégasque. Ces solutions ont été jugées inacceptables et la loi définitivement adoptée a introduit une disposition curieuse aboutissant en fait à soumettre la réserve à la loi nationale du défunt. Tout en maintenant l'inclusion de la réserve dans le domaine de la loi successorale, la loi a introduit une exception à la règle de l'application générale de la loi successorale. Le deuxième alinéa de l'article 63 dispose en effet « [t]outefois, il [le droit applicable à la succession] ne peut avoir pour effet de priver un héritier de la réserve que lui assure le droit de l'État dont le défunt a la nationalité au moment de son décès, ni d'appliquer la réserve à la succession d'une personne dont le droit de l'État dont elle a la nationalité au moment de son décès ne connaît pas ce régime ». C'est une disposition bien étrange, car elle revient finalement à considérer l'application de la loi successorale monégasque à la succession d'un Anglais domicilié à Monaco comme contraire à l'ordre public de la Principauté. En réalité, l'article 63, al. 2 démembre l'unité de la loi successorale et tend à soustraire de son domaine la réserve héréditaire en en faisant une catégorie spéciale régie par la loi nationale du défunt.

Et, pour revenir à l'Europe et à notre règlement sur les successions, on peut faire la même observation sur le recours à l'exception d'ordre public en vue de retirer de la loi successorale les dispositions de celle-ci moins protectrices des intérêts des réservataires que celles de leur loi nationale. Car dans les droits qui la connaissent, la réserve représente rarement moins de la moitié de la succession et souvent plus des trois quarts.

[3] Loi n° 1448 du 22.6.2017, *Journal de Monaco*, n° 8337, 7.7.2017, *Revue critique de droit international privé* 2018, p. 994. Sur cette loi, voir P. Lagarde : « La codification du droit international privé monégasque », *Revue critique de droit international privé*, 2018, p. 753—774.

Bibliographie

Collins L.A., Harris J. : D*icey, Morris & Collins. The Conflict of Laws, 5th Cumulative Supplement to the 15th ed.* Sweet and Maxwell 2019, § 27—136, p. 438.

Lagarde P. : « La codification du droit international privé monégasque ». *Revue critique de droit international privé*, 2018, p. 753—774.

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"Member States" and "Third States" in the Succession Regulation

Abstract: The author advocates a flexible approach with respect to the interpretation of the term "Member State" as employed in the Succession Regulation, allowing the differentiation between "participating" and "non-participating" States. It does not mean that the term "Member State" should always be interpreted in a wide sense including the three non-participating States: Denmark, the Republic of Ireland, and the United Kingdom. Whether a wide or a narrow interpretation is appropriate depends on the context and the purpose of the single provision. Most provisions contained in the chapter on jurisdiction refer to participating Member States only. But some articles such as the Article 13 of the Regulation, provide a counter-example. A uniform interpretation of the concept of Member State in all provisions of the Succession Regulation seems far too sweeping. It reminds of *Begriffsjurisprudenz* and does not take account of the purpose of the single provisions. In particular, it disregards the need for the cross-border protection of individual rights in a Union with open frontiers.

Keywords: EU Succession Regulation — recognition of decisions given in Member States — the notion of third State

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I. Member States, participating Member States, third States

According to Article 39 of the Succession Regulation[1], "a decision given in a Member State shall be recognised in the other Member States without any special procedure being required". This is only one of the numerous provisions of the Regulation that uses the term "Member State". In the secondary law of the European Union, this term usually designates those States which have concluded and ratified the founding Treaties on European Union and on the Functioning of the European Union. The other States are "third States". From the perspective of the Union, the world appears to be divided into Member States and third States, *tertium non datur*. This is similar to the terminology employed in the field of international treaties, for example, the Hague conventions, where "contracting states" are distinguished from "non-contracting states".

However, the EU Regulations on the judicial cooperation in civil matters have established a more complicated situation. Under Protocols No. 21 and 22 annexed to the Treaty of Lisbon[2], Denmark, the Republic of Ireland, and the United Kingdom do not participate in the measures adopted in this policy area unless they explicitly opt in. Under its own constitutional law such options are foreclosed to Denmark[3]. Moreover, Article 81(3) TFEU requires a unanimous approval by the Council of measures concerning family law which is difficult to attain. Where it cannot be achieved, measures can be adopted by at least nine Member States in the legislative procedure of enhanced cooperation, Article 326 TFEU. Thus, there are two ways leading to what is called *Europe à la carte*. As a consequence, several EU regulations in the field of private international law are not in force for all Member States. The Succession Regulation is one of them: Denmark, the Republic of Ireland, and the United Kingdom do not participate. Here, the world is divided into three groups of countries: participating Member States, non-participating Member States, and third States.

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[1] Regulation (EU) No. 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, OJ 2012 L 201/107.

[2] Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security, and justice, OJ 2016 C 202/295; Protocol (No 22) on the position of Denmark, OJ 2016 C 202/298.

[3] See P.A. Nielsen: *Denmark and EU Civil Cooperation*. "Zeitschrift für Europäisches Privatrecht" 2016, pp. 300—309.

What does this mean for the interpretation of Article 39 and numerous other provisions of the Succession Regulation which do not distinguish participating and non-participating Member States? Some commentators have subjected this question to a careful analysis and have come to the conclusion that the term "Member State" as employed in the Succession Regulation has to be understood in the sense of participating Member State[4]. This view is based on the implicit assumption that the term "Member State" must be interpreted in a uniform way throughout the Succession Regulation; as a consequence judicial decisions in matters of succession originating in Denmark, the Republic of Ireland, or the United Kingdom are not covered by Article 39. My following remarks are intended to question the underlying assumption of a uniform interpretation of the term "Member State". I shall suggest that this term should be interpreted in the context and with a view to the purpose of the single provision where it is used. This will allow for a more open interpretation of Article 39 and some other provisions of the Regulation.

II. Text of the Regulation

The text of the Succession Regulation is incomplete and unclear in this respect. With regards to the United Kingdom and Ireland, Recital 82 referring to Protocol No. 21, points out that "those Member States are not taking part in the adoption of this Regulation and are not bound by it or subject to its application". The same words can be found in Recital 83 with regards to Denmark. But these recitals only repeat what is said about the position of the three States set forth in Protocols No. 21 and 22. Their courts are of course not bound to apply the provisions of the Regulation. The British, Danish, and Irish courts will continue to apply their national rules of law relating to jurisdiction, applicable law and the recognition and enforcement of judicial decisions originating in other EU Member States in matters of succession.

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[4] See A. Bonomi, in: *Le droit européen des successions — Commentaire du Règlement No. 650/2012 du 4 juillet 2012*. Eds. A. Bonomi, P. Wautelet. Bruxelles 2013, pp. 30—31; A. Dutta, in: *Münchener Kommentar zum BGB*. Vol. 11, 7th edn. München 2018, Article 1 EuErbVO, Rn. 29; J. Weber, in: *Internationales Erbrecht*. Eds. A. Dutta, J. Weber. München 2016, Einl., para. 29; J. Carrascosa González: *El Reglamento Sucesorio Europeo 650/2012 de 4 de julio 2012 — Análisis crítico*. Granada 2014, pp. 47 *et seq*.

But neither the recitals nor any other provision of the Regulation address the question whether the three countries are to be considered as Member States in proceedings conducted *in the courts of the Participating Member States*. A pertinent provision contained in the initial Commission proposal was deleted in the course of the legislative proceedings[5]. The cancellation of this provision has been explained as an unintentional mistake[6]. This explanation is in line with the existence of clear definitions of the term "Member State" in most EU acts on private international law adopted prior to 2010. But why are the more recent instruments on private international law equally silent on this issue? The situation is the same everywhere: Some Member States and at least Denmark are not among the participating States. But neither the Brussels I Recast[7] nor the Insolvency Regulation[8] define the concept of Member State; and the Regulation on marital property does not clarify this issue either[9] although the initial Commission Proposal contained a general provision defining the term[10]. The same applies to the Regulation on property issues of registered partnerships[11]. In the light of

[5] See Article 1(2) of the 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 of 14 October 2009, COM(2009) 154 final: "In this Regulation, 'Member State' means all the Member States with the exception of Denmark [the United Kingdom and Ireland]". The square brackets are due to the fact that it was unclear at the time of the proposal whether the United Kingdom and Ireland would opt in.

[6] See A. Bonomi, in: *Le droit européen*..., p. 30: "Il s'agit probablement d'un oubli".

[7] Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJ 2012 L 351/1; Article 1(3) of the predecessor Regulation 44/2001 excluding the application of the regulation in and to Denmark was not taken over perhaps because of the bilateral Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ 2005 L 299/62.

[8] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast), OJ 2015 L 141/19.

[9] Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, OJ 2016 L 183/1; under Article 70(2) the Regulation applies in the Member States which participate in the enhanced cooperation allowed by Decision 2016/954; the Regulation is silent on its application in the participating Member States, to the recognition of judicial decisions originating in other Member States.

[10] See Article 1(2) of the Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes of 16 March 2011, COM(2011) 126 final.

[11] Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement

these instruments the silence of the Succession Regulation rather appears to be deliberate and may be part of a new general approach based on the insight that the non-application of the Regulation in some Member States does not necessarily imply that they are to be considered as third States in judicial proceedings conducted in the participating Member States.

III. Reciprocity and mutual recognition

A closer look at the arguments submitted in this dispute gives support to a more open-minded approach. The first point is reciprocity. Commentators argue that the participating Member States should not recognise, in accordance with Article 39 of the Succession Regulation, judgments originating in Denmark, Ireland, or the United Kingdom since the courts of those States do not apply the Succession Regulation to the recognition of judgments from participating Member States in analogous situations[12]. That is an argument of reciprocity. The principle of reciprocity governs the relations between States under public international law. States commit themselves since the counterparty accepts corresponding duties. This results from the basic principle of *do ut des* that governs the law of agreements. Thus, States balance their mutual interests which are State interests.

The situation in the EU is different. The Court of Justice has pointed out as early as 1963 in *van Gend en Loos* that "this Treaty [establishing the European Economic Community] is more than an agreement which merely creates mutual obligations between the contracting states. … The Community constitutes a new legal order of international law … the subjects of which comprise not only Member States but also their nationals"[13]. The principle of reciprocity is inappropriate where three or more parties are involved. It is particularly problematic where the consequences of a lack of reciprocity between States have to be borne by individuals[14].

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of decisions in matters of the property consequences of registered partnerships, OJ 2016 L 183/30; Article 70(2) is identical to the provision of the Marital Property Regulation, the preceding footnote.

[12] See A. Bonomi, in: *Le droit européen*, and A. Dutta, in: *Münchener Kommentar, both cited above at fn. 4.*

[13] CJEU, 5.2.1963, Case 26/62 (*van Gend en Loos*), ECLI:EU:C:1963:1 at p. 12.

[14] See J. Basedow: *Gegenseitigkeit im Kollisionsrecht.* In: *Zwischenbilanz — Festschrift für Dagmar Coester-Waltjen zum 70. Geburtstag.* Bielefeld 2015, pp. 335—348;

In the context of the fundamental freedoms which confer rights upon private persons, the constant practice of the Court of Justice has rejected the principle of reciprocity. Member States are not permitted to exclude the application of the basic freedoms to citizens of other Member States which are in breach of their obligations under the Treaty[15]. This case law precludes an argument based upon the same principle in the context of EU private international law which is meant to protect individual rights.

It might however be argued that the Treaty itself is meant to promote recognition only to the extent that recognition is "mutual", see Article 81(1) TFEU, and that, contrary to the basic freedoms, the principle of reciprocity is therefore acknowledged in this field of EU policy. But Article 81 has to be read in conjunction with Article 67 TFEU which lays down the general guidelines for the establishment of the area of freedom, security, and justice. It follows from Article 67(4) TFEU that the recognition and enforcement of judgments is considered as an aspect of the access to justice and, moreover, that the principle of mutual recognition is only intended to *facilitate* access to justice, not to *obstruct* it.

It also emerges from Article 67(1) TFEU that the whole construction of Title V of the Treaty is aimed at the respect of fundamental rights. The traditional approach considered the recognition and enforcement of foreign judgments as an exercise of giving effect to the acts of a foreign sovereign; this approach is still reflected in Article 67(1) TFEU by the "respect [required] for the different legal systems and traditions of the Member States". But within the European Union this traditional approach has been supplemented by the "respect for fundamental rights", that is, an objective putting the individual and their private rights first. The protection of property by Article 17 ChFR is directly affected by the non-recognition of judgments in matters of succession. Where the courts of the Member States implement provisions of EU law such as the Succession Regulation they are required by Article 51 ChFR to respect the fundamental rights and should interpret its provisions to the widest extent possible in a way that ensures the respect for property rights.

J. Basedow: *The Law of Open Societies — Private Ordering and Public Regulation in the Conflict of Laws*. The Hague 2015, paras. 538—540.

[15] See for example CJEU, 16.5.2002, Case-142/01 (*Commission v. Italy*), ECLI:EU:C:2002:302, para. 7 (Italian requirement of reciprocity for the admission of foreign skiing instructors); CJEU, 13.2.2003, Case C-131/01 (*Commission v. Italy*), ECLI:EU:C:2003:96, paras. 39—46 (hidden requirement of reciprocity for the registration of foreign patent attorneys).

IV. The mirror principle

A second point relates to the alleged link of recognition under Article 39 with the application of provisions on jurisdiction and applicable law by the courts of the country of origin of the foreign judgment. It has been argued that the recognition of a foreign judgment is based upon the fact that the foreign court has applied the same rules on jurisdiction and choice of law that would apply in the country of recognition[16]. It is true that this link gave rise to the conclusion of the Brussels Convention of 1968 in the form of a *convention double*. And it is also true that the national legal provisions of many countries that govern the recognition of foreign judgments provide that the jurisdiction of the foreign court has to be checked under the rules of jurisdiction of the country of recognition. In accordance with the so-called mirror principle the court of the country of recognition has to examine whether it would have been competent had the same facts been submitted to it *mutatis mutandis*.

On the other hand, conventions which exclusively deal with the recognition of foreign judgments without covering rules on jurisdiction demonstrate that there is no such inherent link. Moreover, it is very well conceivable that a country gives effect to the judgment of a foreign court that has based its jurisdiction upon a provision that would not apply in the country of recognition. The mirror principle provides for a *minimum of respect* for foreign judgments, but the country of recognition is not precluded from going beyond that minimum. And the wording of Article 39 allows going beyond with regards to judgments originating in Denmark, the Republic of Ireland, and the United Kingdom.

A more open interpretation of Article 39 allowing for the recognition of decisions from the three countries might be an incentive for the courts of those States to respect judgments from participating Member States in a generous manner under their national provisions. At the same time it would avoid the private parties involved to be taken as hostages for the conduct of States.

[16] See A. Dutta, in: *Münchener Kommentar*, fn. 4.

V. Alternative solutions

The interpretation of Article 39 should also take into account the alternative solution that applies if the three non-participating countries are not considered as Member States. In this case the recognition of judgments originating in the three Member States would be left to the national provisions which deviate as between the participating Member States. In some countries such as Italy and Poland recognition and enforcement require that the foreign proceedings are in line with certain procedural principles, relating *inter alia* to jurisdiction, and do not violate the public policy of the forum[17]. In others such as Germany there is an additional requirement of reciprocity[18], and there are also Member States such as Sweden which exclude, in the absence of an international agreement with the country of origin, the recognition and enforcement of foreign judgments completely[19]. A strict interpretation of Article 39 would revitalise the differences between the national laws with regards to the recognition of judgments in matters of succession originating in Denmark, the Republic of Ireland, and the United Kingdom.

Let me illustrate with a final example what this means. Assuming that a Polish national living in Denmark passes away and that his estate consists of assets located in Denmark which was the country of his last habitual residence, and of real property located in Poland. Let us further assume that two children, both pretenders of the inheritance, one living in Denmark, the other in Sweden, start to litigate in Copenhagen. The resulting Danish judgment may be effective in Sweden under a Nordic convention[20]. But will it be recognised in Poland? Since it relates to real property located in Poland, the exclusive jurisdiction of Polish courts in matters relating to real property in Poland will likely be an impediment[21].

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[17] See Article 64 of the Italian law of 31 May 1995 No. 218 on the Reform of the Italian system of private international law and Article 1146 of the Polish Code of Civil Procedure.

[18] See § 328(1) No. 5 of the German Code of Civil Procedure.

[19] See M. Bogdan: *Sweden*, in: *International Encyclopedia of Laws — Private International Law*. Ed. B. Verschraegen. Alphen aan den Rijn 2012, para. 312.

[20] See M. Hellner: *Sweden*, in: J. Basedow, G. Rühl, F. Ferrari, P. de Miguel Asensio: *Encyclopedia of Private International Law*. Vol. 3, Cheltenham 2017, pp. 2535—2548 (2545 f.), referring to the Convention of the Nordic Countries of 11 October 1977 on the recognition and enforcement of judgments in the field of private law, published in Sveriges överenskommelser med främmande makter, SÖ 1978:11.

[21] A. Mączyński: *Poland*, in: J. Basedow, G. Rühl, F. Ferrari, P. de Miguel Asensio: *Encyclopedia*…, pp. 2421—2433 (2426) referring to the exclusive jurisdiction of Polish courts in matters relating to immovable property located in Poland.

As a consequence, the Danish judgment may become effective in Sweden, but not in Poland. This will perpetuate the dispute between the heirs. The exclusive competence does not matter if Article 39 applies as the basis of recognition. Similar examples could easily be added. They demonstrate that the alternative to an open interpretation of Article 39 is the chaos that prevailed in the area of recognition and enforcement of foreign judgments over so many years. This chaos is even aggravated by the migration of millions of Europeans that has occurred meanwhile on the basis of the fundamental freedom of movement.

It is unlikely that this unsatisfactory situation will be resolved by the conclusion of conventions on the recognition and enforcement of foreign judgments with the three non-participating States. The participating *Member States* are not allowed to negotiate such agreements, since the exclusive competence for their conclusion is vested in the European Union[22]. The *Union* has concluded a separate agreement with Denmark concerning jurisdiction and the recognition and enforcement in general civil and commercial matters; this was meant to ensure the continuous application of a uniform Brussels I regime in all Member States[23]. But the Union will not conclude similar agreements in other fields such as succession, since there are already provisions in the two Protocols mentioned above[24] that enable the three Member States to ensure the mutual recognition of judgments in matters of succession and other areas. Thus, the solution for the recognition and enforcement of judgments originating in Denmark, the Republic of Ireland, and the United Kingdom in matters of succession can only be conceived in the framework of the existing Regulation.

VI. Conclusion

These considerations do not suggest that the term "Member State" as employed in the Succession Regulation should always be interpreted in a wide sense including the three non-participating States. Whether a wide or a narrow interpretation is appropriate depends on the context

[22] See CJEU, 7.2.2006, opinion 1/03 (*Lugano Convention*), ECLI:EU:C:2006:81.

[23] Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, done at Brussels on 19 October 2005, OJ 2005 L 299/62.

[24] See fn. 2.

and the purpose of the single provision. Thus, most provisions contained in the chapter on jurisdiction refer to participating Member States only. But Article 13 provides a counter-example. Where proceedings are conducted in a court of a participating Member State and a person designated as heir and resident in a non-participating Member State wants to waive the succession, the court of his or her habitual residence in Denmark, the Republic of Ireland, or the United Kingdom may be considered as having jurisdiction for that purpose under Article 13 provided that the law of the forum of habitual residence allows such a declaration.

In a similar vein, Article 57 on the requirement of an enforcement security can easily be applied where the enforcement of a judgment from a non-participating Member State in a participating Member State is at issue. The same is true for the acceptance of an authentic act established in Denmark, Ireland, or the UK, in other parts of the Union, Article 60. In Article 39 the term Member State is used twice, for the country of origin of the judgment and for the country of recognition. It is only for the designation of the country of origin of the decision that a wide interpretation of the term is appropriate. Where the recognition is requested in a non-participating Member State, this will of course be decided on the basis of national law, not the Regulation.

In summary, a uniform interpretation of the concept of Member State in all provisions of the Succession Regulation is far too sweeping. It reminds of *Begriffsjurisprudenz* and does not take account of the purpose of the single provisions. In particular, it disregards the need for the cross-border protection of individual rights in a Union with open frontiers.

References

Basedow J.: *Gegenseitigkeit im Kollisionsrecht*. In: *Zwischenbilanz — Festschrift für Dagmar Coester-Waltjen zum 70. Geburtstag*. Bielefeld 2015, pp. 335—348.

Basedow J.: *The Law of Open Societies — Private Ordering and Public Regulation in the Conflict of Laws*. The Hague 2015.

Basedow J., Rühl G., Ferrari F., de Miguel Asensio P.: *Encyclopedia of Private International Law*. Vol. 3, Cheltenham 2017.

Bogdan M.: *Sweden*, in: *International Encyclopedia of Laws — Private International Law*. Ed. B. Verschraegen. Alphen aan den Rijn 2012.

Bonomi A., in: *Le droit européen des successions — Commentaire du Règlement No. 650/2012 du 4 juillet 2012*. Eds. A. Bonomi, P. Wautelet. Bruxelles

2013; Bonomi A., Wautelet P. (eds.): *Le droit européen des successions — Commentaire du Règlement No. 650/2012 du 4 juillet 2012*. Bruxelles 2013. Carrascosa González J.: *El Reglamento Sucesorio Europeo 650/2012 de 4 de julio 2012 — Análisis crítico*. Granada 2014.

Dutta A., in: *Münchener Kommentar zum BGB*. Vol. 11, 7th edn. München 2018.

Dutta A., Weber J. (eds.): *Internationales Erbrecht*. München 2016.

Hellner M.: *Sweden*, in: J. Basedow, G. Rühl, F. Ferrari, P. de Miguel Asensio: *Encyclopedia of Private International Law*. Vol. 3, Cheltenham 2017, pp. 2535—2548.

Mączyński A., *Poland*, in: J. Basedow, G. Rühl, F. Ferrari, P. de Miguel Asensio: *Encyclopedia*…, pp. 2421—2433.

Nielsen P. A.: *Denmark and EU Civil Cooperation*. "Zeitschrift für Europäisches Privatrecht" 2016, pp. 300—309.

Weber J., in: *Internationales Erbrecht*. Eds. A. Dutta, J. Weber. München 2016.

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Application of the Succession Regulation by German courts — Selected Issues

Abstract: The article discusses the impact of the EU Succession Regulation on the German system of private international law. The change came with some important differences introduced in the text of the Regulation as in comparison to previous German solutions (especially the use of the habitual residence as the main connecting factor instead of nationality), and, as a result of the number of decisions of the CJEU on the Regulation (in particular the *Kubicka* case).

The paper presents the most important, up-to-date German case-law relating to the EU Succession Regulation. It starts with the general remarks in that regard and continues to discuss judgments covering issues of jurisdiction, applicable law, and the European Certificate of Succession. Three conclusions are drawn therefrom. First, the cases show a general willingness of the courts to cope with the fundamental changes introduced by the Regulation. In particular, the concept of "habitual residence" is applied on the basis of an autonomous interpretation by reference to the case-law of the CJEU on Regulation Brussels IIa. Second, a number of decisions make apparent that the courts are sometimes slow to accept the consequences which flow from the changes brought about by the Regulation, and which oblige to re-consider the German practice in matters of international successions. That applies in particular to the issuing of the European Certificate of Succession. Third, German courts are generally ready to initiate cooperation with the CJEU by formulating preliminary questions (three questions posed by the end of 2019).

Keywords: private international law — EU Succession Regulation — case law of German courts — European Certificate of Succession

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I. Introduction: Impact of the Succession Regulation on the German system of private international law

The adoption of uniform provisions on jurisdiction, the applicable law, and the recognition and enforcement of decisions in matters of succession by Regulation No. 650/2012 (to which I will refer hereafter as the Succession Regulation, or "SR") had, unsurprisingly, a decisive impact on the systems of conflict of laws of the EU Member States. Although it was not the most affected, the German conflicts system also underwent important changes. These changes were of two kinds. They resulted, firstly, from certain guiding principles enacted in the Regulation itself, and, secondly, from a number of rulings of the Court of Justice of the European Union (hereafter: "CJEU"). The most far-reaching change generated by the Regulation was the choice of the *habitual residence of the deceased* as the general connecting factor for the purposes of determining both jurisdiction and applicable law (Articles 4 and 21). It replaced the long-standing German conflicts rule according to which the *nationality* of the deceased was the decisive factor for the determination of the *lex successionis*. A further change resulted from the possibility for the testator to *choose*, instead of the law of the habitual residence, the law of the State whose nationality he possesses at the time of making the choice or at the time of death as the law governing his succession (Article 22). The hitherto applicable rule in Germany only allowed the choice of German law for the succession to immovables situated in Germany[1]. So far for the most important changes brought about by the Regulation itself. It may be mentioned in that context that another general principle of the Regulation, according to which the applicable law is to govern the succession *as a whole*, did not come as a novelty, as German conflicts law adhered since long to the principle of *Nachlasseinheit* and, in particular, did not distinguish, as regards the scope of the applicable law, between succession to movables and to immovables.

In addition to the aforementioned changes, German conflicts law in matters of succession was affected by a number of decisions of the CJEU on the Regulation, of which I will mention three. The first ruling, given in the Polish-German case of *Kubicka*[2], concerned the recognition in Ger-

[1] See the former Article 25(2) of the Introductory Law to the (German) Civil Code (EGBGB).

[2] CJEU, 12.10.2017, C-218/16 *Kubicka*; cf. the comment by Thorn, Lasthaus, "Praxis des Internationalen Privat- und Verfahrensrechts" (hereafter: "IPRax") 2019, p. 24; Weber, "Deutsche Notar-Zeitschrift" 2018, p. 16.

many of the material effect of a legacy "by vindication" provided for by the law governing succession (in the instant case, Polish law). Although German law only provides for legacies "by damnation"[3], the CJEU ruled that where immovable property situated in Germany is the object of a legacy "by vindication", Germany has to recognise the direct material effect provided for by the Polish *lex successionis*. In its judgment the CJEU insisted on the principle of unity of the succession and stated that "to accept that Article 1(2)(l) of Regulation No 650/2012 allows the acquisition of ownership of an asset by legacy 'by vindication' to be excluded from the scope of that regulation would lead to the *fragmentation of the succession*, which is incompatible with the wording of Article 23 of the same regulation and with its objective"[4]. The second ruling of the CJEU that has to be mentioned likewise obliged Germany to depart from an accepted principle of German private international law. It related to the characterisation of a provision of German substantive law situated at the intersection between succession and matrimonial property law. That provision, § 1371(1) of the Civil Code (BGB), concerns the share of the inheritance of the surviving spouse if the spouses lived in the property regime of community of accrued gains (*Zugewinngemeinschaft*). It provides that at the death of a spouse "the equalisation of the accrued gains is effected by increasing the share in the inheritance on intestacy of the surviving spouse by one quarter". Whether that provision is part of inheritance law or matrimonial property law was highly controversial in German private international law until the Bundesgerichtshof (BGH) ruled in 2015 that the "flat-rate equalisation" of accrued gains provided for in § 1371(1) BGB was to be classified as "purely matrimonial property law"[5]. For the BGH, the purpose of the provision was decisive: to dispose of the matrimonial property regime as a special arrangement of the property of

[3] Before the European Court, the German government referred to the explanatory memorandum of the German draft law on international succession law and amending the provisions governing the certificate of succession and other provisions (Gesetzesentwurf der Bundesregierung, Bundestag-Drucksache 17/5451 of 4 March 2015) which provides that it is not obligatory, in the context of Regulation No 650/2012, for German law to recognise a legacy "by vindication" on the basis of a will drawn up according to the law of another Member State.

[4] Para. 57, emphasis added.

[5] BGH 13.5.2015 — IV ZB 30/14, BGHZ 205, 289, "Zeitschrift für das gesamte Familienrecht" (hereafter: "FamRZ") 2015, p. 1180 with a comment by Mankowski. In that case, the inheritance share of the surviving spouse was to be determined in accordance with Greek law and amounted to one quarter; the spouses had lived in the matrimonial property regime of the community of accrued gains pursuant to German law, so that the increase of the statutory inheritance portion by one quarter pursuant to § 1371(1) BGB was effected by virtue of *matrimonial property law*.

the spouses, not to allow the survivor to participate in the deceased's property by virtue of his attachment to the deceased. The increase in the statutory share of the inheritance was conceived by the legislature as a *special type of equalisation of gains*, and that function was not called into question by the fact that it was realised "by way of inheritance law". It was no surprise that the analogous issue presented itself under the Succession Regulation: Does a provision like § 1371(1) BGB fall under the concept of succession upon death as understood by the Regulation, or is it excluded therefrom because it concerns a question "relating to matrimonial property regimes" (Article 1(2)(d))? Contrary to expectations in legal literature, which had predominantly welcomed the matrimonial property characterisation by the BGH, the CJEU decided that § 1371(1) BGB had to be characterised as belonging to the law of succession.[6] By contrast to the BGH, the Court of Justice, in agreement with the Opinion of Advocate General Szpunar, saw the "main purpose" of this provision not in the division of property between the spouses or in the termination of the matrimonial property regime, but "in the determination of the portion of the inheritance which belongs to the surviving spouse in relation to the other heirs"[7]. Such a provision "principally" concerns succession to the estate of the deceased spouse and not the division of assets between spouses or the termination of the matrimonial property regime[8]. The consequence of this is, in particular, that information on the increased share of the inheritance pursuant to § 1371(1) BGB has to be included in the European Certificate of Succession. The CJEU adds that the objectives pursued by this certificate would be significantly compromised if it did not "include full information relating to the surviving spouse's rights regarding the estate"[9]. Following the CJEU's ruling the application of the Succession Regulation is undoubtedly facilitated; moreover the *effet utile* of the European Certificate of Succession is ensured. With the characterisation of § 1371(1) BGB as belonging to inheritance law, the CJEU did not, however, eliminate the problem of the interfaces between inheritance law and property law, but merely reversed its signs. Since the "matrimonial property quarter" presupposes that the spouses have lived under the property regime of the community of accrued gains, a "clean" solution presupposes that German law governs both the suc-

[6] CJEU, 1.3.2018, C-558/16 Mahnkopf, "FamRZ" 2018, p. 632 with a comment by Fornasier.

[7] Para. 40 of the judgment.

[8] This statement is also supported by the fact that according to § 1371(1) BGB the increase in the statutory share of the inheritance by a quarter is independent of whether the spouses have made any gains at all.

[9] Para. 43 of the judgment.

cession and the property regime. If the succession and property regimes diverge, problems of coordination and adaptation arise as before.

The third ruling of the CJEU which had an important impact on the German law and practice in matters of international successions concerned the scope of Article 4 SR on the general jurisdiction of the courts of the Member State in which the deceased had his habitual residence "to rule on the succession as a whole". Does that provision, which applies for the issuing of European Certificates of Succession (ECS), also apply for the issuing of *national* certificates of succession (which are not precluded by the ECS)? The background to that question was a provision of German law relating to the (international and territorial) jurisdiction of courts in matters of succession,[10] which stipulates that where the deceased did not have his habitual residence in Germany, the Amtsgericht Schöneberg in Berlin shall have jurisdiction if the deceased was a German national or if part of the estate is located in Germany. The CJEU ruled that Article 4 SR precluded national legislation such as the German provision[11]. In agreement with A-G Szpunar, the Court understood Article 4 as applying to *all* proceedings in matters of succession taking place before the courts of the Member States irrespective of whether decisions were given in contentious or non-contentious proceedings. Thus the provision covers also procedures that do *not* lead to the adoption of a judicial decision as defined by the Regulation. Again, the Court emphasised the principle of the unity of the succession, to which it added that the rules of the Regulation are devised so as to ensure that the court having jurisdiction will, in most situations, have to apply its own law. Clearly, allowing the courts of the Member States to issue national certificates of succession when they have jurisdiction according to national law bears the risk that the *Gleichlauf*-principle is not respected and that contradictory decisions relating to the succession may be given in the Member States. The CJEU's ruling puts an end to the long-standing practice of German courts to issue (national) certificates of succession under foreign law relating, and limited, to assets located in Germany (*gegenständlich beschränkte Fremdrechtserbscheine*). At the same time, the ruling strengthens the role of the ECS, although national certificates of succession may still be issued by the courts or a competent authority in another Member State having jurisdiction under Article 4 SC.

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[10] § 343(3) of the law on proceedings in family matters and matters subject to non-contentious proceedings (FamFG). Whether that provision was overruled by Article 4 SC was a matter of controversy when the German implementing legislation was prepared, see the details reported by Fornasier, "FamRZ" 2018, p. 1265.

[11] CJEU, 21.6.2018, C-20/17 *Oberle,* "FamRZ" 2018, p. 1262 with a comment by Fornasier.

II. German case-law on the Succession Regulation — general remarks

Decisions of German courts on the Succession Regulation have become known since 2016. However, there are no reliable figures on the number of cases decided under the SR. As judgments or orders of first instance courts have rarely been made public, most of the case-law publicly available emanates from higher regional courts, the Oberlandesgerichte (OLG), which decide on appeal[12]. The first and, so far, only decision of the Federal Court of Justice, the Bundesgerichtshof (BGH)[13], has been delivered in July 2019[14]. Most of the decisions have been published in legal periodicals, some only in the *juris* database. The decisions have mainly been given in non-contentious proceedings relating to the issuing of certificates of succession, either European or national. They frequently address points of jurisdiction, while questions relating to the applicable law are less discussed. The following paragraphs will present a limited number of decisions which deserve particular attention.

1. Jurisdiction

In matters of jurisdiction, the habitual residence of the deceased — the main connecting factor for the determination of both the jurisdiction of courts and the applicable law — had to be frequently assessed by the courts. Where that concept is discussed in some depth, the courts refer to Recitals 23 and 24 of the SR and to the case-law of the CJEU on Regulation Brussels IIa.[15] On the basis that it is an *autonomous* concept of EU law, the courts are often paraphrasing the requirement, formulated in Recital 23, that they have to "make an overall assessment of the circumstances of the life of the deceased during the years preceding

[12] For the present report, approximately 20 appeal decisions have been considered.

[13] The BGH decides on further appeals (*Revision* or *Rechtsbeschwerde*), which require that leave to appeal has been granted by the OLG. In contentious proceedings, the decision not to grant leave to appeal may itself be appealed; by contrast, no such appeal lies if leave to appeal is not granted in non-contentious proceedings, cf. § 61 FamFG.

[14] BGH, 10.7.2019, *infra*, fn. 24.

[15] The case-law referred to includes in particular the judgments in the "A" case (2.4.2009, C-523/07) and the *Mercredi* case (22.12.2010, C-497/10 PPU). For a comprehensive discussion of the concept see Kurth: *Der gewöhnliche Aufenthalt in Art. 4, 21 Abs. 1 EuErbVO, 2017*, reviewed by Mankowski, "FamRZ" 2018, p. 672.

his death and at the time of his death, taking account of all relevant factual elements, in particular the duration and regularity of the deceased's presence in the State concerned and the conditions and reasons for that presence. The habitual residence thus determined should reveal a close and stable connection with the State concerned taking into account the specific aims of [the] Regulation." In that context, two scenarios of more general interest have been discussed by the courts. The first concerns the determination of the habitual residence of a cross-border commuter. In a case decided by the Berlin Kammergericht in 2016[16], the deceased, a German national, had, after retirement, moved to Poland where he had rented a flat close to the German border. He maintained an apartment in his daughter's house in Berlin but, apparently, never stayed there. Anyhow, he continued his former business as a construction entrepreneur on the German side of the border while always returning to his place in Poland. It appeared that his family and social contacts in Berlin were not disrupted and continued as before; he also kept his German bank accounts. His ties to Poland were tenuous. He did not speak Polish and had no contacts in Poland, with the exception of casual conversations with the pastor of the local church, who spoke German. On these findings, the Kammergericht concluded that the centre of the life interests (*Mittelpunkt des Lebensinteresses*) of the deceased had not changed after retirement and that his habitual residence continued to be in Germany. Although that conclusion seems arguable, it has been rightly remarked that it needs particularly strong elements to rebut the presumption, recalled by a German legal scholar, that the habitual residence is "where one goes to sleep"[17]. In the rather atypical case at hand those elements were probably present. But take the case of modern European nomads: a French couple working in Luxembourg with an international organisation, who rented an apartment on the German side of the Moselle where they return every night. Even if they do not speak German, and although they may go to Paris over the weekend on a regular basis, the presumption based on the German place of abode would point to an habitual residence in Germany.

Another scenario relates to the situation of German pensioners spending their life after retirement out of Germany, preferably in Spain, while keeping at least part of their family and social relations in Germany. The determination of the centre of life of the deceased may be difficult in those cases. As the courts consider "habitual residence" to be a *fac-*

[16] Kammergericht, 26.4.2016, "FamRZ" 2016, p. 1203 with a comment by Mankowski, "IPRax" 2018, p. 72 with a comment by Martiny, p. 29.

[17] Mankowski, "FamRZ" 2016, p. 1204.

tual concept, its determination requires them in the first place to bring together the "factual elements" mentioned in Recital 23 of the SR[18]. The evaluation of those elements is left to the discretion of the court, and it does not come as a surprise that in a given case the first instance court and the appellate court come, with equal conviction, to opposite results[19]. In that context, the courts emphasise at times that the points to be taken into account include not only objective but also subjective elements, in particular the *intention of the deceased* to stay and to remain in a given place.[20] To that end the courts often cite commentators of the Succession Regulation who refer to the CJEU's judgment in the *Mercredi* case where the Court said that "[b]efore habitual residence can be transferred to the host State, it is of paramount importance that the person concerned has it in mind to establish there the permanent or habitual centre of his interests, with the *intention* that it should be of a lasting character. Accordingly, the duration of a stay can serve only as an indicator in the assessment of the permanence of the residence, and that assessment must be carried out in the light of all the circumstances of fact specific to the individual case[21]." The *Mercredi* case concerned the interpretation of Article 8 of Regulation Brussels IIa. There are valid reasons to transpose the statement of the European Court, *mutatis mutandis*, to the interpretation of the concept of habitual residence in the Succession Regulation. But this is far from being *acte clair*, and a reference to the CJEU would seem appropriate before reaching that conclusion.

Particular problems arise where the deceased died in a hospital or a nursing home in a far-away country (where he had been brought by relatives because the cost of long-term care is lower than in European countries). What elements are required in order to conclude that the ha-

[18] See Oberlandesgericht Hamburg, 16.11.2016, "FamRZ" 2017, p. 568; Oberlandesgericht Köln, 4.07.2018 — 2 Wx 222/18, *juris*.

[19] See, for example, Oberlandesgericht Hamm, 2.01.2018, IPRax" 2019, 151 with a critical comment by Kurth, p. 123), a case where the deceased, who had died in Spain, had lived in that country for many years, *inter alia* during his second marriage. That marriage was followed by a third one in Germany, but the deceased had separated from his wife and gone again to Spain. However, he was still a registered resident in Germany and his mail was not forwarded to Spain; he received medical treatment in Germany, and allegedly wished to return there. While the first instance court had concluded that the habitual residence of the deceased was in Spain, the OLG Hamm came to the opposite result.

[20] Obviously, the existence of the *animus manendi* is often inferred from *objective* elements and thus again left to the discretion of the courts. In the case referred to above, the Oberlandesgericht emphasised that the deceased had lacked the intention to stay permanently in Spain. A certain "homeward trend" may have guided that conclusion of the German court.

[21] CJEU, 22.12.2010, C-497/10 PPU Mercredi, para. 51 emphasis added.

bitual residence of the deceased has been transferred to that country? According to the Oberlandesgericht München[22] the intention of the deceased to stay and to remain in the host State must be established also in these cases. On the basis that habitual residence is a factual concept, the court held that the *animus manendi* does not require full legal capacity, but that the person concerned must be in a position to express his intentions. The court also emphasised that there can be *no legal representation* of that person in the context of establishing a habitual residence; otherwise, the legal representative would be in a position to choose the applicable law to the succession of the person concerned. Clearly, also as regards that issue a reference to the CJEU would have been appropriate.

2. Applicable law

There have been so far only a few decisions in which the choice-of-law rules of the Succession Regulation have been discussed by German courts. In the case decided by the Bundesgerichtshof in July, 2019, those rules had to be applied pursuant to the transitional provisions of Article 83 SR[23]. The deceased, a woman of German nationality who died in 2017, left two dispositions of property upon death, an agreement as to succession (*Erbvertrag*) concluded in 1998, and a will made in 2016; both instruments had been made in Germany before a notary. The deceased had concluded the agreement with her then life companion, an Italian national who had lived in Germany since 1986. In the agreement they appointed each other as sole heirs; their two children were to be heirs of the surviving party. They also declared that their succession was to be governed in every respect by German law. In 1998, however, such a choice was not permitted under German conflicts law[24]. In 2016, after their relationship had come to an end, the woman made a will in which she appointed as heirs her unborn grand-children and, in case that no grand-children should be living at the time of her death, another person, the appellant in the instant case. After her death, her former companion claimed to be her sole heir arguing that the 2016 will was null and void because it violated the 1998 agreement. That claim was opposed by the presumptive heir, who argued that the 1998 agreement was

[22] Oberlandesgericht München, 22.3.2017, "FamRZ" 2017, p. 1251.

[23] BGH, 10.7.2019 — IV ZB 22/18, "FamRZ" 2019, p. 1561, with a comment by von Bar. I am grateful to Dr Carl-Friedrich Nordmeier for his comments on this decision.

[24] It was, however, allowed under Italian law in the relevant time, see the following footnote.

invalid as its conclusion was governed, as far as the companion of the deceased was concerned, by Italian law according to which a disposition of property with binding effect is invalid because it limits the testamentary freedom of the testator[25]. The Bundesgerichtshof upheld the claim of the deceased's companion. Starting from Article 83(2) SR, the court held that according to Article 25(3) SR the parties to the 1998 agreement had validly chosen German law to govern the agreement as that provision permits the parties to choose the law of a State of which either of the parties is a national. German law, validly chosen, allows agreements as to succession with binding effect and provides that a subsequent disposition of property upon death is invalid to the extent that it impairs the rights of the beneficiary of the agreement[26]. The court then discusses the appellant's argument that the retroactive application of the conflict rules of the SR — which leads to the validity of the initially invalid choice of German law — violates the principles of legal certainty and non-retroactivity recognised by EU law and German constitutional law. However, according to the court, these principles apply only to cases of *authentic* retroactivity, that is, cases where the provision in question is designed to control a situation which is already completed or "closed" (*abgeschlossen*) because it has produced its effects in the past. In the present context that would be the case if the testator had died, and the succession had been opened, *before* the applicability of the Succession Regulation[27]. By contrast, the retroactive effect of Article 83(2) SR is permitted — as *in-*

[25] See Article 458 Codice civile. It is, however, open to doubt whether Italian law was applicable at the time the agreement was made. Under German conflicts law in force in 1998 the admissibility of the agreement was governed for each party by his or her national law, that is, German law and Italian law in the present case. However, the reference to Italian law included the rules of private international law, and according to Article 46(2) of the Italian Act on Private International Law (Law No 218 of 1995) a person could choose as the law to govern his succession, instead of the *lex patriae* which would normally apply, the law of the State of his habitual residence. Thus, in the instant case, the choice of German law by the Italian companion of the deceased was valid and lead to a *renvoi* to German law. As a result, as German law applied in any case to the deceased because of her German nationality, the admissibility of the 1998 agreement was to be assessed solely under that law.

[26] See § 2289 BGB.

[27] In a case decided by the Oberlandesgericht Schleswig (25.4.2016 — 3 Wx 122/15, "FamRZ" 2016, 1606) the presumptive heir of the deceased, a national of Poland who had died in 2014, argued that the German legislator had ordered the retroactive application of the SR so as to cover the succession of the deceased. That is rightly denied by the court: the new Article 25 of the Introductory Law to the German BGB, which became applicable on August 17, 2015, provides for the analogous application of Chapter III of the SR in matters of succession *not* covered by the Regulation. A retroactive application of the SR itself is of course not intended.

authentic retroactivity — where the testator died on or after August 17, 2015, because the succession is opened only at that time. The court refers to the objectives of the transitional rules which tend not only to ensure the validity of dispositions of property made before the applicability of the Regulation but also to permit invalid dispositions to become valid. The court detects here a *favor testamenti* which amounts to a rule of validation, whereas it is not prepared to protect a party's expectations as to the *invalidity* of a previous disposition of property upon death.

In a case before the Amtsgericht Hamburg-Wandsbeck decided in 2018[28] the court had to rule on the interpretation of a joint will that had been made by the deceased and her husband in Chicago in 1967. Both were German nationals who had emigrated to the Unites States. The will was typewritten and signed by the couple and three witnesses. It disposed that upon the death of one of the spouses their property "shall be held by the survivor to use the same as the survivor may see fit, and to have and to hold to the said survivor, survivor's heirs and assigns forever". The husband died in the United States in 1968. The wife died when the Succession Regulation already applied. Before the Hamburg court, a dispute about the heritage arose between the siblings of the wife and other relatives. The court held that the succession to the deceased was governed by the Regulation according to Article 83(1) SR. The *formal* validity of the joint will made in 1967 is then assessed according to the 1961 Hague Convention on the form of wills (to which Article 75(1) SR refers). The court applies Illinois law as the law of the place where the testamentary disposition was made, and affirms the formal validity of the will according to § 43 of the Illinois Probate Act of 1939, as applicable in 1967. The court then determined the law applicable to the *interpretation* of the will, which was at the centre of the dispute. As according to Art. 26(1)(d) SR the interpretation pertains to the substantive validity of the will, the court had to determine the law applicable in that respect. Applying Art. 83(3) and Art. 24(1) SR, the court refers to Illinois law as the law of the habitual residence of the testator at the time the will was made which, according to Art. 21 SR, would have been applicable to the succession if the testator had died on the day on which the disposition was made. Thus Illinois law as the hypothetically applicable law governs also the interpretation of the will. Having reached that conclusion, the court, in an *obiter dictum*, expresses doubts as to its result. It notes that under the German conflict rules in force in 1967, the interpretation of the will of the testator would have been governed by German law as the

[28] Amtsgericht Hamburg-Wandsbeck, 17.05.2018, "FamRZ" 2018, p. 1274 with a critical comment by Ludwig.

law governing the succession because of the nationality of the couple. That situation changed with the applicability of the SR in 2015. According to the court, the change of the applicable law seems problematic as the testator had relied since 1967 on the applicability of German law. The court then looks for a possibility to apply German law under the rules of the SR. It envisages to apply Art. 21(2) SR, which provides, by way of exception, for the application of the law of another State than that of the habitual residence if the deceased was manifestly more closely connected with that other State. Referring to the German nationality of the deceased, her lasting connections with Germany, and the fact that the beneficiaries of the will were in Germany, the court seemed disposed to conclude that the deceased is more closely connected with Germany than with Illinois. However, it did not decide the issue as the interpretation of the will according to German law would have yielded the same result as the interpretation according to the law of Illinois.

As far as the *scope* of the applicable law is concerned, a decision of the Oberlandesgericht Saarbrücken applying the reasoning of the CJEU's ruling in *Kubicka* deserves mentioning[29]. A resident of France died in 2016, without leaving a will. His estate included an apartment in Germany. French law governed the succession, and heirs on intestacy were the wife of the deceased, and descendants. The wife applied to the competent German court for a rectification of the land register (*Grundbuch*) where the deceased was registered as owner of the apartment. She presented a European Certificate of Succession, issued by a notary in Paris, according to which, upon the partition of the estate, she was entitled to 5/8 as full property, and 3/8 as usufruct, and asked that her position be registered accordingly. The first instance court dismissed the application. As regards the registration of the usufruct, that court noted that a transfer of title by the heirs was necessary because the usufruct had no effect *in rem* for the purposes of registration in the German land register. On appeal that decision was overturned. Referring to the CJEU's judgment in *Kubicka*[30], the appellate court held that where the *lex successionis* provided for the direct material effect of a legacy ("legacy by vindication") that effect was to be recognised also in a Member State whose law provides only for legacies "by damnation", which only have effect *in personam*. That principle applied to the usufruct of the surviving spouse according to French law. Accordingly, the registration of the usufruct did not require a consensual transfer of title as the wife acquired

[29] Oberlandesgericht Saarbrücken, 23.5.2019 — 5 W 25/19, "FamRZ" 2019, p. 1569.
[30] *Supra*, fn. 3.

that right with direct effect *ex lege* upon the death of her spouse[31]. This meant that the German land register was no longer correct and had to be rectified. In order to *prove* the incorrectness of the land register it suffices according to the court that the beneficiary presents a European Certificate of Succession which contains the information about the right in question. The court points to Art. 63(2)(b) SR, according to which the ECS may be used to demonstrate "the attribution of a specific asset … of the estate to the heir(s) or … the legatee(s) mentioned in the Certificate". That Certificate must be accepted as proof for the purposes of registration of an asset of the estate. The court rejects the argument put forward by German authors that the court has still to verify whether according to the *lex successionis* the acquisition of the right mentioned in the certificate took place with immediate effect. The court refers to Article 69(2)(2) SR, which provides that the person mentioned in the Certificate as heir or legatee is "*presumed* to have the status"[32] and hold the right therein mentioned "with no conditions and/or restrictions being attached to [the right in question] other than those stated in the Certificate". However, that presumption may be rebutted, and the authority to which the Certificate is presented is entitled to verify its content "like in the case of national certificates of succession" where there are doubts as to its correctness. Finally, the court gives detailed instructions to the lower court how to proceed in the case at hand. Clearly, the elaborated reasoning of the court shows its consciousness that the situation under the Succession Regulation is dramatically different from the hitherto applicable rules and overturns the long-standing German practice in matters of administering successions governed by foreign law.

3. The European Certificate of Succession

In the cases just mentioned the German courts had to deal with the administration of estates where *foreign* law governed the succession. Another line of cases shows that comparable problems may arise where German law is applicable in that respect. A number of decisions delivered by the appellate courts in Nuremberg and Munich concerned cases where the estate of the deceased included immovable property situated in other Member States. In these cases, in order to register the acquisi-

[31] See also Jacoby: *Die Rechte des überlebenden Ehegatten und das europäische Nachlasszeugnis in den deutsch-französischen Beziehungen*. „GPR — Zeitschrift für das Privatrecht der Europäischen Union" 2018, p. 303.

[32] Emphasis added.

tion of the property by the heirs the foreign registration authority asked for a certificate of succession where the particular immovable was identified. As German law adheres to the principle of *Universalsukzession*[33] according to which the succession as a whole, or a share thereof, passes to the heir(s), a national certificate of succession (*Erbschein*), which demonstrates the status of the heir(s), never mentions *single* assets of the estate. Does that principle apply also to the European Certificate of Succession? In a typical case concerning immovable property in Austria, the Munich Court of Appeals refused the application of the sole heir to have the property mentioned in the ECS for the purposes of registration in Austria[34]. The court emphasised that the principle of universal succession excludes any mention of individual assets in the ECS. It then turned to Art. 63(2)(b) SR, which provides that the Certificate may be used to demonstrate the attribution of specific assets to the heirs, and Art. 68(l) SR, according to which the Certificate may contain a list of assets for any given heir. According the court, those provisions only apply where individual assets are attributed to the heir with immediate effect *ex lege*, like in the case of the partition of an estate according to foreign law (legacies by vindication are not mentioned by the court). As German law provides for the attribution of the succession as a whole the said provisions were not applicable. The court follows herewith the interpretation of the provisions in cases previously decided by the Nuremberg Court of Appeals[35]. However, that case-law has rightly been criticised by German legal scholars[36], who emphasise that nothing in the wording of Art. 68(l) and (m) SR warrants the narrow interpretation advanced by the Nuremberg and Munich courts. On the contrary, the objectives and the *effet utile* of the ECS to facilitate the administration of successions in the EU are better served if individual assets are mentioned in the Certificate also in cases where the *lex successionis* follows the principle of universal succession. Actually, a broader interpretation of the provisions of the

[33] As opposed to *Singularsukzession* or *Einzelrechtsnachfolge*.

[34] Oberlandesgericht München, 12.09.2017, "FamRZ" 2018, p. 142. It appears however that the position of the lower Austrian courts has been overruled by the Austrian Supreme Court (Oberster Gerichtshof [OGH]) who is ready to accept a ECS concerning successions under German law where immovables in Austria are not mentioned, see OGH, 29.08.2017 — 5 Ob 108/17v, "FamRZ" 2018, p. 635, and OGH, 15.5.2018 — 5 Ob 35/18k, EvBl 2018/151.

[35] See Oberlandesgericht Nürnberg, decisions of 5.4.2017 ("FamRZ" 2018, p. 143, "IPRax" 2019, p. 327) and 27.10.2017 ("IPRax" 2019, p. 328).

[36] See in particular Nordmeier, *Die Aufnahme einzelner Nachlassgegenstände in das Europäische Nachlasszeugnis — zum durch den Todesfall bedingten Rechtserwerb und zur Reichweite der Art. 68 lit. l und m EuErbVO*. "IPRax" 2019, p. 306.

SR appears to be in line with the CJEU's decisions in *Kubicka*[37] and *Mahnkopf*[38] where the objectives of the ECS were referred to in order to support the findings of the Court.

However, it has to be kept in mind that individual rights or assets may be mentioned in the ECS only if they have been attributed to the beneficiary *successionis causa*. Rights, interests and assets "created or transferred otherwise than by succession" are excluded from the scope of the SR according to Art. 1(2)(g). That principle was applied by the Nuremberg Court of Appeals[39] in a case where the deceased and her husband were joint owners of an apartment in Austria. According to the relevant Austrian legislation the surviving spouse acquires full ownership by way of accrual (*Anwachsung*) upon the death of the other spouse[40]. According to the court, such acquisition is comparable to the effects of a *joint tenancy*[41] and takes place otherwise than by succession. It is thus excluded from the Regulation, and the right of ownership acquired by way of accrual may not be mentioned in the ECS. Anyhow, in order to define the conditions under which individual assets of the estate may be mentioned in the ECS under Art. 68 SR, in particular in cases where such mention is necessary for the purposes of registration, a reference to the CJEU would seem required in an appropriate case.

IV. Concluding remarks

It is obviously too early to draw solid conclusions from the German case-law under the Succession Regulation delivered so far. The number of reported cases is small, and decisions merely applying the provisions of the Regulation are of limited interest. However, three tentative findings may be formulated. *First*, the cases presented show a general willingness of the courts to cope with the fundamental changes introduced by the SR. They also show that the courts are ready to interpret key concepts of the Regulation in a European way. In particular the concept of "habitual residence" is applied on the basis of an autonomous interpretation by reference to the case-law of the CJEU on Regulation

[37] *Supra*, fn. 2.
[38] *Supra*, fn. 6.
[39] Oberlandesgericht Nürnberg, 25.4.2017, "IPRax" 2019, 328.
[40] § 14 Wohnungseigentumsgesetz.
[41] Expressly mentioned in the German version of Article 1(2)(g) SR.

Brussels IIa, and mindful of a coherent application of the concepts of European private international law. *Second*, a number of decisions make apparent that the courts are sometimes slow to accept the consequences which flow from the changes brought about by the Regulation, and which oblige to re-consider the German practice in matters of international successions. That applies in particular to the issuing of the European Certificate of Succession. In that respect the provisions of the Regulation are sometimes viewed under the strict rules governing the issuing of the German *Erbschein*. The *third* finding concerns the role of the European Court. German courts have already triggered three preliminary rulings on the interpretation of the SR. In the cases presented herein a number of issues have become apparent which deserve to be referred to the CJEU. They concern, *inter alia*, elements of the concept of habitual residence in Art. 4 and Art. 21 SR, and the content of the ECS. Clearly, a further contribution of the European Court would be welcome in order to facilitate, and harmonise, the application of the Regulation in the Member States.

References

Fornasier M.: A comment to decision of CJEU, 1.3.2018, "Zeitschrift für das gesamte Familienrecht" 2018, pp. 624—632.

Fornasier M.: A comment to decision of CJEU, 21.6.2018, "Zeitschrift für das gesamte Familienrecht" 2018, pp. 1265—1266.

Jacoby E.: *Die Rechte des überlebenden Ehegatten und das europäische Nachlasszeugnis in den deutsch-französischen Beziehungen*, "GPR — Zeitschrift für das Privatrecht der Europäischen Union" 2018, pp. 303—308.

Kurth S.: *Der gewöhnliche Aufenthalt in Art. 4, 21 Abs. 1 EuErbVO, 2017*. Einzeldarstellung, 2018.

Mankowski P.: A comment to decision of BGH 13.5.2015, "Zeitschrift für das gesamte Familienrecht" 2015, pp. 1180—1183.

Mankowski P.: A review of *Der gewöhnliche Aufenthalt in Art. 4, 21 Abs. 1 EuErbVO, 2017*. "Zeitschrift für das gesamte Familienrecht" 2018, p. 672.

Mankowski P.: A comment to decision of Kammergericht Berlin, 26.4.2016, "Zeitschrift für das gesamte Familienrecht" 2016, p. 1203.

Nordmeier C.F.: *Die Aufnahme einzelner Nachlassgegenstände in das Europäische Nachlasszeugnis — zum durch den Todesfall bedingten Rechtserwerb und zur Reichweite der Art. 68 lit. l und m EuErbVO*. "IPRax" 2019, pp. 306—312.

Thorn K., Lasthaus C.: A comment on *Kubicka*, "Praxis des Internationalen Privat- und Verfahrensrechts" 2019, pp. 24—30.

Weber J.: *Kubicka und die Folgen: Vindikationslegate aus Sicht des deutschen immobiliarsachenrechts*, "Deutsche Notar-Zeitschrift: Verkündungsblatt der Bundesnotarkammer" 2018 nº 1, pp.16—32.

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The Notion of "Court" under the Succession Regulation

Abstract: The article concerns the notion of "court" in the Succession Regulation. This notion is used in the Brussels I and Brussels Ia Regulations, where it does not necessarily have the same scope. The author attempts to interpret the concept in the light of the recitals to the Succession Regulation (in particular Recital 20) and of the case law of the Court of Justice. The very general description of the concept contained in Article 3(2) of the Regulation might potentially embrace other authorities and legal professionals, where they exercise judicial functions by way of delegation of power from the court. In the author's view, the European Court, especially in *Oberle* and *WB v Notariusz Przemysława Bac* correctly navigated its way through the Succession Regulation and ruled in a way which is both coherent as regards the operation of the Regulation and consistent with the intentions of the legislator. The above judgments are analysed also with regard to Poland's omission to notify notaries as "courts" under Article 79 of the Succession Regulation. The European Court found that the criteria for determining whether an authority or a legal professional, in particular a notary public, constitutes a "court" are determined by Article 3(2) and not by Article 79. Consequently, Poland's omission to notify was not conclusive, but was in any event correct in substance. The author expresses the opinion that the judgment is accurate on this point.

Keywords: EU Succession Regulation – the notion of "court" – authentic instruments – judicial body – competent authority

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1. Introduction

Within the scheme of the Succession Regulation[1], the notion of "court" assumes considerable importance. Courts are bound by the jurisdiction rules of the Regulation[2], whereas other authorities, such as notaries, are not, unless they are exercising judicial functions[3]. Court decisions circulate under Chapter IV of the Regulation[4], whereas documents drawn up by other competent authorities, in particular notaries, do not; however, such documents may circulate as authentic instruments if the necessary conditions are met[5].

At the same time, the Succession Regulation does not provide an exhaustive definition of "court". Instead, it gives a very general description, which potentially embraces other authorities and legal professionals,[6] and requires the Member States to make a notification to the Commission of all such authorities and legal professionals that it designates as "courts"[7]. The Commission then publishes the list (and any subsequent amendments thereto) of such authorities in the Official Journal and through the European Judicial Network[8].

In these circumstances, it is unsurprising that the European Court has been called upon to give guidance on how to interpret this concept. In this writer's view, the Court has, by and large, correctly navigated its way through the murky shallows of the Regulation and ruled in a way

[1] Regulation 650/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, [2012] OJ L 201/107.

[2] Article 4 of the Regulation provides as follows: "The courts of the Member State in which the deceased had his habitual residence at the time of death shall have jurisdiction to rule on the succession as a whole."

[3] Recital 22 provides in pertinent part that: "When notaries exercise judicial functions, they are bound by the rules of jurisdiction …When notaries do not exercise judicial functions, they are not bound by the rules of jurisdiction…".

[4] Chapter IV is entitled "Recognition, Enforceability and Enforcement of Decisions". Article 39 provides that "a decision given in a Member State shall be recognised in the other Member States". "Decision" is defined in Article 3(1)(g) as "any decision in a matter of succession given by a court of a member State".

[5] Recital 22 states that: "when notaries exercise judicial functions … the decision they give *(sic)* should circulate in accordance with the provisions on recognition, enforceability, and enforcement of decisions". On the other hand: "when notaries do not exercise judicial functions … the authentic instruments they issue *(sic)* should circulate in accordance with the provisions on authentic instruments".

[6] Article 3(2), *infra*.

[7] Article 3(2), second sub-paragraph, read in conjunction with Article 79.

[8] Article 79.

which is both coherent as regards the operation of the Regulation and consistent with the intentions of the legislator.

2. Definition of "court"

Article 3(2) of the Regulation defines a "court" as "any judicial authority and 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, provided that such other authorities and legal professionals offer guarantees with regard to impartiality and the right of all parties to be heard and provided that their decisions under the law of the Member States in which they operate may be made the subject of an appeal or to review by a judicial authority and have a similar force and effect as a decision of a judicial authority on the same matter".

In order to make some sense of this definition, one needs to consult the recitals in the preamble to the Succession Regulation, in particular Recital 20. Strictly speaking, the purpose of recitals is simply to explain the purpose behind the provisions of a given piece of EU legislation and the language of recitals ("should") reflects this idea. Nevertheless, in practice, the proper interpretation of many provisions of EU law requires reading them in conjunction with the recitals: this phenomenon is very conspicuous in the instruments adopted in the civil law field (where recitals often take the place of an Explanatory Report) and is especially the case with the Succession Regulation, in which some of the recitals, in reality, assume normative value.

Recital 20 is somewhat ambiguous. On the one hand, it states first that the term court should "be given a broad meaning", so as to embrace not only "courts in the true sense", but also in particular "notaries or registry offices" where they exercise judicial functions like courts and "notaries or legal professionals" where they exercise judicial functions by way of delegation of power by a court. On the other hand, the final sentence of the recital adds a note of caution by specifying that the term should not cover "notaries in most Member States where, as is usually the case, they are not exercising judicial functions".

Clearly, the legislature was preoccupied by the role of notaries in matters of succession in the very different systems of the Member States. Even in those Member States in which notaries have a general compe-

tence in non-contentious matters, it does not necessarily follow that they are thereby acting as courts. The legislature was therefore concerned to give some guidance as to where to draw the line. It has however been left up to the Court of Justice to put flesh on the bones.

The Court has already had to grapple with the interpretation of the notion of "court" within the meaning of the Brussels I[9] and European Enforcement Order Regulations.[10] Although the Court's reasoning is not necessarily wholly transposable to the different context of the Succession Regulation, the judgments nevertheless repay careful study.

In the *Pula Parking*[11] judgment[12], the Court held that notaries were not courts for the purpose of the Brussels Ia Regulation unless they were deemed to be so by an explicit provision[13]. In this respect, it focused first on the essential difference between judicial and notarial functions.[14] Second, it laid stress on the importance of mutual trust in the context of both regulations, in particular on the aspect that courts in the Member States must be able to have confidence that judgments handed down in other Member States "had been delivered in court proceedings offering guarantees of independence and impartiality and in compliance with the principle of *audi alteram partem*"[15]. Reading between the lines, the Court seemed to imply that, even if the notary carried out judicial functions, he could not be characterised as a court since he was not part of the judicial system[16]. However, the Court was careful to stress that, ultimately,

[9] Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L 351/1.

[10] Regulation 805/2004 creating a European Enforcement Order for uncontested claims [2004] OJ L 143/15.

[11] CJEU, 9.3.2017, C-551/15 *Pula Parking* ECLI:EU:C:2017:193.

[12] The Court came to the same conclusion regarding the European Enforcement Regulation in CJEU, 9.3.2017, C-484/15 *Zulfikaparsic*, ECLI:EU:C:2017:199. Although the cases were not formally joined, they were decided by the same Chamber and pleaded on the same day, although, curiously enough, a different Advocate General was assigned to each case, *infra*. Judgment was delivered on the same day in both cases.

[13] The concept of court is not defined in either Regulation. However, Article 3(a) of the Brussels Ia Regulation provides that, in Hungary, in summary proceedings concerning orders to pay, notaries are deemed to be courts. Despite the fact that the role of Croatian notaries in the context of such summary proceedings was very similar to that of Hungarian notaries, the Court considered (correctly it is submitted) that this was a deeming provision, not simply a clarification of a borderline case. Consequently, *a contrario*, unless such a notary was specifically mentioned, he fell outside the scope of the definition.

[14] C-551/15 *Pula Parking*, para. 47, citing earlier case law.

[15] C-551/15 *Pula Parking*, para. 54.

[16] See on this point also the Opinion of A-G Bobek in C-551/15 *Pula Parking* who clearly articulates the distinction between being part of the judicial architecture and the exercising of judicial functions. In essence, he promulgated a test focussing primar-

it was for the legislature to determine what constituted a court for the purposes of a given regulation and pointed out that the Succession Regulation is less rigid than the Brussels Ia Regulation, in that it clearly does contemplate that a notary may in certain circumstances be a court.

The Court thus wisely avoided prejudging the definition of court for the purposes of the Succession Regulation. It therefore remained an open question as to what extent the reasoning in these two judgments was transposable to that Regulation.

Since the judgments in *Pula Parking* and *Zulfikaparsic*, the Court has given judgments in two cases concerning the notion of "court" for the purposes of the Succession Regulation: the judgments provide valuable clarification of the notion of courts under the Succession Regulation and are both, in the author's view, demonstrably correct.

In the first of the discussed cases, *Oberle*[17], the European Court was faced with the situation of a testator who at the time of his death had been habitually resident in France. The deceased owned property in both France and Germany. The relevant French court had issued a national certificate of succession stating that the two sons of the deceased each inherited half of the estate. One of the brothers then applied to the competent court in Germany for a certificate of succession to the same effect, but limited to the part of the estate situated in Germany. The first instance court in Germany declined jurisdiction on the basis that, by virtue of Article 4 of the Regulation, only a French court would have jurisdiction to issue such a certificate. On appeal, the referring court

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ily on whether an authority forms part of the normal judicial structure of a Member State (para. 90 of the Opinion). If so, it is *prima facie* to be treated as a court, subject to a possible correction taking as its inspiration the Court's case law on what is a "court or tribunal" within the meaning of Article 267 TFEU. Thus, in order to be treated as a court, the body must also offer sufficient guarantees in terms of independence, impartiality, *inter partes* contradictory procedure and overall respect for the rights of the defence (para. 105). Cf. the Opinion of A-G Bot in C-484/15 *Zulfikarpasic*. Although that Opinion contains some common features with the Opinion of A-G Bobek, it falls into the error of assuming that, because the notary is under an obligation to check certain facts of his own motion, this is tantamount to protecting rights of the defence, despite the obvious lack of any contradictory procedure and the fact that the notary, despite being clothed with certain state functions is, like any lawyer, a professional acting for a client. Since under Croatian law the notary issued an order for payment on the basis only of a bill rather than any independently verifiable evidence, the analysis of Advocate General Bot on this point is demonstrably incorrect. It was clearly (and correctly) rejected by the Court's statement that "the examination by notaries in Croatia of an application for a writ of execution on such a basis is not conducted on an *inter partes* basis".

[17] CJEU, 21.6.2018, C-20/17 Oberle, ECLI:EU:C:2018:485; noted L. Perreau-Saussine: *Quelle place pour les certificats nationaux dans le règlement Successions internationales, no 650/2012?*. "Revue critique de droit international privé", 2018, p. 850.

asked whether Article 4 applied to the issuing of national certificates of succession.

Whilst there was no doubt that the competent authority was, from a structural point of view, a court, the issue was whether it was bound by the rules of jurisdiction of the Regulation, in particular Article 4, which provides that the courts of the last habitual residence of the deceased "have jurisdiction to rule on the succession as a whole". The debate thus focused on whether the expression "to rule" applied only to decisions adopted by national courts exercising their judicial functions or whether it also extended to the issuing of national certificated of succession, not having the force of *res judicata*, at the end of a non-contentious procedure[18].

The Court decided that "to rule" embraced any decision of a court, even the issuing of a national certificate in non-contentious proceedings. It invoked a number of arguments in support of this conclusion.

First, the Court referred to Article 13 of the Succession Regulation. This provision stipulates that, in addition to the court having jurisdiction over the succession, a court of the habitual residence of any person entitled under the *lex successionis* to make any declaration concerning the acceptance or waiver of the succession, of a legacy or of a reserved share, or a declaration relating to the limitation of liabilities under the succession was also to have jurisdiction to receive such a declaration. The very existence of this provision implies that, without it, only the court having jurisdiction over the succession as a whole would be competent to receive such a declaration. It was thus a clear indication that the jurisdiction referred to in Article 4 also embraced decisions in non-contentious matters[19].

Second, the Court referred to Recital 59, which states that, in the light of the objective of mutual recognition of decisions in matters of succession, "irrespective of whether such decisions were given in contentious or non-contentious proceedings", the Regulation should lay down rules *inter alia* on jurisdiction similar to those in other instruments in the field of private international law[20].

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[18] In Germany the "herrschende Meinung in der Literatur" defended the theory that the jurisdiction provisions of the Regulation did not apply to national certificates of succession. See, for example, J. Weber, C. Schall: *Internationale Zuständigkeit für die Erteilung deutscher Erbscheine: (k)eine Frage der europäischen Erbrechtsverordnung?* "Neue Juristische Wochenschrift" 2016, 3564; F. Wall: *Richtet sich die internationale Zuständigkeit zur Erbscheinserteilung künftig ausschließlich nach Artt. 4 ff EU-Erb-VO?* "Zeitschrift für die Steuer- und Erbrechtspraxis" 2015, 9. *Aliter*; V. Grau: *Deutscher Erbschein und Europäische Erbrechtsverordnung.* In *Festschrift für Eberhard Schilken*. Hrsg. C. Meller-Hannich, L. Haertlein, H.F. Gaul, E. Becker-Eberhard. München 2015.

[19] C-20/17 *Oberle*, paras. 41, 42.

[20] C-20/17 *Oberle*, para. 43.

This would have been enough to dispose of the matter but the Court also devotes 16 paragraphs to dealing with two further points. First, it analyses the interplay between the normal rules of jurisdiction and the special regime relating to the issuing of a European Certificate of Succession and, second, the objective of ensuring as far as possible that the court having jurisdiction applies its own law as applicable law.

As regards the first two main points mentioned above, the *Oberle* judgment should be read alongside the Opinion of A-G Szpunar who analyses the issues raised not only in more detail but also in a more orderly fashion. He pointed out in particular that, under the regime of the Brussels Ia Regulation, a judgment must emanate from a judicial body "deciding on its own authority on the issues between the parties". However, he considered that Recital 59 of the preamble to the Succession Regulation was clear in indicating that, in determining the definition of a decision, it is irrelevant whether it was given in contentious or non-contentious proceedings.

The message of the *Oberle* judgment is thus unequivocal: when issuing a national certificate of succession even in non-contentious proceedings a court is still a court. Consequently, it is bound by the rules of jurisdiction set out in Chapter II (Articles 4 and the following) of the Regulation.

A number of other conclusions follow by necessary implication.

The German government had argued that national certificates of succession did not fall within the scope of the Regulation and thus jurisdiction to issue such a certificate was governed by national law[21]. It claimed that its interpretation of the Regulation on this point was to the benefit of the heirs and beneficiaries since, if it was correct, it would enable them to obtain a national certificate in Germany, rather than needing, in France, to ask for a European Certificate of Succession, which might be more expensive to obtain and more difficult to have accepted in other Member States.

However, the premise on which this argument is based is demonstrably false. It overlooks the fact that, *mutatis mutandis*, the French certificate of succession drawn up by the French court was also to be regarded as a decision[22]. It could therefore circulate under Chapter IV of the Regulation and its effects could be "recognised" (loosely speaking) in Germany. It would therefore be unnecessary for the joint heirs in that

[21] Opinion of Advocate General Szpunar, para. 311.

[22] Normally, under French law, such a certificate would have been drawn up by a notary. However, (albeit the point is not made explicit in the judgment or the national file), a court was competent by virtue of the special rules applying in the Moselle, Bas-Rhin and Haut-Rhin départements (L. Perreau-Saussine: *Quelle place…).*

case to acquire either a European Certificate of Succession in France or a national certificate of succession in Germany, even in respect of immovable property forming part of the estate and located in Germany.[23]

The second important judgment in this respect is *WB v Notariusz Przemysława Bac*.[24] This case is in some respects the reverse of *Oberle*. It concerns the issue of whether a Polish notary, who draws up a certificate of succession at the unanimous request of all the parties to the procedure, constitutes a court; if the question were to be answered in the affirmative this would mean that the certificate would constitute a decision and could circulate under Chapter IV of the Regulation.

However, the Court answered the question in the negative[25]. While acknowledging that the concept of "court" should be given a broad interpretation in the context of the Succession Regulation,[26] the Court of Justice nevertheless reiterated that the exercise of a judicial function presupposes that the relevant person has the competence to rule on his own motion on points of dispute between the parties. This is not the case where the powers of the professional concerned are entirely dependent on the will of the parties[27]. Since, under Polish law, the notaries have power to draw up the certificate only at the unanimous request of the parties, it followed that they are not thereby exercising a judicial function, despite being under an obligation to verify that the requirements for issuing the certificate had been complied with.

Reading the two judgments together, the results may at first sight seem inconsistent; the notary in *WB* is not treated as a court despite the fact that he is exercising what is to all intents and purposes the same function as the Amtsgericht Schöneberg in *Oberle*. However, the explanation is simple: the Amtsgericht Schöneberg is a court "in the true

[23] CJEU, 12.10.2017, C-218/16 Kubicka, EU:C:2017:965. The judgment in *Kubicka* was delivered after the *Oberle* case had been pleaded.

[24] CJEU, 23.5.2019, C-658/17 WB ECLI:EU:C:2019:444.

[25] The Court instead held that a deed of certification of succession drawn up by a notary may be certified as an authentic instrument and hence circulate under Chapter V of the Succession Regulation, provided that it satisfied the conditions set out in the Regulation. Since the authenticity of the document must relate not only to the signature but also to the content, if the authenticity relates only to the signature by the parties, the document will not satisfy the criteria. In this respect, the Court stressed that, under Polish law, the notary is required to carry out checks, which may lead him to refuse to draw up the deed. Hence, the authenticity of the instrument relates both to signature and content. By stressing this point, the Court clearly envisages that, where the duty of the notary is limited to recording the statement of the parties and does not extend to verifying the facts, the deed will not qualify as an authentic instrument. This, however, is a question for another day.

[26] C-658/17 *WB,* para. 53.

[27] Ibidem, para. 55.

sense of the word",[28] in that it forms part of the judicial system, whereas a notary does not; he is a self-employed professional. There is therefore no paradox in determining that "a court is always a court" whereas a notary, who is not structurally speaking a court, is not a court unless he is exercising a judicial function and then only if he offers the guarantees of impartiality, independence and respect for the rights of the defence that a true court would.

3. The legal significance of notifications under Article 79

By virtue of Article 3(2) of the Regulation, read in conjunction with Article 79, Member States must notify to the European Commission the "other authorities and legal professionals" that constitute courts within the meaning of the definition set out in Article 3(2). The Commission must then publish the list and any subsequent amendments in the Official Journal and through the European Judicial Network in civil and commercial matters.

Of the 25 Member States bound by the Regulation, 16 have not made any notification under Article 79 (or have explicitly stated that only courts are competent, which amounts to the same thing). Two have notified executors. Of the remaining seven, the Czech Republic, Spain and Portugal have made very precise notifications regarding notaries, specifying that they are not to be treated as courts except when they exercise certain specific statutory functions. The remaining four notifications are problematic. Hungary and Croatia have notified notaries, claiming that in succession matters they always act as courts, which simply cannot be right, whereas Greece and Latvia have purported to notify notaries, but have done so in a very ambiguous way[29].

By virtue of Article 79, the European Commission has no formal power to refuse a notification made by a Member State or to require a Mem-

[28] Cf. the wording of Recital 21.

[29] For example, the notification by Greece states that notaries are competent in matters of succession and adds that they are vested with authority to draw up authentic acts. On the face of it, this does not seem to, purport to be a notification that notaries act as courts. The remainder of the notification is dedicated to a eulogy of notaries ("lawyers with high academic training" "play an active and effective role in preventive justice, safeguarding the rights of all those appearing before them").

The notification by Latvia contains the same ambiguity, albeit without the fulsome praise for notaries.

ber State to make such a notification. This raises the question of the legal value of a notification or absence thereof when the Member State has not properly assessed the issue according to the principles laid down by the Court of Justice.

The question was raised by the national court in *WB, supra*. Since, as it transpired, Poland was quite correct in not having notified notaries, the question did not, strictly speaking, call for a reply; nevertheless, the Court addressed it.

The Court pointed out that the criteria for determining whether an authority or legal professional, in particular a notary, is a court are determined by Article 3(2) and not by Article 79. It would *inter alia* undermine the objective of the Succession Regulation if a Member State could determine unilaterally which bodies are or are not courts. This conclusion is corroborated by Recital 21. Consequently, Poland's omission to notify notaries under Article 79 was not conclusive.

The conclusion is undoubtedly correct. However, certain aspects of the Court's reasoning on the effect of an incorrect notification or failure to notify are puzzling.

In the first place, the Court states that a notification under Article 79 creates a "presumption" that the authority declared is indeed a court[30] whereas a failure to notify an authority has "merely indicative value"[31].

If the Court thereby intended to state that an incorrect (positive) notification of a particular authority has some kind of higher probative status than an erroneous failure to notify an authority, then it is submitted that the Court fell into error. The statements seem to imply that, whereas an incorrect positive notification at least has the merit that the Member State has made an assessment, and thus addressed its mind to the question, a failure to notify implies a lack of any assessment and thus a lack of care. If this is what the Court meant, it is wrong: a failure to notify an authority under Article 79 is in reality a tacit notification that that authority does not fulfil the conditions for being treated as a court. There is therefore no reason to treat an incorrect failure to notify an authority as a court as being worthy of less respect than an incorrect positive notification.

In the second place, the Court purports to give instructions to national courts that have doubts as to whether a notification has been correctly made. In para. 45 of the judgment, the Court states that "a national court hearing a dispute concerning whether an authority … qualifies as a "court"… or which has doubts as to the accuracy of the declarations

[30] C-658/17 WB, para. 43.

[31] Ibidem, para. 48.

made by a Member State, may query whether the conditions listed in [Article 3(2) are satisfied] and, *if so*, submit … a request for a preliminary ruling" (emphasis added). The expression "if so" in the English text of the judgment seems to imply that if a national court wishes to call into question a notification made by a Member State, it may do so only if it first makes a reference for a preliminary ruling. However, it is apparent that "if so" in the English version of the judgment is in fact a mistranslation of the French expression "le cas échéant", which is better translated by "if necessary" or "as the case may be"[32]. In other words, the Court is not requiring a hypothetical national court to make a reference for a preliminary ruling as a condition of departing from the classification made by the competent Member State, but simply reminding it of the possibility that exists under Article 267 TFEU.

This would mean that if a national court is asked to classify an authority differently from the relevant Member State, it may do so on its own responsibility, with the possibility of making a reference if it considers that it needs to do so. Only a court from which there is no appeal would be obliged to make a reference. That said, it is clearly preferable from the point of view of legal certainty for a lower court to make a reference in order to have the matter conclusively determined.

4. Consequences of a body being characterised a court

As mentioned above, if an authority is a court within the meaning of Article 3(2), it follows, on the one hand, that it is bound by the rules of international jurisdiction set out in Articles 4 and the following[33]. On the other hand, any decision of a court, whether in contentious or non-contentious proceedings, will be recognised in the other Member States, and may be enforced there, under Chapter IV of the Regulation.

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[32] Cf. CJEU, 30.5.2018, C-517/16 *Czerwiński* EU:C:2018:350 on the cognate issue of the value of a declaration made by a Member State under the Social Security Regulation, cited by the Court at para. 43 of *WB*. There the Court states that a notification made is not definitive and that the classification may therefore be made by the national court referring "if necessary, a question for a preliminary ruling". In that judgment, the French expression "le cas *échéant*" is translated correctly.

[33] However, if a court wrongly assumes jurisdiction, this would not prevent a decision from circulating under the Regulation, since this is not listed in Article 40 as a ground of non-recognition.

If an authority is not a court, it is not bound by the rules of jurisdiction. However, any deed or certificate that the authority draws up will not circulate under Chapter IV but may be "accepted" and as the case may be enforced under the provisions of Chapter V, provided that the document is an authentic instrument, in particular as regards the authenticity of its content.

The significance of the distinction between "acceptance" of an authentic instrument and "recognition" of a decision handed down by a court in non-contentious proceedings will no doubt need to be worked out in due course.

References

Grau V.: *Deutscher Erbschein und Europäische Erbrechtsverordnung*, in *Festschrift für Eberhard Schilken*. Hrsg. C. Meller-Hannich, L. Haertlein; H.F. Gaul, E. Becker-Eberhard. München 2015.

Perreau-Saussine L.: *Quelle place pour les certificats nationaux dans le règlement Successions internationales, no 650/2012?* "Revue critique de droit international privé", 2018.

Wall F.: *Richtet sich die internationale Zuständigkeit zur Erbscheinserteilung künftig ausschließlich nach Artt. 4 ff EU-Erb-VO?* "Zeitschrift für die Steuer- und Erbrechtspraxis" 2015.

Weber J., Schall C.: *Internationale Zuständigkeit für die Erteilung deutscher Erbscheine: (k)eine Frage der europäischen Erbrechtsverordnung?* "Neue Juristische Wochenschrift" 2016.

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The Capacity and the Quality of Heir Possible Interaction with Preliminary Questions

Abstract: The article contains an overview of the rules relating to the scope of application of the EU private international law regulations. It addresses the treatment of the relevant preliminary questions, with special reference to the Succession Regulation. The issues are discussed in three steps. The first is connected with the way of interpreting the notions and concepts, such as marriage, adoption, legal capacity etc., where such matters as personal status, legal capacity or family relationship may come to the foreground as a preliminary question. The second is dealing with the law applicable to the preliminary question. The author compares pros and cons of the "independent reference" (*lex fori*) and the "dependent reference" (*lex causae*) solutions, considering the latter as less effective, producing more negative consequences. The third step embraces questions relating to the jurisdiction with respect to preliminary question.

Keywords: private international law — EU Succession Regulation — capacity of heir — legal capacity — preliminary questions — personal status — family relationships

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1. Overview of the EU private international law Regulations provisions on their respective scope of application and on the treatment of some relevant preliminary questions

The European Succession Regulation (ESR) raises some issues and provides some solutions concerning the relationship between its scope of application (excluded vs included questions), the scope of the applicable law and preliminary questions that have been the object of extensive scholarly analysis in respect to the other EU regulations in the field of conflicts of laws. It is thus worth assessing such issues in order to establish if the solutions proposed in the ESR are the same as in the other EU regulations or if the peculiarities of succession matters require specific answers, as well as if any problems are still open.

The starting points are Recital 11 and Article 1 ESR. According to the former, "This Regulation should not apply to areas of civil law other than succession. For reasons of clarity, a number of questions which could be seen as having a link with matters of succession should be explicitly excluded from the scope of this Regulation". Article 1(2) provides the list of excluded matters, that includes "(a) the status of natural persons, as well as family relationships and relationships deemed by the law applicable to such relationships to have comparable effects; (b) the legal capacity of natural persons, without prejudice to point (c) of Article 23(2) and to Article 26; (c) questions relating to the disappearance, absence or presumed death of a natural person; … (h) questions governed by the law of companies and other bodies, corporate or unincorporated"[1].

Some of these matters are excluded also from the other EU private international law regulations, concerning jurisdiction and the applicable law[2].

For example, Regulation No 593/2008 on the law applicable to contractual obligations (Rome I) excludes from its scope "(a) questions involving the status or legal capacity of natural persons, without prejudice to Article 13; (b) obligations arising out of family relationships and relationships deemed by the law applicable to such relationships to have comparable effects, including maintenance obligations; (c) obligations arising

[1] Issues arising in relation to company law will not be addressed in this paper.

[2] With the exception of Regulation No 4/2009, which does not provide a list of excluded matters, but it declares that it "shall apply to maintenance obligations arising from a family relationship, parentage, marriage or affinity" (Article 1(1)).

out of matrimonial property regimes, property regimes of relationships deemed by the law applicable to such relationships to have comparable effects to marriage, and wills and succession".

Non-contractual obligations arising out of family relationships and relationships deemed by the law applicable to such relationships to have comparable effects, including maintenance obligations, and non-contractual obligations arising out of matrimonial property regimes, property regimes of relationships deemed by the law applicable to such relationships to have comparable effects to marriage, as well as wills and succession are excluded also from the scope of the Rome II Regulation on the law applicable to non-contractual obligations,[3] that, however, does not mention questions involving the status or legal capacity of natural persons.

Both Regulations define the notion of "family relationships" as covering parentage, marriage, affinity and collateral relatives. Yet, neither are these notions defined, nor do their provisions offer any hint as to which law applies in order to assess whether such relationships exist in a given case. Reference is made to the *lex fori* only for purposes of defining "relationships having comparable effects to marriage and other family relationships" (Recitals 8 and 10, respectively).

Also the Rome III Regulation on the law applicable to divorce and legal separation[4] excludes a list of issues that relate to status, capacity and family relationship, namely: (a) the legal capacity of natural persons; (b) the existence, validity or recognition of a marriage; (c) the annulment of a marriage; (d) the name of the spouses. It further specifies that they are excluded "even if they arise merely as a preliminary question within the context of divorce or legal separation proceedings" (Article 1(2)).

If one looks at Regulations No 2016/1103 and No 2016/1104 on the private international law issues arising out of matrimonial property and the economic effects of registered partnerships, respectively, they exclude a "number of questions which could be seen as having a link with matters of matrimonial property regime" and with the property consequences of registered partnerships (Recital 19), replicating the wording of Recital 11 ESR. Both Regulations exclude the legal capacity of spouses/partners and the existence, validity or recognition of a marriage/registered partnership (Article 1(2)(a) and (b)). The definition of "marriage" is left to the national laws of the Member States (Recital 17 of Regulation No 2016/1103), while the "actual substance" of the notion of "registered partnership" "should remain defined in the national laws of the Member

[3] Regulation No 864/2007, Article 1(2)(a) and (b).

[4] Regulation No 1259/2010.

States" (Recital 17 of Regulation No 2016/1104). In neither case do these provisions indicate whether reference to the domestic law of the Member States includes reference to its conflict of laws rules.

If one now turns to the Brussels-type Regulations, on jurisdiction and the recognition and enforcement of judgments, one sees that the Brussels Ia Regulation (No 1215/2012) excludes "the status or legal capacity of natural persons" (Article 1(2)(a)), while the Brussels IIa Regulation (No 2201/2003) does not apply to "(a) the establishment or contesting of a parent-child relationship; (b) decisions on adoption, measures preparatory to adoption, or the annulment or revocation of adoption; (c) the name and forenames of the child; (d) emancipation" (Article 1(3)).[5]

2. Personal status and family relationships as preliminary questions

This short overview shows that the solutions adopted by EU legislature largely coincide, that there is a sort of *fil rouge* (common thread) running among the various regulations, even if the wording is not always aligned, maybe due to the evolution of the rules over the years. The EU law-maker is perfectly aware that when applying these regulations, the excluded matters may come to the foreground as preliminary questions which have to be answered in order to decide the main questions included in their scope and brought in the courts of the Member States. Yet, no clear indication is provided on the law applicable to such questions.

The paradigm of the relationship between the issues included and excluded and preliminary questions in this respect is provided by the notions of "status", "capacity" and "family relations". Starting with personal status and family relationships, their existence occurs as a preliminary question in connection with succession matters in almost all cases, in particular in order to determine the beneficiaries, to whom the applicable law may reserve a share of the estate. The exclusion covers precisely the status of natural persons in respect to such incidental questions to succession matters. For example, if the law applicable to the succession designated by the ESR includes an adopted child or the partner of a registered partnership within the beneficiaries, the question of

[5] Cf. also Article 1(4)(a)-(d) of Regulation No 2019/1111 (Brussels IIa recast).

whether an adoption or a registered partnership is valid falls outside the scope of Regulation. The same applies with regard to other issues, such as the validity of a marriage for the quality of spouse, the assessment of parentage for the quality of child or parent, whether legitimate or out-of-wedlock, and more generally for the existence of liens with the deceased and/or his/her (presumed) relatives[6].

While interpreting the notions used in an EU private international law regulation, it is almost a reflex to refer to the other regulations, surmising that the system is coherent and consistent. This approach has been generally approved by the EU Court of Justice, mainly recalling the will to avoid gaps among the regulations that has been explicitly declared by the legislature. Yet, it should be kept in mind that in some instances the Court of Justice has established that some notions or provisions have to be interpreted independently from those used in other regulations, since the aim of assuring consistency cannot, in any event, lead to the provisions of a regulation being interpreted in a manner which is unconnected to the scheme and objectives pursued by it.[7]

Bearing this in mind, as already indicated, the Rome I and Rome II Regulations do not provide any hint, apart from a general definition of "family relationship". Yet, it could be inferred, and it has been inferred by the majority of commentators, that if such issues are excluded from their scope, they are left to the domestic law of the Member States, including their conflicts of laws rules. Moreover, these Regulations refer to the *lex fori* in order to interpret the notion of "relationships having comparable effects to marriage and other family relationships" in Article 1(2).[8] This might imply that the so-called independent reference solution of the preliminary questions issue is adopted, albeit implicitly.

This solution is made explicit in the Rome III Regulation, which at Recital 10 clearly states that "Preliminary questions such as legal capacity and the validity of the marriage … should be determined by the conflict-of-laws rules applicable in the participating Member State concerned". Article 1(2) then provides that "This Regulation shall not apply to the following matters, even if they arise merely as a preliminary question within the context of divorce or legal separation proceedings: …".

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[6] M. Weller: *Article 1. Scope*, in *The EU Succession Regulation, A Commentary*. Eds. A.-L. Calvo Caravaca, A. Davì, H.-P- Mansel. Cambridge, 2016, pp. 73 ff, at 81. The assessment of the death and the moment of the death are excluded from the ESR, as well as the establishment of disappearance, absence or presumed death of a natural person.

[7] Cf. for example, CJEU, 16.1.2014, C-45/13 *Kainz*, ECLI:EU:C:2014:7.

[8] Cf. Art 1(2)(b) and (c) Rome I and Art 1(2)(a) and (b) Rome II and Recitals 8 and 10, respectively.

More recently, the Regulations on matrimonial property and on the property consequences of registered partnership have gone in the same direction, where they state that they should not apply to other preliminary questions such as the existence, validity or recognition of a marriage/registered partnership, respectively, "which continue to be covered by the national law of the Member States, including their rules of private international law" (Recitals 21 of both Regulations).

The ESR follows the same route, insofar as it excludes "family relationships and relationships deemed by the law applicable to such relationships to have comparable effects" (Article 1(2)(a)). Moreover, the provisions on the Certificate of Succession explicitly state that it shall contain elements which have been established "under the law applicable to the succession or under any other law applicable to specific elements"[9].

These provisions may be interpreted as meaning that the EU lawmaker favours the "independent reference" solution to the preliminary questions issue, which corresponds to the choice usually made by national legislatures in order to preserve the uniformity of solutions within a domestic legal system: the existence of the status or lien is always governed by the same law, designated by the domestic conflicts of laws rules, irrespective of whether it is assessed as main or as preliminary question.[10] Indeed, the "dependent reference", according to which the preliminary question should be governed by the same law applicable to the main question (*lex causae*), including its conflicts-of-laws rules, is seldom used in the legal systems of the Member States.[11]

The "independent reference" in applying the EU private international law instruments is particularly effective in terms of achieving the uniformity of solutions within the EU when the preliminary question is governed by an EU regulation, as it happens, for example, with the dissolution of marriage under Rome III, that is, when the Member States are bound by unitary rules on the preliminary questions that point to the same applicable law[12]. When no common rules exist, this advan-

[9] Art 69(2): "The Certificate shall be presumed to accurately demonstrate elements which have been established under the law applicable to the succession or under any other law applicable to specific elements. The person mentioned in the Certificate as the heir, legatee, executor of the will or administrator of the estate shall be presumed to have the status mentioned in the Certificate". Art 67(1): "The issuing authority shall issue the Certificate without delay in accordance with the procedure laid down in this Chapter when the elements to be certified have been established under the law applicable to the succession or under any other law applicable to specific elements".

[10] A. Bonomi: *Successions internationales: conflits de lois et de juridictions*. "Recueil des cours"2010, vol. 350, p. 323.

[11] Ibidem, p. 324.

[12] Cf. also M. Weller: *Article 1*..., p. 83.

tage would be lost at the level of EU law, but uniformity would still be achieved at national level.

Recourse to the "dependent reference" should not be retained, then. Within the system of the ESR, it has even more negative consequences. Not only would it lead to lack of internal uniformity, but it is subject to a further major critical argument: it would allow the testator to choose the law applicable to the preliminary question when he/she chooses the law applicable to the succession.[13] A third position could be that since the regulations exclude these questions from their scope, each Member State is free to choose the solution it prefers, "independent" or "dependent" reference. This approach, however, would lead to divergences when the connecting factors used in the domestic legal systems differ, and in particular it might create problems for the recognition of Certificates of Succession[14].

If one thus follows the "independent reference" solution, which is supported by the majority of scholars, at least as far as national legal systems are concerned, a further question has to be answered. When a court is seized with the main action on succession, is it empowered to decide a preliminary question on the existence of a status or a family relationship with effects limited to the specific main proceedings, or should it- if such court is not the court vested with jurisdiction to hear that question with *erga omnes* effect — stay the main proceedings?[15] In other words, should a GAT-like approach apply?[16]

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[13] According to A. Bonomi, however, this outcome is not so relevant since under the ESR the testator can only choose one law, his/her national law (A. Bonomi: *Article 22. Choix de la loi*. In: *Le droit européen des successions, Commentaire du Règlement n° 650/2012 du 4 juillet 2012*. Dir. A. Bonomi, P. Wautelet. Bruxelles, 2013, p. 301 ff). The solution could be to adopt the "independent reference" only if the testator has chosen the applicable law, but this would lead to divergent solutions in applying the ESR to a preliminary question depending upon whether the testator has chosen the applicable law or not. A second general criticism raised against the "dependent reference" — namely, that it would run counter to the prohibition of renvoi provided in the EU private international law regulations — cannot be raised in the case of ESR since this Regulation allows renvoi in certain cases and at certain conditions.

[14] A. Bonomi: *Successions internationales*..., p. 325.

[15] G. Biagioni: *L'ambito di applicazione del regolamento sulle successioni*, in *Il diritto internazionale privato delle successioni mortis causa*. A cura di P. Franzina, A. Leandro. Milan 2013, pp. 47—48.

[16] CJEU, 13.7.2006, C-4/03 GAT, ECLI:EU:C:2006:457: "Article 16(4) of the 1968 Brussels Convention is to be interpreted as meaning that the rule of exclusive jurisdiction laid down therein concerns all proceedings relating to the registration or validity of a patent, irrespective of whether the issue is raised by way of an action or a plea in objection".

In order to answer this question, one should consider that, on the one hand, the Court of Justice has been very explicit and rigid when interpreting the Brussels IIa Regulation, in establishing a clear boundary between this Regulation and other regulations, for instance, the Maintenance Regulation. In *Matoušková*[17], the CJEU has stated that splitting the decision-making process concerning matters relating to a succession between two different Member States, one in which the succession proceedings have been opened and the other which is the habitual residence of the child for designating a representative of the child who would approve an agreement for the sharing-out of an estate (concluded by a guardian *ad litem* on behalf of minor children), laid down in Article 8(1) of Regulation No 2201/2003, is mandatory under the Regulations and does not compromise the best interests of the child. The jurisdiction of each court is well defined by the EU rules and must be respected. In our perspective, one might surmise that if the preliminary question were included within the scope of another EU private international law regulation, it should be brought in the court designated by such regulation. Yet, where no EU uniform provisions exist for determining the court competent to assess a preliminary question, such as the existence of a status or the validity of a marriage, the answer should be sought elsewhere.

On the other hand, however, Articles 67(1) and 69(2) ESR concerning the Certificate of Succession mention elements "which have been established under any other law applicable to specific elements". Recital 71 clarifies that "The Certificate … should have an evidentiary effect and should be presumed to demonstrate accurately elements which have been established under the law applicable to the succession or under any other law applicable to specific elements, such as the substantive validity of dispositions of property upon death. The evidentiary effect of the Certificate should not extend to elements which are not governed by this Regulation, such as questions of affiliation …". These provisions seem to imply that the assessment of such elements is carried out by the same authority that drafts the Certificate, and that the jurisdiction on the merits concerning the succession includes the power to assess preliminary questions as well, such as the establishment of a status or a family relationship, irrespective of whether that authority has jurisdiction to decide them with *erga omnes* effect, based upon national (or EU, if any) jurisdiction rules.[18]

[17] CJEU, 6.10.2015, C-404/14, ECLI:EU:C:2015:653.

[18] It is worth mentioning that the 2019 Hague Judgments Convention has a provision on preliminary questions, which implies that a court is empowered to decide such questions if they are raised in a judicial proceeding. According to Article 8(2), recogni-

This solution is to be preferred also because the authority that is competent to decide on the succession and to issue the Certificate under the ESR may be a notary public and not a court. Moreover, and even more convincingly, according to Article 59(4) ESR concerning authentic instruments, "If the outcome of proceedings in a court of a Member State depends on the determination of an incidental question relating to the legal acts or legal relationships recorded in an authentic instrument in matters of succession, that court shall have jurisdiction over that question".[19]

Finally, as already mentioned, another argument in favour of the competence of the same authority vested with jurisdiction on the succession to decide preliminary questions can be drawn from Recital 10 of the Rome III Regulation, that seems to allow the court seized for the succession matter to decide on the preliminary question as well when it states that "Preliminary questions such as legal capacity and the validity of the marriage … should be determined by the conflict-of-laws rules applicable in the participating Member State concerned", that is, in the Member State of the court seized of the main question. It is important to notice that the EU legislature mentions together legal capacity, which may undisputedly be assessed by the same court competent for the succession, and the validity of the marriage.

The fact that, according to the Court of Justice, in case the issue concerning the validity of marriage is raised as a main question through an action for the annulment of a marriage after the death of one of the spouses for purposes of a succession proceedings, the competent court is determined by the Brussels Ia Regulation,[20] does not affect the approach that is suggested above. In fact, in that case the validity of marriage was the main question brought in the national court, for which the Brussels Ia Regulation provides a unitary jurisdiction criterion to be respected. Had such issue been raised as a preliminary question within the main proceedings on the succession, it could have been decided by the same court competent for these proceedings.

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tion or enforcement of a judgment may be refused if, and to the extent that, the judgment was based on a ruling on a matter to which the Convention does not apply.

[19] Recital 64: "If a question relating to the legal acts or legal relationships recorded in an authentic instrument is raised as an incidental question in proceedings before a court of a Member State, that court should have jurisdiction over that question".

[20] CJEU, 13.10.2016, C-294/15 Mikołajczyk, ECLI:EU:C:2016:772.

3. Legal capacity as preliminary question

Having examined the possible solutions for the assessment of preliminary questions concerning status and family relationships, one may proceed to addressing the issue of legal capacity of natural persons as preliminary question.

Legal capacity is excluded from the Rome I Regulation (Article 1(2 (a), without prejudice to Article 13 on incapacity)[21], from the Rome III Regulation (Article 1(2)(a)), from Regulation No 2016/1103 (Article 1(2 (a))[22] and from Regulation No 2016/1104 (Article 1(2)(a)).[23] The capacity to choose the applicable law/to enter into an agreement on choice of law is determined by the law which would govern the agreement under the regulation in question if the agreement or term were valid under Articles 3(5) and 10 of the Rome I Regulation, Article 6 of the Rome III Regulation, and the respective Articles 24 of Regulations No 2016/1103 and No 2016/1104[24].

As indicated above, also the ESR excludes the legal capacity of natural persons from its scope of application, without prejudice to Article 23(2) (c) and Article 26. The former includes the capacity to inherit within the scope of the applicable law (and thus within the scope of the Regulation); the latter states that the capacity of the person making the disposition of property upon death to make such a disposition pertains to substantive validity and thus it (falls within the Regulation and) is governed by the law "which, under this Regulation, would have been applicable to the

[21] "In a contract concluded between persons who are in the same country, a natural person who would have capacity under the law of that country may invoke his incapacity resulting from the law of another country, only if the other party to the contract was aware of that incapacity at the time of the conclusion of the contract or was not aware thereof as a result of negligence".

[22] Recital 20: "Accordingly, this Regulation should not apply to questions of general legal capacity of the spouses; however, this exclusion should not cover the specific powers and rights of either or both spouses with regard to property, either as between themselves or as regards third parties, as these powers and rights should fall under the scope of this Regulation".

[23] Recital 20: "Accordingly, this Regulation should not apply to questions of general legal capacity of the partners; however, this exclusion should not cover the specific powers and rights of either or both partners with regard to property, either as between themselves or as regards third parties, as these powers and rights should fall under the scope of this Regulation".

[24] The Rome II Regulation does not mention this issue, albeit in certain cases it allows the parties to choose the law applicable to the non-contractual obligation at stake (Article 14).

succession of the person who made the disposition if he had died on the day on which the disposition was made".

Thus, the capacity to inherit and the capacity to dispose of one's assets are subject to the ESR, that determines the applicable law to them, namely, the law applicable to the succession at the moment of the death and the law that would have applied to the succession had the testator died when the disposition was made, respectively. The rationale is that they are "special" capacities relevant only within the context of the main matter[25].

As far as the capacity to inherit is concerned, it includes the capacity of the unborn child or a legal entity, the conditions that a minor must satisfy in order to inherit, incapacities or prohibitions to inherit in certain circumstances, the capacity to inherit by will, that, consequently, are governed by the same law that applies to the succession[26].

As regards the capacity to make a disposition of property upon death, such as the capacity to make a disposition for a person under age or a legally incapacitated adult, it must be assessed according to the law of the State of the habitual residence of the person concerned on that day or, if he had made a choice of law under this Regulation, the law of the State of his nationality on that day (Recital 51).

If subsequently the testator changes the habitual residence or the nationality, the conditions laid down by that law for that special capacity continue to apply[27]. It is the same solution followed in the Rome 1 Regulation and the other regulations mentioned above and is particularly welcome both for granting coherence within the EU private international law instruments and to avoid that domestic conflicts of laws rules apply. Moreover, it is also in line with the 1989 Hague Convention on the law applicable to succession to the estates of deceased persons (Article 5(2))[28].

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[25] The same solution is adopted in the Rome II Regulation, which states at Article 15 (Scope of the applicable law) that "The law applicable to non-contractual obligations under this Regulation shall govern in particular: (a) the basis and extent of liability, including the determination of persons who may be held liable for acts performed by them".

[26] For example, for the notary public who assists in drafting the will, the doctor who assists the deceased, the tutor of the deceased. Cf. E. Castellanos Ruiz: "Article 23. The Scope of the Applicable Law," in *The EU Succession Regulation, A Commentary*. Eds. A.-L. Calvo Caravaca, A. Davì, H.-P- Mansel. Cambridge 2016, at 356. According to A. Bonomi, however, the latter incapacities pertain to the validity of the will and are thus governed by the law designated by Articles 24 and 25 (A. Bonomi: "Article 23. Portée de la loi applicable," in *Le droit européen des successions, Commentaire du Règlement n° 650/2012 du 4 juillet 2012*. Dir. A. Bonomi, P. Wautelet. Bruxelles 2013, at 352 and 421).

[27] A. Bonomi: "Article 26. Validité au fond des dispositions à cause de mort," in *Le droit européen des successions, Commentaire du Règlement n° 650/2012 du 4 juillet 2012*. Dir. A. Bonomi, P. Wautelet. Bruxelles 2013, at 418.

[28] A. Bonomi: *Successions internationals*..., p. 249.

On the contrary, the capacity to accept the inheritance or renounce it falls within the general capacity and is thus excluded from the ESR.[29] For example, if the law applicable to the succession requires a certain age, it has to be ascertained according to the law applicable to the general legal capacity of the heir. The same applies to personality rights *post mortem* and issues related to the deceased as a person[30].

These issues may fall under the domestic law of the court seized or under an international convention or an EU Regulation. For example, the representation and the protection of minors or incapacitated adults may be subject to the Hague Conventions of 1996 and 2000, respectively, and/or to the Brussels IIa Regulation. In particular, the Regulation applies to the attribution, exercise, delegation, restriction or termination of parental responsibility, which may deal with measures for the protection of the child relating to the administration, conservation or disposal of the child's property, as per Article 1(1)(b) and (2)(e)[31].

The EU Court of Justice has been very clear in this respect in two judgments. Albeit they were rendered on cases falling outside the temporal scope of the ESR and they concerned issues of jurisdiction, drawing the line between the ESR and the Brussels IIa Regulation, they mention the Succession Regulation and thus they should be taken into consideration also for purposes of interpreting its provisions in their entirety, since the scope application of the provisions on jurisdiction and on the applicable law is the same.

In *Matoušková*, that concerned the approval of an agreement for the sharing-out of an estate concluded by a guardian *ad litem* on behalf of minor children, the Court of Justice has stated that "such approval is a measure taken having regard to the legal capacity of the minor", that "relates directly to the legal capacity of a natural person and, by its nature, constitutes an action intended to ensure that the requirements of protection and assistance of minor children are met. … [L]egal capacity and the associated representation issues must be assessed in accordance with their own criteria and are not to be regarded as preliminary issues dependent on the legal acts in question. Therefore, it must be held

[29] A. Bonomi: *Article 1. Champ d'application*, in *Le droit européen des successions, Commentaire du Règlement n° 650/2012 du 4 juillet 2012*. Dir. A. Bonomi, P. Wautelet. Bruxelles 2013, at 80; D. Damascelli: *L'acquisto dell'eredità o del legato da parte dell'incapace: coordinamento tra «statuto successorio» e «statuto di protezione»*, "Rivista di diritto internazionale privato e processuale", 2019, pp. 54 f.

[30] Cf. M. Weller: *Article 1*..., p. 85.

[31] Recital 9: "As regards the property of the child, this Regulation should apply only to measures for the protection of the child, i.e. (i) the designation and functions of a person or body having charge of the child's property, representing or assisting the child, and (ii) the administration, conservation or disposal of the child's property".

that the appointment of a guardian for the minor children and the review of the exercise of her activity are so closely connected that it would not be appropriate to apply different jurisdictional rules, which would vary according to the subject-matter of the relevant legal act. Therefore, the fact that the approval at issue in the main proceedings has been requested in succession proceedings cannot be regarded as decisive as to whether that measure should be classified as falling within the law on succession. The need to obtain approval from the court dealing with guardianship matters is a direct consequence of the status and capacity of the minor children and constitutes a protective measure for the child relating to the administration, conservation or disposal of the child's property in the exercise of parental responsibility within the meaning of Article 1(1)(b) and 2(e) of Regulation No 2201/2003. Such an interpretation is supported by the report of Mr Lagarde on the Hague Convention 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, the scope of which corresponds with regard to parental responsibility to that of Regulation No 2201/2003. While explaining that successions must, in principle, be excluded from that convention, the report states that, if the legislation governing the rights to succession provides for the intervention of the legal representative of the child heir, that representative must be designated in accordance with the rules of the convention, since such a situation falls within the area of parental responsibility. That interpretation is also confirmed by Regulation No 650/2012, not applicable *ratione temporis* in the case in the main proceedings, which, in accordance with recital 9 in the preamble thereto, was adopted in order to cover all civil law aspects of succession to the estates of a deceased person. Article 1(2)(b) thereof excludes from its scope the legal capacity of natural persons. That regulation governs only the aspects relating specifically to the capacity to inherit, under Article 23(2)(c) thereof, and the capacity of the person making the disposition of property upon death to make such a disposition in accordance with Article 26(1)(a) thereof."[32]

This judgment was recently confirmed in *Saponaro*,[33] that concerned the authorisation to renounce an inheritance. Recalling *Matoušková*, the Court of Justice stated that "it is necessary to regard an application lodged by parents in the name of their minor child for authorisation to renounce an inheritance as being concerned with the status and capacity

[32] Fn. 17, paras. 28—33. Cf. the text in fn. 20 for the discussion on the possibility to raise an issue concerning status, family relationships or capacity as a preliminary question with effects *inter partes*.

[33] CJEU, 9.4.2018, C-565/16 Saponaro, ECLI:EU:C:2018:265, paras. 18—19.

of the person". Thus, "such an application does not fall within the law on succession but within that of parental responsibility and […] therefore, the question referred must be examined having regard to Regulation No 2201/2003."

References

Biagioni G.: *L'ambito di applicazione del regolamento sulle successioni*, in *Il diritto internazionale privato delle successioni mortis causa*. A cura di P. Franzina, A. Leandro. Milan 2013.

Bonomi A.: *Successions internationales: conflits de lois et de juridictions*. "Recueil des cours" 2010, vol. 350.

Bonomi A.: *Article 22. Choix de la loi*. In: *Le droit européen des successions, Commentaire du Règlement n° 650/2012 du 4 juillet 2012*. Dir. A. Bonomi, P. Wautelet. Bruxelles 2013.

Castellanos Ruiz E.: "Article 23. The Scope of the Applicable Law," in *The EU Succession Regulation, A Commentary*. Eds. A.-L. Calvo Caravaca, A. Davì, H.-P- Mansel. Cambridge 2016.

Damascelli D.: *L'acquisto dell'eredità o del legato da parte dell'incapace: coordinamento tra «statuto successorio» e «statuto di protezione»*. "Rivista di diritto internazionale privato e processuale", 2019.

Weller M.: *Article 1. Scope*, in: *The EU Succession Regulation, A Commentary*. Eds. A.-L. Calvo Caravaca, A. Davì, H.-P- Mansel. Cambridge 2016.

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The Regulation on Matrimonial Property and Its Operation in Succession Cases — Its Interaction with the Succession Regulation and Its Impact on Non-participating Member States

Abstract: The Regulations on Matrimonial Property (No 2016/1103) and on the Property Consequences of Registered Partnerships (No 2016/1104) are new important pieces in the "puzzle" of European private international law. This article particularly focuses on the relationship between the Matrimonial Property Regulations and the Succession Regulation, two instruments which will often be applied in parallel because of the close connection between the two areas they govern. The author examines in particular the scope of those instruments as well as their interaction with respect to jurisdiction and applicable law. At the same time, an attempt is also made to assess the position of Poland and of those other Member States that are bound by the Succession Regulation, but not by the Matrimonial Property Regulation.

Keywords: matrimonial property — registered partnerships — private international law — succession — EU Regulations — family law — non-participating Member States

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I. Introduction

The Regulations on Matrimonial Property (No 2016/1103) and on the Property Consequences of Registered Partnerships (No 2016/1104) are new important pieces in the "puzzle "of European private international law. They cover wide and important fields of family law, thus completing the Brussels IIbis Regulation (which will be replaced in some years by the Brussels IIter Regulation[1]), the Rome III Regulation, the Maintenance Regulation, and the Succession Regulation.

Since the links between the topics regulated by these instruments are very tight, it is important that they are now all regulated at the European level. This enhances consistency, at least with respect to the origin of the sources of the applicable rules, the way they are interpreted, their scope and their interaction. Thus, the material scope of application of all regulations mentioned above is designed in a way that avoids overlapping between those instruments, while such coordination does not necessarily exist between European and national PIL rules. A certain amount of coherence is also ensured with respect to the basic approaches followed by the harmonised rules: just to provide an simple example, all European PIL regulations use habitual residence as the main connecting factor, while several Member States still give priority to nationality in their national PIL systems.

Unfortunately, the benefits of harmonisation are restrained by the fact that not all of EU instruments are applicable in all Member States. The Regulations on Matrimonial Property and Registered Partnership have been adopted by way of enhanced cooperation, and are therefore applicable in only 18 Member States[2]. A similar limitation applies to the Rome III Regulation: however, the 17 participating Member States[3] are only partially the same that adopted the 2016 Regulations. The Succession Regulation is applicable in 25 Member States, with the exception of

[1] As from 1 August 2022 Brussels II bis will be replaced by the Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), OJ L 178, 2.7.2019, pp. 1—115.

[2] Austria, Belgium, Bulgaria, Croatia, Cyprus, Estonia, Finland, France, Germany, Greece, Italy, Luxemburg, Malta, the Netherlands, Portugal, the Czech Republic, Slovenia, Spain, and Sweden: see Recital 11.

[3] Austria, Belgium, Bulgaria, Estonia, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxemburg, Malta, Portugal, Romania, Slovenia, and Spain. Cf. https://e-justice.europa.eu/content_law_applicable_to_divorce_and_legal_separation-356-maximize-en.do (accessed: 31.08.2020).

Denmark and Ireland. The Maintenance Regulation is applicable in all Member States[4], however the reference it entails to conflict of law rules of the 2007 Hague Protocol does not apply in Denmark and Ireland. Finally, the Brussels IIbis Regulation is applicable in all Member States, however once again with the exception of Denmark.

An additional source of confusion is that not all of these instruments are applicable to the same family relationships. The Brussels IIbis Regulation and the Rome III Regulation only concern married couples and do not cover registered partnerships. Moreover, their applicability to same-sex marriages is debatable[5], and this question was not clarified by the 2019 recast. The applicability to registered partnerships of the Maintenance Regulation[6] and of the 2007 Hague Protocol[7] depends on their characterisation as family relationships, which may vary from one Member State to the other. As for the Matrimonial Property Regulation, it refers, for the definition of marriages, to the law of the Member States[8].

In this short paper, I will focus, on the one hand, on the relationship between the Succession Regulation and the Matrimonial Property Regulation. Because of the connection between these two areas, these two instruments will often be applied in parallel in those Member States, in which they are both applicable. By contrast, I will not address the interactions with the other, already mentioned regulations.

On the other hand, I will also try to determine — always in the relation with the succession of one of the spouses — the impact of the Matrimonial Property Regulation on non-participating Member States. In this respect, it is important to highlight that, while all Member States

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[4] In Denmark, by virtue of an Agreement of 19 October 2005.

[5] W. Pintens, in: U. Magnus, P. Mankowski: *Brussels IIbis Regulation*. Munich 2012, Art. 1er n° 21.; Th. Rauscher: *EuZPR-EuIPR Europäisches Zivilprozess- und Kollisionsrecht — Kommentar*, vol. IV, Art. 1 Brüssel IIa-VO, n° 6 à 8; S. Corneloup, in: *Droit européen du divorce*. Ed. S. Corneloup. Paris, 2013, p. 503; P. Hammje: *'Mariage pour tous' et droit international privé*. "Rev. crit. DIP", 2013, p. 773.

[6] See M. Andrae, in: Th. Rauscher: *EuZPR-EuIPR Europäisches Zivilprozess- und Kollisionsrecht — Kommentar*, vol. IV, Art. 1 EG-UntVO, n° 5.

[7] See A. Bonomi: *Explanatory Report on the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations*, The Hague 2009.

[8] See Recital 17. In our understanding, this implies a reference to the law of the forum, including its private international law system: see A. Bonomi: *Fragen des Allgemeinen Teils: Qualifikation, Vorfrage, Renvoi und ordre public*. In: *Die Europäischen Güterrechtsverordnungen*. Eds. A. Dutta, J. Weber. Beck, 2017, n° 45 ss, p. 131 s. However, this is controversial: see D. Coester-Waltjen: *Connecting Factors to Determine the Law Applicable to Matrimonial Property Regimes*. "YPIL", 2017/2018, p. 203 (law of the forum without the conflict of law rules); A. Dutta: *Beyond Husband and Wife — New Couple Regimes and the European Matrimonial Property Regulations*. "YPIL", 2017/2018, p. 149 (law of the country where the marriage was celebrated).

bound by the Matrimonial Property Regulation are also bound by the Succession Regulation, the opposite is not true. Poland and several other Member States, which are bound by the Succession Regulation, are not participating in the enhanced cooperation that allowed the adoption of the Matrimonial Property Regulation[9].

II. The notion of "Member State" and the impact of the Matrimonial Property Regulation on non-participating Member States

It is important to clarify from the outset the meaning of the term "Member State" as used in the Matrimonial Property Regulations, and the impact of this instrument on non-participating Member States, if such occurs.

Although the Matrimonial Property Regulation does not clearly provide for it, non-participating Member States should be regarded, for the purpose of this instrument, as non-Member States. This was already the case under the Succession Regulation[10], and there can be no doubt that this interpretation is also appropriate here. Indeed, only this reading is compatible with the provision of the Treaty on the European Union concerning enhanced cooperation: indeed, non-participating Member States are not bound by the provisions of the Regulation[11]. This is true not only with respect to procedural law provisions, such as rules on jurisdiction, and on recognition and enforcement of decisions, authentic instruments and judicial settlements, but also with respect to conflict-of-laws rules.

While only participating Member States are bound by the Regulation, this instrument has a significant impact on non-participating Member States and third States — as it is also the case of the Succession Regulation.

Admittedly, certain rules of the Matrimonial Property Regulation are only applicable *inter partes*, that is, in the relationships among partici-

[9] This is the case of Croatia, Hungary, Latvia, Lithuania, Romania, and Slovakia.

[10] A. Bonomi, P. Wautelet: *Le droit européen des successions : commentaire du Règlement (UE) n° 650/2012 du 4 juillet 2012*. 2ème éd. 2016, Bruylant, Introduction, n° 16; A. Davì: I*ntroduction*. In: A.-L. Calvo Caravaca, A. Davì, H.-P. Mansel: *The EU Succession Regulation*. Cambridge, 2016, n° 13, p. 17 et s.

[11] Under Article 20(4) of the Treaty on European Union, "[a]cts adopted in the framework of enhanced cooperation shall bind only participating Member States […]".

pating Member States. This is the case of the rules on foreign decisions, authentic instruments and judicial settlements: indeed, it follows from the notion of "mutual recognition", that decisions originating from non-participating Member States cannot benefit from the provisions on recognition and enforcement under the Regulation, and the same is true for authentic instruments and judicial settlements[12]. In this area, Member States will continue to apply their national rules. The same is probably also true with respect to *lis pendens* and related actions, in the absence of provisions equivalent to those of Articles 33 and 34 of the Brussels Ibis Regulation[13].

By contrast, the rules on jurisdiction and the conflict of rules included in the Regulation are applicable in the participating Member States even when the internationality of the situation results from contacts with non-participating Member States or third States. One may say that such rules have an *erga omnes* dimension.

This is clearly provided for with respect to conflict of laws rules by Article 20 ("universal application"). As stated in this provision, "[t]he law designated as applicable under this Regulation shall be applied whether or not it is the law of a Member State", a language which mirrors that included in all other EU regulations on the applicable law. As a consequence, most provisions of Chapter III refer to the law of a "State", which obviously includes both Member States and third States.

Only Articles 23 and 25 of the Regulation, concerning the formal validity of choice of law agreements and matrimonial agreements, seem to reflect a different approach. Besides some minimum uniform formal requirements (a document "in writing, dated and signed"), these provisions also refer, in paragraph 2, to additional formalities, as provided under the law of the "Member State" where the spouses (or one of them) have their habitual residence. By contrast, these provisions do not refer to formalities provided by the law of a non-Member State. Since the rationale of such distinction is far from clear, it is open to discussion whether the reference to the law of a "Member State" should include *all* Member States or only *participating* Member States: in either case, the limitation is highly objectionable[14].

While no specific provision on "universal application" is included in Chapter II, rules on jurisdiction are also applicable *erga omnes*, that is,

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[12] With respect to the Succession Regulation see A. Bonomi, P. Wautelet: *Le droit européen des successions*..., Introduction, n° 16.

[13] See *infra*, section VI.

[14] Indeed, if the application of the formal requirement of the State of the habitual residence aims at protecting the spouses' legitimate expectations, there is no reason for excluding formalities provided under the law of a third State.

even in the absence of any relationship to another Member State. Indeed, as the CJEU ruled in *Owusu*, the internationality of the situation, which is required for the EU jurisdictional rules to apply, can also result from connection to a non-Member State[15]. This is true *a fortiori* for the Matrimonial Property Regulation, where the jurisdictional rules are exhaustively listed, thus leaving no room for the application of national jurisdictional rules of the Member States[16]. Therefore, such rules are not only applicable in the relationship to other participating Member States, but also in situations connected to non-participating Member States (such as Poland) or non-Member States.

III. The issues regulated by the Matrimonial Property Regulation and by the Succession Regulation

a) Private International Law issues

The Matrimonial Property Regulation governs issues that are very similar to that of the Succession Regulation. Both instruments cover all main private international law questions: jurisdiction, applicable law, recognition and enforcement of decisions, acceptance and enforcement of authentic instruments, and enforcement of judicial settlements. By contrast, they do not affect substantive law, which remains under the exclusive competence of the Member States.

b) No rules on the European Certificates of Succession

Obviously, the Matrimonial Property Regulation does not provide for an instrument comparable with the European Certificate of Succession (hereafter: "ECS"). What is more surprising, and somewhat disappointing, it does not include any specific provision to complement the rules on the ECS of the Succession Regulation.

As is well known, pursuant to Article 68(h) of the Succession Regulation, the ECS also includes "information concerning a *marriage contract*

[15] CJEU, 1 May 2005, *Owusu*, in case C-281/02, ECLI:EU:C:2005:120, para. 26: "The involvement of a Contracting State and a non-Contracting State, for example because the claimant and one defendant are domiciled in the first State and the events at issue occurred in the second, would also make the legal relationship at issue international in nature".

[16] See Recital 40.

entered into by the deceased or, if applicable, a contract entered into by the deceased in the context of a relationship deemed by the law applicable to such a relationship to have comparable effects to marriage, and information concerning the *matrimonial property regime* or equivalent property regime" (emphasis added). However, the effect of such information is quite limited. Indeed, under Article 69(2), the effects of the ECS, and in particular its evidentiary effects and the presumption of accuracy that attaches to it, only concern "elements which have been established under the law applicable to the succession or under any other law applicable to specific elements". Recital 71 clarifies this by stating that "the evidentiary effect of the Certificate should not extend to *elements which are not governed by this Regulation*, such as questions of affiliation or the question whether or not a particular asset belonged to the deceased" (emphasis added).

According to a wide-spread interpretation[17] — which was shared by A-G Szpunar in his opinion in the *Mahnkopf* case[18] and confirmed, at least incidentally, by the Court in its decision in the same case[19] — this means that the effects of the ECS do not extend to the information it contains concerning the marriage contract and/or the matrimonial property regime. The main reason for this is that — at the time of the adoption of the Succession Regulation — such information had to be determined under the law designated by the national choice of rules in force in the Member State of the forum, as opposed to harmonised conflict of law rules. It followed that information concerning matrimonial property included in the ECS might differ depending on the Member State of issuing: therefore, it could not benefit of the evidentiary effects and the presumptions attached to the ECS[20].

After the entry into force of the Matrimonial Property Regulation with its harmonised conflict of laws rules, however, this reasoning is not applicable anymore as far as participating Member States are concerned. Therefore, the effects of the ECS should now also extend to information relating to matrimonial property, as far as the ECS is issued in a Member State participating in the enhanced cooperation and used in another participating Member State. A specific provision to that effect could have been included in the Matrimonial Property Regulation: it is regrettable that this opportunity has not been seized.

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[17] See A. Bonomi, P. Wautelet: *Le droit européen des successions*..., Article 69, n° 24.

[18] Opinion of A-G Szpunar, 13.12.2017, in case C-558/16, *Mahnkopf*, ECLI: EU:C:2017:965, para. 100 *et seq.*

[19] CJEU, 1.3.2018, *Mahnkopf*, case C-558/16, ECLI:EU:C:2018:138, para. 42 *et seq.*

[20] A. Bonomi, P. Wautelet: *Le droit européen des successions*..., Articles 68, n° 39 et seq., 69, n° 25.

Admittedly, such a provision could also be included, in the future, in the Succession Regulation, when this text will be reviewed. However, this will only happen after 2025, year when the Commission is required to submit a report on the application of that Regulation.

c) The scope *ratione materiae*

The Succession Regulation and the Matrimonial Property Regulations govern two areas of law, which are very closely connected. The determination of their respective scope is particularly important to prevent overlapping and gaps.

In principle, the dividing line between the two instruments is clear. Indeed, while the former excludes matrimonial property from its substantive scope (Article 1(2)(d) of the Succession Regulation), the latter in turn leaves out successions (Article 1(2)(d) of the Matrimonial Property Regulation). *In concreto*, however, the determination of the boundaries between the two instruments largely depends on the exact meaning of "succession", on the one hand, and "matrimonial property regime", on the other.

These notions are defined in the relevant instrument. Thus, under Article 3(1)(a) of the Succession Regulation, "'succession' means succession to the estate of a deceased person and covers all forms of transfer of assets, rights and obligations by reason of death, whether by way of a voluntary transfer under a disposition of property upon death or a transfer through intestate succession". And under Article 3(1)(a) of the Matrimonial Property regulation "'matrimonial property regime' means a set of rules concerning the property relationships between the spouses and in their relations with third parties, as a result of marriage or its dissolution". Since these two areas of law are closely related and often intertwined, the distinction might prove difficult in several borderline cases, notwithstanding the definitions.

As is well known, when the Court of justice was confronted with this issue in the *Mahnkopf* case[21], it opted for a broad understanding of the notion of "succession", as suggested by AG Szupnar in its opinion[22]. According to this interpretation, national rules belong to succession when "they deploy their effect in the case of succession" and "determine the

[21] CJEU, 1.3.2018, in case C-558/16, *Mahnkopf*, ECLI:EU:C:2018:138, in which the court ruled that a provision such as § 1371(1) BGB "which prescribes, on the death of one of the spouses, a fixed allocation of the accrued gains by increasing the surviving spouse's share of the estate falls within the scope of that regulation."

[22] Opinion of A-G Szpunar, 13.12.2017, in case C-558/16, *Mahnkopf*, ECLI:EU:C:2017:965, para 93.

rights of the surviving spouse in the relationship with the other heirs"[23]. A broad understanding of this notion had also been followed — albeit in a different context — in the *Kubicka* decision[24].

While the result of their application in the *Mahnkopf* case is not exempt from criticism[25], the criteria provided by the Court can (and probably will) be used as a yardstick for other controversial characterisation issues. To take one example, we can mention dispositions included in a marriage contract in contemplation of the death of a spouse, as they are often used in France and other countries (so-called *avantages matrimoniaux*, e.g. a *clause d'attribution intégrale au conjoint survivant*). If we transpose the *Mahnkopf* criteria, it seems that such dispositions should be characterised as dispositions upon death (and more specifically as agreements as to succession, within the meaning of Article 3(1)(b) of the Succession Regulation) because "they deploy their effect in the case of succession" and "determine the rights of the surviving spouse in the relationship with the other heirs". Such characterisation would certainly deserve approval, because the effect of such clauses goes clearly beyond the scope and purposes of a matrimonial property regime.

As in the *Mahnkopf* case, such broad reading of the concept of succession would also help to extend the scope and efficacy of the ECS. Thus, the effects of the certificate would extend to the property transferred by way of *avantages matrimoniaux*, and this in all Member States that are bound by the Succession Regulation.

From the perspective of Poland and other non-participating Member States, this are probably good news: although such Member States are not bound by the Matrimonial Property Regulation, they can only benefit of a broad interpretation of the Succession Regulation. This will not only promote the effects of the ECS, but also extend the scope of application of the harmonised private international law rules included in that instrument.

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[23] CJEU, 1.3.2018, in case C-558/16, *Mahnkopf*, ECLI:EU:C:2018:138, para 40.

[24] CJUE, 12.10.2017, in case C-218/16, *Kubicka*, ECLI:EU:C:2017:755.

[25] Since § 1371(1) BGB is only applicable, as a matter of German law, when the spouses were subject to the default property regime of the "Zugewinngemeinschaft" ('equalisation of the accrued gains'), the assessment of the Court according to which that provision "does not appear to have as its main purpose the allocation of assets or liquidation of the matrimonial property regime" (CJEU, *Mahnkopf*, para. 40) is debatable. One should also consider that — while the *Mahnkopf* decision specifically concerned the effects of the European Certificate of Succession (see *supra*, section III(b)), its indirect implications on the determination of the applicable law might be odd: if § 1371(1) BGB is applicable when the succession is governed by German law (as it follows from its characterisation as pertaining to succession), would this also be the case when the matrimonial property falls under a foreign law?

IV. The interaction between the Matrimonial Property Regulation and the Succession Regulation with respect to jurisdiction

Because of their material proximity, the Matrimonial Property Regulation and the Succession Regulation are designed to interact in many respects. Such interaction has largely influenced the rules on jurisdiction of the Matrimonial Property Regulation.

Pursuant to Article 4 of this instrument, when the courts of a Member State are seized of a succession matter under the Succession Regulation, the jurisdiction of the court seized also extends to matrimonial property issues, provided that they are related to the succession.

The purpose of this provision is clearly to ensure a concentration of proceedings[26]. The court competent for ruling on the succession of a married person has often to rule also on the matrimonial property regime. Indeed, the only property forming part of the estate in succession is that property which does not pass to the surviving spouse under the matrimonial property regime. In order for litigants to avoid delays or other unnecessary complications, it is important that the authority seized in relation to the succession can equally rule on claims based on the matrimonial relations. Such extension also avoids a situation in which the courts of different Member States may claim concurrent jurisdiction on such closely related issues. This clearly serves the interests of procedural economy and efficiency, since it is expedient, on grounds of both procedural costs and convenience for the parties, to combine closely related proceedings.

However, concentration of proceedings is not guaranteed in an absolute manner by the Matrimonial Property Regulation. Given that this instrument regulates neither jurisdiction with regard to the subject matter (cf. Article 2), nor the territorial jurisdiction of the court on a domestic level, Article 4 does not attribute jurisdiction *to the court seized*, but rather *to the courts of the same Member State*. It is thus possible that within a Member State, the court competent to address issues regarding the matrimonial property regime may not be the same as the courts

[26] See Recital 32. See P. Mankowski: *Internationale Zuständigkeit nach EuGüVO und EuPartVO*. In: *Die Europäischen Güterrechtsverordnungen*. Eds. A. Dutta, J. Weber. Beck, 2017, p. 13, n° 2; P. Franzina: *Jurisdiction in Matters Relating to Property Regimes under EU Private International Law*. "YPIL", 2017/2018, p. 163.

seized for determining succession issues[27]. Despite this, a certain concentration is nevertheless ensured, because the courts of the same Member State can rule both on matters of succession as well as on matrimonial property.

The coordination between the two instruments brought about by Article 4 goes in certain cases even too far, at the expenses of other important objectives, such as proximity and predictability[28].

Indeed, the "derived" jurisdiction under Article 4 is to be interpreted broadly. It is provided not only for the most common case, when the jurisdiction in succession matters is based on the last habitual residence of the deceased (Article 4 of the Succession Regulation), but also when it results from other provisions of the Succession Regulation (Articles 5 to 11)[29]. In the former case, the provision leads to fair results, because the courts of the Member State of the last habitual residence of the deceased spouse are generally well placed to also rule on the property rights arising from the marriage. By contrast, this is not always the case when the jurisdiction for succession matters is based on other subsidiary rules of the Succession Regulation, in particular on Article 10.

As is well known, the jurisdictional reach of Member States courts under Article 10 of the Succession Regulation is very broad, sometimes even extensively so. Based on the location of assets in a Member State and on the nationality or a previous habitual residence of the deceased, the courts of that Member State are granted by Article 10(1) all-inclusive jurisdiction for the whole of the estate, including assets situated abroad[30]. Already somewhat questionable in matters of succession, this wide jurisdiction also extends, by virtue of Article 4 of the Matrimonial Property Regulation, to matrimonial property, and it encompasses potentially all assets belonging to the spouses. This is very far-reaching: indeed, it is difficult to understand why the courts of the jurisdiction of the State where a part of the property of the deceased spouse is situated (note that it can also be his or her *personal* property) should have jurisdiction to rule on the sharing out of the matrimonial property regime, including the property of the spouses which is situated abroad. The too extensive

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[27] See P. Mankowski: *Internationale Zuständigkeit*…, p. 14, n° 3, et p. 15, n° 5.

[28] See A. Bonomi: *Compétence accessoire versus proximité et prévisibilité du for : quelques réflexions sur ces objectifs antagonistes à l'aune des Règlements sur les régimes et les partenariats*. In: *Melanges en l honneur du professeur bertrand ancel*. Iprolex, 2018, p. 232.

[29] See P. Mankowski: *Internationale Zuständigkeit*…, n° 4, p. 15; P. Franzina: *Jurisdiction in Matters Relating to Property*…, p. 166 s.

[30] A. Bonomi, P. Wautelet: *Le droit européen des successions*…, Article 10, n° 14 ss et 19 ss.

scope of this jurisdictional rule is even more apparent in the scenario, seen frequently in practice, in which the spouses, at the moment of death, were living together in the same non-Member State. In this scenario, the authorities of the State of the common habitual residence will generally have jurisdiction to rule, at the same time, on the succession and on the distribution of the matrimonial property. They are also best placed to do so for reasons of proximity and predictability. Conferring all-inclusive jurisdiction on the courts of the Member State of the place in which a part of their property is situated is necessarily designed to create a positive conflict with the authorities of the third State of the habitual residence.

An example will clarify the criticism. Let us assume that a German citizen dies in Switzerland, where he has his domicile and habitual residence with his Swiss wife. He left property in Germany which he inherited from his parents. Based on their national PIL rules, Swiss courts will have jurisdiction to rule on the succession and on the matrimonial property[31]. Nevertheless, based on Article 10(1) of the Succession Regulation, German courts will have concurrent jurisdiction to rule on the entire estate, including property situated in Switzerland. As an effect of Article 4 of the Matrimonial Property Regulation, their jurisdiction extends also to issues of matrimonial property, without any limitation. This is the case even if the surviving spouse never had any relationship to Germany.

Of course, the court seized on the basis of Article 10(1) might rely on Article 12 of the Succession Regulation and on the analogous provision of Article 13 of the Matrimonial Property Regulation in order to exclude from the proceedings certain assets located abroad (in our example property situated in Switzerland), but these provisions are discretionary and subject to conditions.

Such excessive, and probably unintended, side-effects of the coordination between the two Regulations could have been prevented if the European lawmaker had been more cautious. Article 5 of the Matrimonial Property Regulation offers a good example: while the first paragraph of that provision mirrors Article 4 providing for similar coordination mechanism ("derived" jurisdiction of the courts seized under the Brussels IIbis Regulation), its second paragraph limits it by requiring both spouses' agreement when the divorce proceedings have been initiated in a "weak" forum[32]. A similar restriction should have been provided in Article 4.

The impact of Article 4 of the Matrimonial Property Regulation

[31] Articles 51(a) and 86(1) of the Swiss PIL Act.

[32] This applies in particular to jurisdiction based on the habitual residence of the plaintiff under Article 3(1) of the Brussels IIbis Regulation and to "residual jurisdiction" as provided by the law of the forum under Article 7 of that Regulation.

in connection with Article 10 of the Succession Regulation is very far-reaching not only in the relationship with a non-Member State (such as Switzerland), but also in the relationship with those Member States, which are not bound by the Succession Regulation (Denmark and Ireland). By contrast, one should distinguish in this respect the position of those Member States that are party to the Succession Regulation, such as Poland.

If we assume, in the foregoing example, that the deceased's last habitual residence was in Poland, Polish courts will have jurisdiction over the succession based on Article 4 of the Succession Regulation. As a consequence, the courts of other Member States (in our example, German courts) will not be able to take jurisdiction under Article 10 of the same Regulation and, therefore, they will also be prevented from relying on Article 4 of the Matrimonial Property Regulation. Admittedly, this does not completely rule out the possibility of concurrent jurisdiction: indeed, the jurisdiction of a Member State's court over matrimonial property could still be based on Articles 6, 10 or 11 of the Matrimonial Property Regulation. However, since these rules are less far-reaching than Article 10 of the Succession Regulation, the potential for conflicts is more limited.

V. The interaction between the Matrimonial Property Regulation and the Succession Regulation with respect to the applicable law

A good coordination between the Succession Regulation and the Matrimonial Property Regulation is extremely important also with respect to the applicable law. Indeed, complex characterisation issues, such as those dealt with in the *Mahnkopf* case, can be avoided if the same substantive law is applicable to both succession and matrimonial property; adaptation problems can also be prevented this way[33].

However, the EU lawmaker was not impressed by these arguments and decided, in the field of applicable law, to prioritise other goals, in particular a certain (not entirely convincing) idea of predictability of the applicable law. The result is that, in many instances, the law applica-

[33] A. Bonomi: *The Interaction Among the Future EU Instruments on Matrimonial Property, Registered Partnerships and Successions*. "YPIL", 2011, Vol. XIII, p. 219 *et seq.*

ble to matrimonial property under the Matrimonial Property Regulation will differ from the law applicable to the succession under the Succession Regulation.

Indeed, while the Succession Regulation designates the law of the *last* habitual residence of the deceased (Article 21(1)), the main connecting factor of the Matrimonial Property Regulation points to the law of the *first* common habitual residence of the spouses after (or better "short after"[34]) the marriage (Article 26(1)(a)).

It follows that the same law will generally be applicable to succession and matrimonial property when the spouses did not change their habitual residence during the marriage. The same is true if the spouses, after having lived in different countries during the marriage, return in the end to the country where they had established their first habitual residence after the marriage.

By contrast, two different laws will govern matrimonial property and succession whenever at the moment of the death of one of the spouses, his or her habitual residence was situated in a country other than that of the first habitual residence after the marriage, that is, in most of the cases where the spouses have changed their common habitual residence during their marriage.

Let us take the case of a couple formed by an English wife and a German husband, who marry in England and establish in that country their first common habitual residence: their matrimonial property is governed by English law. In principle, this will not change when the spouses move to Germany some years after the marriage. However, when years after the husband dies, German law will be applicable to his succession as the law of his last habitual residence. The German courts having jurisdiction for both succession and the sharing of the matrimonial property, will have to apply German law to the former and English law to the latter, which can raise some difficult issues.

A better coordination between the two related matters could be brought about through the so-called escape clause of Article 26(3) of the Matrimonial Property Regulation. This provision allows the court, by way of exception and on request of one of the spouses, to apply the law of the spouses' *last* common habitual residence in lieu of the law of their *first* common habitual residence after the marriage. However, this pro-

[34] See Recital 49. The philosophy of the Regulation, which is based on the principle of "immutability" of the applicable law, implies that in the absence of a common habitual residence established "shortly after" the marriage, the subsidiary connecting factors (common nationality, closest connection) become applicable: see D. Coester-Waltjen: *Connecting Factors*..., p. 203; B. Heiderhoff: *Die EU-Güterverordnungen*. "IPRax", 2018., p. 5.

vision is subject to two cumulative conditions: it is required a) that the duration of their last habitual residence was significantly longer than their first habitual residence, and b) that both spouses relied on that law in arranging or planning their property relations. It is also important to stress, that even if these conditions are satisfied, the escape clause does not operate *de iure*, but it depends on a discretional decision of the court. Subject to these conditions, this provision can prove a useful coordination tool in order to ensure that the same law is applicable to both matrimonial property and succession.

However, the exception clause is not applicable[35] when, in the absence of a habitual residence of the spouses at the moment of the marriage or shortly thereafter[36], matrimonial property is governed by the law of the common nationality of the spouses or, failing it, by the law of the country to which the situation is most closely connected (Article 26(1)(b) and (c)). Such subsidiary connecting factors can also frequently lead to the application of a law other than that of the last habitual residence of the deceased, governing the succession, even more so, because they both refer to the time of the marriage. Since subsequent circumstances, including the last habitual residence of the spouses, are completely irrelevant in these cases, it will be impossible for the court to correct this result by submitting the two related matters to a single law.

A better coordination could often be achieved by the spouses through the choice of the applicable law. In particular, in the case of change of their habitual residence, they can submit their matrimonial property relations to the law of their new habitual residence, which will also probably be the law eventually applicable to their succession. If they provide their choice with a retroactive effect, one single law will apply to all these issues[37]. Thus, in the foregoing example, the English wife and her German husband — after moving to Germany — could have designated German law as the law of their new common habitual residence to govern their property relations; they could have also provided their choice with a retroactive effect. This way, they would have ensured that German law would be applicable to all issues relating to the matrimonial property and the succession.

[35] This objectionable limitation results from the black-letter text of Article 26(3): "[…] the judicial authority having jurisdiction to rule on matters of the matrimonial property regime may decide that the law of a State o*ther than the State whose law is applicable pursuant to point (a) of paragraph 1* shall govern the matrimonial property regime […]" (emphasis added). See the criticism by B. Heiderhoff: *Die EU-Güterverordnungen*…, p. 6; D. Coester-Waltjen: *Connecting Factors*…, p. 207.

[36] See *supra*, fn. 32.

[37] In the absence of a specific indication by the spouses, the law chosen during the marriage will only be applicable prospectively: see Article 22(2) of the Regulation. This will result in two different laws subsequently applicable to the matrimonial property.

We now turn to the impact of these rules from the perspective of a non-participating Member States, such as Poland.

Obviously, non-participating Member States, as well as non-Member States, will not apply the conflict of laws rules of the Matrimonial Property Regulation, but will determine the law applicable to matrimonial property under their own, national conflict of laws rules.

In the case of Poland, these will point first to the law of the spouses' current common nationality (Article 51(1) of the Polish PIL Act). In international cases, this law will frequently be different from the law governing the succession under the Succession Regulation. Moreover, it will also frequently be different from the law of the first habitual residence of the spouses, applicable to matrimonial property in the Member States bound by the Matrimonial Property Regulation.

Let us assume that a couple of Lithuanian citizens marry in Germany, where they establish their first common habitual residence. Some years after the marriage, they move to Poland, where the husband eventually dies. Polish court will have jurisdiction to rule on the succession under the Succession Regulation and will apply Polish law to the succession; however, they will have to apply Lithuanian law to the matrimonial property (Article 51(1) of the Polish PIL Act). If we assume that the couple owned immovable property in Germany, German courts will also have jurisdiction to rule on those assets under Article 10 of the Matrimonial Property Regulation and they will apply German law to this issue (Article 26(1)(a) of the Matrimonial Property Regulation). As a result, there is no coordination between succession and matrimonial property, and no coordination between participating and non-participating Member States.

In the absence of a common nationality, the Polish PIL Act submits matrimonial property to the law of the spouses' common domicile (or failing it, of their common habitual residence). Although Article 51(2) of the Polish PIL Act does not expressly state it, it is intended to refer — as Article 51(1) for the case of common nationality — to the law of the *current* domicile (or the *current* habitual residence) of the spouses. Therefore, if we assume, in our previous example, that the English-German couple, after living in England and in Germany, had eventually moved to Poland, Polish law would become applicable to their matrimonial property. In case of death of one of them, Polish law would be also applicable to the succession. However, if the spouses also owned immovable property in Germany, German courts also have jurisdiction to rule on these assets under Article 10 of the Matrimonial Property Regulation, and would apply English law as the law of the first habitual residence of the spouses, subject to the exception clause.

As this example shows, Polish law — based on the mutability principle — sometimes grants a better coordination between matrimonial property and succession. By contrast, the law governing matrimonial property will often be in contradiction with the law applicable in the participating Member States. This can lead to conflict if one of these States has concurrent jurisdiction, as it is the case with respect to immovable property located there (Article 10 of the Matrimonial Property Regulation).

VI. Lack of coordination between participating Member States and third States with respect to parallel proceedings and recognition of decisions

Concurrent jurisdiction together with diverging choice-of-law rules can lead to positive conflicts. These can sometimes be prevented through the application of *lis pendens* rules or through the recognition of foreign judgments.

As the Succession Regulation, the Matrimonial Property Regulation includes both rules on *lis pendens* and related actions (Articles 17 and 18), and rules on recognition and enforcement of decisions (Chapter IV). However, these rules are only applicable in the relationships among the participating MS[38].

Contrary to the Brussels Ibis Regulation[39], the Matrimonial Property Regulation — as already the Succession Regulation and all other regulations in the field of family law — does not include specific rules on *lis pendens* and related actions applicable in the relationship to third States. This gap might be filled by national *lis pendens* rules provided that such rules actually exist in the States concerned, and that they are considered to be compatible with the European harmonised rules on jurisdiction — a question that arose after the *Owusu* judgment by the Court of Justice of the European Union, and that is still unresolved[40].

[38] See *supra*, section II.

[39] Articles 33 and 34 of the Brussel Ibis Regulation.

[40] By holding that Article 2 of the Brussels Convention is "mandatory in nature" and that "there can be no derogation from the principle it lays down except in the cases expressly provided for by the Convention" (CJEU, 1 May 2005, *Owusu*, in case C-281/02, ECLI:EU:C:2005:120, para. 37), the CJEU has cast a doubt on the compatibility of national *lis pendens* rules with the jurisdictional rules included in EU law instruments.

Similar considerations apply, *mutatis mutandis*, with respect to recognition and enforcement of decisions. So far, no European regulation includes rules on recognition and enforcement of third States' decisions — an issue that was only discussed in academic circles and addressed in an interesting resolution adopted by the EGPIL[41]. Therefore, recognition and enforcement of such decisions is still left to the national recognition rules of the participating Member States. Several of these States are quite open to recognition of third State judgments in the area of matrimonial property, but this is not necessarily the case of all of them.

Nevertheless, a decision rendered in matters of succession is entitled to recognition and enforcement under the Succession Regulation in all Member States bound by this instrument. This holds true even if that decision rests on a decision on the sharing out of matrimonial property, which does not benefit from recognition rules of the Matrimonial Property Regulation and cannot be recognised under the national recognition rules.

References

Bonomi A.: *The Interaction Among the Future EU Instruments on Matrimonial Property, Registered Partnerships and Successions*. "YPIL", 2011, Vol XIII.

Bonomi A.: *Explanatory Report on the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations*, The Hague 2009

Bonomi A.: *Compétence accessoire versus proximité et prévisibilité du for: quelques réflexions sur ces objectifs antagonistes à l'aune des Règlements sur les régimes et les partenariats*. In: *Melanges en l honneur du professeur bertrand ancel*. Iprolex, 2018.

Bonomi A., Wautelet P.: *Le droit européen des successions: commentaire du Règlement (UE) n° 650/2012 du 4 juillet 2012*. 2ème éd. 2016, Bruylant, Introduction, n° 16.

Calvo Caravaca A.-L., Davì, H.-P. Mansel A.: *The EU Succession Regulation*. Cambridge, 2016, n° 13, p. 17 et s.

Coester-Waltjen D.: *Connecting Factors to Determine the Law Applicable to Matrimonial Property Regimes*. "YPIL", 2017/2018.

Corneloup S. (éd.): *Droit européen du divorce*. Paris 2013.

[41] The European Group of PIL thoroughly analysed the question of uniform rules for third-country judgments in its Copenhagen and Brussels meetings and came up with a detailed draft proposal, available at http://www.gedip-egpil.eu/documents/gedip-documents-20poe.htm (accessed 31.08.2020).

Dutta A.: *Beyond Husband and Wife — New Couple Regimes and the European Matrimonial Property Regulations*. "YPIL", 2017/2018.
Dutta A., Weber J. (éds.): *Die Europäischen Güterrechtsverordnungen*. Beck, 2017.
Franzina P.: *Jurisdiction in Matters Relating to Property Regimes under EU Private International Law*. "YPIL", 2017/2018.
Hammje P.: *'Mariage pour tous' et droit international privé*. "Rev. crit. DIP", 2013.
Heiderhoff B.: *Die EU-Güterverordnungen*. "IPRax", 2018.
Magnus U., Mankowski P.: *Brussels IIbis Regulation*. Munich 2012, Art. 1er n° 21.
Rauscher Th.: *EuZPR-EuIPR Europäisches Zivilprozess- und Kollisionsrecht — Kommentar*, vol. IV, Art. 1 Brüssel IIa-VO, n° 6 à 8.

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The Influence of Bilateral Treaties with Third States on Jurisdiction and Recognition of Decisions in Matters on Succession — Polish Perspective

Abstract: The aim of the study is to discuss the impact of bilateral international treaties concluded by EU Member States with third countries on jurisdiction and recognition of judgments in matters of succession from Polish perspective. The author discusses the main problems in the interpretation of Article 75 of Regulation 650/2012 and the possible conflict of this solution with the Treaty on the Functioning of the EU. The article indicates also practical problems related to the collision of bilateral treaties and Regulation No 650/2012 regarding, for example, the possibility of concluding choice-of-court agreements, recognition of foreign judgments in matters of succession and the possibility of issuing the European Certificates of Succession.

Keywords: bilateral treaties — Regulation (EU) No 650/2012 — inheritance proceedings — international jurisdiction — recognition and enforcement of decisions in matters of succession

I. Introduction

The purpose of Regulation (EU) No 650/2012 was to unify completely the regulations concerning, among other things, international jurisdic-

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tion and the recognition and enforcement of decisions in matters of succession within the European Union. The same applied to conflict-of-laws rules in those matters. For that reason, the jurisdiction provisions in the Regulation, for example, exclude, as a rule, the possibility of invoking jurisdiction grounds in the succession matters, which the Court of Justice explicitly confirmed in its judgment in re: *Oberle*[1].

Nevertheless, Regulation (EU) No 650/2012 provided for an exception to that rule in case of bilateral international agreements (treaties) with third countries on succession matters that had been made before the effective date of the Regulation (Article 75.1 of Regulation (EU) No 650/2012). On the one hand, that was supposed to keep the existing international obligations of Member States towards third countries.[2] On the other hand, the Regulation has completely replaced bi- and multilateral agreements between Member States, except for the Hague Convention of 1961 and the Nordic Convention (Article 75.2 of Regulation (EU) No 650/2012).

The solution gives rise to many concerns in Poland as there is a considerable number of bilateral agreements that Poland had undertaken prior to its accession to the EU and that regulate the direct international jurisdiction of courts as well as the recognition and enforcement of decisions in the succession matters[3]. The provisions to that effect are typically included in bilateral agreements on judicial cooperation in civil matters and there are more than thirty such agreements to which Poland is a party. As there has been a large number of citizens from Ukraine, Belarus, and Russia migrating to Poland recently, the provisions of agreements with those countries are of particular importance in that context[4]. Notably: Agreement between the Republic of Poland and the Republic of Belarus on legal aid and legal relationships in civil, family, labour, and

[1] Judgment of the CJEU of 21 June 2018 in case C-20/17, proceedings brought by Vincent Pierre Oberle.

[2] A. Bonomi: *Le droit des successions. Commentaire du Reglement (UE) no 650/2012 du 4 julliet 2012*. Bruylant 2016, p. 939.

[3] Cf. among others, P. Czubik: *Obowiązywanie norm kolizyjnych z umów o pomocy prawnej zawartych z Białorusią, Ukrainą i Rosją w obrębie materii objętej zakresem zastosowania rozporządzeń europejskich*. „Nowy Przegląd Notarialny" 2015, No. 3, pp. 19 ff.

[4] M. Margoński also points to the practical importance of the agreement with Vietnam (in: *Rozporządzenie Parlamentu Europejskiego i Rady (UE) Nr 650/2012 z dnia 4 lipca 2012 r. w sprawie jurysdykcji, prawa właściwego, uznawania i wykonywania orzeczeń, przyjmowania i wykonywania dokumentów urzędowych dotyczących dziedziczenia oraz w sprawie ustanowienia europejskiego poświadczenia spadkowego. Komentarz*. Ed. K. Osajda. Warszawa 2020, comment 10 on Article 75).

criminal matters, concluded on 26 October 1994[5]; Agreement between the Republic of Poland and the Russian Federation on legal aid and legal relationships in civil and criminal matters, concluded on 16 September 1996[6] and Agreement between the Republic of Poland and Ukraine on legal aid and legal relationships in civil and criminal matters, concluded on 24 May 1993[7]. As regards jurisdiction-related provisions, the agreements contain identical regulations concerning the recognition and enforcement of decisions.

Naturally, the problem is more complex as similar agreements were signed by West European countries (agreements between Germany and Iran, Russia and Turkey; Austria and Iran and Russia; France and Iran, Cambodia and Tunisia) as well as other Central and Eastern European countries (Estonia, Lithuania, Latvia with Russia and Ukraine)[8]. However, in Poland the problem is quite specific as the agreements do include regulations on direct jurisdiction in matters of succession, rather than only being limited in scope to the applicable law[9].

The issue at hand not only pertains to the relations between the said agreements and procedural rules concerning jurisdiction, recognition, and enforcement of decisions, but also to conflict-of-laws regulations included in the agreements. Yet, those issues are beyond the scope of this paper.

II. The wording and the origin of Article 75.1 of the Regulation

In keeping with Article 75.1 of Regulation (EU) No 650/2012 the said Regulation shall not affect the application of international conventions to which one or more Member States are party at the time of adoption of that Regulation and which concern matters covered by that Regulation.

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[5] Journal of Laws of 1995 No. 128, item 619.

[6] Journal of Laws of 2002 No. 83, item 750.

[7] Journal of Laws of 1994 No. 96, item 465.

[8] Cf. the list of agreements presented by R. Frimston: *European Union Succession Regulation 650/2012: an update end entreaty*. "Private Client Business" 2018, vol. 6, p. 198.

[9] R. Frimston: *European Union Succession Regulation*…, p. 198, who points out that the Western countries regulated international jurisdiction issues only in agreements with Turkey.

The provision contains the so-called compatibility clause that is also present in other regulations, such as: Article 73.3 of Regulation (EU) No 1215/2012 (Brussels IA), Article 25.1 of Regulation (EC) No 593/2008 (Rome I) and Article 28.1 of Regulation (EC) No 864/2007 (Rome II).

It is a known fact that the lack of explicit compatibility clause in Regulation (EC) No 44/2001 (Brussels I) that preceded Regulation (EU) No 1215/2012 was the subject of disputes in the doctrine[10]. The regulation contained in Regulation (EC) No 44/2001 which defined its relations with other instruments (Articles 67 to 72) was incomplete as it did not cover the relations between Regulation (EC) No 44/2001 and international agreements that are binding on Member States and third countries and that are not international agreements on particular matters, as referred to in Article 71 of Regulation (EC) No 44/2001, and agreements referred to in Article 72 of Regulation (EC) No 44/2001[11]. In practice it referred to bilateral agreements between Member States and third countries. Therefore, the issue at stake was the mutual relation between Regulation (EU) No 44/2001 and specific international agreements with third countries which was of importance when a specific international agreement contained regulations concerning direct international jurisdiction. To make it as simple as possible, the issue came down to the question whether or not, in a case which is subject to both Regulation (EC) No 44/2001 and an international agreement with a third state, the court in a Member State forum should follow the provisions of Regulation (EC) No 44/2001 or the provisions of the international agreement.

The said issue of the mutual relation between Regulation (EU) No 44/2001 and specific international agreements with third countries gave rise to concerns. Some claimed that the conflicts of law arising in such a situation should be resolved in such a way as to keep the provisions of the international agreement with a third state intact[12], which usually means that the provisions of the agreement prevailed over the provisions of Regulation (EC) No 44/2001; others claimed that Regulation (EC) No 44/2001 also prevailed over international agreements of

[10] Cf. P. Mankowski, in: *Brussels I Regulation*. Eds. U. Magnus, P. Mankowski, Sellier 2007, pp. 760—761.

[11] See A. Nuyts: *Study of Residual Jurisdiction: Review of the Member States' Rules concerning the 'Residual Jurisdiction' of their courts in Civil and Commercial Matters pursuant to the Brussels I and II Regulations'*. Available online: https://gavclaw.files.wordpress.com/2020/05/arnaud-nuyts-study_residual_jurisdiction_en.pdf (accessed 13.10.2020), p. 146.

[12] Cf. P. Grzegorczyk: *Jurysdykcja krajowa w sprawach z zakresu prawa własności przemysłowej*, Warszawa 2007, pp. 140—141; R. Geimer, in: R. Geimer, R.A. Schütze: *Europäisches Zivilverfahrensrecht: EuZVR*. 3 Aufl. C.H. Beck, München 2010, Art. 71, bibliographic note 18, p. 895 (citing Article 71 of Regulation No 44/2001).

Member States with third countries[13]. The latter standpoint relied on the assumption that Regulation (EC) No 44/2001 was of universal nature and that the national law of Member States and their international agreements with third countries are applied only under Article 4.1 of Regulation (EC) No 44/2001 if the defendant had no domicile or registered office in any Member State. As a result, where the scopes of application of Regulation (EC) No 44/2001 and of the said international agreements coincided, the said agreements could not be applied pursuant to Article 4.1 of Regulation (EC) No 44/2001. In that context, the fact that the provisions specifying the relation between Regulation (EC) No 44/2001 and other instruments do not contain a rule concerning such agreements was supposed to mean that Regulation (EC) No 44/2001 was to be applied rather than such international agreements.

Due to the expansion of the scope of application of Regulation (EU) No 1215/2012 so as to include defendants from countries other than EU countries, the EU legislator decided to regulate clearly the relations between Regulation and bilateral agreements in Article 73.3, even though such a solution had not originally been included in the proposed regulation. It was only included after attracting criticism from the doctrine. Consequently, as far as jurisdiction in civil and commercial matters is concerned, a solution parallel to the one previously established in the area of conflicts-of-laws regulations under Article 25.1 of Regulation (EC) 593/2001 (Rome 1) and Article 28.1 of Regulation (EC) 864/2007 started to be applied. Upon the adoption of such a solution, in case of a conflict between an EU jurisdiction regulation and a jurisdiction regulation (concerning direct international jurisdiction) in an international agreement between Poland and a third state, the jurisdiction regulation in said international agreement would have a priority as a rule. Such priority is naturally delineated by the limits on the application of the international agreement with a third state and it only applies to the subject matter of the regulation; most significantly, in addition to regulating direct jurisdiction it could also cover other jurisdiction-related issues (e.g. examination as to jurisdiction, respecting prior *lis pendens* of the case), as long as a given international agreement contains some provisions in that respect.

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[13] See the report by A. Nuyts: *Study…*, p. 147 citing the ECJ opinion of 7.02.2006, 1/03 (ECR 2006, p. I—01145) concerning the projected conclusion of the Lugano Convention II. The same direction is also followed by P. Grzebyk: *Jurysdykcja krajowa w sprawach z zakresu prawa pracy w świetle rozporządzenia Rady (WE) nr 44/2001*. Warszawa 2011, pp. 56—57. The author refers to a situation where the international agreement with a third state contains the so-called compatibility clause, as a result of which priority should be given to Regulation (EC) No 44/2001.

It seems that similar arguments were considered when adopting Article 75.1 of Regulation (EU) No 650/2012 as a legal instrument regulating not only procedural rules but also conflicts-of-laws rules. Therefore, the adopted interpretation of Article 73.3 of Regulation (EU) 1215/2012 cannot be disregarded when interpreting Article 75.1 of Regulation (EU) No 650/2012.

III. Problems with the application of Article 75.1

a) Conflict with Article 351 of TFEU

The doctrine pointed out that the consequences of introducing a compatibility clause concerning international agreements with third countries should also be viewed from the perspective of Article 351 of the Treaty on the functioning of the European Union (TFEU)[14]. On the one hand, Article 351.1 of TFEU reads that TFEU shall not affect the rights and obligations of Member State arising from agreements with third countries concluded before 1 January 1958 or, for acceding States, before the date of their accession; on the other hand, Article 351.2 of TFEU provides that to the extent that such agreements are not compatible with TFEU (which also includes incompatibility with secondary EU law), the Member State concerned shall take all appropriate steps to eliminate the incompatibilities established. It is assumed that the duty may involve the need to renegotiate, or even terminate, an agreement with a third state, unless it is impossible under the provisions of the said agreement and of international law[15]. The question arises how to evaluate, under Article 351.2 of TFEU, the compatibility clauses existing in secondary laws, such as: Article 73.3 of Regulation (EU) No 1215/2012 (Brussels IA),

[14] Cf. Ch. Kohler: *Die künftige Erbrechtsverordnung der Europäischen Union und die Staatsverträge mit Drittstaaten*. In: *Europäisches Erbrecht. Zum Verordnungsvorschlag der Europäischen Kommission zum Erb- und Testamentsrecht*. Eds. G. Reichelt, W.H. Rechberger, 2011, p. 109 ff.

[15] On Article 351 TFEU (former Article 397 of EC Treaty) see K. Schmalenbach, in: *EUV/EGV. Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta. Kommentar*. Eds. Ch. Calliess, M. Ruffert, München 2007, art. 307, pp. 2460—2467; D. Booß, in: *EU-Verträge. Kommentar nach dem Vertrag von Lissabon*. Eds. C.-O. Lenz, K.-D. Borchardt. Köln—Wien 2010, art. 351, pp. 2882—2885; D.-E. Khan, in: *EUV/AEUV. Vertrag über die Europäische Union und Vertrag über die Arbeitsweise der Europäischen Union. Kommentar*. Eds. R. Geiger, D.-E. Khan, M. Kotzur. München 2010, art. 351, pp. 967—970.

Article 25.1 of Regulation (EC) No 593/2008 (Rome I) and Article 28.1 of Regulation (EC) No 864/2007 (Rome II), and most of all Article 75.1 of Regulation (EU) No 650/2012. Two lines of thoughts seem possible in this case.

First of all, it may be claimed that since a given instrument of secondary law explicitly provides that an international agreement has priority over its provisions, including an agreement between a Member State or Member States and a third state or third countries, then such an international agreement is not incompatible with that instrument of secondary law, therefore there is no incompatibility within the meaning of Article 351.2 of TFEU[16].

Secondly, it may be argued that no compatibility clause may repeal the effect of Article 351.2 of TFEU, therefore even if such a clause is added to a given secondary law instrument, the fact will not alter the duties of the Member States under that regulation.

If the former standpoint is adopted, then some importance would need to be ascribed to the language of the compatibility clause itself. See for example the language of Article 69.1 of Regulation (EC) 4/2009, which reads that while the Regulation shall not affect the application of bilateral conventions and agreements to which one or more Member States are party and which concern maintenance matters, the obligations of the Member States under Article 351 of TFEU (former Article 307 of the EC Treaty) remain valid. There is no such reservation under Article 73.3 of Regulation (EC) No 1216/2001, Article 25.1 of Regulation (EC) No 593/2008 (Rome I) and Article 28.1 of Regulation (EC) No 864/2007 (Rome II) and Article 75.1 of Regulation (EU) No 650/2012. Therefore, as a result of that provision, bilateral agreements keep their priority over the Regulation.

If the latter standpoint is adopted, countries such as Poland would be required to terminate bilateral agreements with third countries within the scope overlapping with the scope of Regulation (EU) No 650/2012. However, it is hard to accept that standpoint because bilateral agreements are used to set a certain standard of protection in both contracting states. It is therefore not advisable for Poland to voluntarily eliminate the duty for a third state to apply specific contractual provisions to Polish nationals in that country. Such a step could lead to considerable deterioration of the standard of protection afforded to Polish citizens or the predictability of decisions made by the authorities of the third state.

[16] Cf. *Opinion of the Legal Service* of 7.02.2000 in conjunction with Article 64 of the subsequent Regulation (EC) No 44/2001 (5353/00) and Opinion of the Legal Service of 22.03.2006 in conjunction with Article 28 of the subsequent Regulation (EC) No 864/2007 (Rome II) (7645/06). Also in A. Bonomi: *Le droit des successions*..., p. 938.

Termination of certain provisions regulating certain issues (such as conflicts-of-laws standards, rules of recognising foreign decisions) might, however, be possible but they should not be terminated altogether[17].

b) Compatibility clause under Article 75.1 vs compatibility clauses in international agreements

The views presented in the doctrine include an opinion that due to a "general compatibility clause" in the agreements between Poland and Belarus, Russia and Ukraine, the Succession Regulation has priority over those bilateral conventions[18]. Under Article 105 of the agreement with Belarus, Article 102 of the agreement with Russia and Article 97 of the agreement with Ukraine, the agreements do not affect the provisions of other agreements binding on one or both contracting parties.

However, this is a minority opinion. The critics raised, however, that Article 75.1 of Regulation (EU) No 650/2012 was disregarded and it prevented conflict between the Regulation and the conventions signed with countries other than EU Member States in that they remain in full force and effect in terms of the substance covered thereby. In addition, it is also mentioned that the scope of the said conventions is very narrow. They cover actual states of affairs that are strongly related to the legal areas of the countries being parties to specific conventions. The solutions adopted in the conventions rely on the principle that similar matters should be treated in the same manner in both countries[19]. The key argument being that compatibility clauses in agreements binding on Poland may be applied only to obligations existing at the time they are concluded and not in the future in respect of other obligations.[20] Furthermore, they only relate to conflicts with other agreements, rather than the provisions of internal law, that is the provisions of regulations once they have been adopted by EU authorities.

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[17] Cf. P. Czubik: *Obowiązywanie*..., pp. 26—27. The author postulates termination of all conflicts-of-laws regulations under agreements on judicial cooperation.

[18] According to M. Czepelak in such a case it should be assumed that the compatibility clauses are mutually waived, and therefore priority should be given to the EU regulation. See in respect to Article 25 of Regulation (EC) No 593/2008 and Article 28 of Regulation (EC) No 864/2007, M. Czepelak: *Umowa międzynarodowa jako źródło prawa prywatnego międzynarodowego*. Warszawa 2008, pp. 377—378.

[19] M. Pazdan: *Zakres zastosowania rozporządzenia spadkowego*. In: *Nowe europejskie prawo spadkowe*. Eds. M. Pazdan, J. Górecki. Warszawa 2015, item 4.

[20] M. Szpunar, K. Pacuła: *Prawo prywatne międzynarodowe. Komentarz*. Ed. M. Pazdan. Warszawa 2019, bibliographic note C.2 on Article 75 of Regulation (EU) No 650/2012, *legalis*.

IV. Provisions of bilateral agreements binding in Poland

As regards jurisdiction-related provisions, the agreements binding on Poland use nationality as the connecting factor and location as the connecting factor for immovable property. In keeping with Article 41.1 of the agreement with Ukraine, Article 42.1 of the agreement with Russia, and Article 45.3 of the agreement with Belarus, succession matters concerning movable property shall be within jurisdiction of authorities of the party of which the testator was citizen at the time of death. According to the second paragraph of those articles, succession matters concerning immovable property shall be resolved by authorities of the party where the property is situated. In addition, all three agreements envisage the possibility of referring the case to the other country if the entire movable property left upon the death of a citizen of one party remains on the territory of the other party, provided an heir makes such a request and all known heirs give their consent thereto (Article 41.3 of the agreement with Ukraine, Article 42.3 of the agreement with Russia and Article 45.3 of the agreement with Belarus). The agreements do not provide for the possibility of entering into agreements on national jurisdiction of Polish courts.

All three agreements also provide for a mechanism for the recognition and declaration of enforceability of decisions in civil cases which also include decisions in succession matters. They regulate the proceedings on recognition and declaration of enforceability of decisions from the country of the other party, as well as the grounds for refusal of recognition or enforcement of decisions. However, they do not provide for automatic recognition of decisions which has been known in the EU for many years, ever since the Brussels Convention of 1968; in contrast, they require proceedings in that matter while reserving that the law of the contracting party in which the decision is to be recognised and enforced shall apply to the decision recognition and enforcement.

V. Problematic issues in the application of bilateral agreements

First of all, there are concerns as to which issues should be considered within the scope of the agreement and which ones should be deemed

to fall outside the scope. It is therefore about the interpretation of Article 75.1 and determining the exclusion of the Regulation application within the scope that coincides with the scope of the agreement. As regards jurisdiction, recognition, and enforcement of decisions and documents, other than decisions, legitimising heirs, the scope of the Regulation is much broader than that of bilateral agreements.

It seems that since agreements regulate the grounds of international jurisdiction of the courts of both countries, then a Polish court may not invoke the Regulation as the grounds of its jurisdiction if the testator was a citizen of a country subject to the agreement, even if his/her last place of domicile was in an EU Member State. That also applies to a situation where jurisdiction would only by justified by the fact that assets were left in a Member State. Therefore, the application of Articles 4 and 10 of Regulation (EU) No 650/2012 by a Polish court is excluded. It is, however, worth keeping in mind that the said agreements are only binding on Poland — consequently, from the perspective of other courts of Member States Polish courts have national jurisdiction under Article 4 of Regulation (EU) No 650/2012 in a succession matter involving, for example, a deceased Ukrainian citizen who had his habitual residence in Poland at the time of death[21]. However, there are opinions that in such a situation the court of another Member State should take into account a bilateral agreement binding on the other Member State[22]. However, that position is doubtful.

The question is whether or not it is possible to effectively enter into a jurisdiction agreement in such a matter pursuant to the regulation. Bilateral agreements do not provide for the possibility of entering into jurisdiction agreements although they do not explicitly prohibit it. Given the time when those agreements had been made, it should be concluded that such a possibility was excluded at that time. Obviously it is first necessary to answer the question whether or not a Ukrainian, Russian, or Belarussian citizen who has habitual residence in Poland may choose the law to govern his/her succession under Article 22 of Regulation (EU) No 650/2012[23]. That is because the conflicts-of-laws rules under the bi-

[21] See M. Margoński, in: *Rozporządzenie Parlamentu Europejskiego i Rady (UE) Nr 650/2012 z dnia 4 lipca 2012 r. w sprawie jurysdykcji, prawa właściwego, uznawania i wykonywania orzeczeń, przyjmowania i wykonywania dokumentów urzędowych dotyczących dziedziczenia oraz w sprawie ustanowienia europejskiego poświadczenia spadkowego. Komentarz*. Ed. K. Osajda. Warszawa 2019, comment 14 on Article 75, Legalis.

[22] R. Frimston's position in R. Frimston: *European Union Succession Regulation…*, p. 199, can also be interpreted in that way.

[23] This refers to the law of a Member State, in keeping with Article 6. In practice, it applies to individuals who changed citizenship before death or who have dual citizenship.

lateral agreements do not allow that either. Choice of law is the premise for entering into a choice-of-court agreement. It seems that the opinion currently prevailing in Poland is that it is impossible. Consequently, it is considered that using a choice-of-court agreement as the basis for the jurisdiction of Polish courts in succession matters involving citizens of countries being parties to bilateral agreements is ineffective.

However, those issues are highly disputable as the bilateral agreements binding on Poland do not create a complete jurisdiction mechanism for succession matters. They do not regulate many material issues not only in terms of choice-of-law agreements, but also in terms of examination as to jurisdiction, effects of declining jurisdiction, etc. In the latter scope, Regulation (EU) No 650/2012 should definitely be applicable.

There are also concerns as to whether or not a Polish court may use Article 11 of Regulation (EU) No 650/2012 (*Forum Necessitatis*) as the grounds for its jurisdiction if such a solution is not envisaged under agreements binding on Poland. It seems, however, that since *forum necessitatis* is applied when courts of the other country have no jurisdiction or it is impossible to effectively initiate proceedings before the competent court, then such a possibility should be permitted pursuant to the Regulation[24]. Besides, if there had been no grounds for the application of Regulation (EU) No 650/2012, then the Polish court would still have to take advantage of *forum necessitatis* as regulated under Polish law (Article 1099^1 of the Polish Code of Civil Procedure).

There are also important issues concerning the recognition and enforcement of decisions in succession matters.

First of all, the Regulation provisions concerning the proceedings on the recognition and declaration of enforceability only apply to decisions originating from Member States that follow the Regulation. Therefore, they do not apply to decisions on succession matters originating from third countries. That creates problems in a situation where the court of a Member State gave its decision on a succession while using the Regulation as the grounds of its jurisdiction or for determining the applicable law, even though a bilateral agreement should be applied in a given case from the Polish perspective. As rightly noted in the doctrine, under such circumstances the Polish court has no grounds to refuse to recognise such a decision because it is not envisaged in any grounds of non-recognition under Article 40 of Regulation (EU) No 650/2012[25]. The Regulation

[24] A. Dutta: *Münchener Kommentar, Vol. 10 (ed. J. v. Hein), Article 64 of Regulation (EU) No 650/2012*, Article 64 of Regulation (EU) No 650/2012, bibliographic note 9; M. Margoński, in: *Rozporządzenie…,* bibliographic note 16 on Article 75.

[25] M. Margoński, in: *Rozporządzenie…*, bibliographic note 21 on Article 75.

does not provide for any control in terms of conflict of laws or jurisdiction in respect of decisions subject to recognition.

It should be also pointed out, as a side note, that the grounds for non-recognition of decisions under agreements with Ukraine, Russia, and Belarus do not include a public policy clause. It is quite surprising because such a ground was left in Regulation (EU) No 650/2012 for succession decisions from EU and also in other EU regulations concerning recognition and enforcement of decisions. This means that decisions from third countries receive preferential treatment versus the decisions of courts from EU Member States which are subject to control in terms of the public policy clause. It gives rise to reasonable concerns and the question as to whether or not the public policy clause should be added to the grounds of non-recognition for decisions originating from third countries. However, that would require either the relevant interpretation of the bilateral agreements by the judicature or actually termination of the agreements in that regard.

There is also a practical question about the possibility of issuing a European Certificate of Succession (ECS) in a case in which a Polish court uses a bilateral agreement as the ground of its jurisdiction. Obviously none of the agreements excludes the admissibility of issuance of ECS. Therefore the overwhelming opinion is that since Polish courts may issue a decision based on its jurisdiction determined under a bilateral agreement, it is also possible to issue ECS. The wording of the Regulation itself is, however, problematic. Under Article 64 of Regulation (EU) No 650/2012, ECS may be issued in the Member State whose courts have jurisdiction under Article 4, Article 7, Article 10, or Article 11 of the Regulation. Therefore, the wording of the provision excludes the issuance of ECS in a situation where jurisdiction is governed by the provisions of a bilateral agreement that has a priority. However, as rightly noted in the doctrine, the said provision is not to ground jurisdiction in the provisions listed therein but rather to make the issuance of ECS dependent on the existence of such jurisdiction. If jurisdiction in fact exists, then even if it arises, in whole or in part, from provisions other than the listed ones, there is no reason to exclude the issuance of ECS and refer the parties concerned only to national courts for succession proceedings[26]. However, that issue gives rise to a number of concerns.

[26] M. Margonski, in: *Rozporządzenie*..., comment 25 on Article 75; A. Dutta: *Münchener op. cit*., bibliographic note 9.

VI. Conclusions

Concluding, it may be stated that there are many practical concerns regarding the existence, under Article 75.1 of Regulation (EU) No 650/2012, of bilateral agreements on legal assistance regulating national jurisdiction, recognition and enforcement of decisions. While they are not as frequent as complications relating to the conflict-of-laws rules (of applicable law), they do disturb the uniform application of the Succession Regulation in procedural terms.

Most significantly, the complications arise when procedural rules arising from a bilateral agreement are to be respected by courts of other Member States that are not bound by a given agreement. There are doubts as whether or not there is a legal basis for that.

Furthermore, it leads to the implementation of procedural connecting factors in the European legal area, such as nationality or location or immovable property, that Regulation (EU) No 650/2012 attempted to eliminate or limit. It defeats the purpose of the Regulation which was to create a unity of forum for succession matters.

Therefore, the requests for renegotiation of the agreements to some extent, (though not their termination altogether) are worth considering[27]. There is, however, hardly any requirement for Member States to terminate such agreements under EU law. The need for renegotiation is rather dictated by practical reasons and the need to ensure uniform nature of the legal system.

It is also necessary to arrive at an interpretation of the agreements' provision that does not excessively expand the scope of their application. They should not be interpreted according to the principle that if something is not envisaged by law, then it is forbidden. The assumption should be quite the opposite. It is also worth keeping in mind that the same agreement is applied in a third state and is meant for the protection of Polish citizens' rights in that country.

[27] Cf. R. Frimston: *European Union Succession Regulation*..., p. 199. See also A. Dutta: *The Perspective of the European Union*. In: *European Private International Law and Member State Treaties with Third States. The Case of the European Succession Regulation*. Eds. A. Dutta, W. Wurmnest. Intersentia 2019, p. 323.

References

Bonomi A.: *Le droit des successions. Commentaire du Reglement (UE) no 650/2012 du 4 julliet 2012*. Bruylant 2016.

Calliess Ch., Ruffert M. (eds.)*: EUV/EGV. Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta. Kommentar*. München 2007.

Czepelak M.: *Umowa międzynarodowa jako źródło prawa prywatnego międzynarodowego*. Warszawa 2008.

Czubik P.: *Obowiązywanie norm kolizyjnych z umów o pomocy prawnej zawartych z Białorusią, Ukrainą i Rosją w obrębie materii objętej zakresem zastosowania rozporządzeń europejskich*. „Nowy Przegląd Notarialny" 2015, No. 3.

Dutta A.: *Münchener Kommentar, Vol. 10 (ed. J. v. Hein), Article 64 of Regulation (EU) No 650/2012*, Article 64 of Regulation (EU) No 650/2012.

Dutta A.: *The Perspective of the European Union*. In: *European Private International Law and Member State Treaties with Third States. The Case of the European Succession Regulation*. Eds. A. Dutta, W. Wurmnest. Intersentia, 2019.

Frimston R.: *European Union Succession Regulation 650/2012: an update end entreaty*. "Private Client Business" 2018, vol. 6.

Geiger R., Khan D.-E., Kotzur M. (eds.): *EUV/AEUV. Vertrag über die Europäische Union und Vertrag über die Arbeitsweise der Europäischen Union. Kommentar*. München 2010.

Grzebyk P.: *Jurysdykcja krajowa w sprawach z zakresu prawa pracy w świetle rozporządzenia Rady (WE) nr 44/2001*. Warszawa 2011.

Grzegorczyk P.: *Jurysdykcja krajowa w sprawach z zakresu prawa własności przemysłowej*. Warszawa 2007.

Kohler Ch.: *Die künftige Erbrechtsverordnung der Europäischen Union und die Staatsverträge mit Drittstaaten*. In: *Europäisches Erbrecht. Zum Verordnungsvorschlag der Europäischen Kommission zum Erb- und Testamentsrecht*. Eds. G. Reichelt, W.H. Rechberger, 2011.

Lenz C.-O., Borchardt K.-D.: *EU-Verträge. Kommentar nach dem Vertrag von Lissabon*. Köln—Wien 2010.

Magnus U., Mankowski P. (eds.): *Brussels I Regulation*. Sellier 2007.

Nuyts A.: *Study of Residual Jurisdiction: Review of the Member States' Rules concerning the 'Residual Jurisdiction' of their courts in Civil and Commercial Matters pursuant to the Brussels I and II Regulations'*. Available online: EC, https://gavclaw.files.wordpress.com/2020/05/arnaud-nuyts-study_residual_jurisdiction_en.pdf (accessed 13.10.2020).

Pazdan M.: *Zakres zastosowania rozporządzenia spadkowego*. In: *Nowe europejskie prawo spadkowe*. Eds. M. Pazdan, J. Górecki. Warszawa 2015.

Rozporządzenie Parlamentu Europejskiego i Rady (UE) Nr 650/2012 z dnia 4 lipca 2012 r. w sprawie jurysdykcji, prawa właściwego, uznawania i wyko-

nywania orzeczeń, przyjmowania i wykonywania dokumentów urzędowych dotyczących dziedziczenia oraz w sprawie ustanowienia europejskiego poświadczenia spadkowego. Komentarz. Ed. K. Osajda. Warszawa 2020.

Szpunar M., Pacuła K.: *Prawo prywatne międzynarodowe. Komentarz*. Ed. M. Pazdan. Warszawa 2019.

„Problemy Prawa Prywatnego Międzynarodowego". T. 26
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The Principle of a Single Estate and Its Role in Delimiting the Applicable Laws

Abstract: This paper argues that the principle of unity of succession is one of the key concepts of the Succession Regulation. By operation of this principle on the jurisdictional level, the Regulation tends to favor a perspective of a single Member State when it comes to all issues related to succession. The principle of unity of succession does not of course eliminate the need to proceed to the characterization and to delimitate the scopes of conflict of laws rules at stake. However, this principle — aiming to promote a unitary vision of a single estate in all the Member States bound by the Regulation — sets a tone for some interpretative techniques that tend to favor succession-related characterization of the issues having some importance in the context of succession with cross-border implications. According to the Author, effet utile-driven characterization, on the one hand, and succession-friendly characterization of the issues falling within 'gray areas' created by the operation of Article 1(2) of the Succession Regulation, on the other hand, are among them.

Keywords: EU Succession Regulation — principle of unity of succession — characterisation (classification)

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1. Introduction

The principle of a single estate, most commonly referred to as 'the principle of unity of succession' or 'the monist principle'[1] and widely recognizable under its French denomination of 'principe de l'unité de la succession', echoes a traditional debate relating to the international successions where it is opposed to 'the principle of scission' or 'the dualist principle'[2].

In a general sense, the principle of unity of succession seeks to ascertain that a single law is applicable to all inheritance property in order to facilitate the settlement of international successions[3]. It can be argued, however, that it does so without taking into account the need to promote international consistency in addressing the matters of succession or at least that it disregards the differencing solutions.

In more detailed terms, on the one hand, the unity of succession aims to prevent a 'horizontal' ('territorial', 'spatial') division of the succession — that is to say, the inheritance in its entirety, movable and immovable assets included, should be governed by a single law. On the other hand, this principle aims to prevent division of the succession in 'vertical' ('temporal') sense. A single law should therefore apply in relation to

[1] See A. Davì, in: *The EU Succession Regulation. A Commentary*. Eds. A.-L. Calvo Caravaca, A. Davì, H.P. Mansel. Cambridge 2016, p. 3.

[2] This debate has inspired a voluminous body of literature long prior to the enactment of EU private international law provisions on succession. See, among others, H. Li: *Some recent developments in the conflict of laws of succession*. "Recueil Des Cours de l'Académie de La Haye" 1990, vol. 224, p. 22 and seq.; E. Rabel: *The Conflict of Laws: A Comparative Study. Volume Four Property: Bills and Notes: Inheritance: Trusts: Application of Foreign Law: lntertemporal Relations*. Michigan 1958, p. 268 and seq.; A. Grahl-Madsen: *Conflict between the Principle of Unitary Succession and the System of Scission*. "International and Comparative Law Quarterly" 1979, vol. 28, no. 4, p. 598 and seq. For a brief overview of solutions existing in the Member States in this respect prior to the date of application of the Succession Regulation see M. Pazdan: *Statut spadkowy w świetle rozporządzenia spadkowego*. In: *Nowe europejskie prawo spadkowe*. Eds. M. Pazdan, J. Górecki. Warszawa 2015, p. 95.

[3] See A. Wysocka-Bar: *Jurysdykcja krajowa sądów polskich a kolizyjna jednolitość spadku*. "Problemy Współczesnego Prawa Międzynarodowego Europejskiego i Porównawczego" 2016, vol. XIV, p. 91. It is also argued that the unity of succession does not only address the particular needs of the conflict of laws but also reflects more faithfully the universal character of the succession recognised under some of the substantive laws. See D.A. Popescu: *Guide on international private law in successions matters*. Oneşti 2014, p. 40 et seq. See also, for examples of legal systems in which the universal character of succession inspired the recognition of the principle of a single estate in the realm of private international law, A. Grahl-Madsen: *Conflict*..., p. 601.

the whole succession process, from its opening to the final distribution of the assets[4].

Against this background, the reference to the principle of unity of succession in the context of the delimitation between succession law and other applicable laws may be a priori surprising or even feel misguided. The principle of unity of succession is mainly oriented towards the internal unity of the law applicable to succession and not towards the external boundaries of this law or its interplay with other applicable laws. It may therefore be questioned whether this principle can play any significant role with regard to the delimitation of applicable laws. Yet, it seems that at least in the context of the Succession Regulation and its iteration of the principle of unity of succession, this question may surprisingly call for an affirmative answer.

2. Principle of a single estate under the Succession Regulation

It is the first paragraph of Article 21(1) of the Succession Regulation, headed 'General rule', that clarifies the choice made by the EU legislator in favor of the unitary approach to the international succession. It does so by indicating that 'the law of the State' designated as applicable under this provision by a connecting factor of 'habitual residence' is applicable to the 'succession as a whole'. That interpretation is borne out by Recital 37 of the Regulation which affirms that, for the sake of legal certainty and in order to avoid the fragmentation of the succession, a single law should govern 'all of the property forming part of the estate, irrespective of the nature of the assets and regardless of whether the assets are located'. This Recital is a nod to the 'horizontal' ('territorial', 'spatial') dimension of the principle of unity of succession. However, the listing of

[4] The distinction between 'horizontal' and 'vertical' unity is framed in these exact terms, inter alia, by A. Davì, in: *The EU...*, p. 37; P. Lagarde, in: *EU Regulation on Succession and Wills. Commentary*. Eds. U. Bergquist, D. Damasceli, R. Frimston, P. Lagarde, F. Odersky, B. Reinhartz. Koln 2015, p. 29. Some other authors distinguish the unity of the succession as to the assets and liabilities, on the one hand, and the unity of the succession as to the matters (issues) of succession, on the other hand. See A. Metallinos, in: *EU Succession Regulation No 650/2012: A Commentary*. Ed. H. Pamboukis. Oxford 2017, p. 241—243. Similarly, A. Bonomi, in: *Le droit européen des succession, Commentaire du règlement (UE) n° 650/2012, du 4 juillet 2012*. Eds. A. Bonomi, P. Wautelet. Bruxelles 2016, p. 364 et seq., distinguishes between the unity in relation to the assets ('l'unité par rapport au biens successoraux') and the unity in relation to the issues governed ('l'unité par rapport aux questions régies').

issues falling with the scope of the law applicable under the conflict of laws rules of the Succession Regulation, provided by Article 23, makes it clear that, under this Regulation, the unitary approach extends also to the 'vertical' ('temporal') dimension of the unity[5]. A *dépeçage* resulting from the parallel application of multiple laws is a priori excluded. To that end, the connecting factor of 'habitual residence' must lead to the application of one legal system to the succession in its entirety[6].

The emphasis on the unity of the succession should be followed, in my view, not only with regards to Article 21(1) of the Regulation that relies on the connecting factor of 'habitual residence' but also in respect to Articles 21(2) and 22 of the Regulation and their respective connecting factors of State manifestly more closely connected with the deceased and of nationality of the deceased. Firstly, the reasons justifying the avoidance of fragmentation of the succession under Article 21(1) of the Succession Regulation do not lose their relevance solely due to the fact that a different connecting factor is used. Secondly, the conflict of laws rules contained in Articles 21 and 22 refer to 'the law' of the State that meets the requirement set by the connecting factors and use, in general, the terminology implying that only a single law governs the succession. Thirdly, neither the affirmation provided by Recital 37, nor the listing provided by the Article 23 confine themselves solely to Article 21(1) of the Regulation. Fourthly, if the principle of unity of succession is intended to be one of the key principles of the Regulation, there should be some compelling reasons to deviate from this principle. Articles 21(2) and 22 do not seem to offer any[7].

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[5] According to Article 23(2) of the Succession Regulation the law determined pursuant to Articles 21 and 22 of the Regulation shall govern the succession as a whole: from the issues related to the opening of the succession, through the powers of the heirs and of the legatees, to the sharing-out of the estate.

[6] It is worth noticing that in order to achieve the coordination between ius and forum mentioned in Recital 27 of the Succession Regulation, the connecting factor of 'habitual residence' is used also in the rule on jurisdiction of Article 4 of the Regulation. It is true that the functions of conflict of laws rules and rules on jurisdiction largely differ. However, if the pursuit of coordination was driving the EU legislator's choice of the connecting factors, it can be argued that they should receive the same interpretation irrespectively of the context in which they are being used. If anything, on the interpretation of the connecting factor of 'habitual residence' under Article 4, see footnote 13.

[7] In particular, an individual possessing multiple nationalities should not be allowed to frustrate the unity of succession by exercising the autonomy he or she is granted under Article 22 of the Succession Regulation. Such choice of law seems to be excluded by second phrase of Article 22(1) of the Regulation. However, some authors consider that the issue in question is not expressly addressed by the Regulation. See A. Makowiec: *W kierunku harmonizacji prawa spadkowego w Unii Europejskiej — rozporządzenie (UE) nr 650/2012 z 4 lipca 2012 r.* "Roczniki Administracji i Prawa" 2013, vol. 13, p. 447. Even

Notwithstanding the foregoing, it is widely acknowledged that under the Succession Regulation the principle of unity of succession has many facets[8], most of which deviate from its traditional understanding. It is, for instance, argued that by means of this principle the legislator is not only aiming to achieve an internal unity of law applicable to the succession[9], but also striving to ensure that a succession will be submitted, in its entirety, to one and the same court[10]. In order to achieve that goal, at least two requirements have to be met. One the one hand, the extent of jurisdiction, understood as the aspects of succession in respect to which, territorial-wise, a court holds jurisdiction, should not be limited to a particular Member State[11]. On the other hand, the connecting factors used by the Regulation have to be constructed as to lead to the conferral of the jurisdiction to the courts of a single Member State[12]. Both these require-

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if that is the case, the choice of law is inherently limited under the terms of Article 22 and it does not seem that the EU legislator was intending to sacrifice the unitary approach for the sake of autonomy to choose the applicable law.

[8] A. Bonomi, in: *Le droit européen des succession…* Eds. A. Bonomi, P. Wautelet, p. 364.

[9] See P. Lagarde, in: *EU Regulation…*, p. 24, 29 who takes the view according to which the principle of unity of succession encompasses the unity of law applicable and the unity of jurisdiction. See also A. Wysocka-Bar: *Jurysdykcja…*, p. 103, who draws a distinction between 'the unity of ius' and 'the unity of forum'.

[10] This view seems to be shared by, inter alia, P. Lagarde who states 'the principle idea motivating the originators of the Regulation is that of unity: unity of succession, meaning that the inheritance in its entirety, both movable and immovable, will be governed by a single law and submitted to the same court, both at the level of judicial and of legislative competence'. See P. Lagarde, in: *EU Regulation…*, p. 24. Similar view is taken by A. Davì, in: *The EU…*, p. 37, who contends that 'the principle implies that one single judicial authority has jurisdiction on the succession and one law is applicable to it'. In this vein, P. Kindler: *The General Rule: The 'Last Habitual Residence' of the Deceased and 'the Closer Connection' are objective connecting factor determining the law applicable to the succession*. In: *Towards the Entry into Force of the Succession Regulation:Building Future Uniformity upon Past Divergencies*. Eds. S. Bariatti, I. Viarengo, F.C. Villata. JUST/2013/JCIV/AG/4666, argues that the principle of unity of succession is provided for in Article 21 of the Succession Regulation and confirmed by, inter alia, Article 4 of this Regulation.

[11] Indeed, Article 12(1) of the Succession Regulation seems to imply that, under the Regulation, the extent of general jurisdiction is not limited to a specific territory within the EU. It follows from this provision that a court of a Member State *may* decide not to pronounce itself on the assets located in a third State if that court anticipates refusal of recognition or enforcement of its future judgment. The limitation lies therefore within the practical effectiveness of a judgment due to the potential difficulties with its recognition and/or enforcement in a third State and not within a limitation of the extent of jurisdiction inherent to all of the rules on jurisdiction of the Regulation.

[12] Under Article 4 of the Succession Regulation, it is the place of the habitual residence of the deceased at the time of death that serves as the main connecting factor in

ments are — with some deviations discussed below — met under the Succession Regulation.

3. Deviations from the principle of a single estate

The pursuit of unity under the Succession Regulation is not absolute[13]. It is subject to some derogations provided for by the Regulation both in relation to the conflicts of laws and jurisdictional issues.

On the conflict of laws level, the deviations from the principle of unity of succession occur due to the operation of Articles 29 (special rules on the appointment and powers of an administrator), 30 (overriding mandatory rules), 31 (adaptation), 32 (commorients), 33 (estate without a claimant), 34 (renvoi) and 35 (public policy exception). Interestingly, at least some of them can be prevented by the coordination between ius and forum[14]. It is yet to be seen whether, in order not to circumvent the

matters of succession. In order to maintain the proper functioning of the principle of unity of succession, that connecting factor would need to be interpreted as requiring that each person has, at the time of death, only one place of the habitual residence. The question whether such an interpretation is correct has been already referred to the Court of Justice in the case E.E., C-80/19. While the Court has not yet delivered its judgment, in his Opinion presented in that case (ECLI:EU:C:2020:230, points 41 to 44), Advocate General Campos Sánchez-Bordona took the view that the practical effectiveness of the Regulation requires Article 4 to be interpreted as implying that a deceased can have only single place of habitual residence within the meaning of this provision. At point 42 of the Opinion, Advocate General backs his interpretation with an argument drawn from the avoidance of the fragmentation of succession. Following this line of reasoning, also the connecting factors used in Article 5, 7, 9, 10(1) and 11 of the Regulation would also have to be interpreted as leading to the jurisdiction of the courts of a single Member State.

[13] In fact, R. Frimston argues that Article 21(1) of the Succession Regulation may be interpreted as a provision already flagging that the principle of unity of succession can be and indeed is deviated from under this Regulation. According to this provision, 'unless otherwise provided for in this Regulation, the law applicable to the succession as a whole shall be the law of the State in which the deceased had his habitual residence at the time of death'. For this Author, Article 21(1) of the Regulation provides for a non-absolute character of the principle at least in relation to the law applicable to succession-related issues. See R. Frimston: *The European Union Succession Regulation no. 650/2012*. "Estates, Trusts & Pensions Journal" 2013, vol. 33, p. 109.

[14] Against this background, D.A. Popescu: *Guide*..., p. 39, contends that 'the principle of inheritance unity' has two aspects: on the one hand, the application of a single law to the succession and, on the other hand, the identity between the applicable law and the competent authority. While it is doubtful whether the coordination between ius and

principle of unity of succession underlying the Regulation, these Articles will receive a strict interpretation[15]. Surprisingly, the opposite might be inferred from a reading of Article 34. In fact, the unity of succession operating on conflict of laws level is sacrificed for the sake of 'international consistency' underlying this provision[16]: while at least to a certain extent a *renvoi* promotes the solutions of third States [and protects the application of the law of a Member State under Article 34(1)(b)], it does so without requiring a unitary end result of its operation[17]. In this respect, it may be argued that all the derogations from the principle of a single estate in its conflict of laws incarnation were put in place in order to ensure such 'international consistency'.

On the jurisdictional level, the derogations from the principle of unity of succession may occur in instances to which references are made in Articles 10(2) and 12 of the Succession Regulation[18]. They may also occur in the instances referred to in Article 11 of the Regulation, if it is accepted that the extent of jurisdiction of the forum of necessity is limited to the assets located in the Member State of this forum and, potentially, also to the assets located in a third State with which the case is closely connected and where the proceedings cannot reasonably be brought or conducted or would be impossible to conduct. Besides, in a certain parallel to the operation of *renvoi* under Article 34 which protects the application of the law of a Member State, the Regulation does not favor the unity of succes-

forum — understood as a situation where a competent court applies its own law — has to be necessarily perceived as an element of the principle of a single estate, such coordination definitely operates in favor of the unity of succession. It may prevent the application of multiple legal orders to a single succession as a result of the operation of Articles 29(1) (special rules of the forum on the administrator of the estate) and 35 (public policy of the forum). Similarly, Article 31 of the Succession Regulation allows for adaptation where there is a divergence between the jurisdiction and applicable law and these two legal systems differ on the recognition of a certain type of right in rem. The lack of such divergence would eliminate the very reason for the recourse to adaption. See, a contrario, A. Lehavi: *Globalizing Property Law: An Institutional Analysis*. "Vanderbilt Journal of Transnational Law" 2017, vol. 50, no. 5, p. 1201.

[15] See, in relation to Article 30 of the Succession Regulation, 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. XI, p. 125.

[16] See Recital 57 of the Succession Regulation.

[17] See W. Popiołek, in: *Prawo prywatne międzynarodowe. Komentarz*. Red. M. Pazdan. Warszawa 2018, komentarz do art. 34 rozporządzenia nr 650/2012, pkt 6. See also A. Devaux: *The European Regulations on Succession of July 2012: A Path Towards the End of the Succession Conflicts of Law in Europe, or Not?* "The International Lawyer" 2013, vol. 47, no. 2, p. 237.

[18] See F. Marongiu Buonaiuti: *The EU Succession Regulation and third country courts*. "Journal of Private International Law" 2016, vol. 12, no. 3, p. 562—563.

sion to the extent that would require a court of a Member State to decline its jurisdiction in favor of a court of a third State being in the position to ensure the complete application of the principle of a single estate[19].

4. Delimitation of applicable laws in the light of the principle of a single estate

The admission of all the aforementioned derogations from the principle of a single estate does not imply that the EU legislator forsakes the pursuit of unity. They only partially affect this principle and are generally specific circumstances related[20]. As such, they do not change the logics of the Regulation: it still favors an inward trend towards a perspective of a single Member State when it comes to all issues related to succession. It remains true even if it happens to be only a facade of unity created by the operation of the rules on jurisdiction and not by application of uniform rules on conflict of laws.

In fact, the conferral of jurisdiction to the courts of a single Member State leads to a situation where — within the whole territory of the Union and even beyond, provided that a decision rendered under the Succession Regulation will be enforced or recognized in a non-Member State — both the incidental questions and the issues falling outside the scope of uniform conflict of laws rules of that Regulation can be addressed from the perspective of a single set of private international law rules applied by the competent court. The delimitation of the laws governing the issues excluded from the scope of the Regulation is exercised by a single Member State and then extrapolated to the States where the decisions

[19] Articles 6, 8 and 9(2) of the Succession Regulation concern the situation where the jurisdiction is declined in favor of a court of a different Member State and under Article 12 of this Regulation the discretion of a court does not go so far as to allow it to decline completely its jurisdiction. See also K. Knol Radoja: *Deviations from the Principle of the Unity of Succession in the EU Regulation on Succession*. "Pravni Vjesnik" 2019, vol. 35, no. 2, p. 55—56.

[20] This is in particular the case of the derogations operating on the jurisdictional level. See also M. Lewandowska-Mroczkowska: *Jurisdiction in the Succession Matters under the Regulation (EU) no 650/2012 of the European Parliament and the Council of 4 July 2012 in the Face of Polish International Civil Procedure*. "Social Transformations in Contemporary Society" 2019, vol. 7, p. 154, who identifies 'the principle of unity of forum' as a general rule of the Regulation and argues that it is derogated in a very limited number of cases.

rendered under this Regulation are enforced or recognized. However, the principle of unity of succession operating on jurisdictional level cannot, by itself, guarantee that the objectives of the Regulation will be effectively met.

5. Characterization and the effectiveness of the Regulation

The delimitation of applicable laws ultimately boils down to the issue of characterization[21] and the conflict of laws strategy that the Regulation adopts makes the courts of a single Member State primarily responsible for dealing with that issue.

Against this background, the terms which the Succession Regulation uses to define its scope and the scope of the law applicable to the succession under Article 21(1) are subject to autonomous interpretation. The interpretation of those terms must therefore take account of the objectives of the Regulation, which — in line with the clarifications provided by the Recitals — are to eliminate obstacles to the free movement of persons within the internal market and ensure that the rights of the heirs are effectively guaranteed in the Member State[22]. To this end, the Succession Regulation introduces the European Certificate of Succession (ECS), intended to enable succession with cross-border implications within the European Union to be settled speedily, smoothly and efficiently[23].

Indeed, the ECS is an instrument that allows for an effective enforcement of a conflict of laws strategy that the Succession Regulation establishes: a succession with cross-border is to be dealt coherently by a single court applying one single law[24].

In this context, the person mentioned in an ECS as a heir or a legatee is to be presumed to have the status and the rights stated in the certificate with no conditions or restrictions other than those provided for in the certificate[25]. The ECS produces its effects in all Member States and is not subject to the public policy exception[26]. However, it can be inferred from Article 69(2) of the Succession Regulation read in the light of the

[21] See D. Salomon: *The Boundaries of the Law Applicable to Succession*. "Anali Pravnog Fakulteta Univerziteta u Zenici" 2016, Issue 18, p. 193.

[22] See Recital 7 of the Sucession Regulation.

[23] See Recital 8 of the Sucession Regulation.

[24] A. Lehavi: *Globalizing Property Law*..., p. 1202.

[25] See Article 69(2) of the Succession Regulation.

[26] See Article 69(1) of the Succession Regulation.

third sentence of recital 71 of this Regulation that the evidentiary effect of an ECS does not extend to issues which do not fall within the scope of this Regulation. As a result, an element relating to a matter excluded from the scope of lex successionis[27] — or any other law determined as applicable under the Succession Regulation[28] —, revealed in the ECS among its other elements, is not covered by the evidentiary effects provided for in Article 69.

This is, in a nutshell, one of the arguments that guided the Court of Justice in its judgment in Mahnkopf[29]. In essence, in this case the Court was asked to rule whether a quarter of the estate attributable under Paragraph 1371(1) of the German Civil Code (BGB) to a surviving spouse should receive a succession-related characterization and therefore fall within the scope of the lex successionis. This question was answered in affirmative. Alongside two other main arguments, the Court found, in line with Advocate General Szpunar[30], that in order for the provisions of the Succession Regulation providing for a regime of the ECS to maintain their effectiveness, a national provision such as Paragraph 1371(1) of the BGB should fall within the scope of the Regulation. As a matter of consequence, the scope of lex successionis has to be interpreted as to include the surviving spouse's share in the estate attributable to that spouse under a national provision such as Paragraph 1371(1) of the BGB[31]. Thus, it can be argued that the succession-related characterization of certain issues may be driven by the concern to preserve effet utile of the Succession Regulation.

The Mahnkopf case illustrates that the unity of succession operating on jurisdictional level is not able to guarantee the full effectiveness of the Succession Regulation. The fact that an ECS is delivered by the courts of a single Member State is not sufficient for this certificate to produce its evidentiary effects in respect to the issues that do not receive a succession-related characterization. This is of course a consequence of

[27] Article 21 of the Succession Regulation.

[28] Article 24—28 of the Succession Regulation.

[29] Judgment of 1 March 2018, Mahnkopf, C-558/16, EU:C:2018:138.

[30] See Opinion of Advocate General Szpunar in Mahnkopf, C-558/16, EU:C:2017:965, point 114.

[31] The same logic should apply in relation to other provisions that share the characteristics of Paragraph 1371(1) of the BGB. Furthermore, for an illustration of provisions of different nature that may cause difficulties in relation to their characterization see A. Bonomi: *The Interaction among the Future EU Instruments on Matrimonial Property, Registered Partnerships and Successions*. "Yearbook of Private International Law" 2011, vol. 13, p. 219—220; P. Wautelet, J. Mary: *Le règlement 650/2012 relatif aux succession internationales. Aperçu et principes généraux*. "Journal des tribunaux" 2016, nº 23, p. 379.

the interpretation of Article 69(2) of the Succession Regulation according to which the evidentiary effect of an ECS does not extend to elements established under the conflict of laws rules other than those contained in the Regulation[32].

Moreover, the Mahnkopf case did not give rise to an issue that could have arguably even strengthened the need to resort to the characterization of Paragraph 1371(1) of the BGB as a succession-related matter. In this case, the German law governed both the succession and the matrimonial property regime. However, a case may have to be decided in accordance to several legal systems governing different issues having particular importance for the international succession. These systems may not be synchronized with each other. That would be a case where both the inheritance and matrimonial property regimes would grant a considerable share in the estate to the surviving spouse. It could lead to a distribution of assets excessively favoring this spouse to the detriment of other heirs. In order to remedy such shortcomings, it may be necessary to have recourse to the adaptation (adjustment) of the applicable laws in question[33]. Adjustment may result in a synthesis of these laws[34]. The inconsistencies would be addresses on the substantial level, without affecting the conflict of laws rules. Thus, on the substantial level, a balanced solution could be achieved.

However, in most instances the recourse to the adjustment would result in a synthesis of two (or more) applicable laws, at least one of them not being designed as applicable by the conflict of laws rules established

[32] It is true that the wording of Article 69(2) of the Succession Regulation could be also subject to a different interpretation. According to this provision '[t]he [ECS] shall be presumed to accurately demonstrate elements which have been established under the law applicable to the succession or under any other law applicable to specific elements'. No reference to the conflict of laws rules of the Succession Regulation is made in this provision. However, a purely textual interpretation of Article 69(2) of the Regulation would lead to a situation where the evidentiary effects are extended to the content of law designated as applicable under national conflict of laws rules that do deeply vary among the Member States. Recital 71 of the Regulation clarifies that this was not the solution that the EU legislator was trying to adopt in the Regulation. The interpretation limiting the evidentiary effects of an ECS to the elements established under the conflict of laws rules of the Succession Regulation was ultimately confirmed by the Court in its judgment of 1 March 2018, Mahnkopf, C-558/16, EU:C:2018:138.

[33] See Opinion of Advocate General Szpunar in Mahnkopf, C-558/16, EU:C:2017:965, point 62. For a general overview of the adjustment in private international law see G. Dannemann: *Adjustment/Adaptation (Anpassung)*. In: *Encyclopedia of private international law*. Eds. J. Basedow, G. Ruhl, F. Schiller, F. Ferrari, P. de Miguel Asensio. Cheltenham 2017, p. 8 et seq.

[34] G.A.L. Droz: *Les régimes matrimoniaux en droit international privé comparé*. „Recueil des cours de l'Académie de la Haye" 1974, vol. 143, p. 98.

by the Succession Regulation. Would the outcome of the adjustment, reproduced in the ECS, benefit, at least partially, from the evidentiary effects provided for in Article 69(1) of the Regulation? Due to the interpretation of Article 69(2) that was ultimately adopted in the Mahnkopf case, that question would most probably have to be answered in the negative. The fused result of the adjustment does not correspond to the content of the law that is designated as applicable law under the Regulation. That would imply that the adjustment operating on the substantial level leads to a highly unsatisfying result at least from the perspective of the succession with cross-border implications settled with recourse to an ECS.

A different form of adjustment would be therefore preferred under the Succession Regulation, namely the one that operates on the conflict of laws level and relies on the revision of the scope of the concerned rules of private international law.

It is true that the adjustment operating on the conflict of laws level can lead to a creation of a new (conflict of laws) rule that designates the law governing the issues that provoked the very need to resort to the adjustment[35]. In relation to the ECS, this form of adjustment would, however, be burdened by the shortcomings that manifest when a synthesis of applicable laws is being created on the substantial level. Such a newly created 'hybrid' conflict of laws rule could be hardly considered as a rule established by the Succession Regulation. As a consequence, the content of law designated as applicable by this rule would not benefit from the evidentiary effect provided for in Article 69(1) of the Succession Regulation. Therefore, even where the adjustment is operating on the conflict of laws level, in order to preserve the effectiveness of the provisions of the Regulation that introduce the ECS, a succession-related characterization of all the concerned issues may be preferred from the viewpoint of this Regulation.

For the sake of completeness, the trend towards succession-related characterization aiming to achieve a unity of succession should not be limited to the instances where the succession is settled by means of an ECS. In fact, an individual can always have recourse to an ECS and the way the delimitation of applicable laws is approached cannot be altered by his choice to do so. Moreover, that trend may be also inspired by other considerations having universal relevance.

[35] See A. Köhler: *General Private International Law Institutes in the EU Succession Regulation — Some Remarks*. "Anali Pravnog Fakulteta Univerziteta u Zenici" 2016, Issue 18, p. 180.

6. Boundaries of the consensus

A number of issues a priori excluded from the scope of application of the Succession Regulation and, as a consequence, from the scope of lex successionis, may be of particular importance in the context of succession with cross-border implications. According to the listing contained in Article 1(2) of this Regulation not only the questions relating to matrimonial property regimes and property regimes of relationships having effects comparable to marriage do not fall within the scope of the Regulation, but also, inter alia, the questions relating to the property rights, interests and assets created or transferred otherwise than by succession as well as the questions governed by the law of companies and other bodies.

It can be inferred from the architecture of the Regulation that the EU legislator did hope for a future unification of conflicts of laws rules in respect to other areas that may enter into interactions with the succession law. At least some of the exclusions listed in Article 1(2) are reminiscent of EU private international law instruments on which work has already been completed or is in progress. Unsurprisingly, the scopes of the Succession Regulation and such other instruments are meant not to overlap[36]. Moreover, if uniform conflict of law rules on the matrimonial property regimes existed in all of the Member States, the issue related to the evidentiary effects of an ECS which surfaced in the Mahnkopf case [due to the interpretation of Article 69(2) of the Succession Regulation limiting the evidentiary effects of the Certificate to the elements established under conflict of laws rules of the Regulation] could have been most probably solved without the necessity to resort to succession-related characterization of Paragraph 1371(1) of the BGB. Of course, taking into account the wording of Article 69(2) of the Succession Regulation according to which the evidentiary effects extends to the 'elements which have been established under the law applicable to the succession or under any other law applicable to specific elements', as interpreted in the Mahnkopf case by the Court of Justice, it would not have been possible to achieve that result by relying on a simple textual interpretation of this provision. However, on the one hand, it cannot be ruled out that a similar result could have been achieved with recourse to the teleological interpretation of Article 69(2) of the Succession Regulation. On the other hand, the Regulation could have been amended to that effect.

[36] See judgments: of 6 October 2015, *Matoušková*, C-404/14, EU:C:2015:653, point 34; of 1 March 2018, Mahnkopf, C-558/16, EU:C:2018:138, point 41.

Yet, the Succession Regulation was negotiated and adopted in a specific timeframe in the European Union history, in the very advent of EU private international law development, a few years after the initial date of application of the Rome and Maintenance Regulations. Conversely, despite the efforts made in this regard, no uniform conflict of laws rules have yet been elaborated in the areas of the EU law that are excluded from the scope of the Succession Regulation. Suffice it to mention that the efforts in relation to matrimonial property regimes and registered partnerships only yielded moderate success with the regulations adopted within the framework of enhanced cooperation. It does not seem that any major developments as to the questions of property rights or company law are to be expected in the nearest future. One could even argue that, at least in relation to some of these areas, the Succession Regulation already holds the ground at the boundaries of Member States' consensus.

However, the boundaries at which the Succession Regulation allegedly holds ground are not clearly defined. In fact, the interpretation of the exclusions provided for in Article 1(2) of the Succession Regulation can turn out to be a tedious task. So can be the delimitation of the law applicable to succession and other applicable laws. Some gray areas do still exist.

It would not be so surprising to see the scope of the lex successionis interpreted in a manner allowing to adopt a succession-related characterization of the issues falling within these gray areas. Desirable or not, it can be argued that such characterization allows to achieve what the EU legislator was not able to accomplish in relation to the development of uniform conflict of laws rules.

7. Conclusion

The principle of unity of succession is one of the key concepts of the Succession Regulation. By operation of this principle on the jurisdictional level, the Regulation tends to favor a perspective of a single Member State when it comes to all issues related to succession. These issues may be addressed by the laws designed as applicable by a single set of conflict of laws rules. To a certain extent, it allows to minimalize the shortcomings resulting from the lack of uniform conflict of law rules relating to the issues excluded from the scope of application of the Succession Regulation. Furthermore, the characterization of the issues that do not fall within the scope of the Regulation adopted in that single Member State is extrapo-

lated to the other Member States due to the mechanisms of recognition and enforcement of the decisions rendered under the Regulation.

The principle of unity of succession does not, therefore, eliminate the need to proceed to the characterization and to delimitate the scopes of conflict of laws rules at stake. However, this principle — aiming to promote a unitary vision of a single estate in all the Member States bound by the Regulation — sets a tone for some interpretative techniques that tend to favor succession-related characterization of the issues having some importance in the context of succession with cross-border implications.

Firstly, the principle of unity of succession operating solely on the jurisdictional level fails to preserve the effectiveness (effet utile) of the Succession Regulation. A proper characterization of concerned issues may be far more promising in that respect. It can be driven by the concern to preserve the effectiveness of EU law and, more specifically, of provisions of the Succession Regulation. Besides, the concern to preserve the effectiveness of the Regulation affects also the way the adjustment should be approached in relation to the succession with cross-border implications. The adjustment operating on the substantial level may not be sufficient to preserve the effectiveness of the provisions of the Regulation that introduce the ECS. Therefore, it seems that the adjustment operating on the conflict of laws level may, at least in some instances, be preferred over the adjustment operating on the substantial level.

Secondly, at least in relation to some of the areas excluded from the scope of the Succession Regulation and not covered by other instruments of EU private international law, this Regulation already holds the ground at the boundaries of Member States' consensus. The characterization aiming to promote a unitary vision of a single estate allows to achieve what the EU legislator was not yet able to accomplish in relation to the development of uniform conflict of laws rules.

References

Bonomi A.: *The Interaction among the Future EU Instruments on Matrimonial Property, Registered Partnerships and Successions*. "Yearbook of Private International Law" 2011, vol. 13.

Bonomi A., in: *Le droit européen des succession, Commentaire du règlement (UE) n° 650/2012, du 4 juillet 2012*. Eds. A. Bonomi, P. Wautelet. Bruxelles 2016.

Dannemann G.: *Adjustment/Adaptation (Anpassung)*. In: *Encyclopedia of private international law*. Ed. J. Basedow, G. Ruhl, F. Schiller, F. Ferrari, P. de Miguel Asensio. Cheltenham 2017.

Davì A., in: *The EU Succession Regulation. A Commentary*. Eds. A.-L. Calvo Caravaca, A. Davì, H.P. Mansel. Cambridge 2016.

Devaux A.: *The European Regulations on Succession of July 2012: A Path Towards the End of the Succession Conflicts of Law in Europe, or Not?* "The International Lawyer" 2013, vol. 47, no. 2.

Droz G.A.L.: *Les régimes matrimoniaux en droit international privé comparé*. "Recueil des cours de l'Académie de la Haye" 1974, vol. 143.

Frimston R.: *The European Union Succession Regulation no. 650/2012*. "Estates, Trusts & Pensions Journal" 2013, vol. 33.

Grahl-Madsen A.: *Conflict between the Principle of Unitary Succession and the System of Scission*. "International and Comparative Law Quarterly" 1979, vol. 28, no. 4.

Kindler P.: *The General Rule: The 'Last Habitual Residence' of the Deceased and 'the Closer Connection' are objective connecting factor determining the law applicable to the succession*. In: *Towards the Entry into Force of the Succession Regulation:Building Future Uniformity upon Past Divergencies*. Eds. S. Bariatti, I. Viarengo, F.C. Villata. JUST/2013/JCIV/AG/4666.

Knol Radoja K.: *Deviations from the Principle of the Unity of Succession in the EU Regulation on Succession*. "Pravni Vjesnik" 2019, vol. 35, no. 2.

Köhler A.: *General Private International Law Institutes in the EU Succession Regulation — Some Remarks*. "Anali Pravnog Fakulteta Univerziteta u Zenici" 2016, Issue 18.

Lagarde P., in: *EU Regulation on Succession and Wills. Commentary*. Eds. U. Bergquist, D. Damasceli, R. Frimston, P. Lagarde, F. Odersky, B. Reinhartz. Koln 2015.

Lehavi A.: *Globalizing Property Law: An Institutional Analysis*. "Vanderbilt Journal of Transnational Law" 2017, vol. 50, no. 5.

Lein E.: *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. XI.

Lewandowska-Mroczkowska M.: *Jurisdiction in the Succession Matters under the Regulation (EU) no 650/2012 of the European Parliament and the Council of 4 July 2012 in the Face of Polish International Civil Procedure*. "Social Transformations in Contemporary Society" 2019, vol. 7.

Li H.: *Some recent developments in the conflict of laws of succession*. "Recueil Des Cours de l'Académie de La Haye" 1990, vol. 224.

Makowiec A.: *W kierunku harmonizacji prawa spadkowego w Unii Europejskiej — rozporządzenie (UE) nr 650/2012 z 4 lipca 2012 r*. "Roczniki Administracji i Prawa" 2013, vol. 13.

Marongiu Buonaiuti F.: *The EU Succession Regulation and third country courts*. "Journal of Private International Law" 2016, vol. 12, no. 3.

Metallinos A., in: *EU Succession Regulation No 650/2012: A Commentary*. Ed. H. Pamboukis. Oxford 2017.

Pazdan M.: *Statut spadkowy w świetle rozporządzenia spadkowego*. In: *Nowe europejskie prawo spadkowe*. Eds. M. Pazdan, J. Górecki. Warszawa 2015.

Popescu D.A.: *Guide on international private law in successions matters*. Oneşti 2014.

Popiołek W., in: *Prawo prywatne międzynarodowe. Komentarz*. Red. M. Pazdan. Warszawa 2018, komentarz do art. 34 rozporządzenia nr 650/2012, pkt 6.

Rabel E.: *The Conflict of Laws: A Comparative Study. Volume Four Property: Bills and Notes: Inheritance: Trusts: Application of Foreign Law: lntertemporal Relations*. Michigan 1958.

Salomon D.: *The Boundaries of the Law Applicable to Succession*. "Anali Pravnog Fakulteta Univerziteta u Zenici" 2016, Issue 18.

Wautelet P., Mary J.: *Le règlement 650/2012 relatif aux succession internationales. Aperçu et principes généraux*. "Journal des tribunaux" 2016, nº 23.

Wysocka-Bar A.: *Jurysdykcja krajowa sądów polskich a kolizyjna jednolitość spadku*. "Problemy Współczesnego Prawa Międzynarodowego Europejskiego i Porównawczego" 2016, vol. XIV.

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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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Keywords: the EU Succession Regulation — the principle of the unity of *legis successionis* — dispositions upon death — intertemporal issues — succession administration of the enterprise in the estate — notion of a "court" and a "decision" — deed of certification of succession

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 Law[3], the Institut de Droit International[4] , and the Groupe européen de droit international privé[5] 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 Dispositions[6], 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. Roztworowski: *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 théoretique 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 Persons[7]. Although the latter Convention has never entered into force[8], 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 succession[9].

The landmark enactment came from the European Union in 2012 and grew to be known as the EU Succession Regulation[10], known also as the Brussels IV Regulation[11]. Its adoption was preceded by solid *travaux préparatoires*. The road ahead was filled with difficulties given the different legal traditions of the various Member States[12], which are particularly

tie spéciale. I: *Le droit des conflits de conventions*), p. 395. In the Polish literatere e.g. A. Mączyński: *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: *Traités 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 2004[13]. The important steps towards the adoption of the Regulation were the Commission's Green Paper Succession and Wills of 2005[14] and the proposal of the regulation presented by the Commission in 2009[15]. These propositions led to an intensive debate in academia and among legal practitioners involved in the area of succession law[16]. 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 2015[17]) 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 countries[18], including Poland[19], 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 grows[20] and every year new preliminary questions are directed to the Court[21]. The academics all around Europe devote much attention to novelties adopted therein and the difficulties arising in that respect[22]. This is also true for Poland where the Regulation has spurred considerable interest in the doctrine[23].

[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 *Matouškova*, 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 sukcesjny 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 Denmark[24]) 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 States[25]: 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 EU[26]. 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 Ocean[27] and elsewhere[28].

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 revolution[29], given that the European legislator opted for a single law governing all of the assets belonging the estate of the deceased[30] (unitary system/monist principle)[31].

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[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 veritable revolution"; 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 veritable tournant copernicien pour la matière en ie qu`il institute 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 approach[32] was adopted (e.g. Germany, Austria, Poland[33]). 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 planners[34]. 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:

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srecht. "Praxis des Internationalen Privat-und Verfahrensrechts (IPRax)" 2005, p. 4. In Polish literature see, e.g. Ł. Żarnowiec: *Wpływ statutu rzeczowego na rozstrzyganie 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 matters[35],
— 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 successionis*. 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 successionis* 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 Regulation[36] 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 Błeszyńskiemu". 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; Ł. 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 heir[39]) 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 persons[40]. 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 25[41]. 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 laws[42]; 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 will[43]; 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. Őztürk: *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. Döbreiner: *Das internationale Erbrecht nach der EU-Erbrechtsverordnung (Teil II), Mitteilungen des Bayerischen Notarvereins 2013*. München 2014, p. 439; A. Davi, A. Zanobetti: *Il nuovo diritto internazionale privato europeo delle successioni*. Torino 2014, p. 106, para 18; A. Bonomi, A. Őztürk: *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 succession[45].

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 admissible[46]. Moreover, specific limitations as to the personal qualifications of the persons making an agreement would seem to be covered here[47]. 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 disposition[48]. 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 regolamente 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 possibilie?* "Rivista di diritto internazionale privato e processuale" 2014, vol. 50, p. 813. To the contrary: D. Damascelli: *Le pacte de famille*. In: "Les pactes successoraux 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-exhaustive[50].

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-exhaustive[51]. 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 estate[53]. 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*. "Milteilungen 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. Őztürk: *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 OKR[54]. 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 TFUE[55]. 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 2010[57] 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 2015[58]. 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 perfoms auxillary 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 law[60]. 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 shell 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 certainty[61]. 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 Law[62]) 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 convention[63]. The states entering an international agreement generally aim at facilitating legal transactions and enhance legal certainty rather than add complexity[64]. His argument was backed up by J. Pazdan[65], 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 law[66]. This

[62] A Polish translation of the Ukrinian Act on private internatinal law was prepared by J. Czubak, 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. Czapliński, 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 Regulation[68]. 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 agreements[69].

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[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 alternatively[70].

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 date[71]. 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 country[72].

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

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[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 Gemeinschaftsprivatrecht" 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 law[73])[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 sufficient[76].

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

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[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 durd 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)*. Műnchen 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-422/20[77]).

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 dispositions[78]. 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 2019[79] (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 986[1] KC), or for the appointment of the executor of the enterprise subject to legacy by vindication (Article 990[1] 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 Act[81]. 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 enterprise[84].

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 wa s disposed of.

[84] This vew 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. Kopaczyńska-Pieczniak: *Status prawny zarządcy sukcesyjnego*. "Przegląd 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. Strzępce". Eds. E. Zielińska, P. Pinior, 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. Wrzecionek: *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 successionis* per Article 23(2)(f) of the EU Succession Regulation[85].

[85] Applying the rules of the Act 2018 as part of the *legis successionis* 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 successionis* 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 repealed[86]) in Polish law (Articles 1058—1088 KC)[87]. Both in the judicature[88] and the doctrine[89] a view prevailed that the succession of a farm located in Poland was subject to the law applicable to succession[90], regardless of whether Polish or foreign law applied as a result Nevertheless, it was agreed that the *legis successionis* must be applied with modifications resulting from

właściwe dla czynności prawnych związanych z zarządem 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 miedzynarodowym. Metody regulacji właściwości 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 exception[91]. 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 Convention[93] and Article 9 of Rome I Regulation[94]).

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 Regulation[95]. This provision reads:

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[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 *legi sitae*, where the rules in question meet the criteria stipulated in this provision. While it has not been clearly spelled out (unfortunately[96]), Article 30 draws upon the concept of overriding mandatory rules[97], 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 Regulation[98]. 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 beneficiaries[99]. 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 estate[101]. 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-

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[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 wsysaniu 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 considerations[102].

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 foreigner[103]. 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 Regulation[104]. 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 succession[105].

If 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

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[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 succesionis* 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 PrPrywM 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 system[107]. 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-

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[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 2011[108]. 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 therein[109]. 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

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[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 States[110].

There are several requirements set out in Article 3(2) that have to be cumulatively[111] 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 criticism[112].

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. Księżak: *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 omitted[113]. 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 estate[114]. 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 junctions in the meaning of Article 3(2) of the Regulation[115]. 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 dispute[117]. 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.

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[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. Grzegorczyk, 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. Księżak: *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 2007[118], which amended the Law on Notaries. The change came as a result of the expectations expressed in the Polish scholarly writing[119]. The reaction thereafter was generally very positive[120]. 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. Sztyk: *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. Sztyk: *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. Jacyszyn, 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,

2015[121] 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 them[122].

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 significant[123].

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. Fras (eds.): *Kodeks cywilny. Komentarz*. T. 6. Warszawa 2019, p. 646, Nb. 20; P. Księżak: *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 PrNot[124]. 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. Księżak: *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 KPC[125]; 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 court[126].

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 underlined[128].

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 Regulation[129].

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,

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[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 prawnoporównawcza 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 DCS[131]. 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. Truszkiewicz: *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. Fras (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 669[1] § 1 KPC the court overrules the registered DCS if confirmation of succession was issued earlier concerning the same estate[132].

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 669[1] § 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 competences[133]. 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 669[1] § 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 case[134] — 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/Regulation[136]. 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.

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[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 meaning[137].

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 Union[139] and in principle enjoy — as will be explained below — effects provided to them under the law of the state of their origin[140].

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 succession[141].

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 DCS[142]. 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 reasons[143], 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.

Bibliography

Basedow J., Rühl G., Ferrari F., De Miguel Asensio P.A.: *Encyclopedia of private international law*. Cheltenham 2017.

Bergquist U., Damascelli D., Frimston R., Lagarde P., Odersky F., Reinhartz B.: *EU Regulation on succession and wills: commentary*. München 2015.

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

Bieluk J.: *Ustawa o zarządzie sukcesyjnym przedsiębiorstwem osoby fizycznej. Komentarz*. Warszawa 2019.
Blicharz R.: *Zarząd sukcesyjny przedsiębiorstwem w spadku*. Warszawa 2019.
Blok M.: *Notarialny akt poświadczenia dziedziczenia a sądowe stwierdzenie praw do spadku*. "Rejent" 2010.
Bonomi A.: *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.
Bonomi A.: *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.
Bonomi A., Őztürk A.: *Das Statut der Verfügung von Todes wegen (Art. 24 EuErbVO)*. In: "Die Europäische Erbrechtsverordnung". Eds. A. Dutta, S. Herrler. München 2014.
Bonomi A., Schmid C.: *Successions internationales. Réflexions autour du futur règlement européen et son impact pour la Suisse*. Genève 2010.
Bonomi A., Wautelet P. (eds.): *Le droit européen des successions*. Bruxelles 2013.
Borkowski P.: *Notarialne poświadczenie dziedziczenia*. Warszawa 2011.
Borrás A.: *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.
Bost J.: *Nothing certain about death and taxes (and inheritance): European Union regulation of cross-border successions*. "Emory International Law Review" 2013, vol. 27.
Breyer S.: *Nowe przepisy o dziedziczeniu gospodarstw rolnych*. "Palestra" 1972.
Bureau D., Watt H.M.: *Droit international privé*. T. 2. Paris 2017.
Caravaca A.-L.C., Davì A., Mansel H.-P.: *The EU Succession Regulation: A Commentary*. 2016.
Ciepła H.: *Notarialne akty poświadczenia dziedziczenia*. "Nowy Przegląd Notarialny" 2009.
Crivellaro J., Herzog S., Michaels M.: *The EU Succession Regulation and its impact for non-Member States and non-Member State nationals*. "Trusts & Trustees" 2016, vol. 22.
Czapliński W., Wyrozumska A.: *Prawo międzynarodowe publiczne. Zagadnienia systemowe*. Warszawa 2014.
Czepelak M.: *Międzynarodowe prawo zobowiązań Unii Europejskiej*. Warszawa 2012.
Czepelak M.: *Umowa międzynarodowa jako źródło prawa prywatnego międzynarodowego*. Warszawa 2008.

Damascelli D.: *Le pacte de famille*. In: "Les pactes successoraux en droit comparé et en droit international privé". Eds. A. Bonomi, M. Steiner. Genève 2008.

Davì A.: *Riflessioni sul futuro diritto internazionale privato europeo delle successioni*. "Rivista di diritto internazionale" 2005, vol. 88.

Davi A., Zanobetti A.: *Il nuovo diritto internazionale privato europeo delle successioni*. Torino 2014.

Deixler-Hübner A., Schauer M. (eds.): *Kommentar zur EU-Erbrechtsverordnung (EuErbVO)*. Wien 2015.

Döbreiner C.: *Das internationale Erbrecht nach der EU-Erbrechtsverordnung (Teil II), Mitteilungen des Bayerischen Notarvereins 2013*. München 2014.

Dończyk D.: *Notarialne poświadczenie dziedziczenia. Komentarz*. Warszawa 2011.

Dörner H., Hertel C., Lagarde P., Riering W.: *Auf dem Weg zu einem europäischen Internationalen Erb- und Verfahrensrecht*. "Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)" 2005.

Dowgert A.: *Ukraińska kodyfikacja prawa prywatnego międzynarodowego*. "Kwartalnik Prawa Prywatnego" 2008.

Droz G.A.: *Note Introductive a la Convention de la Haye sur la Loi Applicable aux Successions a Cause de Mort*. "Revue de droit uniforme" 1989.

Droz G.A., Martin-Bosly B.: *Traités 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.

Dutta A.: *Succession and Wills in the Conflict of Laws on the Eve of Europeanisation*. "Rabels Zeitschrift für ausländisches und internationales Privatrecht" 2009.

Ereciński T., Gudowski J., Weitz K. (eds.): *Kodeks postępowania cywilnego. Komentarz*. T. 3: *Postępowanie rozpoznawcze*. Warszawa 2012.

Ernst U.: *Das polnische IPR-Gesetz von 2011: Mitgliedstaatliche Rekodifikation in Zeiten supranationaler Kompetenzwahrnehmung*. "Rabels Zeitschrift für ausländisches und internationales Privatrecht" 2012, vol. 76.

Fabian J.: *Statut spadkowy w nowym prawie prywatnym międzynarodowym*. "Państwo i Prawo" 1968.

Fongaro E.: *L'anticipation successorale à l'épreuve du" règlement successions"*. "Journal du droit international (Clunet)" 2014, vol. 141.

Frank S., Döbereiner C.: *Nachlassfälle mit Auslandsbezug*. Bielefeld 2015.

Galligan M.W.: *US expatriate persons and property owners, the European Union Succession Regulation and the choice of New York law*. "Trusts & Trustees" 2017, vol. 23.

Geimer R., Schütze R. (eds.): *Europäische Erbrechtsverordnung (EuErbVO). Internationales Erbrechtsverfahrensgesetz (IntErbRVG)*. Műnchen 2016.

Giray F.K.: *Possible Impacts of EU Succession Regulation No. 650/2012 on Turkish Private International Law*. "Anali Pravnog fakulteta Univerziteta u Zenici" 2016, vol. 9.

Gniewek E., Machnikowski P. (eds.): *Kodeks cywilny. Komentarz*. Warszawa 2019.

Gomez-Riesco De Paz Tabernero J.: *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.

Górecki J.: *Forma umów obligacyjnych i rzeczowych w prawie prywatnym międzynarodowym*. Katowice 2007.

Górecki J.: *Prawo właściwe dla czynności prawnych związanych z zarządem sukcesyjnym*. "Problemy Prawa Prywatnego Międzynarodowego" 2020, vol. 26.

Górecki J.: *Rozgraniczenie statutu spadkowego i statutu rzeczowego na tle rozporządzenia spadkowego*. In: "Nowe europejskie prawo spadkowe". Eds. M. Pazdan, J. Górecki. Warszawa 2015.

Grzybczyk K., Szpunar M.: *Notarialne poświadczenie dziedziczenia jako alternatywny sposób stwierdzenia prawa do dziedziczenia*. "Rejent" 2006.

Gutowski M. (ed.): *Kodeks cywilny. Komentarz*. T. 6: *Spadki*. Warszawa 2017.

Gutowski M. (ed.): *Kodeks cywilny*. T. 2: *Komentarz do art. 353—626*. Warszawa 2016.

Gwiazdomorski J.: *Zmiany przepisów o dziedziczeniu gospodarstwa rolnego*. "Państwo i Prawo" 1972.

Habdas M., Fras M. (eds.): *Kodeks cywilny. Komentarz*. T. 6. Warszawa 2019.

Harris J.: *The proposed EU regulation on succession and wills: prospects and challenges*. "Trust Law International" 2008, vol. 22.

Heinig J.: *Rechtswahlen in Verfügungen von Todes wegen nach der EU-Erbrechts-Verordnung*. "Milteilungen der Rheinischen Notarkammer (RNotZ)" 2014.

Hüßtege R., Mansel H.-P. (eds.): *Rom-Verordnungen*. Baden-Baden 2015.

M.P. 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.

Iżykowski M.: *Notarialne poświadczenie dziedziczenia jako rozstrzygnięcie sprawy cywilnej*. In: "Proces cywilny: nauka—kodyfikacja—praktyka: księga jubileuszowa dedykowana Profesorowi Feliksowi Zedlerowi". Eds. G. Grzegorczyk, K. Knoppek, M.W. Walasik. Warszawa 2012.

Jayme E.: *Entwurf eines EG-Familien- und Erbrechtsübereinkommens*. "Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)" 1994, vol. 14.

Kapkowski R.: *Odmowa dokonania czynności przez notariusza w aspekcie proceduralnym*. "Rejent" 2008.

Kapkowski R.: *Sporządzenie aktu poświadczenia dziedziczenia*. "Państwo i Prawo" 2009.

Kapkowski R., Kaufmann M.: *Charakter prawny zarządcy sukcesyjnego na tle pokrewnych instytucji zarządu masą spadkową*. "Rejent" 2019.
Kaplan A., Eyal L.: *The EU Succession Regulation: estate planning in Israel*. "Trusts & Trustees" 2016, vol. 22.
Karkut D.: *Czy polski notariusz może być objęty zakresem kategorii pojęciowej "sąd" w rozumieniu unijnego rozporządzenia spadkowego*. "Rejent" 2017.
Kasperek F.: *Z dziedziny prawa międzynarodowego prywatnego*. "Rozprawy Wydziału Historyczno-Filozoficznego Akademii Umiejętności w Krakowie" 1894, vol. 32.
Kidyba A. (ed.): *Kodeks cywilny*. T. 4. Warszawa 2015.
Kindler P.: *La legge applicabile ai patti successori nel regolamente UE nr 650/2012*. "Rivista di diritto internazionale private e processuale" 2017.
Kłoda M.: *Europejskie rozporządzenie spadkowe a rozrządzenie na wypadek śmierci dokonane przed 17 sierpnia 2015 r*. "Palestra" 2014.
Kohler C.: *Application of the Succession Regulation by German courts — Selected Issues*. "Problemy Prawa Prywatnego Międzynarodowego" 2020, vol. 26.
Kohler C.: *L'autonomie de la volonté en droit international privé: un principe universel entre libéralisme et étatisme*. "Recueil des Cours" 2013, vol. 359.
Konieczna K.: *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.
Kopaczyńska-Pieczniak K.: *Status prawny zarządcy sukcesyjnego*. "Przegląd Prawa Handlowego" 2018.
Kordasiewicz B. (ed.): "System Prawa Prywatnego". Vol. 10: *Prawo spadkowe*. Warszawa 2015.
Kot T.: *Czy polski notariusz może być sądem na gruncie rozporządzenia spadkowego? Głos w dyskusji*. In: "Nowe europejskie prawo spadkowe". Eds. M. Pazdan, J. Górecki. Warszawa 2015.
Księżak P.: *Charakter prawny aktu poświadczenia dziedziczenia*. In: "Notarialne poświadczenia dziedziczenia". Ed. A. Marciniak. Warszawa 2019.
Kwaśnicka L., Porębska B.: *Notarialne poświadczenia dziedziczenia*. "Monitor Prawniczy" 2008.
Lagarde P.: *La nouvelle convention de La Haye sur la loi applicable aux successions*. "Revue critique de droit international privé" 1989, vol. 78.
Lagarde P.: *Les principes de base du nouveau règlement européen sur les successions*. "Revue critique de droit international privé" 2012, vol. 101.
Lasok D.: *The Polish System of Private International Law*. "The American Journal of Comparative Law" 1966, vol. 15.
Lein E.: *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.
Leitzen M.: *Die Rechtswahl nach der EuErbVO*. "Zeitschrift für Erbrecht und Vermögensnachfolge" 2013.

Les successions internationales dans l`UE. Perspectives pour une Harmonisation. Würzburg 2004.
Lewald H.: *Questions de droit international des successions*. The Hague 1925.
Ludwiczak W.: *Międzynarodowe prawo prywatne*. Warszawa 1990.
Ludwig I.: *Die Wahl zwischen zwei Rechtsordnungen durd bedingte Rechtswahl nach Art. 22 der EU-Erbrechtsverordnung*. "Deutsche Notar — Zeitschrift" 2014.
Łaski K.: *Postępowanie spadkowe. Proponowane kierunki zmian*. "Nowy Przegląd Notarialny" 2001.
Majoros F.: *Les conventions internationales en matière de droit privé. Abrégé théoretique et traité pratique*. Paris 1976.
Manowska M.: *Wybrane zagadnienia dotyczące poświadczenia dziedziczenia*. "Nowy Przegląd Notarialny" 2008.
Margoński M.: *Charakter prawny europejskiego poświadczenia spadkowego. Analiza prawnoporównawcza aktu poświadczenia dziedziczenia i europejskiego poświadczenia spadkowego*. Warszawa 2015.
Mataczyński M.: *Przepisy wymuszające swoje zastosowanie — wybrane zagadnienia*. "Problemy Prawa Prywatnego Międzynarodowego" 2016, vol. 18.
Mączyński A.: *Dziedziczenie testamentowe w prawie prywatnym międzynarodowym: ustawowe i konwencyjne unormowanie problematyki formy*. Warszawa 1976.
Mączyński A.: *Nowelizacja przepisów szczególnych o dziedziczeniu gospodarstw rolnych a prawo prywatne międzynarodowe*. "Krakowskie Studia Prawnicze" 1986, vol. 19.
Nietner S.: *Erbrechtliche Nachlassspaltung durch Rechtswahl — Schicksal nach der EuErbVO?* "Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)" 2015, vol. 35.
Nordmeier C.F.: *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.
Nordmeier C.F.: *Erbverträge und nachlassbezogene Rechtsgeschäfte in der EuErb-VO — eine Begriffsklärung*. "Zeitschrift für Erbrecht und Vermögensnachfolge" 2013.
Nordmeier C.F.: *Grundfragen der Rechtswahl in der neuen EU-Erbrechtsverordnung—eine Untersuchung des Art. 22 ErbRVO*. "Zeitschrift für Gemeinschaftsprivatrecht" 2013, vol. 10.
Odersky F.: *Der wirksamwirkungslose Erb- und Pflichtteilverzicht nach der EU-ErbVO* "notar" 2014.
Oleszko A.: *Prawo o notariacie. Komentarz*. T. 1: *Ustrój notariatu*. Warszawa 2016.
Oleszko A.: *Prawo o notariacie. Komentarz*. Cz. 2. T. 1. Warszawa 2012.
Oleszko A.: *Prawo o notariacie. Komentarz*. Cz. 2. T. 2. Warszawa 2012.
Osajda K. (ed.): *Kodeks cywilny. Spadki. Komentarz*. T. 4A. Warszawa 2019.

Osajda K. (ed.): *Prawo i postępowanie spadkowe. Komentarz*. T. 4B. Warszawa 2018.

Pajor T.: *Introduction to the New Polish Act on Private International Law of 4 February 2011*. "Yearbook of Private International Law" 2011, vol. 13.

Pajor T.: *La nouvelle loi polonaise de droit international privé. Présentation générale*. "Revue critique de droit international privé" 2012, vol. 101.

Pamboukis H.P. (ed.): *EU Succession Regulation No 650/2012. A Commentary*. Athens—München—Oxford—Baden-Baden 2017.

Pazdan J.: *Ku jednolitemu międzynarodowemu prawu spadkowemu*. "Rejent" 2005.

Pazdan J.: *Umowy dotyczące spadku w rozporządzeniu spadkowym Unii Europejskiej*. Warszawa 2018.

Pazdan M.: *Aspekty kolizyjnoprawne zapisu windykacyjnego*. "Problemy Prawa Prywatnego Międzynarodowego" 2015, vol. 16.

Pazdan M.: *Das neue polnische Gesetz über das internationale Privatrecht*. "Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)" 2012.

Pazdan M.: *Dziedziczenie ustawowe w prawie prywatnym międzynarodowym. Metody regulacji właściwości prawa*. Katowice 1973.

Pazdan M.: *Notarialne poświadczenie dziedziczenia a prawo prywatne międzynarodowe*. In: "Rozprawy z prawa prywatnego. Księga dedykowana Profesorowi Aleksandrowi Oleszce". Eds. A. Dańko-Roesler, J. Jacyszyn, M. Pazdan, W. Popiołek. Warszawa 2012.

Pazdan M.: *Notarialne poświadczenie dziedziczenia po zmianach z 2015 roku*. "Rejent" 2016.

Pazdan M.: *O rozgraniczaniu statutów i wsysaniu 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.

Pazdan M.: *O zmiennych losach i perspektywach na przyszłość odesłania w prawie prywatnym międzynarodowym*. In: "Oblicze prawa cywilnego. Księga Jubileuszowa dedykowana Profesorowi Janowi Błeszyńskiemu". Ed. K. Szczepanowska-Kozłowska. Warszawa 2013.

Pazdan M.: *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.

Pazdan M.: *Prawo spadkowe*. In: "Zielona Księga. Optymalna wizja Kodeksu cywilnego w Rzeczypospolitej Polskiej". Ed. Z. Radwański. Warszawa 2006.

Pazdan M.: *Zakres zastosowania rozporządzenia spadkowego*. In: "Nowe europejskie prawo spadkowe". Eds. M. Pazdan, J. Górecki. Warszawa 2015.

Pazdan M.: *Zarząd sukcesyjny — aspekty kolizyjnoprawne*. In: "Prawo handlowe. Między teorią, praktyką a orzecznictwem. Księga jubileuszowa dedykowana Profesorowi Januszowi A. Strzępce". Eds. E. Zielińska, P. Pinior, P. Relidzyński, W. Wyrzykowski, M. Żaba. Warszawa 2019.

Pazdan M.: *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.
Pazdan M.: *Zielona księga o dziedziczeniu i testamentach — propozycje odpowiedzi na pytania*. "Rejent" 2006.
Pazdan M. (ed.): *Prawo prywatne międzynarodowe. Komentarz*. Warszawa 2018.
Pazdan M. (ed.): "System Prawa Prywatnego". Vol. 20A: *Prawo prywatne międzynarodowe*. Warszawa 2014.
Pazdan M. (ed.): "System Prawa Prywatnego". Vol. 20C: *Prawo prywatne międzynarodowe*. Warszawa 2015.
Pfeiffer M.: *Legal certainty and predictability in international succession law*. "Journal of Private International Law" 2016, vol. 12.
Piątowski J.S.: *Uwagi o dziedziczeniu ustawowym gospodarstw rolnych według kodeksu cywilnego*. "Studia Prawnicze" 1970, vol. 26—27.
Piątowski J.S.: *Z zagadnień dziedziczenia gospodarstwa rolnego po cudzoziemcu*. "Państwo i Prawo" 1971.
Pietrzykowski K. (ed.): *Kodeks cywilny*. T. 2: *Komentarz do art. 450—1088*. Warszawa 2018.
Pisuliński J.: *Europejskie poświadczenie spadkowe*. In: "Rozprawy cywilistyczne. Księga dedykowana Profesorowi Edwardowi Drozdowi". Eds. M. Pecyna, J. Pisuliński, M. Podrecka. Warszawa 2013.
Pisuliński J.: *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.
Poczobut J. (ed.): *Prawo prywatne międzynarodowe. Komentarz*. Warszawa 2017.
Przybyłowski K.: *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.
Rabel E.: *The Conflict of Laws: A Comparative Study*. Ann Arbor 1958.
Rajski J.: *The New Polish Private International Law, 1965*. "International and Comparative Law Quarterly" 1966, vol. 15.
Revillard M.: *Droit international privé et européen: pratique notariale*. Paris 2018.
Rodríguez-Uría Suárez I.: *La ley aplicable a las pactos sucesorios*. Santiago de Compostela 2014.
Roztworowski M.: *Prawo spadkowe na warsztacie sesji piątej (1925) i szóstej (1928) Konferencji Międzynarodowego Prawa Prywatnego w Hadze*. "Czasopismo Prawnicze i Ekonomiczne" 1929, vol. 25.
Savigny F.C.V.: *System des heutigen römischen Rechts, Band VIII*. "Berlin: Veit & Comp" 1849.

Schoppe C.: *Die Übergangsbestimmungen zur Rechtswahl im internationalen Erbrecht: Anwendungsprobleme und Gestaltungspotential*. "Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)" 2014.
Schurig K.: *Das internationale Erbrecht wird europäisch: Bemerkungen zur kommenden Europäischen Verordnung*. In: "Festschrift für Ulrich Spellenberg: zum 70. Geburtstag". Ed. J. Bernreuther. München 2010.
Scoles E.F.: *The Hague Convention on Succession*. "The American Journal of Comparative Law" 1994, vol. 42.
Sieradzka M.: *Zarząd sukcesyjny przedsiębiorstwem osoby fizycznej — analiza i ocena nowych rozwiązań prawnych (cz. II)*. "Monitor Prawniczy" 2018.
Sośniak M.: *Prawo prywatne międzynarodowe*. Katowice 1991.
Strong S.: *The European Succession Regulation and the Arbitration of Trust Disputes*. "Iowa Law Review" 2017, vol. 103.
Szereda A.: *Przedsiębiorstwo w spadku — odrębna jednostka organizacyjna*. In: "Notarialne poświadczenie dziedziczenia". Ed. A. Marciniak. Warszawa 2019.
Sztyk R.: *Testament notarialny. Wybrane zagadnienia*. "Rejent" 2005.
Sztyk R.: *Zakres kompetencji notariusza w XXI wieku*. "Łódzki Biuletyn Notarialny" 2010.
Talpis J.: *Impact of the European Regulation on Succession in Canada*. "Estates, Trusts & Pensions Journal" 2017, vol. 36.
Trammer H.: *Sprawy czysto majątkowe w polskim prawie prywatnym międzynarodowym*. "Prawo w Handlu Zagranicznym" 1968.
Truszkiewicz Z.: *Uchylenie aktu poświadczenia dziedziczenia*. "Przegląd Sądowy" 2010.
Van Loon H.: *The Hague Convention on the Law Applicable to Succession to the Estates of Deceased Persons*. "Hague Yearbook of International Law" 1989.
Vismara F.: *Patti successori nel regolamento (UE) no. 650/2012 e patti di famiglia: in'interferenza possibilie?* "Rivista di diritto internazionale privato e processuale" 2014, vol. 50.
Von Gierl W., Köhler A., Kroiß L., Wilsch H. (eds.): *Internationales Erbrecht*. Wien 2015.
Von Hein J. (ed.): *Münchener Kommentar zum Bürgerlichen Gesetzbuch*. München 2015.
Von Overbeck A.E.: *La Convention du 1er août 1989 sur la loi applicable aux successions pour cause de mort*. "Annuaire suisse de droit international" 1989.
Walasik M.W.: *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.
Wehberg H. (ed.): *Résolutions de l'Institut de droit international (1873—1956)*. Bâle 1957.
Westermann H.P., Grunewald B., Maier-Reimer G. (eds.): *Erman. Bürgerliches Gesetzbuch*. Köln 2017.

Wilderspin M.: *The Notion of "Court" under the Succession Regulation*. "Problemy Prawa Prywatnego Międzynarodowego" 2020, vol. 26.

Wojewoda M.: *Instytucja odesłania w rozporządzeniu spadkowym (UE) nr 650/2012 — geneza i normatywny kształt renvoi w art. 34*. "Europejski Przegląd Sądowy" 2014.

Wrzecionek R.: *Zarządca sukcesyjny przedsiębiorstwa w spadku*. Warszawa 2020.

Wysocka-Bar A.: *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.

Wysocka-Bar A.: *Prawo właściwe dla dziedziczenia*. "Kwartalnik Prawa Prywatnego" 2007.

Wysocka-Bar A.: *Projekt jednolitego międzynarodowego prawa spadkowego państw Unii Europejskiej*. "Kwartalnik Prawa Prywatnego" 2010.

Wysocka-Bar A.: *Wybór prawa w międzynarodowym prawie spadkowym*. Warszawa 2013.

Zachariasiewicz M.A.: *Przepisy wymuszające swoje zastosowanie a statut spadkowy*. In: "Nowe europejskie prawo spadkowe". Eds. M. Pazdan, J. Górecki. Warszawa 2015.

Załucki M.: *Attempts to harmonize the inheritance law in Europe: past, present, and future*. "Iowa Law Review" 2018, vol. 103.

Załucki M. (ed.): *Unijne rozporządzenie spadkowe nr 650/2012. Komentarz*. Warszawa 2018.

Zieliński A.: *Dziedziczenie gospodarstw rolnych w świetle nowelizacji kodeksu cywilnego z dnia 26.10.1971 r.* "Palestra" 1973.

Żarnowiec Ł.: *Odesłanie w ujęciu przepisów rozporządzenia spadkowego*. "Problemy Prawa Prywatnego Międzynarodowego" 2017, vol. 21.

Żarnowiec Ł.: *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.

Żarnowiec Ł.: *Wpływ statutu rzeczowego na rozstrzyganie spraw spadkowych — na styku statutów*. Warszawa 2018.

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Prawo właściwe dla czynności prawnych związanych z zarządem sukcesyjnym

Abstract: The Act of 5 July 2018 on the succession administration of the business of a physical person introduced a possibility to carry out transactions relating to establishing and performing administration of the estate. In particular, the Act permits to appoint a succession administrator and empowers him or her to carry out legal transactions relating to the business of the deceased entrepreneur. A need to determine the law applicable to these legal transactions arises. The article contains an analysis of the conflict rules adopted in the EU Succession Regulation. From this analysis the author draws a conclusion that the appointment of the succession administrator and the legal acts relating thereto are subject to the law applicable to succession. Likewise one should classify legal transactions relating to the administration of the business undertaken by persons named in the Act to carry out administration in the period before the succession administration is established. The prerequisites of the validity of the legal transactions carried out by the effectively nominated succession administrator on the other hand are subject to the law applicable to the given legal transactions, as according to general rules relating thereto. This includes, inter alia, that the legal acts falling with the scope of the law applicable to succession (Article 23 of the Succession Regulation), are governed by that law.

Keywords: succession administration, the law applicable to succession, business, succession administrator, conservatory acts

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1. Uwagi wprowadzające

Dnia 25 listopada 2018 r. weszła w życie ustawa z dnia 5 lipca 2018 r. o zarządzie sukcesyjnym przedsiębiorstwem osoby fizycznej[1]. Zgodnie z jej art. 1, reguluje ona zasady tymczasowego zarządzania przedsiębiorstwem po śmierci przedsiębiorcy, który we własnym imieniu wykonywał działalność gospodarczą na podstawie wpisu do Centralnej Ewidencji i Informacji o Działalności Gospodarczej [dalej: CEIDG][2], oraz kontynuowania działalności gospodarczej wykonywanej z wykorzystaniem tego przedsiębiorstwa, zwanego w dalszych przepisach ustawy przedsiębiorstwem w spadku[3].

Realizacja celu ustawy wymaga dokonania szeregu czynności prawnych, z których najistotniejsze znaczenie ma powołanie zarządcy sukcesyjnego. Może ono nastąpić albo za życia przedsiębiorcy, albo po jego śmierci. W tym pierwszym przypadku przedsiębiorca na podstawie art. 9 ust. 1 ustawy powołuje zarządcę sukcesyjnego w ten sposób, że wskazuje określoną osobę do pełnienia funkcji zarządcy sukcesyjnego albo zastrzega, że z chwilą jego śmierci wskazany prokurent stanie się zarządcą sukcesyjnym. Do ustanowienia zarządcy potrzeba wówczas

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[1] Dz.U. poz. 1629. Od 1 stycznia 2020 r. – ustawa o zarządzie sukcesyjnym przedsiębiorstwem osoby fizycznej i innych ułatwieniach związanych z sukcesją przedsiębiorstw (zob. art. 66 pkt 1 i art. 86 ustawy z dnia 31 lipca 2019 r. o zmianie niektórych ustaw w celu ograniczenia obciążeń regulacyjnych. Dz.U. poz. 1495) [dalej: ustawa]. Szerzej na temat zarządu sukcesyjnego zob. T. Szczurowski: *Zarząd sukcesyjny przedsiębiorstwem w spadku*. „Przegląd Ustawodawstwa Gospodarczego" 2018, nr 11, s. 31 i n.; J. Bieluk: *Ustawa o zarządzie sukcesyjnym przedsiębiorstwem osoby fizycznej. Komentarz*. Warszawa 2019, *passim*; R. Blicharz: *Zarząd sukcesyjny przedsiębiorstwem w spadku*. Warszawa 2019, *passim*. Pozycję prawną zarządcy sukcesyjnego omawiają: M. Pazdan: *Zarządca sukcesyjny a wykonawca testamentu*. W: *„Ius est ars boni et aequi". Księga pamiątkowa dedykowana Profesorowi Józefowi Frąckowiakowi*. Red. A. Dańko-Roesler, M. Leśniak, M. Skory, B. Sołtys. Wrocław 2018, s. 885 i n.; K. Kopaczyńska-Pieczniak: *Status prawny zarządcy sukcesyjnego*. „Przegląd Prawa Handlowego" 2018, nr 12, s. 4 i n.; K. Kopystyński: *Zarządca sukcesyjny jako przedsiębiorca*. „Przegląd Ustawodawstwa Gospodarczego" 2019, nr 6, s. 18 i n.; P. Pacek: *Wykonawca testamentu a zarząd sukcesyjny przedsiębiorstwem osoby fizycznej – wybrane zagadnienia*. „Rejent" 2019, nr 6, s. 59 i n.; R. Kapkowski, M. Kaufmann: *Charakter prawny zarządcy sukcesyjnego na tle pokrewnych instytucji zarządu masą spadkową*. „Rejent" 2019, nr 7, s. 54 i n.

[2] Zob. też ustawę o Centralnej Ewidencji i Informacji o Działalności Gospodarczej i Punkcie Informacji dla Przedsiębiorcy z dnia 6 marca 2018 r. T.j. Dz.U. 2019, poz. 1291.

[3] Zob. art. 2 ustawy. W przypadkach, o których mowa w rozdziale 8 ustawy, jej przepisy odnoszące się do przedsiębiorstwa w spadku stosuje się też odpowiednio do udziału przedsiębiorcy w majątku wspólnym wspólników spółki cywilnej.

jeszcze zgody osoby wskazanej jako zarządca oraz wpisu zarządcy sukcesyjnego do CEIDG.

Powołanie zarządcy sukcesyjnego przez przedsiębiorcę oraz wyrażenie zgody osoby powołanej na zarządcę sukcesyjnego na pełnienie tej funkcji wymagają zachowania formy pisemnej pod rygorem nieważności.

Na zarządcę sukcesyjnego może być powołana tylko osoba fizyczna, która ma pełną zdolność do czynności prawnych. Nie może pełnić funkcji zarządcy sukcesyjnego osoba, wobec której prawomocnie orzeczono: zakaz prowadzenia działalności gospodarczej, o którym mowa w art. 373 ust. 1 ustawy Prawo upadłościowe[4], lub środek karny albo środek zabezpieczający w postaci zakazu prowadzenia określonej działalności gospodarczej, obejmujący działalność gospodarczą wykonywaną przez przedsiębiorcę lub działalność gospodarczą w zakresie zarządu majątkiem. Funkcję zarządcy sukcesyjnego w danym czasie może pełnić tylko jedna osoba, i to nawet wówczas, gdy zmarły przedsiębiorca prowadził kilka przedsiębiorstw.

Jeżeli zarząd sukcesyjny nie został skutecznie ustanowiony za życia przez przedsiębiorcę, to po jego śmierci zarządcę sukcesyjnego może powołać: małżonek przedsiębiorcy, któremu przysługuje udział w przedsiębiorstwie w spadku, lub spadkobierca ustawowy przedsiębiorcy, który przyjął spadek, albo spadkobierca testamentowy przedsiębiorcy, który przyjął spadek, albo zapisobierca windykacyjny, który przyjął zapis windykacyjny, jeżeli zgodnie z ogłoszonym testamentem przysługuje mu udział w przedsiębiorstwie w spadku.

Jeżeli nie zostało wydane prawomocne postanowienie o stwierdzeniu nabycia spadku, nie został zarejestrowany akt poświadczenia dziedziczenia ani nie zostało wydane europejskie poświadczenie spadkowe, wielkość udziałów w przedsiębiorstwie w spadku ustala się z uwzględnieniem wszystkich znanych osobie powołującej zarządcę sukcesyjnego osób, którym w chwili powołania zarządcy sukcesyjnego przysługuje udział w przedsiębiorstwie w spadku.

Po uprawomocnieniu się postanowienia o stwierdzeniu nabycia spadku, zarejestrowaniu aktu poświadczenia dziedziczenia albo wydaniu europejskiego poświadczenia spadkowego zarządcę sukcesyjnego może powołać wyłącznie właściciel przedsiębiorstwa w spadku. Właścicielem przedsiębiorstwa w spadku w rozumieniu ustawy jest:

a) osoba, która zgodnie z prawomocnym postanowieniem o stwierdzeniu nabycia spadku, zarejestrowanym aktem poświadczenia dziedziczenia albo europejskim poświadczeniem spadkowym, nabyła składniki przedsiębiorstwa zmarłego przedsiębiorcy na podstawie powołania do

[4] Ustawa z dnia 28 lutego 2003 r. T.j. Dz.U. 2019, poz. 498 ze zm.

spadku z ustawy albo testamentu[5], albo nabyła przedsiębiorstwo albo udział w przedsiębiorstwie na podstawie zapisu windykacyjnego[6];

b) małżonek przedsiębiorcy, któremu przysługuje udział w przedsiębiorstwie w spadku;

c) osoba, która nabyła przedsiębiorstwo w spadku albo udział w przedsiębiorstwie w spadku bezpośrednio od osoby, o której mowa powyżej, w tym osoba prawna albo jednostka organizacyjna, o której mowa w art. 33^1 § 1 k.c., do której wniesiono przedsiębiorstwo tytułem wkładu – w przypadku, gdy po śmierci przedsiębiorcy nastąpiło zbycie tego przedsiębiorstwa albo udziału w tym przedsiębiorstwie.

Wielkość udziałów w przedsiębiorstwie w spadku ustala się według wielkości udziałów spadkowych lub udziałów we współwłasności przedsiębiorstwa. Do powołania zarządcy sukcesyjnego po śmierci przedsiębiorcy wymagana jest zgoda osób, którym łącznie przysługuje udział w przedsiębiorstwie w spadku większy niż 85/100.

Osoba powołująca zarządcę sukcesyjnego po śmierci przedsiębiorcy składa przed notariuszem oświadczenie o przysługującym jej udziale w przedsiębiorstwie w spadku oraz o znanych jej innych osobach, którym przysługuje udział w przedsiębiorstwie w spadku. Do powołania zarządcy sukcesyjnego wystarczy wtedy oświadczenie jednej z uprawnionych osób oraz zgoda pozostałych.

Powołanie zarządcy sukcesyjnego po śmierci przedsiębiorcy oraz zgoda na jego powołanie wymagają zachowania formy aktu notarialnego.

Powołanie zarządcy sukcesyjnego po śmierci przedsiębiorcy notariusz zobowiązany jest niezwłocznie zgłosić do CEIDG. Powinien to uczynić nie później jednak niż w następnym dniu roboczym po dniu powołania zarządcy sukcesyjnego. Zarządca sukcesyjny powołany po śmierci przedsiębiorcy pełni funkcję od chwili dokonania wpisu do CEIDG tego zarządcy, natomiast ten powołany za życia przedsiębiorcy — od chwili śmierci przedsiębiorcy (art. 7 ust. 1 ustawy). Od tej chwili zarządca sukcesyjny wykonuje prawa i obowiązki zmarłego przedsiębiorcy wynikające z wykonywanej przez niego działalności gospodarczej oraz prawa i obowiązki

[5] Ustawa pomija nieznane polskiemu prawu tytuły dziedziczenia. Nie można jednak wykluczać, że następstwo prawne po zmarłym przedsiębiorcy opierać się będzie np. na znanej niektórym ustawodawstwom umowie dziedziczenia. Stanie się tak wówczas, gdy prawem właściwym dla spraw spadkowych po zmarłym przedsiębiorcy jest prawo obce. Zob. także M. Pazdan: *O umowach dziedziczenia zawieranych przed polskimi notariuszami*. „Rejent" 1996, nr 4—5, s. 60 i n.

[6] Według ustawy, w przypadku zapisu windykacyjnego przedsiębiorstwa na rzecz jednego zapisobiercy oraz dziedziczenia przez jednego spadkobiercę można stosować zarząd sukcesyjny tylko do czasu uprawomocnienia się postanowienia sądu stwierdzającego nabycie spadku (zarejestrowania aktu poświadczenia dziedziczenia, wydania europejskiego poświadczenia spadkowego) – zob. art. 59 ust. 1 pkt 2 ustawy.

wynikające z prowadzenia przedsiębiorstwa w spadku (art. 29 ustawy). Zarządca sukcesyjny działa w imieniu własnym, na rachunek właściciela przedsiębiorstwa w spadku (art. 21 ust. 1 ustawy).

Uprawnienie do powołania zarządcy sukcesyjnego wygasa z upływem dwóch miesięcy od dnia śmierci przedsiębiorcy. Jeżeli akt zgonu przedsiębiorcy nie zawiera daty zgonu albo chwila śmierci przedsiębiorcy została oznaczona w postanowieniu stwierdzającym zgon, termin ten biegnie od dnia znalezienia zwłok przedsiębiorcy albo uprawomocnienia się postanowienia stwierdzającego zgon (art. 12 ust. 10 ustawy).

Celem niniejszego opracowania jest ustalenie, jakiemu prawu należy poddać wskazane powyżej czynności prawne związane z powołaniem zarządcy sukcesyjnego (pkt 3), a ponadto czynności prawne dokonywane przez zarządcę sukcesyjnego (pkt 4) oraz tzw. czynności zachowawcze podejmowane jeszcze przed ustanowieniem zarządu sukcesyjnego (pkt 5). Przy dokonywaniu tych czynności prawnych pojawić się może bowiem tzw. element obcy (zagraniczny)[7] i wówczas niezbędne stanie się dokonanie takiego ustalenia. Aby wskazany cel zrealizować, konieczne jest jednak uprzednie omówienie zagadnień związanych z ustalaniem prawa właściwego dla spraw spadkowych (statutu spadkowego) oraz określenie zakresu jego zastosowania (pkt 2).

2. Prawo właściwe dla ogółu spraw spadkowych

Aspekty kolizyjnoprawne związane z dziedziczeniem uregulowane są obecnie w rozporządzeniu spadkowym[8]. Prawo właściwe dla ogółu spraw spadkowych wskazują przede wszystkim art. 21 i 22 rozporządzenia spadkowego[9]. Według art. 21 rozporządzenia, co do zasady prawem właś-

[7] Zob. M. Pazdan: *Prawo prywatne międzynarodowe*. Warszawa 2017, s. 23 i n.

[8] Rozporządzenie Parlamentu Europejskiego i Rady (UE) nr 650/2012 z dnia 4 lipca 2012 r. w sprawie jurysdykcji, prawa właściwego, uznawania i wykonywania orzeczeń, przyjmowania i wykonywania dokumentów urzędowych dotyczących dziedziczenia oraz w sprawie ustanowienia europejskiego poświadczenia spadkowego. Dz.Urz. UE L 201, s. 107 [dalej: rozporządzenie spadkowe].

[9] Zob.: C. Fischer-Czermak: *Anwendbares Recht*. In: *Europäische Erbrechtsverordnung*. Hrsg. M. Schauer, E. Scheuba. Wien 2012, s. 43 i n.; A. Wieczorek: *Ustalenie prawa właściwego w świetle rozporządzenia spadkowego nr 650/2012*. „Problemy Prawa Prywatnego Międzynarodowego" 2017, T. 21, s. 74 i n.; M. Pazdan, w: *Prawo prywatne międzynarodowe. Komentarz*. Red. M. Pazdan. Warszawa 2018, s. 1162 i n. oraz dalszą powołaną tam literaturę.

ciwym dla ogółu spraw dotyczących spadku jest prawo państwa, w którym zmarły miał miejsce zwykłego pobytu w chwili śmierci. W przypadku, gdy wyjątkowo ze wszystkich okoliczności sprawy jasno wynika, że w chwili śmierci zmarły był w sposób oczywisty bliżej związany z państwem innym niż państwo ostatniego miejsca jego zwykłego pobytu, prawem właściwym dla dziedziczenia jest prawo tego innego państwa. Jednak zgodnie z art. 22 rozporządzenia spadkowego, każdy może dokonać wyboru prawa państwa, którego jest obywatelem w chwili dokonywania wyboru lub w chwili śmierci, jako prawa, któremu podlega ogół spraw dotyczących jego spadku. Kto jest obywatelem więcej niż jednego państwa może wybrać prawo każdego państwa, którego jest obywatelem w chwili dokonywania wyboru lub w chwili śmierci. Wybór prawa musi być dokonany w sposób wyraźny w oświadczeniu złożonym w formie wymaganej dla rozrządzenia na wypadek śmierci lub musi wynikać z postanowień takiego rozrządzenia.

W związku z powyższym prawo polskie znajdzie zastosowanie do spraw spadkowych po zmarłym przedsiębiorcy prowadzącym w Polsce działalność gospodarczą ujawnioną w CEIDG, jeżeli:

a) dokonał on na podstawie art. 22 rozporządzenia spadkowego skutecznego wyboru polskiego prawa jako właściwego dla ogółu spraw dotyczących jego spadku;
b) w braku wyboru prawa (jego nieskuteczności) miał on w chwili śmierci miejsce zwykłego pobytu w Polsce albo
c) w chwili śmierci przedsiębiorca był w sposób oczywisty bliżej związany z Polską, mimo że nie była ona państwem miejsca jego zwykłego pobytu w chwili śmierci; za takim bliskim związkiem może przemawiać np. fakt prowadzenia działalności gospodarczej w Polsce.

Obce prawo znajdzie zastosowanie jako statut spadkowy wówczas, gdy przedsiębiorca prowadzący w Polsce przedsiębiorstwo:

a) dokonał skutecznie wyboru obcego prawa ojczystego jako statutu spadkowego (także wtedy, gdy był jednocześnie również obywatelem polskim lub w chwili śmierci jego miejsce zwykłego pobytu znajdowało się w Polsce);
b) w razie braku wyboru prawa (jego nieskuteczności) miał on w chwili śmierci miejsce zwykłego pobytu poza granicami Polski albo
c) w chwili śmierci był w sposób oczywisty bliżej związany z państwem innym niż Polska, która była państwem miejsca jego zwykłego pobytu w chwili śmierci.

To ostatnie jest jednak mało prawdopodobne ze względu na to, że przedsiębiorstwo zmarłego przedsiębiorcy znajduje się w Polsce. Nie można jednak wykluczyć, że przedsiębiorca prowadził także przedsiębiorstwo/przedsiębiorstwa położone w innym państwie, choć miejsce jego

zwykłego pobytu w chwili śmierci znajdowało się w Polsce. Wówczas można wykazywać bliższy związek zmarłego przedsiębiorcy z tym innym państwem, a tym samym doprowadzić do zastosowania prawa tego państwa jako statutu spadkowego.

Według art. 23 rozporządzenia spadkowego, statutowi spadkowemu podlegają w szczególności:

a) przyczyny, czas i miejsce otwarcia spadku;
b) określenie beneficjentów, ich udziałów i obowiązków, które mógł nałożyć na nich zmarły, oraz ustalenie innych praw spadkowych, w tym praw spadkowych pozostającego przy życiu małżonka lub partnera;
c) zdolność do dziedziczenia;
d) wydziedziczenie i niegodność dziedziczenia;
e) przejście składników majątku, praw i obowiązków wchodzących w skład spadku na spadkobierców oraz, w stosownych przypadkach, na zapisobierców, w tym warunki i skutki przyjęcia lub odrzucenia spadku lub zapisu;
f) uprawnienia spadkobierców, wykonawców testamentów i innych zarządców spadku, w szczególności dotyczące sprzedaży składników majątku i zaspokojenia wierzycieli, bez uszczerbku dla uprawnień, o których mowa w art. 29 ust. 2 i 3 rozporządzenia spadkowego[10];
g) odpowiedzialność za długi spadkowe;
h) rozrządzalna część spadku, udziały obowiązkowe oraz inne ograniczenia w rozrządzaniu na wypadek śmierci, oraz roszczenia, jakie osoby bliskie zmarłego mogą zgłaszać wobec majątku spadkowego lub spadkobierców;
i) obowiązek zwrotu lub zaliczenia darowizn i zapisów przy określaniu udziałów należnych różnym beneficjentom;
j) dział spadku[11].

Poza zakresem zastosowania statutu spadkowego znajduje się m.in. dziedziczność przedsiębiorstwa (a właściwie jego składników). Podlega ona prawu właściwemu dla poszczególnych składników przedsiębiorstwa[12]. W przypadku przedsiębiorstwa, którego materialne składniki

[10] Artykuł 29 rozporządzenia spadkowego dotyczy zasadniczo zarządców, których powołanie przez sąd jest obligatoryjne. Wyraźnie poddaje się ich działanie statutowi spadkowemu. Zob. Ł. Żarnowiec: *Wpływ statutu rzeczowego na rozstrzyganie spraw spadkowych – na styku statutów*. Warszawa 2018, s. 232 i n.; zob. też M. Pazdan: *Zarząd sukcesyjny – aspekty kolizyjnoprawne*. W: *Prawo handlowe. Między teorią, praktyką a orzecznictwem. Księga jubileuszowa dedykowana Profesorowi Januszowi A. Strzępce*. Red. P. Pinior i in. Warszawa 2019, s. 72.

[11] Szerzej na temat zakresu zastosowania statutu spadkowego zob. M. Pazdan, w: *Prawo prywatne międzynarodowe. Komentarz*. Red. M. Pazdan..., s. 1180 i n.

[12] W kwestii kolizyjnoprawnej kwalifikacji przedsiębiorstwa zob. C. Wendehorst, in: *Münchener Kommentar*. Bd. 11. *Internationales Privatrecht II*. Hrsg. J. von Hein.

(rzeczy) położone są w kilku państwach, o ich dziedziczności rozstrzygać należy przede wszystkim na podstawie prawa państwa miejsca ich położenia (art. 41 ustawy Prawo prywatne międzynarodowe)[13].

Dziedziczność prawa do udziału w majątku wspólnym wspólników spółki cywilnej podlega prawu właściwemu dla tej spółki (zob. art. 21 w zw. z art. 17 p.p.m. 2011). Artykuł 1 ust. 2 lit. h rozporządzenia spadkowego wyraźnie wyłącza z zakresu stosowania rozporządzenia spadkowego kwestie dotyczące spółek i innych podmiotów posiadających osobowość prawną lub jej nieposiadających, takie jak postanowienia aktów założycielskich i statutów spółek i innych podmiotów posiadających osobowość prawną lub jej nieposiadających, które określają los udziałów po śmierci członków[14].

Ponadto ustalenie wynikającego z ustroju majątkowego udziału małżonka w przedsiębiorstwie w spadku należy do kompetencji statutu stosunków majątkowych małżeńskich. Zgodnie bowiem z art. 1 ust. 2 lit. d rozporządzenia spadkowego, także kwestie związane z małżeńskimi ustrojami majątkowymi są wyłączone z zakresu zastosowania tego rozporządzenia. Zatem o tym, czy przedsiębiorstwo w spadku należało do majątku osobistego zmarłego przedsiębiorcy, czy też wchodziło w skład majątku wspólnego przedsiębiorcy i jego małżonka decyduje prawo właściwe ustalone na podstawie art. 51 i 52 p.p.m. 2011[15].

3. Prawo właściwe dla powołania zarządcy sukcesyjnego

Podstawową kwestią, jaka pojawia się przy kolizyjnoprawnej analizie instytucji zarządu sukcesyjnego, jest przesądzenie o tym, któremu prawu podlega powołanie zarządcy sukcesyjnego oraz wykonywanie przez niego zarządu sukcesyjnego. Jak wskazano powyżej, według art. 23 lit. f

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München 2015, s. 195; H.P. Mansel, in: *Staudinger BGB. Art. 43—46 EGBGB. Internationales Sachenrecht*. Hrsg. D. Henrich. Berlin 2015, s. 259 i n. Zob. także uchwałę SN z dnia 25 czerwca 2008 r., III CZP 45/08. „Orzecznictwo Sądu Najwyższego – Izba Cywilna" 2009, nr 7—8, poz. 97; wyr. SN z dnia 31 marca 2015 r., II CSK 427/14. Legalis; wyr. SN z dnia 18 kwietnia 2019 r., II CSK 197/18. Legalis.

[13] Ustawa z dnia 4 lutego 2011 r. T.j. Dz.U. 2015, poz. 1792 [dalej: p.p.m. 2011]. Zob. jednak także art. 42 i 43 p.p.m. 2011 oraz J. Górecki, w: *Prawo prywatne międzynarodowe. Komentarz*. Red. M. Pazdan..., s. 374 i n.

[14] Zob. np. art. 872 k.c.

[15] Szerzej zob. P. Twardoch, w: *Prawo prywatne międzynarodowe. Komentarz*. Red. M. Pazdan..., s. 459 i n.

rozporządzenia spadkowego, uprawnienia spadkobierców, wykonawców testamentów i innych zarządców spadku, w szczególności dotyczące sprzedaży składników majątku i zaspokojenia wierzycieli, podlegają statutowi spadkowemu. Oznaczałoby to, że przepisy ustawy regulujące zarząd przedsiębiorstwem w spadku można stosować jedynie wtedy, gdy dziedziczenie po zmarłym przedsiębiorcy podlega prawu polskiemu. Natomiast jeśli statutem spadkowym jest prawo obce, ustanowienie zarządu sukcesyjnego i jego wykonywanie może być oparte tylko na tym obcym prawie.

Przed ostatecznym rozstrzygnięciem wskazanej powyżej kwestii należy jeszcze rozważyć, czy do innych wniosków nie doprowadzi zastosowanie art. 30 rozporządzenia spadkowego[16]. Stanowi on bowiem, że w przypadku, gdy prawo państwa, w którym znajdują się niektóre nieruchomości, niektóre przedsiębiorstwa lub inne szczególne kategorie składników majątku, zawiera szczególne przepisy nakładające z przyczyn ekonomicznych, rodzinnych lub społecznych ograniczenia dotyczące dziedziczenia lub wpływające na dziedziczenie w odniesieniu do tych składników majątku, te szczególne przepisy mają zastosowanie do dziedziczenia w takim zakresie, w jakim na mocy prawa tego państwa mają one zastosowanie bez względu na prawo właściwe dla dziedziczenia.

Artykuł 30 rozporządzenia spadkowego przełamuje przyjmowaną w tym rozporządzeniu zasadę jednolitości statutu spadkowego[17]. Ma on charakter wyjątkowy, dlatego wymaga ścisłej wykładni[18]. Potwierdza to

[16] Szerzej na temat art. 30 rozporządzenia spadkowego zob. G. Contaldi, in: *The EU Succession Regulation. A Commentary*. Eds. A.L. Calvo Caravaca, A. Davi, H.-P. Mansel. Cambridge 2016, s. 430 i n.; M.A. Zachariasiewicz, w: *Prawo prywatne międzynarodowe. Komentarz*. Red. M. Pazdan..., s. 1225 i n.; Ł. Żarnowiec: *Wpływ statutu...*, s. 304 i n.; A. Machnikowska, w: *Unijne rozporządzenie spadkowe nr 650/2012. Komentarz*. Red. M. Załucki. Warszawa 2018, s. 233 i n.; M. Margoński, w: „Komentarze Prawa Prywatnego". T. 4 B: *Prawo i postępowanie spadkowe*. Red. K. Osajda. Warszawa 2018, s. 67 i n.; 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, T. 25, s. 47 i n.; A. Köhler, in: *Internationales Erbrecht*. Hrsg. W. Gierl, A. Köhler, L. Kroiß, H. Wilsch. Baden-Baden 2020, s. 88 i n.

[17] Zob. S. Nietner: *Internationaler Entscheidungseinklang im europäischen Kollisionsrecht*. Tübingen 2016, s. 125—126, s. 306 i n.; K.A. Dadańska: *O realizacji zasady jednolitości statutu spadkowego w świetle rozporządzenia nr 650/2012*. „Problemy Prawa Prywatnego Międzynarodowego" 2016, T. 19, s. 75 i n.; A. Köhler, in: *Internationales Erbrecht*. Hrsg. W. Gierl, A. Köhler, L. Kroiß, H. Wilsch..., s. 88; A. Machnikowska, w: *Unijne rozporządzenie...*, s. 236; M. Margoński, w: „Komentarze Prawa Prywatnego". T. 4 B..., s. 68. Zob. także post. SN z dnia 11 marca 2016 r., I CSK 64/15. Legalis.

[18] Zob. orzeczenie OLG Nürnberg z dnia 27 października 2017 r., 15 W 1461/17. „Zeitschrift für Erbrecht und Vermögensnachfolge" 2018, s. 339 oraz D. Looschelders, in: *Nomoskommentar*. Bd. 6. *Rom-Verordnungen*. Hrsg. R. Hüstege, H.P. Mansel. Ba-

także uwaga 54 preambuły rozporządzenia spadkowego, w której wprawdzie zaznaczono, że ze względów ekonomicznych, rodzinnych lub społecznych niektóre nieruchomości, przedsiębiorstwa i inne szczególne kategorie składników majątku podlegać mogą szczególnym uregulowaniom w państwie członkowskim, w którym się znajdują, nakładającym ograniczenia dotyczące dziedziczenia tych składników majątku lub wpływające na ich dziedziczenie, dlatego w rozporządzeniu spadkowym należy zapewnić stosowanie tych szczególnych uregulowań. Ze względu jednak na konieczność zachowania zgodności z ogólnym celem rozporządzenia (tzn. jednolitością statutu spadkowego) ten wyjątek od stosowania prawa właściwego dla dziedziczenia należy interpretować ściśle[19].

Zastosowanie art. 30 rozporządzenia spadkowego w odniesieniu do dziedziczenia przedsiębiorstw zależy od kumulatywnego spełnienia następujących przesłanek[20]:

a) przedsiębiorstwo położone jest w innym państwie niż państwo, którego prawo wskazane jest jako statut spadkowy; nie ma przy tym znaczenia, czy statut spadkowy wyznaczony jest poprzez wybór prawa, czy też z wykorzystaniem łączników obiektywnych;
b) prawo tego innego państwa zawiera szczególne przepisy nakładające z przyczyn ekonomicznych, rodzinnych lub społecznych ograniczenia dotyczące dziedziczenia lub wpływające na dziedziczenie przedsiębiorstwa;
c) na mocy prawa tego innego państwa szczególne przepisy mają zastosowanie do dziedziczenia przedsiębiorstwa bez względu na prawo właściwe dla dziedziczenia.

Nie jest natomiast konieczne, aby przedsiębiorstwo wyczerpywało spadek lub stanowiło choćby jego przeważającą część.

Ustalenie miejsca położenia przedsiębiorstwa w rozpatrywanym przypadku nie powinno nastręczać większych trudności. Z faktu reje-

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den-Baden 2015, s. 954; M.A. Zachariasiewicz: *Przepisy wymuszające swoje zastosowanie a statut spadkowy*. W: *Nowe europejskie prawo spadkowe*. Red. M. Pazdan, J. Górecki. Warszawa 2015, s. 330.

[19] W literaturze jako najbardziej oczywisty przykład zastosowania art. 30 rozporządzenia spadkowego wskazuje się przepisy dotyczące szczególnych zasad dziedziczenia gospodarstw rolnych. Zob. J. Müller-Lukoschek: *Die neue EU-Erbrechtsverordnung*. Bonn 2013, s. 86; M. Mataczyński: *Przepisy ograniczające dziedziczenie na tle art. 30 rozporządzenia spadkowego*. W: *Nowe europejskie prawo spadkowe*. Red. M. Pazdan, J. Górecki..., s. 301 i n.; M.A. Zachariasiewicz: *Przepisy wymuszające*..., s. 323; G. Contaldi, in: *The EU Succession*..., s. 432 i n. Zob. także M. Pazdan: *Zarząd sukcesyjny*..., s. 74.

[20] Zob. A. Dutta, in: *Münchener Kommentar*. Bd. 10. *Internationales Privatrecht I*. Hrsg. J. von Hein. München 2015, s. 1570; A. Köhler, in: *Internationales Erbrecht*. Hrsg. W. Gierl, A. Köhler, L. Kroiß, H. Wilsch..., s. 89 i n.

stracji przedsiębiorcy w CEIDG pośrednio wynika bowiem, że prowadzi on swoje przedsiębiorstwo w Polsce. Z tego też względu przyjąć należy, że rejestracja w CEIDG przesądza, że zmarły przedsiębiorca prowadził swoje przedsiębiorstwo położone w Polsce. Nie jest jednak wykluczone, że niektóre składniki tego przedsiębiorstwa znajdują się poza granicami Polski. Będą to przede wszystkim rzeczy ruchome (np.: ciągniki siodłowe, maszyny, towary, surowce do produkcji), ale mogą to być także nieruchomości oraz prawa do nieruchomości.

Zgodnie z art. 3 ust. 1 lit. a rozporządzenia spadkowego, „dziedziczenie" oznacza dziedziczenie majątku po osobie zmarłej i obejmuje wszystkie formy przejścia składników majątku, praw i obowiązków na skutek śmierci, czy to na podstawie dobrowolnego rozrządzenia na wypadek śmierci, czy to w drodze dziedziczenia ustawowego. Dziedziczenie jest zatem rozumiane jedynie jako następstwo prawne po zmarłej osobie fizycznej. Natomiast pojęcie to nie obejmuje swoim zakresem losu majątku zmarłej osoby fizycznej po przejściu tego majątku na jej następców prawnych z mocy ustawy albo rozrządzenia *mortis causa*.

Przepisy, o których mowa w art. 30 rozporządzenia spadkowego, mają nakładać z przyczyn ekonomicznych, rodzinnych lub społecznych ograniczenia dotyczące dziedziczenia lub wpływać na dziedziczenie przedsiębiorstwa. Nie jest jednak jasne, o jakie przepisy dokładnie chodzi[21]. Znaczna część przepisów prawa spadkowego jest bowiem motywowana względami rodzinnymi, społecznymi i ekonomicznymi. Poza tym przepisy prawa spadkowego dotyczące dziedziczenia ustawowego ze swej natury ograniczają dziedziczenie po zmarłym, gdyż eliminują z tego dziedziczenia część osób bliskich zmarłego, przyznając prawa spadkowe tylko wskazanym osobom, których krąg jest ograniczony. Można się jedynie domyślać, że chodzi tu o przepisy, które dla określonych w art. 30 rozporządzenia spadkowego przedmiotów przewidują szczególne zasady dziedziczenia (następstwa prawnego)[22]. Dotyczyć one mogą zarówno sposobu ich nabycia przez następców prawnych, jak i wyłączenia oznaczonych osób od dziedziczenia tych składników albo stawiania ich nabywcom dodatkowych wymagań[23].

Wreszcie dla zastosowania regulacji z art. 30 rozporządzenia spadkowego wymagane jest, aby szczególne przepisy, które ograniczają dziedziczenie lub wpływają na nie, znajdowały zastosowanie bez względu

[21] Zob. M. Mataczyński: *Przepisy ograniczające*..., s. 292—293.

[22] Zob. też Ł. Żarnowiec: *Wpływ statutu*..., s. 314—315. Jak wskazuje M.A. Zachariasiewicz: *Przepisy wymuszające*..., s. 333, wymienione w art. 30 rozporządzenia spadkowego przyczyny są tak nieostre, że trudno traktować ich katalog inaczej, jak odwołanie się do idei ochrony porządku publicznego.

[23] Zob. A. Machnikowska, w: *Unijne rozporządzenie*..., s. 235.

na prawo właściwe dla dziedziczenia. Powinno to wynikać z wyraźnego brzmienia tych przepisów lub zastosowania innych metod wykładni niż językowa[24].

Odnosząc powyższe uwagi do ustanowienia zarządu sukcesyjnego i jego wykonywania, zacząć należy od tego, że przepisy ustawy nie wprowadzają ograniczeń w dziedziczeniu przedsiębiorstwa oraz nie wpływają w jakikolwiek sposób na to dziedziczenie. Ustawa nie ingeruje w tym zakresie w działanie statutu spadkowego. Dziedziczenie przedsiębiorstwa, które prowadził w Polsce zmarły przedsiębiorca, odbywa się wyłącznie na podstawie przepisów prawa właściwego dla dziedziczenia (statutu spadkowego) ustalonego na podstawie rozporządzenia spadkowego. Natomiast nie powinno ulegać wątpliwości, że cele ustawy są zgodne z celami, o których mowa w art. 30 rozporządzenia. Jej wprowadzenie motywowano utrzymaniem przedsiębiorstwa w całości i kontynuowaniem jego działalności, pomimo śmierci przedsiębiorcy, który je prowadził. Dzięki temu przedsiębiorstwo dalej może przynosić dochody rodzinie zmarłego, stanowić miejsce zatrudnienia pracowników, odprowadzać daniny publiczne itd.[25]

Istotne jest również, że z przepisów ustawy wprost nie wynika, że znajduje ona zastosowanie niezależnie od prawa właściwego dla dziedziczenia[26]. Zresztą samo ustanowienie zarządu sukcesyjnego jest fakultatywne. Przepisy dotyczące zarządu sukcesyjnego nie nakładają obowiązku powołania zarządcy sukcesyjnego w przypadku, gdy w skład majątku spadkodawcy wchodzi przedsiębiorstwo. Nie mają one w tym zakresie charakteru imperatywnego. Powołanie zarządcy sukcesyjnego po śmierci przedsiębiorcy zależy wyłącznie od woli jego następców prawnych (właścicieli przedsiębiorstwa w spadku). Ścisła wykładnia art. 30 rozporządzenia spadkowego (z uwagi na wyjątkowy charakter) nie pozwala na rozciąganie jego stosowania na regulacje o charakterze względnym.

W efekcie stwierdzić należy, że art. 30 rozporządzenia spadkowego nie uzasadnia stosowania ustawy i nie daje podstaw do ustanowienia uregulowanego w niej zarządu sukcesyjnego w przypadku, gdy statutem spadkowym nie jest prawo polskie[27]. Zarząd spadkiem jest objęty

[24] Zob. M. Mataczyński: *Przepisy ograniczające*..., s. 293—294.

[25] Zob. J. Bieluk: *Ustawa o zarządzie*..., s. 2 i n.

[26] Inaczej M. Pazdan: *Zarząd sukcesyjny*..., s. 73, a za nim Ł. Żarnowiec: *Wpływ przepisów*..., s. 53 i n., którzy z art. 1 ustawy wywodzą obowiązek jej stosowania niezależnie od tego, czy statutem spadkowym jest prawo polskie, czy też prawo innego państwa.

[27] Inny pogląd prezentują M. Pazdan: *Zarząd sukcesyjny*..., s. 73—74 i Ł. Żarnowiec: *Wpływ przepisów*..., s. 54 i n. Ich zdaniem, uzasadnienia dla stosowania przepisów ustawy dostarcza także art. 30 rozporządzenia spadkowego. Uważają oni, że oddziaływanie ustawy na zarząd przedsiębiorstwem po śmierci przedsiębiorcy oznacza wpływ

domeną statutu spadkowego, co wynika z art. 23 lit. f rozporządzenia spadkowego. Zarząd sukcesyjny uregulowany ustawą ani nie ogranicza dziedziczenia przedsiębiorstwa, ani nie wpływa na dziedziczenie przedsiębiorstwa w rozumieniu rozporządzenia spadkowego. Nie zmienia bowiem zasad przejścia przedsiębiorstwa na skutek śmierci przedsiębiorcy na jego następców prawnych („właścicieli przedsiębiorstwa w spadku" w rozumieniu ustawy). Dotyczy jedynie zarządzania przedsiębiorstwem, które w wyniku dziedziczenia przeszło na następców prawnych zmarłego przedsiębiorcy na podstawie przepisów statutu spadkowego.

Ponadto należy zwrócić uwagę na to, jakie konsekwencje związane z zarządem przedsiębiorstwem pojawiłyby się w razie stosowania art. 30 rozporządzenia spadkowego do przedsiębiorstw objętych zarządem sukcesyjnym w przypadku, gdy statutem spadkowym byłoby prawo obce. Przede wszystkim do czasu upływu terminu do ustanowienia zarządu sukcesyjnego nie byłoby wiadomo, któremu prawu podlega zarząd przedsiębiorstwem. Zależałoby to bowiem od tego, czy po śmierci przedsiębiorcy dojdzie do ustanowienia zarządu sukcesyjnego[28]. Poza tym zarząd sukcesyjny i czynności dokonywane przez zarządcę sukcesyjnego nie obejmą wówczas przedmiotów będących składnikami przedsiębiorstwa położonymi w innym państwie UE niż Polska (a przynajmniej istnieje znaczne ryzyko ich nieuznawania) z uwagi na poddanie ich innemu statutowi niż statut spadkowy.

Przyjęta powyżej teza o dopuszczalności stosowania ustawy jedynie w przypadku właściwości polskiego prawa dla spraw spadkowych po zmarłym przedsiębiorcy wymaga jeszcze kilku uwag szczegółowych.

Po pierwsze, warto przypomnieć, że pomimo ostatniego miejsca zwykłego pobytu zmarłego przedsiębiorcy poza granicami Polski, fakt prowadzenia przez niego przedsiębiorstwa w Polsce może stanowić okoliczność, o której mowa w art. 21 ust. 2 rozporządzenia spadkowego, i przemawiać za właściwością polskiego prawa do oceny spraw spadkowych po zmarłym przedsiębiorcy.

Po drugie, niezależnie od powiązań przedsiębiorcy (miejsce zwykłego pobytu, obywatelstwo, wybór statutu spadkowego), nie powinno się o dopuszczalności ustanowienia zarządu sukcesyjnego przesądzać jeszcze za życia przedsiębiorcy. Oznacza to, że niezależnie od tych powiązań każdy przedsiębiorca ujawniony w CEIDG może za życia powołać zarządcę sukcesyjnego. Jednak o tym, czy doszło do skutecznego powołania zarządcy

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na jego dziedziczenie, co jednak trudno pogodzić z definicją dziedziczenia zamieszczoną w rozporządzeniu (art. 3 ust. 1 lit. a) oraz wyjątkowym charakterem art. 30 rozporządzenia spadkowego.

[28] W tym kontekście nabierają też znaczenia zamieszczone w ustawie przepisy o tzw. czynnościach zachowawczych, o których mowa w pkt 5 niniejszego artykułu.

sukcesyjnego, przesądzić można dopiero po śmierci przedsiębiorcy, gdy będzie znany statut spadkowy. Zatem dopóki nie okaże się, że statutem spadkowym jest obce prawo, które nie dopuszcza zarządu sukcesyjnego, dopóty nie należy kwestionować kompetencji zarządcy sukcesyjnego do podejmowania działań związanych z zarządem przedsiębiorstwem zmarłego. Natomiast w przypadku powoływania zarządcy sukcesyjnego po śmierci przedsiębiorcy należy brać pod uwagę prawo właściwe dla spraw spadkowych i na jego podstawie przesądzać o dopuszczalności ustanowienia zarządu sukcesyjnego.

Po trzecie, w przypadku przedsiębiorcy, którego miejsce zwykłego pobytu znajduje się poza granicami Polski, powołanie zarządcy sukcesyjnego za życia przedsiębiorcy można powiązać z wyborem polskiego prawa jako statutu spadkowego[29], o ile przedsiębiorca jest obywatelem polskim w chwili dokonywania wyboru prawa (ewentualnie będzie nim w chwili śmierci). Wówczas powołanie zarządcy sukcesyjnego stanie się skuteczne z chwilą śmierci przedsiębiorcy.

Po czwarte, pojawia się pytanie o dopuszczalność poddania obcemu prawu czynności powołania zarządcy sukcesyjnego w przypadku, gdy statutem spadkowym jest prawo polskie. Jest to czynność prawna *mortis causa*, jeśli powołania dokonuje przedsiębiorca. Nie jest ona jednak rozrządzeniem według rozporządzenia spadkowego. Zgodnie z art. 3 ust. 1 lit. d rozporządzenia spadkowego, „rozrządzenie na wypadek śmierci" oznacza testament, testament wspólny lub umowę dotyczącą spadku[30]. Nie stosuje się zatem do powołania zarządcy sukcesyjnego art. 24—27 rozporządzenia spadkowego, regulujących właściwość prawa w zakresie dopuszczalności, ważności materialnej i formalnej rozrządzeń na wypadek śmierci[31].

W uwadze 42 preambuły rozporządzenia spadkowego podano, że prawo ustalone jako prawo właściwe dla dziedziczenia powinno regulować dziedziczenie od chwili otwarcia spadku do chwili przeniesienia własności składników majątku spadkowego na beneficjentów ustalonych na mocy tego prawa. Powinno ono również regulować kwestie związane z zarządzaniem spadkiem. Z art. 23 ust. 1 rozporządzenia spadkowego

[29] Skuteczność wyboru prawa uzależniona jest jednak od zachowania formy wymaganej dla rozrządzenia na wypadek śmierci (art. 22 ust. 2 rozporządzenia spadkowego).

[30] Według rozporządzenia spadkowego, „umowa dotycząca spadku" oznacza umowę, w tym umowę wynikającą z testamentów wzajemnych, która odpłatnie lub nieodpłatnie tworzy, zmienia lub pozbawia praw do przyszłego spadku, lub przyszłych spadków po co najmniej jednej osobie będącej stroną umowy. Szerzej zob. J. Pazdan: *Umowy dotyczące spadku w rozporządzeniu spadkowym Unii Europejskiej*. Warszawa 2018, s. 173 i n.

[31] W Polsce i innych państwach UE będących stroną Konwencji haskiej o prawie właściwym dla formy rozrządzeń testamentowych z dnia 5 października 1961 r. (Dz.U. 1969, nr 34, poz. 284) art. 27 rozporządzenia spadkowego znajduje zastosowanie jedynie dla ustalenia prawa właściwego dla formy (innej niż ustna) umów dotyczących spadku.

wywieść można domniemanie właściwości statutu spadkowego dla ogółu spraw dotyczących spadku. Odstępstwa od tego domniemania wynikać mogą jedynie z samego rozporządzenia spadkowego[32]. Takie odstępstwo dla powołania zarządcy sukcesyjnego, jak ustalono powyżej, nie wynika z art. 30 rozporządzenia spadkowego. Nie wynika też ono z art. 29 rozporządzenia, który dotyczy zarządców ustanawianych obowiązkowo przez sądy.

Ustanowienie zarządu sukcesyjnego (w tym powołanie zarządcy sukcesyjnego) podlega zatem statutowi spadkowemu niezależnie od tego, czy jest dokonywane przed, czy po śmierci przedsiębiorcy. Rozporządzenie spadkowe nie przewiduje w tym zakresie możliwości wyboru innego prawa. Forma i treść oraz skuteczność czynności prawnej powołującej zarządcę sukcesyjnego podlegają statutowi spadkowemu. Jedynie ocena zdolności osób powołujących zarządcę sukcesyjnego oraz osób, których zgoda jest wymagana dla skuteczności tej czynności prawnej, odbywa się według statutu personalnego tych osób ustalanego na ogólnych zasadach. Zgodnie bowiem z art. 1 ust. 2 pkt b rozporządzenia spadkowego, z zakresu jego zastosowania wyłączono zdolność prawną i zdolność do czynności prawnych osób fizycznych[33]. Przesądzenie o wymaganej dla zarządcy sukcesyjnego pełnej zdolności do czynności prawnych następuje zgodnie ze statutem personalnym kandydata na zarządcę ustalonym na zasadach ogólnych określonych w p.p.m. 2011[34]. Powyższe odnosi się także do zmiany i odwołania zarządcy sukcesyjnego.

4. Prawo właściwe dla czynności prawnych dokonywanych przez zarządcę sukcesyjnego

Legitymacja zarządcy sukcesyjnego do dokonywania czynności prawnych wynika ze skutecznego jego powołania (zob. pkt 3). Skuteczność powołania zarządcy sukcesyjnego oparta na przepisach statutu spadkowego nie zawsze jednak pozwoli mu na wykonywanie praw o charakterze publicznoprawnym. Potwierdza to także art. 1 ust. 1 zd. 2 rozporządzenia spadkowego, który wskazuje, że rozporządzenia nie stosuje się do spraw podatkowych, celnych ani administracyjnych. W związku z tym legitymacji tej należy poszukiwać w odpowiednich przepisach prawa

[32] Zob. m.in. jego art. 1 ust. 2.

[33] Z zastrzeżeniem art. 23 ust. 2 lit. c oraz art. 26 rozporządzenia spadkowego.

[34] Zob. art. 11 p.p.m. 2011 oraz M. Pazdan: *Zarząd sukcesyjny*..., s. 76.

publicznego. W przypadku zastosowania prawa polskiego znajdują się one w przepisach ustawy[35]. Natomiast realizacja przez powołanego na podstawie prawa polskiego zarządcę sukcesyjnego praw wynikających z norm obcego prawa publicznego może napotkać na przeszkody, których powodem będzie nieznajomość tej instytucji w tym obcym prawie[36].

Zakres kompetencji zarządcy w sprawach objętych zakresem działania statutu spadkowego określa sam statut spadkowy. Dotyczy to w szczególności spraw wymienionych w art. 23 rozporządzenia spadkowego. Skuteczność czynności dokonanej przez zarządcę sukcesyjnego zależeć może jednak także od wymagań wynikających ze statutu rzeczowego (np.: wpis do rejestru, wydanie przedmiotu umowy, zgoda organu władzy publicznej, uwzględnienie pierwokupu o charakterze prawnorzeczowym[37]).

Przesłanki ważności czynności prawnych dokonywanych przez zarządcę sukcesyjnego podlegają co do zasady prawu właściwemu dla danej czynności prawnej ustalanemu na ogólnych zasadach. Prawo właściwe dla formy tych czynności prawnych ustalać należy na podstawie art. 11 rozporządzenia Rzym I[38] lub na podstawie art. 25 p.p.m. 2011[39].

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[35] Zob. art. 36 i n. ustawy.

[36] Poza ramy niniejszego opracowania wykracza kwestia dopuszczalności umieszczania w europejskim poświadczeniu spadkowym informacji na temat powołania zarządcy sukcesyjnego. Zgodnie z art. 68 pkt o rozporządzenia spadkowego, poświadczenie zawiera informacje dotyczące uprawnienia wykonawcy testamentu lub zarządcy spadku oraz ograniczeń ich uprawnień (zob. także art. 63 rozporządzenia spadkowego). Nie jest jednak jasne, czy chodzi tu o każdego zarządcę spadku lub jego składnika, czy jedynie o zarządcę powołanego na podstawie art. 29 rozporządzenia spadkowego. Zob. też M. Schauer: *Europäisches Nachlasszeugnis*. In: *Europäische Erbrechtsverordnung*. Hrsg. M. Schauer, E. Scheuba..., s. 84 i n.; C.F. Nordmeier, in: *Nomoskommentar*. Bd. 6. *Rom-Verordnungen*. Hrsg. R. Hüstege, H.P. Mansel..., s. 1078; A. Köhler, in: *Internationales Erbrecht*. Hrsg. W. Gierl, A. Köhler, L. Kroiß, H. Wilsch..., s. 145.

[37] Zob. J. Górecki: *Pierwokup w prawie prywatnym międzynarodowym*. W: *Rozprawy z prawa prywatnego. Księga jubileuszowa dedykowana Profesorowi Wojciechowi Popiołkowi*. Red. M. Pazdan, M. Jagielska, E. Rott-Pietrzyk, M. Szpunar. Warszawa 2017, s. 61.

[38] Rozporządzenie Parlamentu Europejskiego i Rady (WE) nr 593/2008 w sprawie prawa właściwego dla zobowiązań umownych (Rzym I). Dz.Urz. UE L nr 177, s. 6.

[39] Szerzej zob. J. Pazdan, w: *Prawo prywatne międzynarodowe. Komentarz*. Red. M. Pazdan..., s. 283 i n. oraz J. Górecki, w: *Prawo prywatne międzynarodowe. Komentarz*. Red. M. Pazdan..., s. 729 i n.

5. Prawo właściwe dla czynności zachowawczych dokonywanych przed powołaniem zarządcy sukcesyjnego

Odrębnych uwag wymaga dokonywanie tzw. czynności zachowawczych po śmierci przedsiębiorcy, a przed powołaniem zarządcy sukcesyjnego. Zgodnie z art. 13 ustawy, w okresie od chwili śmierci przedsiębiorcy do dnia ustanowienia zarządu sukcesyjnego, a jeżeli zarząd sukcesyjny nie został ustanowiony – do dnia wygaśnięcia uprawnienia do powołania zarządcy sukcesyjnego, osoba, o której mowa w art. 14 ustawy, może dokonywać czynności koniecznych do zachowania majątku lub możliwości prowadzenia przedsiębiorstwa w spadku, a także czynności zwykłego zarządu w zakresie przedmiotu działalności gospodarczej wykonywanej przez przedsiębiorcę przed jego śmiercią, jeżeli ciągłość tej działalności jest konieczna do zachowania możliwości jej kontynuacji lub uniknięcia poważnej szkody.

Osobami uprawnionymi do dokonywania wymienionych powyżej czynności są: małżonek przedsiębiorcy, któremu przysługuje udział w przedsiębiorstwie w spadku, lub spadkobierca ustawowy przedsiębiorcy, albo spadkobierca testamentowy przedsiębiorcy, albo zapisobierca windykacyjny, któremu zgodnie z ogłoszonym testamentem przysługuje udział w przedsiębiorstwie w spadku.

Po uprawomocnieniu się postanowienia o stwierdzeniu nabycia spadku, zarejestrowaniu aktu poświadczenia dziedziczenia albo wydaniu europejskiego poświadczenia dziedziczenia wskazanych czynności dokonywać może wyłącznie właściciel przedsiębiorstwa w spadku.

Osoby dokonujące omawianych czynności działają w imieniu własnym, ale na rachunek właściciela przedsiębiorstwa w spadku (art. 15 ustawy).

W związku z powyżej przywołanymi przepisami ustawy pojawia się pytanie, czy znajdują one zastosowanie jedynie w przypadku, gdy statutem spadkowym na podstawie rozporządzenia spadkowego okaże się prawo polskie, czy też można z nich korzystać także wówczas, gdy właściwe dla dziedziczenia po zmarłym przedsiębiorcy jest prawo obce. Odpowiedź na to pytanie powinna być podobna, jak w przypadku powołania zarządcy sukcesyjnego i wykonywania przez niego czynności związanych z zarządem przedsiębiorstwem w spadku. Stwierdzić zatem należy, że i w tym przypadku chodzi o zarząd przedsiębiorstwem w spadku objęty zakresem zastosowania statutu spadkowego. W konsekwencji także w odniesieniu do czynności, o których mowa w art. 13 ustawy, przyjąć trzeba, że ustawa znajdzie zastosowanie jedynie w przypadku, gdy sta-

tutem spadkowym okaże się prawo polskie. Argumentacja za takim rozwiązaniem jest analogiczna do przedstawionej powyżej w odniesieniu do powołania zarządcy sukcesyjnego. Właściwość obcego statutu spadkowego nie zostanie tu przełamana dopuszczalnością posługiwania się ustawą. W szczególności podstawą do odejścia od właściwości statutu spadkowego w omawianym zakresie nie jest art. 30 rozporządzenia spadkowego[40]. Przywołane powyżej przepisy ustawy nie wprowadzają bowiem ograniczeń dotyczących dziedziczenia przedsiębiorstwa i nie wpływają na to dziedziczenie. Odnoszą się one wyłącznie do zarządu składnikami majątku zmarłego przedsiębiorcy.

Bibliografia

Bieluk J.: *Ustawa o zarządzie sukcesyjnym przedsiębiorstwem osoby fizycznej. Komentarz*. Warszawa 2019.

Blicharz R.: *Zarząd sukcesyjny przedsiębiorstwem w spadku*. Warszawa 2019.

Contaldi G., in: *The EU Succession Regulation. A Commentary*. Eds. A.L. Calvo Caravaca, A. Davi, H.-P. Mansel. Cambridge 2016.

Dadańska K.A.: *O realizacji zasady jednolitości statutu spadkowego w świetle rozporządzenia nr 650/2012*. „Problemy Prawa Prywatnego Międzynarodowego" 2016, T. 19.

Dutta A., in: *Münchener Kommentar*. Bd. 10. *Internationales Privatrecht I*. Hrsg. J. von Hein. München 2015.

Fischer-Czermak C.: *Anwendbares Recht*. In: *Europäische Erbrechtsverordnung*. Hrsg. M. Schauer, E. Scheuba. Wien 2012.

Górecki J.: *Pierwokup w prawie prywatnym międzynarodowym*. W: *Rozprawy z prawa prywatnego. Księga jubileuszowa dedykowana Profesorowi Wojciechowi Popiołkowi*. Red. M. Pazdan, M. Jagielska, E. Rott-Pietrzyk, M. Szpunar. Warszawa 2017.

Górecki J., w: *Prawo prywatne międzynarodowe. Komentarz*. Red. M. Pazdan. Warszawa 2018.

Kapkowski R., Kaufmann M.: *Charakter prawny zarządcy sukcesyjnego na tle pokrewnych instytucji zarządu masą spadkową*. „Rejent" 2019, nr 7.

Köhler A., in: *Internationales Erbrecht*. Hrsg. W. Gierl, A. Köhler, L. Kroiß, H. Wilsch. Baden-Baden 2020.

Kopaczyńska-Pieczniak K.: *Status prawny zarządcy sukcesyjnego*. „Przegląd Prawa Handlowego" 2018, nr 12.

Kopystyński K.: *Zarządca sukcesyjny jako przedsiębiorca*. „Przegląd Ustawodawstwa Gospodarczego" 2019, nr 6.

[40] Przeciwnie M. Pazdan: *Zarząd sukcesyjny…*, s. 74.

Looschelders D., in: *Nomoskommentar*. Bd. 6. *Rom-Verordnungen*. Hrsg. R. Hüstege, H.P. Mansel. Baden-Baden 2015.
Machnikowska A., w: *Unijne rozporządzenie spadkowe nr 650/2012. Komentarz*. Red. M. Załucki. Warszawa 2018.
Mansel H.P., in: *Staudinger BGB. Art. 43—46 EGBGB. Internationales Sachenrecht*. Hrsg. D. Henrich. Berlin 2015.
Margoński M., w: „Komentarze Prawa Prywatnego". T. 4 B: *Prawo i postępowanie spadkowe*. Red. K. Osajda. Warszawa 2018.
Mataczyński M.: *Przepisy ograniczające dziedziczenie na tle art. 30 rozporządzenia spadkowego*. W: *Nowe europejskie prawo spadkowe*. Red. M. Pazdan, J. Górecki. Warszawa 2015.
Müller-Lukoschek J.: *Die neue EU-Erbrechtsverordnung*. Bonn 2013.
Nietner S.: *Internationaler Entscheidungseinklang im europäischen Kollisionsrecht*. Tübingen 2016.
Nordmeier C.F., in: *Nomoskommentar*. Bd. 6. *Rom-Verordnungen*. Hrsg. R. Hüstege, H.P. Mansel. Baden-Baden 2015.
Pacek P.: *Wykonawca testamentu a zarząd sukcesyjny przedsiębiorstwem osoby fizycznej – wybrane zagadnienia*. „Rejent" 2019, nr 6.
Pazdan J.: *Umowy dotyczące spadku w rozporządzeniu spadkowym Unii Europejskiej*. Warszawa 2018.
Pazdan M.: *O umowach dziedziczenia zawieranych przed polskimi notariuszami*. „Rejent" 1996, nr 4—5.
Pazdan M.: *Prawo prywatne międzynarodowe*. Warszawa 2017.
Pazdan M.: *Zarząd sukcesyjny – aspekty kolizyjnoprawne*. W: *Prawo handlowe. Między teorią, praktyką a orzecznictwem. Księga jubileuszowa dedykowana Profesorowi Januszowi A. Strzępce*. Red. P. Pinior i in. Warszawa 2019.
Pazdan M.: *Zarządca sukcesyjny a wykonawca testamentu*. W: *„Ius est ars boni et aequi". Księga pamiątkowa dedykowana Profesorowi Józefowi Frąckowiakowi*. Red. A. Dańko-Roesler, M. Leśniak, M. Skory, B. Sołtys. Wrocław 2018.
Pazdan M., w: *Prawo prywatne międzynarodowe. Komentarz*. Red. M. Pazdan. Warszawa 2018.
Schauer M.: *Europäisches Nachlasszeugnis*. In: *Europäische Erbrechtsverordnung*. Hrsg. M. Schauer, E. Scheuba. Wien 2012.
Szczurowski T.: *Zarząd sukcesyjny przedsiębiorstwem w spadku*. „Przegląd Ustawodawstwa Gospodarczego" 2018, nr 11.
Twardoch P., w: *Prawo prywatne międzynarodowe. Komentarz*. Red. M. Pazdan. Warszawa 2018.
Wendehorst C., in: *Münchener Kommentar*. Bd. 11. *Internationales Privatrecht II*. Hrsg. J. von Hein. München 2015.
Wieczorek A.: *Ustalenie prawa właściwego w świetle rozporządzenia spadkowego nr 650/2012*. „Problemy Prawa Prywatnego Międzynarodowego" 2017, T. 21.

Zachariasiewicz M.A.: *Przepisy wymuszające swoje zastosowanie a statut spadkowy*. W: *Nowe europejskie prawo spadkowe*. Red. M. Pazdan, J. Górecki. Warszawa 2015.

Zachariasiewicz M.A., w: *Prawo prywatne międzynarodowe. Komentarz*. Red. M. Pazdan. Warszawa 2018.

Żarnowiec Ł.: *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, T. 25.

Żarnowiec Ł.: *Wpływ statutu rzeczowego na rozstrzyganie spraw spadkowych – na styku statutów*. Warszawa 2018.

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Glosa

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Glosa do postanowienia Sądu Najwyższego z dnia 23 marca 2016 r., sygn. akt: III CZP 112/15

Abstract: The role of art. 57 § 1 of Polish Family and Guardianship Code in proceedings concerning international divorce is disputed and gives rise to many questions concerning its nature. The provision, addressed to the Polish courts dealing with divorce cases, obliges the seized court to rule on fault of spouses in the breakdown of marriage. It may then seem to remain unclear if the court shall apply art. 57 § 1 when the law applicable to divorce does not state for fault based grounds for dissolution of marriage, while the legal order applicable to maintenance obligation between former spouses requires, among other prerequisites, that the fault of the former spouse obliged to alimony is declared in court proceedings.

This paper analyses the judgement of Polish Supreme Court from 23rd of March 2016, in which this issue was raised. The Author rejects the opinion of Supreme Court that the provision in question has a procedural nature. The view, that it constitutes an example of overriding mandatory provision should also be denied. As a provision of double nature: material and procedural, it should be applied by Polish courts as an instrument that enables to rule on fault in all those cases when applicable law provides for fault grounds for divorce; it should be also applied by foreign court deciding on dissolution of marriage when Polish law is applicable.

Keywords: significance of fault in divorce proceedings — international divorce — fault and no-fault based grounds for divorce — prerequisites of maintenance obligation towards former spouse after divorce — law applicable to maintenance obligation between divorced spouses — private international law — international family law

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Postanowienie Sądu Najwyższego będące przedmiotem niniejszego opracowania zasługuje na uwagę z tego względu, że skupia w sobie istotne zagadnienia z zakresu szeroko rozumianego prawa prywatnego międzynarodowego. Na pierwszy plan wysunięto problematykę dotyczącą kolizyjnego prawa rodzinnego, w tym przede wszystkim odnoszącą się do rozwiązania małżeństwa i obowiązku alimentacyjnego między rozwiedzionymi małżonkami. Sąd Najwyższy wiele uwagi poświęcił również zagadnieniom związanym z uznaniem orzeczenia pochodzącego od sądu lub organu państwa niebędącego członkiem Unii Europejskiej. W tle wybrzmiewają też bardziej ogólne rozważania, mające za przedmiot podstawowe (co nie znaczy: proste) instytucje prawa prywatnego międzynarodowego, jak kwalifikacja i dostosowanie czy też analiza przesłanek dopuszczenia do głosu przepisów imperatywnych pochodzących z innego systemu prawnego niż ten, który występuje w roli miarodajnego statutu.

Glosowane orzeczenie zapadło w następującym stanie faktycznym. Powódka, będąca obywatelką polską, oraz pozwany, obywatel Szwecji, w dniu 21 czerwca 2008 r. w Polsce zawarli związek małżeński. Po ślubie strony zamieszkały w Norwegii. W lipcu 2011 r. pozwany zdecydował o zakończeniu małżeństwa, składając wniosek o orzeczenie separacji, w następstwie czego 1 listopada 2011 r. Naczelnik Okręgu T. w Norwegii wydał postanowienie o separacji małżonków. W dniu 10 marca 2012 r. urodziła się córka stron, 20 lipca 2012 r. zaś powódka wniosła o rozwód przed sądem polskim. W dniu 20 czerwca 2014 r. Urząd Wojewódzki w O. w Norwegii orzekł o rozwodzie stron z mocą od 7 stycznia 2014 r. Z kolei wyrokiem z dnia 4 lipca 2014 r. Sąd Okręgowy w W. wydał wyrok rozwiązujący małżeństwo bez orzekania o winie którejkolwiek ze stron. Powódka wniosła apelację od wyroku Sądu Okręgowego w W., zaskarżając go w zakresie, w jakim Sąd Okręgowy odstąpił od orzekania o winie, jak też w odniesieniu do władzy rodzicielskiej w stosunku do córki stron oraz w przedmiocie rozstrzygnięcia o obowiązku alimentacyjnym powoda zarówno względem córki stron, jak i powódki. Rozpoznając apelację, Sąd Apelacyjny powziął poważne wątpliwości prawne, którym dał wyraz w postanowieniu z dnia 8 września 2015 r., występując z przedstawionym w glosowanym orzeczeniu pytaniem prawnym, którego treść brzmi następująco:

> Czy w sprawie o rozwiązanie związku małżeńskiego przez rozwód, przy stosowaniu przez sąd polski jako prawa właściwego prawa obcego, które nie przewiduje orzekania o winie w rozkładzie pożycia

stron, należy na mocy art. 8 ust. 2 ustawy z dnia 4 lutego 2011 r. prawo prywatne międzynarodowe (Dz.U. 2011.80.432 j.t. ze zm.) uwzględnić przepis art. 57 § 1 k.r.o. jako przepis, który stosuje się bez względu na to, jakiemu prawu oceniany stosunek prawny (stosunek małżeństwa) podlega?

Wśród zagadnień będących przedmiotem rozstrzygnięcia w sprawie, której dotyczy glosowane orzeczenie, na czoło wysuwa się problematyka związana z ustaleniem prawa właściwego do oceny obowiązku alimentacyjnego między rozwiedzionymi małżonkami w sytuacji, gdy po rozwiązaniu małżeństwa nie mają oni miejsca zwykłego pobytu na terytorium tego samego państwa. W dalszej kolejności Sąd Najwyższy wypowiedział się w przedmiocie uznania orzeczenia rozwodowego pochodzącego od sądu lub organu państwa, które nie jest członkiem Unii Europejskiej, wskazując z jednej strony podstawę prawną takiego uznania, a z drugiej podkreślając, że żaden z sądów obu instancji orzekających w sprawie nie zbadał, czy orzeczenie wydane w dniu 20 czerwca 2014 r. przez Urząd Wojewódzki w O. w Norwegii podlega uznaniu na terytorium naszego państwa. Jedynie pobieżnie zasygnalizowano, w jakim kierunku — w ocenie Sądu Najwyższego — zmierzać powinno rozstrzygnięcie kwestii leżącej u podstaw przedstawionego przez Sąd Apelacyjny zagadnienia budzącego poważne wątpliwości prawne, a to z uwagi na fakt, że konieczność takiego rozstrzygnięcia może się zaktualizować w postępowaniu, którego dotyczy glosowane orzeczenie jedynie wówczas, gdy ostatecznie przesądzona zostanie sprawa uznania orzeczenia organu norweskiego.

To ostatnie zagadnienie, mimo że w glosowanym orzeczeniu potraktowane zostało ubocznie, zasługuje na szersze omówienie. Innymi słowy, wyjaśnienia wymaga rola, jaką art. 57 § 1 k.r.o. odgrywa nie tylko z perspektywy polskiego prawa materialnego, ale również — a może przede wszystkim — przez pryzmat prawa prywatnego międzynarodowego. Konieczność uważnego rozważenia postawionego przez orzekający w omawianej sprawie Sąd Apelacyjny pytania wynika ze znaczenia, jakie przypisuje się winie w rozkładzie pożycia małżeńskiego (zerwaniu więzi małżeńskich) w prawodawstwie niektórych państw w odniesieniu do dalszych skutków rozwiązania małżeństwa, w szczególności w zakresie obowiązku alimentacyjnego między rozwiedzionymi małżonkami. Należy pamiętać, że w poszczególnych systemach prawnych różnie definiuje się przesłanki rozwiązania małżeństwa, co w szczególności dotyczy nadawania w tej mierze (w różnym stopniu) doniosłości winie w rozkładzie pożycia albo całkowitego uniezależnienia dopuszczalności rozwodu od oceny

zachowania małżonków[1], co w wielu przypadkach skutkuje trudnościami w orzekaniu o ubocznych następstwach rozwodu. Daleko idące komplikacje mogą wystąpić przede wszystkim wówczas, gdy prawem właściwym do rozwiązania małżeństwa jest prawo, w którym rozwód wymaga zaistnienia przesłanek o charakterze obiektywnym, nienacechowanych zawinieniem (np. w postaci życia małżonków w rozłączeniu przez określony czas przed wystąpieniem z żądaniem rozwiązania małżeństwa czy też samego złożenia wniosku o rozwód przez małżonków), podczas gdy prawo występujące w roli statutu miarodajnego do oceny danego skutku rozwodu uzależnia ten skutek od stwierdzonej na etapie postępowania o rozwiązanie małżeństwa[2] winy małżonka w rozkładzie pożycia. Pojawić się więc musi w tym miejscu pytanie o możliwość stosowania lub uwzględniania w postępowaniu o rozwiązanie małżeństwa pochodzących z prawa innego niż właściwe tych rozwiązań prawnych, które służą ustaleniu zawinienia małżonków.

Do tego rodzaju zetknięcia się dwóch systemów prawnych o odmiennej koncepcji co do roli winy w rozwodzie i wynikających z jej ustalenia następstw doszło w sprawie, w której Sąd Najwyższy wydał glosowane orzeczenie. Należy podkreślić, że Sąd Najwyższy odrzucił prezentowany przez pełnomocnika powódki pogląd, zgodnie z którym art. 57 § 1 k.r.o. ma charakter wymuszający swoje zastosowanie w rozumieniu art. 8 ust. 1 p.p.m. Sąd Najwyższy stanął na stanowisku, że art. 57 § 1 k.r.o. jest normą wchodzącą w skład *legi fori processualis* i jako taka podlega stosowaniu w każdej sprawie o rozwód toczącej się przed sądem polskim, w której zgodnie z prawem właściwym orzec należy o winie małżonków.

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[1] Zob. m.in.: M. Antokolskaia: *Divorce law in a European perspective*. In: *European Family Law*. Vol. 3: *Family Law in European Perspective*. Ed. J.M. Scherpe. Cheltenham, Northampton, 2016, s. 55; Y. Bernand, in: *La rupture de marriage en droit compare*. Éd. H. Fulchiron. Paris 2015, s. 42; P. Franzina: *The law applicable to divorce and legal separation under Regulation (EU) no. 1259/2010 of 20 december 2010*. „Cuadernos de Derecho Transnacional" 2011, no. 2, s. 127; H. Bosse-Platière: *Le droit français du divorce*. In: *Droit européen du divorce. European Divorce Law*. Éd. S. Corneloup. Paris 2013, s. 137 i n.; M.C. Domínguez Guillén, O. Riquezes Contreras: *Algunas consideraciones sobre el adulterio como causal de divorcio (especial referencia a los antecedents históricos)*. „Revista Venezolana de Legislación y Jurisprudencia" 2013, núm. 2, s. 281—284 ; E. Örücü: *Changing concept of „family" and challenges for law: Turkey*. In: *European Family Law*. Vol. 2: *The Changing Concept of Family and Challenges for Domestic Family Law*. Ed. J.M. Scherpe. Cheltenham, Northhampton, 2016, s. 348; I. Schwenzer, T. Keller: *The changing concept of „family" and challenges for law: Switzerland*. In: *European Family Law*. Vol. 2: *The Changing Concept of Family and Challenges for Domestic Family Law*. Ed. J.M. Scherpe..., s. 316.

[2] W tym przypadku termin „postępowanie" należy rozumieć szeroko, tak by możliwe było objęcie nim wszelkich sposobów rozwiązania małżeństwa.

Odnosząc się do zaprezentowanej w glosowanym orzeczeniu argumentacji, wskazać należy, że nie zasługuje na aprobatę pogląd, zgodnie z którym art. 57 § 1 k.r.o., nakazujący sądowi orzekającemu o rozwiązaniu małżeństwa dokonanie rozstrzygnięcia w przedmiocie winy w rozkładzie pożycia, ma charakter jedynie procesowy. Należałoby raczej przyjąć, że jest to regulacja, którą można zaliczyć do znanej nauce prawa cywilnego (zarówno materialnego, jak i procesowego) oraz orzecznictwu kategorii przepisów o podwójnej naturze — materialnej i procesowej[3]. Można w tym miejscu jedynie nadmienić, że specyfika tego rodzaju unormowań nie ujawnia się w tych przypadkach, gdy sąd stosuje jako właściwe prawo merytoryczne obowiązujące w siedzibie forum, lecz dopiero wówczas, gdy normy proceduralne i normy prawa wskazanego miarodajną normą kolizyjną pochodzą z dwóch różnych systemów prawnych.

Przejawy procesowej natury art. 57 § 1 k.r.o. można więc sprowadzić do nałożonego na sąd polski (do którego adresowane są obowiązujące na terytorium RP normy proceduralne) obowiązku orzeczenia o winie w rozkładzie pożycia małżonków (w zerwaniu więzi małżeńskich) w wyroku rozwodowym. Oznacza to, że polski sąd wydający wyrok w sprawie o rozwód, bez względu na to, które prawo pełni funkcję statutu rozwiązania małżeństwa, stosuje art. 57 § 1 k.r.o. w zakresie jego treści procesowej[4], zamieszczając w orzeczeniu kończącym sprawę w danej instancji rozstrzygnięcie w przedmiocie winy, albo też odstępuje od takiego rozstrzygnięcia, jeżeli spełnione są przesłanki art. 57 § 2 k.r.o. Wówczas takie zagadnienia, jak pojęcie winy, ewentualne jej stopniowanie oraz katalog zachowań małżonka, które noszą znamiona zawinienia, oceniane są przez sąd na podstawie prawa wskazanego normą kolizyjną z art. 54 p.p.m. Jednak w przypadku, gdy miarodajne prawo właściwe nie przewiduje orzekania o winie ani nie nadaje winie w rozkładzie pożycia jakiejkolwiek doniosłości w kontekście podstaw rozwiązania małżeństwa z uwagi na służebną rolę norm proceduralnych względem regulacji prawa materialnego, stosowanie omawianego przepisu — w takim zakresie, w jakim chodzi o jego procesową naturę — staje się bezprzedmiotowe. Na marginesie można zauważyć, że ta ostatnia uwaga zdaje się zgodna z poglądem wyrażonym przez Sąd Najwyższy w glosowanym orzeczeniu.

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[3] W literaturze polskiej zob. m.in. W. Skierkowska: *Międzynarodowe postępowanie cywilne w sprawach alimentacyjnych*. Warszawa 1972, s. 122. W literaturze obcej: M. Andrae: *Internationales Familienrecht*. Berlin 2006, s. 212 i n.; G. Hohloch, in: *Erman BGB Kommentar*, 2017, s. 6069; P. Winkler von Mohrenfels: *Verordnung (EU) Nr. 1259/2010*. In: *Münchener Kommentar zum Bürgerlichen Gesetzbuch*. Bd. 10: *Internationales Privatrecht I. Europäisches Kollisionsrecht. Einführungsgesetz zum Bürgerlichen Gesetzbuche (Art. 1—240)*. Hrsg. J. v. Hein. München 2015, s. 1215.

[4] W. Skierkowska: *Międzynarodowe postępowanie*…, s. 123.

Natomiast materialnoprawny charakter analizowanego przepisu przejawia się w tym, że sąd (lub inny organ obcego państwa powołany do rozpatrywania spraw o rozwiązanie małżeństwa) stosujący w sprawie rozwodowej jako właściwe prawo polskie jest zobowiązany do ustalenia przed wydaniem orzeczenia rozwiązującego małżeństwo, czy i który z małżonków ponosi winę w rozkładzie pożycia. Wina (w postaci wyłącznej winy jednego z małżonków) stanowi bowiem, zgodnie z art. 56 § 3 k.r.o., negatywną przesłankę orzeczenia rozwodu (zob. poniżej). Z tego też względu dokonanie przez sąd odpowiednich ustaleń przed wydaniem rozstrzygnięcia zgodnego z art. 57 § 1 k.r.o. jest niezbędne. Oznacza to, że — co pozostaje w sprzeczności ze stanowiskiem Sądu Najwyższego zaprezentowanym w glosowanym orzeczeniu — sąd (lub organ) innego państwa orzekający w sprawie o rozwód, w której w roli statutu rozwiązania małżeństwa występuje prawo polskie, stosuje art. 57 § 1 k.r.o. w celu ustalenia, czy nie zachodzi negatywna przesłanka rozwodu, jednak stosownego rozstrzygnięcia dokonuje w ramach procesowych przewidzianych w *legis fori processualis*. Tym samym w braku w obcym prawie procesowym odpowiedniej regulacji, pozwalającej zamieścić w sentencji orzeczenia rozstrzygnięcia o winie (lub w przypadku wyraźnego zakazu), sąd orzekający jest zobowiązany do odnalezienia w wiążącej go procedurze takiego instrumentu, który pozwala na realizację art. 57 k.r.o.[5]

Można również rozważyć, w ślad za wzmiankowaną w glosowanym postanowieniu argumentacją pełnomocnika powódki, czy w sferze materialnoprawnej art. 57 § 1 k.r.o. powinien być traktowany jako przepis wymuszający swoje zastosowanie (art. 8 ust. 1 p.p.m., błędnie oznaczony jako art. 8 ust. 2 p.p.m.) i jako taki być stosowany w każdej sprawie, w której sąd polski orzeka o rozwodzie, bez względu na to, jakie prawo jest właściwe. Należałoby się opowiedzieć przeciwko takiemu odczytywaniu treści omawianego przepisu, a to z tego względu, że art. 57 § 1 nie spełnia przecież przesłanek określonych w art. 8 ust. 1 p.p.m. W literaturze przedmiotu podkreśla się, że do przepisów wymuszających swoje zastosowanie można zaliczyć jedynie te, które mają kluczowe znaczenie dla ochrony porządku publicznego państwa, i ze względu na swój cel lub charakter znajdują zastosowanie niezależnie od prawa właściwego dla danej sytuacji życiowej[6]. Chodzi tu więc o normy o szczególnej doniosłości

[5] Co może polegać np. na zamieszczeniu stosownych rozważań w uzasadnieniu orzeczenia.

[6] M. Pazdan: *Przepisy szczególne o dziedziczeniu gospodarstw rolnych z kolizyjnoprawnego punktu widzenia*. W: *Zagadnienie prawa cywilnego, samorządowego i rolnego. Pamięci Profesora Waleriana Pańki*. Red. A. Agopszowicz, T. Kurowska, M. Pazdan. Katowice 1993, s. 188 i n.; K. Przybyłowski: *Prawo prywatne międzynarodowe. Część ogólna*. Lwów 1935, s. 168; M. Tomaszewski, w: *Prawo prywatne międzynarodo-*

danego systemu prawnego, które służą ochronie fundamentalnych interesów publicznych[7]. Wskazuje się też, że ingerencja tego rodzaju przepisów w oceniany stosunek prawny (sytuację faktyczną) powinna mieć charakter wyjątkowy, a jej dopuszczalność ma wynikać z tak ważnych powodów, że ingerencja ta jest utożsamiana z ochroną *ordre public*[8].

Uwzględniając wyżej przytoczone cechy konstytutywne przepisów wymuszających swoje zastosowanie, należy uznać, że art. 57 § 1 k.r.o. nie spełnia przesłanek tego rodzaju regulacji. Nie ulega przecież wątpliwości, że w polskiej regulacji przyczyn rozwodu wina nie odgrywa kluczowej roli, gdyż rozwiązanie małżeństwa może nastąpić jedynie wówczas, gdy występują przyczyny o charakterze obiektywnym, pozwalające przyjąć, że między małżonkami nastąpił zupełny i trwały rozkład pożycia (art. 56 § 1 k.r.o.)[9]. Istniejące u podstaw rozkładu pożycia małżonków okoliczności mogą mieć zarówno charakter zawiniony, jak i niezawiniony przez małżonka[10], a ich ujmowanie w dwie grupy (przyczyn zawinionych i niezawinionych), co często spotyka się w literaturze, ma co najwyżej znaczenie porządkujące. Innymi słowy, rozwód zgodnie z prawem polskim jest dopuszczalny jedynie w przypadku wystąpienia zupełnego i trwałego rozkładu pożycia małżonków, bez względu na to, czy do ustania poży-

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we. Komentarz. Red. J. Poczobut. Warszawa 2017, s. 237 i n.; M.A. Zachariasiewicz, w: *Prawo prywatne międzynarodowe. Komentarz*. Red. M. Pazdan. Warszawa 2018, s. 156.

[7] M. Mataczyński: *Przepisy wymuszające swoje zastosowanie w prawie prywatnym międzynarodowym*. Kraków 2005, s. 113 i n.; M.A. Zachariasiewicz, w: *Prawo prywatne…*, Red. M. Pazdan, s. 160; Eadem: *O potrzebie wskazania w nowej ustawie o prawie prywatnym międzynarodowym podstawy stosowania przepisów wymuszających swoje zastosowanie*. „Problemy Prawa Prywatnego Międzynarodowego" 2010, T. 7, s. 9 i n.

[8] M. Sośniak: *Klauzula porządku publicznego w prawie prywatnym międzynarodowym*. Warszawa 1961, s. 10 i n.; M. Wojewoda: *Mandatory Rules In Private International Law — with Reference to Mandatory System under the Rome Convention on the Law applicable to the Contractual Obligations*. „Maastricht Journal of European and Comparative Law" 2000, s. 193; Idem: *Zakres prawa właściwego dla zobowiązań umownych. Nowa regulacja kolizyjna w konwencji rzymskiej*. Warszawa 2007, s. 191 i n.; M.A. Zachariasiewicz, w: *Prawo prywatne…*, Red. M. Pazdan, s. 159; Eadem, w: „System Prawa Prywatnego". T. 20A: *Prawo prywatne międzynarodowe*. Red. M. Pazdan. Warszawa 2014, s. 437 i n.

[9] Por. m.in. J. Górecki: *Wina rozwodu a moralność (z rozważań nad zasadami rekryminacji)*. „Państwo i Prawo" 1965, z. 1, s. 27; A. Olejniczak: *Materialnoprawne przesłanki udzielenia rozwodu*. Poznań 1980, s. 23 i n.; K. Piasecki: *Prawo małżeńskie*. Warszawa 2011, s. 230—233; T. Sokołowski, w: „System Prawa Prywatnego". T. 11: *Prawo rodzinne i opiekuńcze*. Red. T. Smyczyński. Warszawa 2014, s. 570 i n.

[10] B. Czech, w: *Kodeks rodzinny i opiekuńczy. Komentarz*. Red. K. Piasecki. Warszawa 2011, s. 383; J. Ignatowicz: *Rozwód po nowelizacji. Art. 56—61 k.r.o. Komentarz*. Warszawa 2009, s. 13 i n.; K. Piasecki: *Prawo małżeńskie…*, s. 230 i n.

cia doszło wskutek okoliczności, które można zarzucić któremukolwiek z małżonków[11]. Winie (i to tylko w postaci wyłącznej winy jednego z małżonków) przypisano doniosłość wyłącznie w katalogu negatywnych przesłanek (przeszkód) rozwodu (art. 56 § 3 k.r.o.)[12]. W polskiej literaturze oraz orzecznictwie istnieje zgoda co do tego, że wina w rozkładzie pożycia odgrywa tylko posiłkową rolę wśród przesłanek rozwiązania małżeństwa[13], stanowiąc podstawę do oddalenia powództwa o rozwód w stanie faktycznym odpowiadającym dyspozycji art. 56 § 3 k.r.o. To ostatnie unormowanie stanowi więc jedyny przypadek, w którym polski ustawodawca, określając podstawy do rozwiązania małżeństwa, sięgnął do przesłanki winy[14]. Nie należy zapominać, że statuowana w art. 56 § 3 k.r.o. zasada rekryminacji doznaje dwóch istotnych wyjątków[15], pozwalających na orzeczenie rozwodu nawet wówczas, gdy powód jest wyłącznie winny rozkładowi pożycia. Można więc zasadnie przyjąć, że w przypadku konfliktu dwóch wartości: z jednej strony, ochrony małżonka niewinnego, a z drugiej, umożliwienia rozwiedzionym małżonkom założenia pełnej, prawidłowo funkcjonującej rodziny, polski system prawny co do zasady wyżej stawia drugą z nich[16]. Trzeba też raz jeszcze przypomnieć, że sięganie do art. 56 § 3 k.r.o. jako podstawy oddalenia powództwa jest dopuszczalne tylko wtedy, gdy sąd stwierdzi, że między małżonkami zaistniał zupełny i trwały rozkład pożycia, a więc wówczas, gdy spełniona jest pozytywna przesłanka rozwiązania małżeństwa (art. 56 § 1 k.r.o.)[17]. Co więcej, kierowany do sądu nakaz wynikający z art. 57 § 1 k.r.o. ma charakter względny w tym znaczeniu, że na wniosek stron sąd może odstąpić od orzekania o winie (art. 57 § 2 k.r.o.)[18]. W tym ostatnim przypadku orzekanie w sentencji wyroku o winie jest niedopuszczalne[19].

Jedynie już na marginesie można dodać, że tym samym brak jest też podstaw do przyjęcia, że art. 57 § 1 k.r.o. miałby być uwzględniany na

[11] G. Jędrejek: *Kodeks rodzinny i opiekuńczy. Komentarz*. Wolters Kluwer 2017, s. 384 i n.; A. Olejniczak: *Materialnoprawne przesłanki*..., s. 113 i n.

[12] W. Stojanowska, w: „System Prawa Prywatnego". T. 11..., Red. T. Smyczyński, s. 646; A. Szpunar: *Rozwód na żądanie małżonka wyłącznie winnego rozkładu*. W: *Prace z prawa cywilnego wydane dla uczczenia pracy naukowej profesora Józefa Stanisława Piątowskiego*. Red. B. Kordasiewicz, E. Łętowska. Warszawa 1985, s. 325.

[13] A. Olejniczak, w: *Kodeks rodzinny i opiekuńczy*. Red. H. Dolecki, T. Sokołowski. Warszawa 2013, s. 421.

[14] Ibidem, s. 432.

[15] J. Ignatowicz: *Rozwód*..., s. 27.

[16] A. Olejniczak, w: *Kodeks rodzinny i opiekuńczy*. Red. H. Dolecki, T. Sokołowski..., s. 433.

[17] B. Czech, w: *Kodeks rodzinny*..., Red. K. Piasecki, s. 404.

[18] K. Piasecki: *Prawo małżeńskie*..., s. 234.

[19] J. Winiarz, w: *Kodeks rodzinny i opiekuńczy. Komentarz*. Red. K. Pietrzykowski. Warszawa 2012, s. 551.

podstawie normy kolizyjnej będącej odpowiednikiem art. 8 ust. 2 p.p.m.[20] przez sąd (organ) innego państwa w każdym przypadku, gdy chodziłoby o rozwód obywatela polskiego, a prawem właściwym do oceny rozwiązania małżeństwa byłoby prawo obce. Brak jest bowiem *de lege lata* uzasadnienia dla nadawania polskiej regulacji winy w rozkładzie pożycia tak dalece idącej doniosłości z punktu widzenia interesów polskiego porządku prawnego, aby wynikający z art. 57 § 1 k.r.o. obowiązek ustalenia przez sąd orzekający o rozwiązaniu małżeństwa, czy i który z małżonków ponosi winę w rozkładzie pożycia, przeważał nad regulacjami prawa ojczystego drugiego z małżonków oraz nad prawem występującym w roli statutu rozwiązania małżeństwa.

Jak już wskazano, w niektórych systemach prawnych stwierdzona w postępowaniu o rozwiązanie małżeństwa wina w zerwaniu więzi małżeńskich nie pozostaje bez wpływu na ocenę dalszych skutków rozwodu. W szczególności odnosi się to do obowiązku alimentacyjnego między byłymi małżonkami, którego powstanie oraz czas trwania mogą być uzależnione od uprzedniej nagannej oceny zachowania małżonka przed rozwiązaniem małżeństwa. Sąd rozpatrujący żądanie rozwiedzionego małżonka w odniesieniu do alimentów może więc napotkać trudności w takim przypadku, gdy w roli statutu alimentacyjnego występuje system prawny przypisujący określone znaczenie winie, a w roli statutu rozwiązania małżeństwa — prawo, które nie przewiduje możliwości orzeczenia o winie w wyroku rozwodowym czy wręcz wprowadza zakaz rozstrzygania w tej kwestii. Z tego rodzaju sytuacją spotkał się Sąd Apelacyjny orzekający w sprawie, w której zostało wydane glosowane orzeczenie, a w której sądy obu instancji przyjęły, że o rozwiązaniu małżeństwa rozstrzyga prawo norweskie, nieprzewidujące możliwości ustalania zawinienia małżonków w rozkładzie ich pożycia, a o roszczeniach alimentacyjnych małżonka należnych po rozwodzie decyduje prawo polskie, które w tej mierze przywiązuje daleko idące znaczenie stwierdzonej przy rozwiązaniu małżeństwa winie. Z tego też względu Sąd Apelacyjny powziął wątpliwość co do roli, jaką może odgrywać art. 57 § 1 k.r.o. w przypadku, gdy na podstawie normy kolizyjnej z art. 54 p.p.m. dochodzi do wskazania prawa obcego. Poza zakresem niniejszych rozważań, jak już wspomniano na wstępie, pozostaje ocena tego, czy prawidłowo doszło do odszukania przez sądy orzekające w sprawie prawa właściwego

[20] Na temat przepisów wymuszających swoje zastosowanie prawa obcego zob. m.in. M. Mataczyński: *Obce przepisy wymuszające swoje zastosowanie. Rozważania na tle art. 7 konwencji rzymskiej oraz orzecznictwa sądów niemieckich*. „Kwartalnik Prawa Prywatnego" 2001, z. 2, s. 113; M.A. Zachariasiewicz, w: „System Prawa Prywatnego". T. 20A…, Red. M. Pazdan, s. 454 i n.

do oceny roszczeń alimentacyjnych powódki i, co za tym idzie, czy rzeczywiście zachodzi wskazana wyżej rozbieżność między systemami prawnymi odgrywającymi role miarodajnych statutów. Należałoby się jednak zastanowić, czy w prawie prywatnym międzynarodowym istnieje tego rodzaju instrument, który pozwoliłby należycie uwzględnić stanowiska wchodzących w grę porządków prawnych.

Zabiegiem pozwalającym usunąć rozbieżności pomiędzy stosowanymi jednocześnie (lub kolejno) systemami prawnymi[21] jest dostosowanie[22]. Polega ono nie tyle na zmianie treści norm materialnoprawnych, ile na modyfikacji sposobu ich stosowania, tak aby uzyskane rozstrzygnięcie było logicznie spójne i słuszne[23]. Wskazać też należy, że do istoty dostosowania należy działanie punktowe, a więc jedynie w precyzyjnie wytyczonym obszarze, w którym zostały zidentyfikowane rozbieżności[24].

Wskazuje się również, że dostosowanie stosowane być musi bardzo ostrożnie, tak aby nie wypaczyć sensu prawa właściwego do oceny danego aspektu rozpatrywanej sprawy. Oznacza to, że gdyby dostosowanie było dokonywane w sytuacji, w której w roli statutu rozwiązania małżeństwa występuje prawo, które hołduje rozwodowi z przyczyn obiektywnych, niezależnych od winy małżonków, albo wręcz jako zasadę przyjmuje dopuszczalność rozwodu na wniosek małżonków, prowadzone na użytek rozstrzygnięcia o obowiązku alimentacyjnym rozważania dotyczące nagannej postawy małżonków nie mogą w żaden sposób odnosić skutku względem samego rozwiązania małżeństwa.

Wydaje się nie budzić wątpliwości, że sąd orzekający o obowiązku alimentacyjnym między rozwiedzionymi małżonkami może samodzielnie, na potrzeby rozstrzyganej sprawy, dokonać oceny zachowania stron przed rozwiązaniem małżeństwa i ustalić, czy noszą one znamiona winy. Brak też podstaw, aby formułować zarzuty pod adresem wyroku rozwodowego, w którego uzasadnieniu zamieszczono rozważania odnoszące się do ujemnie ocenianych zachowań małżonka, mimo że prawo wskazane normą kolizyjną z art. 54 p.p.m. nie uzależnia rozwiązania małżeństwa

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[21] W odróżnieniu od dostosowania dokonywanego na płaszczyźnie kolizyjnoprawnej, polegającego na modyfikacji zakresów norm kolizyjnych.

[22] D. Looschelders: *Die Anpassung im internationalen Privatrecht: zur Methodik der Rechtsanwendung in Fällen mit wesentlicher Verbindung zu mehreren nicht miteinander harmonierenden Rechtsordnungen*. Heidelberg 1995, s. 263.

[23] Na temat dostosowania w polskim prawie prywatnym międzynarodowym zob. m.in. M. Pazdan: *Prawo prywatne międzynarodowe*. Warszawa 2017, s. 86; K. Sznajder-Peroń, w: „System Prawa Prywatnego". T. 20A…, Red. M. Pazdan, s. 537 i n.; Eadem, w: *Prawo prywatne*…, Red. M. Pazdan, s. 74 i n.

[24] D. Looschelders: *Die Anpassung*…, s. 191; K. Sznajder-Peroń, w: *Prawo prywatne*…, Red. M. Pazdan, s. 77; Eadem, w: „System Prawa Prywatnego". T. 20A…, Red. M. Pazdan, s. 538—539.

lub jego skutków od stwierdzonej w postępowaniu o rozwód winy[25], jeżeli rozważania te zostały przeprowadzone w związku z ustaleniem istnienia przesłanek obowiązku alimentacyjnego.

Bibliografia

Andrae M.: *Internationales Familienrecht*. Berlin 2006.

Antokolskaia M.: *Divorce law in a European perspective*. In: *European Family Law*. Vol. 3: *Family Law in European Perspective*. Ed. J.M. Scherpe. Cheltenham, Northampton, 2016.

Bernand Y., in: *La rupture de marriage en droit compare*. Éd. H. Fulchiron. Paris 2015.

Bosse-Platière H.: *Le droit français du divorce*. In: *Droit européen du divorce. European Divorce Law*. Éd. S. Corneloup. Paris 2013.

Czech B., w: *Kodeks rodzinny i opiekuńczy. Komentarz*. Red. K. Piasecki. Warszawa 2011.

Domínguez Guillén M.C., Riquezes Contreras O.: *Algunas consideraciones sobre el adulterio como causal de divorcio (especial referencia a los antecedents históricos)*. „Revista Venezolana de Legislación y Jurisprudencia" 2013, núm. 2.

Franzina P.: *The law applicable to divorce and legal separation under Regulation (EU) no. 1259/2010 of 20 december 2010*. „Cuadernos de Derecho Transnacional" 2011, no. 2.

Górecki J.: *Wina rozwodu a moralność (z rozważań nad zasadami rekryminacji)*. „Państwo i Prawo" 1965, z. 1.

Hohloch G., in: *Erman BGB Kommentar*, 2017.

Ignatowicz J.: *Rozwód po nowelizacji. Art. 56—61 k.r.o. Komentarz*. Warszawa 2009.

Jędrejek G.: *Kodeks rodzinny i opiekuńczy. Komentarz*. Wolters Kluwer 2017.

Looschelders D.: *Die Anpassung im internationalen Privatrecht: zur Methodik der Rechtsanwendung in Fällen mit wesentlicher Verbindung zu mehreren nicht miteinander harmonierenden Rechtsordnungen*. Heidelberg 1995.

Mataczyński M.: *Obce przepisy wymuszające swoje zastosowanie. Rozważania na tle art. 7 konwencji rzymskiej oraz orzecznictwa sądów niemieckich*. „Kwartalnik Prawa Prywatnego" 2001, z. 2.

Mataczyński M.: *Przepisy wymuszające swoje zastosowanie w prawie prywatnym międzynarodowym*. Kraków 2005.

[25] Tak J. Winiarz, w: *Kodeks rodzinny i opiekuńczy*…, Red. K. Pietrzykowski, s. 551.

Olejniczak A.: *Materialnoprawne przesłanki udzielenia rozwodu*. Poznań 1980.

Olejniczak A., w: *Kodeks rodzinny i opiekuńczy*. Red. H. Dolecki, T. Sokołowski. Warszawa 2013.

Örücü E.: *Changing concept of „family" and challenges for law: Turkey*. In: *European Family Law*. Vol. 2: *The Changing Concept of Family and Challenges for Domestic Family Law*. Ed. J.M. Scherpe. Cheltenham, Northhampton, 2016.

Pazdan M.: *Prawo prywatne międzynarodowe*. Warszawa 2017.

Pazdan M.: *Przepisy szczególne o dziedziczeniu gospodarstw rolnych z kolizyjnoprawnego punktu widzenia*. W: *Zagadnienie prawa cywilnego, samorządowego i rolnego. Pamięci Profesora Waleriana Pańki*. Red. A. Agopszowicz, T. Kurowska, M. Pazdan. Katowice 1993.

Piasecki K.: *Prawo małżeńskie*. Warszawa 2011.

Przybyłowski K.: *Prawo prywatne międzynarodowe. Część ogólna*. Lwów 1935.

Schwenzer I., Keller T.: *The changing concept of „family" and challenges for law: Switzerland*. In: *European Family Law*. Vol. 2: *The Changing Concept of Family and Challenges for Domestic Family Law*. Ed. J.M. Scherpe. Cheltenham, Northhampton, 2016.

Skierkowska W.: *Międzynarodowe postępowanie cywilne w sprawach alimentacyjnych*. Warszawa 1972.

Sokołowski T., w: „System Prawa Prywatnego". T. 11: *Prawo rodzinne i opiekuńcze*. Red. T. Smyczyński. Warszawa 2014.

Sośniak M.: *Klauzula porządku publicznego w prawie prywatnym międzynarodowym*. Warszawa 1961.

Stojanowska W., w: „System Prawa Prywatnego". T. 11: *Prawo rodzinne i opiekuńcze*. Red. T. Smyczyński. Warszawa 2014.

Sznajder-Peroń K., w: *Prawo prywatne międzynarodowe. Komentarz*. Red. M. Pazdan. Warszawa 2018.

Sznajder-Peroń K., w: „System Prawa Prywatnego". T. 20A: *Prawo prywatne międzynarodowe*. Red. M. Pazdan. Warszawa 2014.

Szpunar A.: *Rozwód na żądanie małżonka wyłącznie winnego rozkładu*. W: *Prace z prawa cywilnego wydane dla uczczenia pracy naukowej profesora Józefa Stanisława Piątowskiego*. Red. B. Kordasiewicz, E. Łętowska. Warszawa 1985.

Tomaszewski M., w: *Prawo prywatne międzynarodowe. Komentarz*. Red. J. Poczobut. Warszawa 2017.

Winiarz J., w: *Kodeks rodzinny i opiekuńczy. Komentarz*. Red. K. Pietrzykowski. Warszawa 2012.

Winkler von Mohrenfels P.: *Verordnung (EU) Nr. 1259/2010*. In: *Münchener Kommentar zum Bürgerlichen Gesetzbuch*. Bd. 10: *Internationales Privatrecht I. Europäisches Kollisionsrecht. Einführungsgesetz zum Bürgerlichen Gesetzbuche (Art. 1—240)*. Hrsg. J. v. Hein. München 2015.

Wojewoda M.: *Mandatory Rules In Private International Law — with Reference to Mandatory System under the Rome Convention on the Law applicable to the Contractual Obligations*. „Maastricht Journal of European and Comparative Law" 2000.

Wojewoda M.: *Zakres prawa właściwego dla zobowiązań umownych. Nowa regulacja kolizyjna w konwencji rzymskiej*. Warszawa 2007.

Zachariasiewicz M.A.: *O potrzebie wskazania w nowej ustawie o prawie prywatnym międzynarodowym podstawy stosowania przepisów wymuszających swoje zastosowanie*. „Problemy Prawa Prywatnego Międzynarodowego" 2010, T. 7.

Zachariasiewicz M.A., w: *Prawo prywatne międzynarodowe. Komentarz*. Red. M. Pazdan. Warszawa 2018.

Zachariasiewicz M.A., w: „System Prawa Prywatnego". T. 20A: *Prawo prywatne międzynarodowe*. Red. M. Pazdan. Warszawa 2014.

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Kolizyjnoprawna problematyka skuteczności przelewu wierzytelności wobec osób trzecich
Glosa do wyroku Trybunału Sprawiedliwości Unii Europejskiej z dnia 9 października 2019 r. w sprawie BGL BNP Paribas SA c/a TeamBank AG Nürnberg (C-548/18)

Abstract: The question of the law applicable to the third-party effects of assignments of claims is widely discussed in the doctrinal debates. In common opinion, the existing European conflict-of-laws regulations do not provide for a rule governing this issue. In the case BGL BNP Paribas SA v. TeamBank AG Nürnberg (C-548/18), the Court of Justice of the European Union confirmed this gape of the Rome I Regulation.

The gloss presents the justification of the European Union Court's judgment, the reasons for the lack of the uniform conflict-of-laws regulation, and the consequences of this state. It also analyses briefly the European Commission's proposal for the EU Regulation concerning the law applicable to the third-party effects of assignments of claims (COM(2018) 96 final), as a response to this situation. Finally, it examines the appropriate conflict-of-laws rules for proprietary effects of assignments of claims (the law of the assignor's habitual residence and the law of the assigned claim).

Keywords: the conflict of laws, the assignments, the third-party effects of assignment, the law applicable to the proprietary effects of assignments, the contractual obligations, Rome I Regulation

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Uwagi ogólne

Długo przyszło czekać na przesądzenie kwestii na pierwszy rzut oka oczywistej. Trybunał Sprawiedliwości Unii Europejskiej dopiero po dziesięciu latach od przyjęcia rozporządzenia Rzym I[1] miał okazję do wydania wyroku, w którym orzekł: „artykuł 14 [tego aktu] należy interpretować w ten sposób, że nie wskazuje on — ani bezpośrednio, ani poprzez analogię — prawa właściwego dla kwestii skuteczności wobec osób trzecich przelewu wierzytelności w przypadku wielokrotnego przelewu wierzytelności dokonywanego przez tego samego wierzyciela na rzecz kolejnych cesjonariuszy". Stwierdzenie to nie powinno budzić większych kontrowersji, zważywszy na losy projektu rozporządzenia[2], który w pierwotnej wersji przewidywał, że skuteczność przelewu wierzytelności wobec osób trzecich podlegać powinna prawu państwa, w którym cedent ma miejsce zwykłego pobytu w momencie przelewu lub przeniesienia, a na etapie uzgodnień został pozbawiony regulacji odnoszącej się do poruszanej tu kwestii. Co więcej, o istnieniu nierozwiązanego w rozporządzeniu Rzym I problemu normy kolizyjnej dotyczącej skuteczności cesji wobec osób trzecich zdawano sobie sprawę, przyjmując ostateczną wersję tego aktu, gdyż zamiast właściwej regulacji, w art. 27 ust. 2 wprowadzono mechanizm monitorujący, zakładający — w razie konieczności — podjęcie działań zmierzających do usunięcia niekorzystnych skutków świadomego pominięcia spornego unormowania. We wskazanym przepisie Komisja Europejska została zobowiązana do przedłożenia do dnia 17 czerwca 2010 r. Parlamentowi Europejskiemu, Radzie i Europejskiemu Komitetowi Ekonomiczno-Społecznemu sprawozdania na temat skuteczności przelewu wierzytelności (wobec osób trzecich) oraz pierwszeństwa przenoszonej wierzytelności przed prawami innych osób. Co prawda, Komisja Europejska terminu tego nie dochowała, ale ostatecznie, w 2012 r., na jej zlecenie *British Institute of International and Comparative Law* opracował raport, który stał się przyczynkiem do sprawozdania dla Parlamentu Europejskiego, Rady i Europejskiego Komitetu Ekonomiczno-Społecznego zarówno na temat prawnokolizyjnych skutków przelewu lub subrogacji wierzytelności dla osób trzecich, jak i pierwszeństwa przenoszonej wierzytelności przed prawami innych podmiotów. Ono z kolei otwarło debatę

[1] Rozporządzenie (WE) nr 593/2008 Parlamentu Europejskiego i Rady z dnia 17 czerwca 2008 r. dotyczące prawa właściwego dla zobowiązań umownych (Rzym I). Dz.Urz. UE L nr 177 z dnia 4.07.2008, s. 6—16.

[2] Por. art. 13 ust. 3 projektu zawartego we wniosku Komisji dotyczącego rozporządzenia Parlamentu Europejskiego i Rady w sprawie prawa właściwego dla zobowiązań umownych (Rzym I). COM(2005) 650 wersja ostateczna.

i prace nad projektem nowej unijnej regulacji[3], poświęconej kolizyjnym aspektom skuteczności cesji względem osób trzecich[4].

Równolegle z tymi pracami w doktrynie trwała dyskusja o zakresie art. 14 rozporządzenia Rzym I, w tym możliwego jego stosowania do wskazywania prawa właściwego dla skuteczności przelewu wierzytelności wobec osób trzecich. Co prawda, większość przedstawicieli doktryny uznawała, że rozporządzenie Rzym I nie daje podstaw do wyznaczenia w tym zakresie miarodajnego statutu[5], jednakże pogląd przeciwny także znajdował swoich zwolenników[6].

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[3] Projekt rozporządzenia w sprawie prawa właściwego dla skutków przelewu wierzytelności wobec osób trzecich został opracowany i przedstawiony przez Komisję Europejską w marcu 2018 r. COM(2018) 96 wersja ostateczna.

[4] Projekt rozporządzenia został omówiony szczegółowo przez W. Kurowskiego. W. Kurowski: *Kolizyjnoprawna problematyka skuteczności przelewu wierzytelności wobec osób trzecich — projekt rozporządzenia Parlamentu Europejskiego i Rady w sprawie prawa właściwego dla skutków przelewu wierzytelności wobec osób trzecich (COM(2018) 96 final)*. „Problemy Prawa Prywatnego Międzynarodowego" 2019, T. 25, s. 67—90.

[5] S. Leible, M. Lehmann: *Die Verordnung über das auf vertragliche Schuldverhältnisse anzuwendende Recht („Rom I")*. „Recht der Internationalen Wirtschaft" 2008, H. 8, s. 541; F.J. Garcimartín Alférez: *Assignment of claims in the Rome I Regulation: Article 14*. In: *Rome I Regulation. The Law Applicable to Contractual Obligations in Europe*. Eds. F. Ferrari, S. Leible. Munich 2009, s. 234—235; M.P. Zachariasiewicz: *Zmiany w unormowaniu cesji wierzytelności (od artykułu 12 konwencji rzymskiej do artykułu 14 rozporządzenia Rzym I)*. „Problemy Prawa Prywatnego Międzynarodowego" 2010, T. 6, s. 144—154; T.C. Hartley: *Choice of law regarding the voluntary assignment of contractual obligations under the Rome I Regulation*. „International and Comparative Law Quaterly" 2011, no. 1, s. 46—56; A. Wowerka: *Prawo właściwe dla transakcji faktoringowych*. „Problemy Prawa Prywatnego Międzynarodowego" 2009, T. 4, s. 157; Idem: *Przelew wierzytelności w świetle rozporządzenia Rzym I*. „Problemy Prawa Prywatnego Międzynarodowego" 2011, T. 8, s. 44—53; W. Kurowski: *Nowe kolizyjnoprawne unormowanie podmiotowych zmian stosunku zobowiązaniowego na tle rozporządzenia „Rzym I" i polskiej ustawy — Prawo prywatne międzynarodowe z 2011 r.* W: *Współczesne wyzwania prawa prywatnego międzynarodowego*. Red. J. Poczobut. Warszawa 2013, s. 146—147; Idem: *Prawo właściwe do oceny skuteczności przelewu wierzytelności wobec osób trzecich*. W: *Znad granicy ponad granicami. Księga dedykowana Profesorowi Dieterowi Martiny*. Red. M. Krzymuski, M. Margoński. Warszawa 2014, s. 164.

[6] Zdanie odmienne w tym zakresie wyrazili m.in.: A. Flessner, H.L.E. Verhagen: *Assignment in European Private International Law. Claims as property and the European Commission's 'Rome I Proposal'*. Munich 2006, s. 24—26; H.L.E. Verhagen, S. van Dongen: *Cross-border assignments under Rome I*. „Journal of Private International Law" 2010, no. 1, s. 1—21; A. Flessner: *Choice of Law in International Property Law — New Encouragement from Europe*. In: *Party Autonomy in International Property Law*. Eds. R. Westrik, J. van der Weide. Munich 2011, s. 11—40; M. Czepelak: *Międzynarodowe prawo zobowiązań Unii Europejskiej. Komentarz do rozporządzeń rzymskich*. Warszawa 2012, s. 422—426.

Właśnie z tego powodu dobrze się stało, że Trybunał Sprawiedliwości Unii Europejskiej miał okazję do wypowiedzenia się w tej spornej kwestii i przesądzenia nader istotnego problemu prawnego.

Pytania prejudycjalne

Sprawa, która stała się przyczynkiem do wydania przez Trybunał Sprawiedliwości Unii Europejskiej komentowanego orzeczenia nie była szczególnie skomplikowana. Zamieszkała w Niemczech obywatelka Luksemburga zawarła z dwoma bankami umowy pożyczki, przy czym pierwsza podlegała prawu niemieckiemu, a druga — luksemburskiemu. Na ich zabezpieczenie dokonała przelewu tych samych wierzytelności z tytułu wynagrodzenia za pracę, zawiadamiając formalnie swojego pracodawcę jedynie o drugim z nich. W związku z ogłoszeniem przez dłużniczkę upadłości i zgłoszeniem się do syndyka obu banków — wierzycieli z umów pożyczki — powstał spór, komu przysługuje prawo do ściągniętych od luksemburskiego pracodawcy sum, będących zapłatą za świadczoną pracę, a zatem — który przelew wierzytelności o wynagrodzenie za pracę jest skuteczny względem osób trzecich (albo — ujmując problem jeszcze inaczej — któremu z konkurujących podmiotów należy przyznać pierwszeństwo do wierzytelności będącej przedmiotem obu cesji). Pierwszy z banków powoływał się na fakt skutecznego nabycia wierzytelności od osoby będącej wierzycielem, kwestionując uprawnienia drugiej instytucji finansowej, dokonującej później czynności prawnej z już nieuprawnionym. Z kolei ten drugi bank kwestionował skuteczność (wobec osób trzecich) pierwszego przelewu wierzytelności w związku z brakiem zawiadomienia dłużnika o dokonaniu cesji, powołując się na art. 1690 ust. 1 kodeksu cywilnego Luksemburga, zgodnie z którym przelew wierzytelności wywiera skutki wobec osób trzecich jedynie wówczas, gdy dłużnik został o nim zawiadomiony. Warto podkreślić, że istota problemu nie wiązała się z samym postępowaniem upadłościowym, jego podstawą prawną czy też skutecznością przelewów wierzytelności względem masy upadłości. Tym razem przepisy nieobowiązującego już rozporządzenia Rady (WE) nr 1346/2000 z dnia 29 maja 2000 r. w sprawie postępowania upadłościowego[7] nie budziły wątpliwości.

[7] Rozporządzenie Rady (WE) nr 1346/2000 z dnia 29 maja 2000 r. w sprawie postępowania upadłościowego. Dz.Urz. UE L nr 160 z dnia 30.06.2000, s. 191—208, obecnie nie obowiązuje.

Na tle tak zarysowanego stanu faktycznego *Saarländisches Oberlandesgericht* zwrócił się do Trybunał Sprawiedliwości Unii Europejskiej z następującymi pytaniami prejudycjalnymi:

1. Czy art. 14 rozporządzenia Rzym I ma zastosowanie do wielokrotnego przelewu wobec osób trzecich?
2. W razie udzielenia odpowiedzi twierdzącej na pytanie pierwsze: Jakiemu prawu podlegają w takim przypadku skutki przelewu wobec osób trzecich?
3. W razie udzielenia odpowiedzi przeczącej na pytanie pierwsze: Czy przepis ten znajduje zastosowanie przez analogię?
4. W razie udzielenia odpowiedzi twierdzącej na pytanie trzecie: Jakiemu prawu podlegają w takim przypadku skutki wobec osób trzecich?

Analiza wskazanych pytań prejudycjalnych skłania już na wstępie do wniosku, że nie zostały one postawione zbyt szczęśliwie. Trybunał Sprawiedliwości Unii Europejskiej dał temu wyraz w swoim orzeczeniu, a w szczególności — w jego uzasadnieniu. Co prawda, sądowi *meriti* chodziło jedynie o udzielenie odpowiedzi na pytanie, czy art. 14 rozporządzenia Rzym I wskazuje wprost bądź *per analogiam* prawo właściwe dla skuteczności cesji wobec osób trzecich w przypadku wielokrotnego przelewu danej wierzytelności dokonywanego przez tego samego wierzyciela na rzecz innych podmiotów[8], jednakże należy pamiętać, że wskazany problem szczególny należy do szerszego zagadnienia — skuteczności cesji wierzytelności wobec osób trzecich i jemu powinno zostać poświęcone pytanie prejudycjalne *Saarländisches Oberlandesgericht*. Nie budzi bowiem wątpliwości, że w podobnej — z punktu widzenia kolizyjnego — sytuacji znajdują się inne podmioty, które mają interes w tym, by ustalić, komu będąca przedmiotem przelewu wierzytelność przysługuje. Pomijając dłużnika, który — co prawda — nie jest stroną umowy przelewu i w związku z tym mógłby być określany jako „osoba trzecia", jednak jego szczególna sytuacja (odrębnie uregulowana) każe wyłączyć go z omawianego zbioru, przeniesienie wierzytelności w bezpośredni sposób wpływa na sytuację prawną:

a) wierzycieli cedenta;
b) wierzycieli cesjonariusza;
c) kolejnych cesjonariuszy, jeżeli dana wierzytelność jest przedmiotem wielokrotnego, sukcesywnego przelewu[9];

[8] Tak też wprost TSUE w uzasadnieniu wyroku C-548/18, pkt 23.

[9] W przypadku wielokrotnego, sukcesywnego przelewu tej samej wierzytelności jej nabywca, będący stroną pierwszej umowy przelewu, staje się zbywcą w następnej umowie. Dla kolejnego nabywcy istotna staje się odpowiedź na pytanie, czy zbywcy wierzytelności przysługiwało dane prawo podmiotowe przy dokonywaniu tej następnej czynności prawnej, albo inaczej — czy w drodze tej czynności prawnej nabędzie wierzytelność będącą przedmiotem przelewu.

d) innych cesjonariuszy, jeżeli dana wierzytelność jest przedmiotem przelewów dokonywanych przez tego samego cedenta (tak jak to miało miejsce w przypadku stanowiącym podstawę pytań prejudycjalnych)[10];
e) syndyka masy upadłości cedenta (innego podmiotu pełniącego zbliżoną do niego funkcję w odniesieniu do majątku zbywcy wierzytelności); trzeba bowiem pamiętać, że przelew wierzytelności uszczupla majątek cedenta (a zatem modyfikuje skład masy upadłości)[11], a merytoryczno-prawne regulacje dotyczące upadłości przewidują z reguły możliwość uznania za bezskuteczne rozporządzenia prawami podmiotowymi, dokonane w oznaczonym czasie przed ogłoszeniem upadłości.

Dla wskazanych wyżej osób istotna jest odpowiedź na pytanie, komu dana wierzytelność przysługuje, a zatem czy do przeniesienia tego prawa podmiotowego doszło, a jeśli tak — to w jakiej chwili. Inaczej można na to zagadnienie spojrzeć jako na konkurencję podmiotów do uzyskania możliwości zaspokojenia z wierzytelności będącej przedmiotem cesji i prawne usankcjonowanie pierwszeństwa jednego z nich względem pozostałych. W normalnym biegu rzeczy z chwilą przeniesienia wierzytelność zasila majątek cesjonariusza, uszczuplając zasoby cedenta. Uprawnienie do prowadzenia egzekucji z tej wierzytelności tracą zatem wierzyciele zbywcy, a ten ostatni — możliwość dokonywania jej cesji na rzecz innych podmiotów. Jeżeli dokonałby on kolejnej czynności rozporządzającej odnoszącej się do tej samej wierzytelności, to do jej przeniesienia nie powinno dojść, gdyż w majątku cedenta nie ma składnika, którego czynność dotyczyła. Jednocześnie z chwilą pierwszego przelewu uprawnienie do prowadzenia egzekucji z przeniesionej wierzytelności uzyskują wierzyciele cesjonariusza; on też może dokonywać kolejnych cesji na rzecz dalszych osób trzecich. Jednakże ten prosty schemat bywa przez prawodawców modyfikowany. Wynika to z faktu, że wierzytelność, będąca przedmiotem przelewu, nie ma charakteru materialnego, a zatem ustalenie chwili jej przeniesienia staje się dla podmiotów nieuczestniczących w transakcji (a zatem wszystkich, z wyjątkiem stron umowy cesji) szczególnie utrudnione. Dlatego też prawodawcy regulują niekiedy kwestię skuteczności przelewu wobec tych podmiotów w oderwaniu od

[10] W przypadku przelewów tej samej wierzytelności na rzecz różnych podmiotów powstaje spór, m.in. komu dana wierzytelność przysługuje. Sytuacja taka może zaistnieć np. wówczas, gdy cedent — przekonany o nieważności lub nieskuteczności poprzedniej umowy przelewu — dokonuje kolejnej czynności prawnej w odniesieniu do tej samej wierzytelności z inną osobą, albo też gdy do zawarcia kolejnej umowy z innym podmiotem dochodzi wskutek nieuczciwego działania zbywcy.

[11] D. Pardoel: *Les conflits de lois en matière de cession de creance*. Paris 1997, s. 271—294; C. Walsh: *Receivables financing and the conflict of laws: The UNCITRAL Draft Convention on the Assignment of Receivables in International Trade*. „Dickinson Law Review" 2001, no. 1, s. 161.

faktycznego przeniesienia wierzytelności z majątku cedenta na rzecz cesjonariusza (a zatem niezależnie od skuteczności cesji wobec stron tej umowy). W ten sposób, przykładowo, mimo że wierzytelność nie weszła do majątku cesjonariusza, jest on traktowany jako uprawniony, który może skutecznie tym prawem rozporządzać[12], albo też jego wierzyciele mogą uzyskać z niego zaspokojenie[13]. Katalog potencjalnych zdarzeń prawnych, od ziszczenia których cesja może wywierać skutek wobec osób trzecich, jest szeroki. Poza przyjęciem prostego założenia, że przelew jest skuteczny *erga omnes* z chwilą, z jaką wywołuje skutki między stronami umowy cesji, prawodawcy mogą sięgnąć po inne rozwiązania, takie jak powiązanie skuteczności przeniesienia wierzytelności względem innych podmiotów z chwilą: powiadomienia dłużnika o przelewie, dokonania rejestracji cesji w publicznym zbiorze danych czy też ogłoszenia o takim wpisie. Dodatkowo, w celu ochrony masy upadłości cedenta (a zatem zabezpieczenia interesów jego wierzycieli), regulacje prawa upadłościowego wprowadzają mechanizmy prowadzące do ubezskuteczniania czynności uszczuplających majątek upadłego, dokonanych w określonym czasie przed ogłoszeniem upadłości.

Zarysowane wyżej zagadnienie prawne ma swoje implikacje na płaszczyźnie kolizyjnej. W związku z przeciwstawnymi interesami wskazanych podmiotów konieczne staje się prawne unormowanie kwestii skuteczności przelewu wobec osób trzecich. Jednocześnie potrzeba zapewnienia odpowiedniej ochrony zainteresowanym powoduje, że nie zawsze unormowanie to opiera się na zasadzie, zgodnie z którą cesja staje się skuteczna *erga omens* z chwilą skutecznego przejścia wierzytelności z majątku zbywcy na rzecz jej nabywcy. Istnieją bowiem mechanizmy — o czym była mowa — pozwalające na uniezależnienie skuteczności przelewu wobec osób trzecich od jej przeniesienia. Możliwe są zatem sytuacje, w których określony podmiot, nawet gdy wierzytelność nie weszła w skład jego majątku, może być traktowany jako uprawniony i skutecznie tym prawem rozporządzać[14].

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[12] Przykładem takiej sytuacji w prawie polskim może być przypadek skutecznego przeniesienia wierzytelności na rzecz osoby trzeciej przez podmiot, który dokonał — jako nabywca — uprzedniej, pozornej czynności prawnej jej nabycia od innego podmiotu. Dokonując tej kolejnej czynności, wskazanemu podmiotowi nie przysługuje przenoszona wierzytelność, gdyż nie nabył jej w związku z nieważnością wcześniejszej pozornej umowy. Mimo to osoba trzecia stanie się wierzycielem (nabędzie wierzytelność), jeżeli dokonała ze zbywcą odpłatnej czynności prawnej i działała w dobrej wierze (tak wprost art. 83 § 2 polskiego kodeksu cywilnego).

[13] Por. C. Walsh: *Receivables financing*…, s. 167—169.

[14] G. Cuniberti: *La proposition de règlement de la Commission sur la loi applicable à l'opposabilité des cessions de créances*. „Revue critique de droit international privé" 2018, nº 4, s. 796.

W związku z tym, przy sprzecznych interesach podmiotów występujących z konkurencyjnymi uprawnieniami do przenoszonej wierzytelności, konieczne staje się wskazanie prawa właściwego do oceny skuteczności przelewu wobec osób trzecich[15].

Rozstrzygnięcie Trybunału Sprawiedliwości Unii Europejskiej

Postawione przez *Saarländisches Oberlandesgericht* cztery pytania prejudycjalne Trybunał Sprawiedliwości Unii Europejskiej zredukował do jednego, zasadniczego — czy art. 14 rozporządzenia Rzym I należy interpretować w ten sposób, że wskazuje on — bezpośrednio względnie przez analogię — prawo właściwe dla kwestii skuteczności wobec osób trzecich przelewu wierzytelności w przypadku wielokrotnego przelewu wierzytelności dokonywanego przez tego samego wierzyciela na rzecz kolejnych cesjonariuszy. Niepotrzebnie przy tym ograniczył się jedynie do tego wąskiego wycinka zagadnienia skuteczności cesji względem osób występujących z konkurencyjnymi uprawnieniami do przenoszonej wierzytelności. Pomimo bowiem tak postawionych pytań prejudycjalnych, w uzasadnieniu do swojego wyroku Trybunał Sprawiedliwości Unii Europejskiej słusznie wskazał na całość problematyki skuteczności przelewu względem osób trzecich i na niej koncentrował swoje rozważania.

Przechodząc do *meritum*, zarówno wykładnia językowa[16], jak i historyczna[17] przepisów rozporządzenia Rzym I skłoniły Trybunał Spra-

[15] W. Kurowski: *Nowe kolizyjnoprawne…*, s. 146—147; D. Einsele: *Die Drittwirkung von Forderungsübertragungen im Kollisionsrecht — ein kritischer Zwischenruf zum Verordnungsvorschlag der Kommission*. „Praxis des Internationalen Privat- und Verfahrensrechts" 2019, H. 6, s. 477—478.

[16] Artykuł 14 rozporządzenia Rzym I nie wskazuje prawa właściwego do oceny skuteczności przelewu wierzytelności wobec osób trzecich (tak TSUE w uzasadnieniu wyroku C-548/18, pkt 31); podobnie w pkt. 38 preambuły do tego aktu brak jest wytycznych do obrony tezy o objęciu zakresem rozporządzenia spornej kwestii (tak TSUE w uzasadnieniu wyroku C-548/18, pkt 32). Ponadto art. 27 ust. 2 rozporządzenia zobowiązywał Komisję Europejską do przedłożenia „sprawozdania na temat kwestii skuteczności przelewu lub subrogacji wobec osób trzecich", a w razie potrzeby „wniosku dotyczącego zmiany [rozporządzenia Rzym I] i oceny wpływu przepisów, które miałyby być wprowadzone (tak TSUE w uzasadnieniu wyroku C-548/18, pkt 34).

[17] W art. 13 ust. 3 projektu rozporządzenia Rzym I (wniosku Komisji Europejskiej dotyczącego tego rozporządzenia (COM(2005) 650 wersja ostateczna) kwestię skuteczności przelewu wierzytelności wobec osób trzecich proponowano poddać prawu państwa, w którym cedent ma miejsce zwykłego pobytu w momencie przelewu lub przeniesienia.

wiedliwości Unii Europejskiej do zajęcia stanowiska, zgodnie z którym w prawodawstwie unijnym brak jest norm kolizyjnych dotyczących wyraźnie kwestii skutków przelewu wierzytelności wobec osób trzecich[18]. Co więcej, luka ta była świadomym wyborem prawodawcy[19]. Pomimo zatem wąskiego ujęcia zagadnienia w pytaniach prejudycjalnych, nie powinno budzić wątpliwości stwierdzenie, że całość szerokiego zagadnienia pierwszeństwa osób występujących z konkurencyjnymi roszczeniami wobec wierzytelności będącej przedmiotem przelewu pozostała poza zakresem unormowania przepisów kolizyjnych ujednoliconych w ramach Unii Europejskiej.

Unormowania kolizyjne skuteczności przelewu wierzytelności wobec osób trzecich w prawodawstwie krajowym oraz propozycja unifikacji

Z uwagi na brak stosownej regulacji unijnej odnoszącej się do skuteczności cesji wierzytelności względem osób trzecich miarodajnych reguł kolizyjnych należy poszukiwać w prawodawstwie krajowym państw członkowskich. Jednak nie wszędzie odpowiednie przepisy znalazły swoje miejsce w ustawach kolizyjnych, co otwarło drogę dla doktryny lub judykatury, by w ten sposób wypełnić pozostawioną przez legislację unijną lukę. Z państw, w których omawiane zagadnienie zostało wprost uregulowane, należy wskazać: Belgię, Francję oraz Luksemburg (w tym ostatnim przypadku — jedynie w odniesieniu do przeniesienia wierzy-

Propozycja ta nie została jednak przyjęta w trakcie negocjacji prowadzonych w Radzie Unii Europejskiej (tak TSUE w uzasadnieniu wyroku C-548/18, pkt 33). Warto przypomnieć, że wcześniej wyraźne unormowanie wskazanej problematyki zostało zaproponowane w art. 16 projektu konwencji o prawie właściwym dla zobowiązań umownych i pozaumownych z 1972 r., gdzie zakładano wprost poddanie skuteczności cesji względem osób trzecich prawu przenoszonej wierzytelności. Szerzej o tym projekcie regulacji zob. m.in.: M. Giuliano, in: M. Giuliano, P. Lagarde, Th. van Sasse van Ysselt: *Rapport concernant l'avant-projet de convention sur la loi applicable aux obligations contractuelles et non-contractuelles*. „Rivista di diritto internazionale privato e processuale" 1973, Nº 1, s. 246—247; L. Collins: *Contractual Obligations — The EEC Preliminary Draft Convention on Private International Law*. „The International and Comparative Law Quarterly" 1976, vol. 25, s. 56; W. Kurowski: *Przelew wierzytelności w prawie prywatnym międzynarodowym*. Kraków 2005, s. 59.

[18] Tak TSUE w uzasadnieniu wyroku C-548/18, pkt 37.

[19] Ibidem.

telności w ramach sekurytyzacji), gdzie jako właściwe do oceny skutków przelewu wierzytelności wobec osób trzecich uznano prawo miejsca zwykłego pobytu cedenta[20]. Inaczej postąpił prawodawca holenderski, poddając skuteczność przelewu *erga omnes* prawu właściwemu dla umowy zawartej między zbywcą a nabywcą wierzytelności. W tym przypadku prawo, któremu podlega przelew wierzytelności (wskazane na podstawie art. 14 ust. 1 rozporządzenia Rzym I), będzie także właściwe do oceny skuteczności cesji względem osób trzecich. Bardziej konserwatywną postawą wykazał się prawodawca hiszpański, który omawiane zagadnienie uznał za stosowne poddać prawu właściwemu dla przenoszonej wierzytelności[21].

Do grona państw, które wypełniły pozostawioną w rozporządzeniu Rzym I lukę w kwestii skuteczności cesji wobec osób trzecich, zaliczyć trzeba także Polskę. Ze względu na reformę polskiego prawa kolizyjnego[22] i opracowywaną w tamtym czasie ustawę[23] stało się możliwe uzupełnienie nowej regulacji o art. 36[24]. Zgodnie ze wskazanym przepisem, prawo państwa, któremu podlega przelewana wierzytelność, rozstrzyga o skutkach przelewu wobec osób trzecich. Mimo zgłaszanych postulatów[25], prawodawca nie zdecydował się zatem na bardziej nowoczesne

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[20] O wadach i zaletach tego łącznika w odniesieniu do skuteczności przelewu wobec osób trzecich zob. w szczególności: E.-M. Kieninger: *Der Statut der Forderungsabtretung im Verhältnis zu Dritten*. „Rabels Zeitschrift für ausländisches und internationales Privatrecht" 1998, Nr. 3, s. 702—710; Eadem: *Brussels I, Rome I and questions relating to assignment and subrogation*. In: *Enforcement of International Contracts in the European Union. Convergence and divergence between Brussels I and Rome I*. Eds. J. Meeusen, M. Pertegás, G. Straetmans. Antwerp—Oxford—New York 2004, s. 383—386; W. Kurowski: *Przelew wierzytelności…*, s. 137—143; P. Lagarde: *Retour sur la loi applicable à l'opposabilité des transferts conventionnels de créances*. In: *Droit et actualité. Etudes offertes à Jacques Béguin*. Paris 2005, s. 425—426; A. Wowerka: *Prawo właściwe…*, s. 148—149, 157; Idem: *Przelew wierzytelności...*, s. 44—45; W. Kurowski: *Kolizyjnoprawna problematyka…*, s. 84—87.

[21] G. Cuniberti: *La proposition...*, s. 793—794.

[22] Zob. projekt ustawy o prawie prywatnym międzynarodowym z dnia 9.10.2006 r., ogłoszony drukiem w „Problemach Prawa Prywatnego Międzynarodowego" 2007, T. 1, s. 115—131; zob. także A. Kozakiewicz, W. Kurowski: *Co dalej z kodyfikacją prawa prywatnego międzynarodowego w Polsce?* „Kwartalnik Prawa Prywatnego" 2003, z. 4, s. 932—933; W. Kurowski: *Przelew wierzytelności…*, s. 249—251; M. Pazdan: *O projekcie nowej ustawy o prawie prywatnym międzynarodowym*. „Problemy Prawa Prywatnego Międzynarodowego" 2007, T. 1, s. 18.

[23] Ustawa z dnia 4 lutego 2011 r. — Prawo prywatne międzynarodowe. T.j. Dz.U. 2015, poz. 1792 [dalej: p.p.m.].

[24] A. Wowerka: *Przelew wierzytelności…*, s. 59—60; W. Kurowski: *Nowe kolizyjnoprawne…*, s. 147.

[25] Więcej na ten temat: W. Kurowski: *Prawo właściwe…*, s. 164—166; Idem, w: „System Prawa Prywatnego". T. 20B. Red. M. Pazdan. Warszawa 2015, s. 388—392; N. Rycko, w: *Prawo prywatne międzynarodowe. Komentarz*. Red. J. Poczobut. War-

i przystające do współczesnego obrotu rozwiązanie, opierające się w omawianym zakresie na łączniku personalnym cedenta.

Przewidziany jako rozwiązanie tymczasowe przepis art. 36 p.p.m. już ponad dziewięć lat stanowi podstawę do wskazania prawa właściwego do rozstrzygania konfliktów między konkurencyjnymi uprawnieniami podmiotów do przenoszonej wierzytelności. Taki stan potrwa z pewnością dłużej, gdyż dopiero w marcu 2018 r. Komisja Europejska ogłosiła projekt rozporządzenia w sprawie prawa właściwego dla skutków przelewu wierzytelności wobec osób trzecich[26]. Nie będzie ono uzupełniać rozporządzenia Rzym I o kolejne przepisy; zaproponowano bowiem przyjęcie odrębnego, a przy tym rozbudowanego aktu prawnego, poświęconego omawianemu zagadnieniu[27].

Przy ustalaniu miarodajnego dla skuteczności cesji wobec osób trzecich statutu zastosowanie znajdą trzy łączniki (subiektywny oraz dwa obiektywne), w zależności od tego, o przelew jakiej wierzytelności chodzi. Zgodnie z art. 4 ust. 2 projektu, w przypadku cesji (a) „gotówki złożonej na rachunku w instytucji kredytowej" oraz (b) wierzytelności z instrumentu finansowego[28] skutki przelewu wierzytelności wobec osób trzecich podlegać mają prawu właściwemu dla przenoszonej wierzytelności[29]. Z kolei w przypadku cesji dokonywanej w ramach sekurytyzacji jej skuteczność względem osób trzecich podlegać ma prawu miejsca zwykłego pobytu zbywcy[30], chyba że strony skorzystają z pozostawionej im przez prawodawcę ograniczonej kolizyjnej autonomii woli i poddadzą tę kwestię prawu właściwemu dla przenoszonych wierzy-

szawa 2017, s. 625—628.

[26] Projekt rozporządzenia w sprawie prawa właściwego dla skutków przelewu wierzytelności wobec osób trzecich. COM(2018) 96 wersja ostateczna.

[27] O projekcie rozporządzenia zob. m.in. A. Dickinson: *Tough Assignments: the European Commission's Proposal on the Law Applicable to the Third-Party Effects of Assignments of Claims*. „Praxis des Internationalen Privat- und Verfahrensrechts" 2018, H. 4, s. 338—339; W. Kurowski: *Kolizyjnoprawna problematyka…*, s. 67—90.

[28] Kategoria ta obejmuje wierzytelności wynikające z instrumentów finansowych wskazanych w załączniku do dyrektywy Parlamentu Europejskiego i Rady 2014/65/UE z dnia 15 maja 2014 r. w sprawie rynków instrumentów finansowych oraz zmieniająca dyrektywę 2002/92/WE i dyrektywę 2011/61/UE. Dz.Urz. UE L nr 173 z dnia 12.06.2014, s. 349—496.

[29] Zob. też A. Dickinson: *Tough Assignments…*, s. 339; P. Mankowski: *Der Kommissionsvorschlag zum Internationalen Privatrecht der Drittwirkung von Zessionen*. „Recht der Internationalen Wirtschaft" 2018, H. 8, s. 495—497; H. Kronke: *Assignment of Claims and Proprietary Effects: Overview of Doctrinal Debate and the EU Commission's Proposal*. „Oslo Law Review" 2019, no. 1, s. 16; G. Cuniberti: *La proposition de règlement…*, s. 797; D. Einsele: *Die Drittwirkung…*, s. 480.

[30] G. Cuniberti: *La proposition de règlement…*, s. 798; W. Kurowski: *Kolizyjnoprawna problematyka…*, s. 79—82.

telności[31]. I wreszcie, w każdym innym przypadku, a zatem gdy brak jest podstaw do zastosowania reguł szczególnych wskazanych powyżej, ocena skuteczności przelewu wierzytelności wobec osób trzecich ma być dokonywana na podstawie przepisu ogólnego, posługującego się łącznikiem personalnym zbywcy wierzytelności (miarodajnym w tym zakresie statutem ma bowiem stać się prawo państwa, w którym cedent ma miejsce zwykłego pobytu — art. 4 ust. 1 projektu)[32].

Projekt rozporządzenia wypełnia lukę w kolizyjnoprawnym unijnym unormowaniu przelewu wierzytelności. Wychodzi także naprzeciw oczekiwaniom wyraźnego uregulowania tej kwestii jednolicie w ramach Unii Europejskiej. Wątpliwości rodzi jedynie dopuszczenie przez prawodawcę wyjątków od zasady poddania skuteczności cesji wobec osób trzecich prawu państwa, w którym cedent ma miejsce zwykłego pobytu[33]. Na praktyczną ocenę tego rozwiązania przyjdzie jednak jeszcze poczekać.

Bibliografia

Collins L.: *Contractual Obligations — The EEC Preliminary Draft Convention on Private International Law*. „The International and Comparative Law Quarterly" 1976, vol. 25.

Cuniberti G.: *La proposition de règlement de la Commission sur la loi applicable à l'opposabilité des cessions de créances*. „Revue critique de droit international privé" 2018, nº 4.

Czepelak M.: *Międzynarodowe prawo zobowiązań Unii Europejskiej. Komentarz do rozporządzeń rzymskich*. Warszawa 2012.

Dickinson A.: *Tough Assignments: the European Commission's Proposal on the Law Applicable to the Third-Party Effects of Assignments of Claims*. „Praxis des Internationalen Privat- und Verfahrensrechts" 2018, H. 4.

Einsele D.: *Die Drittwirkung von Forderungsübertragungen im Kollisionsrecht — ein kritischer Zwischenruf zum Verordnungsvorschlag der Kommission*. „Praxis des Internationalen Privat- und Verfahrensrechts" 2019, H. 6.

Flessner A.: *Choice of Law in International Property Law — New Encouragement from Europe*. In: *Party Autonomy in International Property Law*. Eds. R. Westrik, J. van der Weide. Munich 2011.

[31] A. Dickinson: *Tough Assignments*..., s. 339. Krytycznie propozycję tę ocenia m.in. P. Mankowski: *Der Kommissionsvorschlag*..., s. 497—499; D. Einsele: *Die Drittwirkung*..., s. 480—481.

[32] G. Cuniberti: *La proposition de règlement*..., s. 794; P. Mankowski: *Der Kommissionsvorschlag*..., s. 491—494; D. Einsele: *Die Drittwirkung*..., s. 479.

[33] W. Kurowski: *Kolizyjnoprawna problematyka*..., s. 90.

Flessner A., Verhagen H.L.E.: *Assignment in European Private International Law. Claims as property and the European Commission's 'Rome I Proposal'*. Munich 2006.

Garcimartín Alférez F.J.: *Assignment of claims in the Rome I Regulation: Article 14*. In: *Rome I Regulation. The Law Applicable to Contractual Obligations in Europe*. Eds. F. Ferrari, S. Leible. Munich 2009.

Giuliano M., in: M. Giuliano, P. Lagarde, Th. van Sasse van Ysselt: *Rapport concernant l'avant-projet de convention sur la loi applicable aux obligations contractuelles et non-contractuelles*. „Rivista di diritto internazionale privato e processuale" 1973, N° 1.

Hartley T.C.: *Choice of law regarding the voluntary assignment of contractual obligations under the Rome I Regulation*. „International and Comparative Law Quaterly" 2011, no. 1.

Kieninger E.-M.: *Brussels I, Rome I and questions relating to assignment and subrogation*. In: *Enforcement of International Contracts in the European Union. Convergence and divergence between Brussels I and Rome I*. Eds. J. Meeusen, M. Pertegás, G. Straetmans. Antwerp—Oxford—New York 2004.

Kieninger E.-M.: *Der Statut der Forderungsabtretung im Verhältnis zu Dritten*. „Rabels Zeitschrift für ausländisches und internationales Privatrecht" 1998, Nr. 3.

Kozakiewicz A., Kurowski W.: *Co dalej z kodyfikacją prawa prywatnego międzynarodowego w Polsce?* „Kwartalnik Prawa Prywatnego" 2003, z. 4.

Kronke H.: *Assignment of Claims and Proprietary Effects: Overview of Doctrinal Debate and the EU Commission's Proposal*. „Oslo Law Review" 2019, no. 1.

Kurowski W.: *Kolizyjnoprawna problematyka skuteczności przelewu wierzytelności wobec osób trzecich — projekt rozporządzenia Parlamentu Europejskiego i Rady w sprawie prawa właściwego dla skutków przelewu wierzytelności wobec osób trzecich (COM(2018) 96 final)*. „Problemy Prawa Prywatnego Międzynarodowego" 2019, T. 25.

Kurowski W.: *Nowe kolizyjnoprawne unormowanie podmiotowych zmian stosunku zobowiązaniowego na tle rozporządzenia „Rzym I" i polskiej ustawy — Prawo prywatne międzynarodowe z 2011 r.* W: *Współczesne wyzwania prawa prywatnego międzynarodowego*. Red. J. Poczobut. Warszawa 2013.

Kurowski W.: *Prawo właściwe do oceny skuteczności przelewu wierzytelności wobec osób trzecich*. W: *Znad granicy ponad granicami. Księga dedykowana Profesorowi Dieterowi Martiny*. Red. M. Krzymuski, M. Margoński. Warszawa 2014.

Kurowski W.: *Przelew wierzytelności w prawie prywatnym międzynarodowym*. Kraków 2005.

Kurowski W., w: „System Prawa Prywatnego". T. 20B. Red. M. Pazdan. Warszawa 2015.

Lagarde P.: *Retour sur la loi applicable à l'opposabilité des transferts conventionnels de créances*. In: *Droit et actualité. Etudes offertes à Jacques Béguin*. Paris 2005.

Leible S., Lehmann M.: *Die Verordnung über das auf vertragliche Schuldverhältnisse anzuwendende Recht („Rom I")*. „Recht der Internationalen Wirtschaft" 2008, H. 8.

Mankowski P.: *Der Kommissionsvorschlag zum Internationalen Privatrecht der Drittwirkung von Zessionen*. „Recht der Internationalen Wirtschaft" 2018, H. 8.

Pardoel D.: *Les conflits de lois en matière de cession de créanse*. Paris 1997.

Pazdan M.: *O projekcie nowej ustawy o prawie prywatnym międzynarodowym*. „Problemy Prawa Prywatnego Międzynarodowego" 2007, T. 1.

Rycko N., w: *Prawo prywatne międzynarodowe. Komentarz*. Red. J. Poczobut. Warszawa 2017.

Verhagen H.L.E., van Dongen S.: *Cross-border assignments under Rome I*. „Journal of Private International Law" 2010, no. 1.

Walsh C.: *Receivables financing and the conflict of laws: The UNCITRAL Draft Convention on the Assignment of Receivables in International Trade*. „Dickinson Law Review" 2001, no. 1.

Wowerka A.: *Prawo właściwe dla transakcji faktoringowych*. „Problemy Prawa Prywatnego Międzynarodowego" 2009, T. 4.

Wowerka A.: *Przelew wierzytelności w świetle rozporządzenia Rzym I*. „Problemy Prawa Prywatnego Międzynarodowego" 2011, T. 8.

Zachariasiewicz M.P.: *Zmiany w unormowaniu cesji wierzytelności (od artykułu 12 konwencji rzymskiej do artykułu 14 rozporządzenia Rzym I)*. „Problemy Prawa Prywatnego Międzynarodowego" 2010, T. 6.

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Honorary Doctorate for Professor Paul Lagarde and the meeting of the European Group for Private International Law

September 2019 blossomed with important events in the private international law at the University of Silesia. The first of these was the annual meeting of the European Group for Private International Law (Groupe européen de droit international privé, abbreviated to EGPIL and GEDIP, respectively in English and French). Established in 1991, GEDIP brings together the most eminent figures of academia and renowned members of international organizations for the purpose of creating, as the Group itself explains, an academic and scientific think tank. The Group focuses mainly on the study of the impact of European integration on private international law.

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Each year, at the invitation of one of its members, the Group holds a multi-day meeting devoted to the most current challenges relating to its main point of focus. The proceedings of the working sessions and the statements of the group are posted on its Website (www.gedip-egpil.eu) and published in various law reviews.

These meetings attract not only immense scholar's attention but are also closely followed by the practitioners. The outcomes of the Group's workings often serve as an impulse for legislative action both at national and supranational levels. Suffice is to note that the recommendations and draft legislation of the Group has been referred to in the legislative process of the European Union.

From 13 to 15 September 2019, the Faculty of Law and Administration of the University of Silesia had the honour of hosting the 29th meeting of the Group, which had been organized at the invitation of one its members, **M. Szpunar**.

The meeting in Katowice was attended by the following members of the Group: **C. Kessedjian**, President of the Group, **P. Kinsch**, Secretary General, **S. Bariatti**, **J. Basedow**, **M. Bogdan**, **A. Bonomi**, **G. Cordero-Moss**, **M. Fallon**, **F. J. Garcimartín Alférez**, **A. Giardina**, **C. González Beilfuss**, **T. Hartley**, **F. Jault-Seseke**, **Ch. Kohler**, **P. Lagarde**, **J. Meeusen**, **G. Möller**, **P.A. Nielsen**, **E. Pataut**, **M. Pauknerová**, **F. Pocar**, **M. Szpunar**, **H. van Loon** and **M.-Ph. Weller**.

In addition, the Group invited **A. Stein** and **M. Wilderspin** from the European Commission, as well the representatives of the organizers, **M. Pazdan**, **W. Popiołek**, **M. Jagielska** and **K. Pacuła**, to participate in the meeting.

The meeting was also assisted by **J. Mary** and **M. Dechamps**.

In the course of the 29th meeting, the members of the Group delved into a number of issues that had been unmistakably identified as the most persisting challenges that the private international law has to address in the future.

Against this background, the Group presented and discussed the draft project on the law applicable to rights in rem. It then went on to discuss a possible European regulation on the private international law of divorce, which largely amends the Brussels IIa Regulation.

Next, the Group's focus moved towards the discussion on a proposal for the codification of the general part of European Private International Law. This discussion had been preceded by the remarks on the interplay between the general part of private international law and the primary law of the EU, presented by Ch. Kohler.

The next point of the agenda was the presentation of the report on the case law of the European Court of Human Rights and its implications for the private international law, delivered by P. Kinsch.

Subsequently, the members of the Group reflected on the newly adopted Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (HCCH 2019 Judgments Convention).

The Group then delved into the issue of corporate liability for violations of human rights and environmental damage.

During the meeting, the Group adopted the „**Proposal of a Regulation on jurisdiction, applicable law and recognition of judgments and decrees with regard to divorce and legal separation**". The Proposal seeks to bring within a single instrument, for the first time, all the rules pertaining to jurisdiction, applicable law and recognition in matters of divorce. It also refines the rules provided for in the EU private international law, i.e. in the Brussels IIa Regulation and its successor, the Recast Regulation 2019/1111.

Moreover, in reaction to the regrettable decrease in the number of Members States of the International Commission on Civil Status (ICCS), the Group adopted its **recommendation concerning the need to maintain and develop international cooperation in matters of civil status**.

Due to the circumstances linked to COVID-19 the annual meeting of 2020 was held online. The next meeting of the Group will take place in Prague, in 2021.

The other memorable event of September 2019 at the University of Silesia was the ceremony of awarding the honorary „doctorate" (*honoris causa*) to one of the leading scholars of the 20th century in private international law — Professor Paul Lagarde. This is the highest academic distinction, which academia can bestow on someone. Since its inception, the University of Silesia has granted this distinction only to 59 people. The event took place on 13th September 2019. The request of the Council of the Faculty of Law and Administration in this matter was approved by the University Senate on 25th June 2019 (Resolution No. 396).

Professor Paul Lagarde is one of the most outstanding contemporary lawyers dealing with private international law. An author of numerous publications in this field, he has been, for the last 60 years, a source of inspiration for scholars around the world. His impactful contributions has been profoundly studied, discussed and cited also in Poland, and in particular in Katowice, which has been the centre for private international scholarship in Poland since the 1970s. Professor Lagarde's works ravished with precision and clarity of the argument. He addressed almost all of the major issues of the private international law, starting with

the public policy exception, which he covered in what has become a classic work in the field: *Recherches sur l'ordre public en droit international privé* (Paris 1959). He has also elucidated the central role of the principle of proximity in the private international law in his famous *Le principe de proximité dans le droit international privé contemporain. Cours général de droit international privé* (Recueil des cours de l'Académie de Droit international de la Haye, vol. 196, 1986-I). More recently, Professor Lagarde directed the work on one of the most controversial, yet relevant topics in modern conflict of laws: the recognition of „situations" (*La reconnaissance des situations en droit international privé*, Paris 2013).

Professor Paul Lagarde was a member of numerous academic associations including the GEDIP since its foundation in 1991, the Comité français de droit international privé, where he served as a president, and the Institut de Droit International, of which he is a member since 1995. Between 1976—2012 he was the *rédacteur en chef* and afterwards the director of the *Revue critique de droit international privé*, the main French journal dealing with private international law. Professor Lagarde has also led or participated in numerous intergovernmental bodies and expert groups that have made a significant contribution to the development of instruments related to private international law. He took part in preparatory works for what became the ground-breaking Rome Convention on the law applicable to contractual obligations (1980). He served as a secretary general of the Commission Internationale de l'État Civil (2000—2009) as well as an expert in the European Commission's group, which laid groundwork for the European Union's private international law relating to successions and matrimonial and partnership property regimes. There are no doubts that Professor Lagarde had a far-reaching impact not just on the private international law as an academic discipline but, more generally, also on the international cooperation in the European Union and worldwide.

The contemporary European history recognizes Professor Lagarde as a devoted scholar and teacher to many generations of lawyers, an influential expert, and an internationalist whose works have contributed to common legal culture in Europe. In Katowice, he is remembered as a forthcoming supporter for many Polish scholars coming to Paris, and, last but not least, as a kind friend.

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Report from the conference "Application of the Succession Regulation in the EU Member States", Katowice 12 September 2019

Remarkable events do occur sparsely and usually do not last long. Yet, they have the unique ability of profoundly marking the people involved by leaving a lasting memory of the days long gone and serve as a source of inspiration for the future endeavors in the days to come.

On 12 September 2019, the premises of the Faculty of Law and Administration of the University of Silesia in Katowice (Poland) witnessed one of such events, which will arguably go down in history of private international law in Poland. On that day, the University hosted an international conference on the Regulation (EU) No 650/2012 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 ("the Succession Regulation"), and on the various issues relating to the succession matters within the European area of freedom, security and justice.

The conference was organized at the occasion of the annual session of the European Group for Private International Law (EGPIL/GEDIP) held at the premises of the Faculty at the invitation of **Maciej Szpunar**,

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a member of the Group, Professor at the University of Silesia and First Advocate General at the Court of Justice of the European Union.

Opening the conference, **Maciej Szpunar**, **Tomasz Pietrzykowski**, Professor at the University of Silesia and Vice-rector for National and International Cooperation, and **Piotr Pinior**, Professor at the University of Silesia and Vice-dean for Scientific Affairs, addressed their word of welcome to all the participants, invited guests and staff of the Faculty. Acknowledging the efforts made by the speakers coming from various jurisdictions, they expressed their gratitude for their presence in Katowice. They emphasized the importance of the event for the entire Polish academic community, not omitting to note that such unique gathering of prominent experts constitutes an unusual phenomenon even on the European scale. Special words of gratitude were addressed to the bodies and organizations which have supported the organization of the conference, namely the Polish National Council of Notaries (Krajowa Rada Notarialna), National Chamber of Legal Advisers (Krajowa Izba Radców Prawnych), Supreme Bar Council (Naczelna Rada Adwokacka) and Association of the Notaries of the Republic of Poland (Stowarzyszenie Notariuszy RP).

Before giving the floor to the speakers, Maciej Szpunar, Tomasz Pietrzykowski and Piotr Pinior wished everyone fruitful deliberations and hoped for their enjoyable stay in Poland.

1.

The opening session of the conference was devoted to the review of the Member States' first experiences with the application of the Succession Regulation. Four speakers were invited to present their lectures on that very topic.

In his lecture opening that session, **Andrea Bonomi**, University of Lausanne, Director of its Centre of Comparative, European and International Law and co-director of LL.M. International Business Law, addressed the interplay between the Succession Regulation and the new Regulations on Matrimonial Property and Registered Partnership.

Professor Bonomi built his subsequent considerations on the observation that the Succession Regulation, on the one hand, and the twin Regulations on Matrimonial Property and on Registered Partnership, on the other hand, will often be applied in parallel due to the close connection between the areas they govern. As he remarked, not all Member States participate in the enhanced cooperation regarding the matrimonial pro-

perty and registered partnership. A certain legal duality thus persists within the EU. He continued by explaining that, from the perspective of the Member States bound by these Regulations, some of their provisions (the rules on jurisdiction and on conflict of laws) do however apply in relation to the situations linked with third States as well as with the Member States that do not participate in the enhanced cooperation relating to the areas that these Regulations govern.

After having discussed the recent case law and the judgment in *Mahnkopf* in particular, Professor Bonomi noted that the CJEU had pronounced itself in favour of a broad definition of the notion of "succession", which delineates the scope of application of the Succession Regulation. Referring the considerations relating to the effectiveness (effet utile) of the Regulation that resonate within the AG's Opinion in the *Mahnkopf* case, he reflected then on the implications of such broad and effectiveness-oriented definition of that notion on the scope of application of the Matrimonial Property Regulation and the effectiveness thereof.

He concluded his lecture by comparing the solutions achieved by the parallel application of the Succession and Matrimonial Property Regulation with those that can be attained by the application of the former Regulation and the national conflict of laws rules.

Afterwards, **Christian Kohler**, Saarland University, discussed the application of the Succession Regulation by German courts. It is worth noticing that, as of 12 September 2019, the CJEU rendered five judgments in the cases relating to the Succession Regulation, namely in the cases *Kubicka*, *Mahnkopf*, *Oberle*, *Brisch* and *WB*. As Professor Kohler observed, the German courts had contributed to the development of the case law, by having been actively engaged in the dialogue with the CJEU by the means of the preliminary reference procedure. This case law had then major implications for Germany.

Against this background, Professor Kohler addressed, *inter alia*, the judgment in *Mahnkopf*. Echoing the previous lecture, he added that the solution endorsed in the AG's Opinion and adopted by the CJEU indeed preserves the effet utile of the European Certificate of Succession. However, while it has the potential of facilitating the Regulation's application, it does not the eliminate the controversy resulting from the interfaces between 'inheritance law' and 'property law', it — as the Professor graphically put it — merely reverses these two tags.

By his lecture, Professor Kohler then went on to illustrate that the aforementioned case law of the CJEU forms only a tip of the iceberg that had been built upon the Succession Regulation. He briefed the participants on the developments of German courts relating to, inter alia, the determination of the habitual residence of the deceased.

Finally, **Maksymilian Pazdan**, Koźmiński University and University of Silesia, and **Maciej Zachariasiewicz**, Koźmiński University, delivered a detailed assessment of the Succession Regulation's highlights and pitfalls.

While the Professors deemed the Regulation to be a true milestone, they did not omit to acknowledge the decisive role that the EGPIL/GEDIP had played in shaping the conflict-of-laws landscape prior to the adoption of that Regulation. The particularly profound words of consideration were addressed to another speaker, Professor Paul Lagarde. If the Regulation is truly a milestone, it rests on the foundations meticulously laid by the Professor and his scientific achievements. Suffice is to mention the comparative rapport of 2002 on the rules of jurisdiction and rules on conflict of laws, prepared by the German Notarial Institute, in cooperation with Professor Heinrich Dörner and the very Professor Paul Lagarde.

Sharing their expert knowledge, Maksymilian Pazdan and Maciej Zachariasiewicz observed that the recourse of the Polish notaries to the Succession Regulation had been gradually more frequent. They noted that much credit for dissemination of knowledge on the Regulation must be given to organizations of notaries. Indeed, the presence of the National Council of Notaries and of the Association of the Notaries of the Republic of Poland among the bodies supporting the organization of the conference served as a confirmation of the observation made by the Professors.

In their presentation, the Professors spoke mostly highly of the Succession Regulation, praising, inter alia, the unitary approach that the Regulation takes regarding the law applicable to succession and the inclusion of the rules on jurisdiction and on the conflict of laws in a single EU law instrument (leaving aside the Insolvency Regulation, as of 2012 when the Succession Regulation had been adopted, it had still been an uncommon practice in the EU private international law).

Complementing the illustration of German case law on the determination of the habitual residence of the deceased provided by Christian Kohler, they reflected on the admissibility of multiple places of habitual residence under the Succession Regulation.

After the opening session and a short break — which, basing on the vigorous discussions between the participants that continued after the session's closure, illustrated the fact that the lectures had indeed touched upon issues that inspire much debate — the subsequent segments of the event followed.

2.

Once the resumption of deliberations took place, **Paulina Twardoch**, University of Silesia, delved into the issue of marriage contracts in the context of the Succession Regulation.

Referring to her publication on that very issue (P. Twardoch, Umowy małżeńskie w prawie prywatnym międzynarodowym, Warszawa 2019), Professor Twardoch observed that the spectrum of matters that may be regulated in a marriage contract varies considerably. One might therefore be dealing with a marriage contract which — from the conflict of laws perspective — is segmented into parts falling within such categories as "matrimonial property regime", "maintenance obligation" or even "divorce and legal separation".

She continued by presenting a rich palette of clauses that may be, according to various legal systems, introduced in a marriage contract (in a marital or premarital agreement) and by providing guidance on their classification under the relevant rules on conflict of laws.

She explained that the clause-segments that boil down to a donation of future property constitute "agreements as to the succession" within the meaning of the Succession Regulation. As such, they are governed by the law determined as applicable under Article 25 of the Regulation.

On the contrary, by reading a contrario the guidelines provided for in the judgment in *Mahnkopf*, she argued that the clauses that provide property advantages for the surviving spouse by virtue of a matrimonial property regime [the preciput clause, the clause providing for an unequal division of the community of property, the clause of unequal participation in the surplus (le bénefice), modifying the Swiss statutory matrimonial property regime etc.] cannot be considered as "agreements as to the succession".

However, the clauses by which a (future) spouse or both (future) spouses waive the right of elective share (such clause is admissible under, among others, the law of the NY State), should be qualified as the "agreements as to succession". The same applies to the so-called "pacte Valkeniers", that is to say the clauses falling within the scope of Article 1388(2) of the Belgian Civil Code and consisting on a total or partial waiver of the statutory succession rights of the surviving spouse. Finally, though not all authors would share this view according to Professor Twardoch, this is also the case of the stipulations of a premarital or marital agreement that constitute a contract to make or not to make a will.

3.

Subsequently, **Andrea Bonomi**, speaker of the opening session, took the presidency over the first panel discussion headed "Delimitation between succession law and other applicable laws" and invited the panelists to share their remarks on that topic.

Stefania Bariatti, University of Milan, was first to take the speech in the panel and presented her remarks on the issue of preliminary question in the context of succession with cross-border implications ("The Capacity and the Quality of a Heir. Possible Interaction with Preliminary Questions").

Professor Bariatti observed at the outset that a number of issues that may be relevant in this context is excluded from the scope of the Succession Regulation. Some of these issues are also explicitly excluded from the scope of other instruments of EU private international law. These instruments provide nearly unanimously that the "the status of natural persons" and/or "family relationships and relationships deemed by the law applicable to such relationships to have comparable effects" do not fall within their scope of application. In some, the EU legislator goes as far as to state — as in Article 1(2) of the Rome III Regulation — that these issues are excluded "even if they arise merely as a preliminary question within the context of divorce or legal separation proceedings".

The EU legislator acknowledges therefore the existence of preliminary questions, yet no clear guidance on the law applicable to these questions is given.

Filling this gap, Professor Bariatti drew a distinction between "independent reference" (a preliminary question governed by the law determined as applicable under the rules on conflict of laws of the forum that are relevant to the object of the preliminary question at stake) and "dependent reference" (a preliminary question should be governed by the same law that applies to the main question, lex causae, including the rules on conflict of laws provided for in that law) and demonstrated which of these concepts should be adopted in relation to the preliminary questions on "personal status", "family relationship" and "legal capacity".

Next, **Tomasz Kot**, Vice President of the Polish National Council of Notaries, presented his remarks concerning the puzzling issues of the scope of application of the Succession Regulation and the scope of the law applicable to the succession ("Where is a Borderline of Succession Law? A Dilemma of European Notaries Dealing with the Succession Regulation").

Backing his remarks with practical knowledge, he presented the issue as it is seen from the perspective of notaries who are in the frontline of the Regulation's application. This valuable view "from the trenches" was a true testimony of the issues that the practitioners may encounter, despite the efforts of EU legislator to address many of them. The insights on the issues surfacing in the scenarios relating to the international successions linked both to Poland and to Germany were particularly illustrative in these regards.

These insights were followed by the remarks of **Paul Lagarde**, Professor emeritus at the University of Paris 1 — Panthéon-Sorbonne, on the reserved share (réserve héréditaire) ("La réserve héréditaire dans le règlement 650/2012 sur les successions" / "Reserved Share under the Succession Regulation").

Under French law, as reminded by Professor Lagarde, certain relatives are entitled to the reserved share. Providing a comparative insight, he noted that while the French legal system is generous in these regards, some legal systems adopt intermediate solutions that are less lavish and others (i.e. common law systems with the notable examples of the United Kingdom and some US States) go so far as to deny the reserved share — in these legal systems, the family members and dependents have to bring a claim for financial support before courts and that support is being then deducted from the estate.

The diversity of solutions concerning the reserved share raises numerous questions in the cross-border scenarios. The issue of applicable law is among them and Professor Lagarde did acknowledge the EU legislator's efforts to address them in the Succession Regulation. He noted that by abandoning both the nationality as the connecting factor, a sort of tradition under Polish law, as well as the principle of scission, which had been a tradition in French law, the Succession Regulation submits in principle the succession to the law of the State in which the deceased had his habitual residence at the time of death (Article 21). Moreover, the Regulation provides an important clarification regarding the reserved share and includes it in the scope of law governing the succession [Article 23(2)(h)].

Still, not all the issues had been resolved. Professor Lagarde explained that these issues result less from the wording of the Succession Regulation and more from the existence, among the Member States, of the aforementioned diversity when it comes to their approach to the reserved share.

Professor Lagarde illustrated the issues in question by two cases that had recently attracted much attention in France.

First reported case concerned the succession of the French singer John Hallyday, who had passed away in 2017. He left a will bequeathing

his entire estate to his wife, whilst leaving nothing to his children from his previous relationships. As observed by Professor Lagarde, the issue at stake ultimately had boiled down the question whether the deceased had had his last habitual residence in France or California. The habitual residence of the deceased would then determine the law applicable to the succession. If the law of the State of California applied, the question remained whether its application did not stand in violation of to the French international public policy.

The second case reported by Professor Lagarde concerned the succession of yet another iconic French artist, Maurice Jarre, who had passed away in 2009. Prior to his death, the artist disinherited his children for the benefit of his wife. Here, there was no controversy concerning the habitual residence of the deceased — it had been acknowledged that the law of the State of California governed the succession. However, his children argued that, by not providing for the reserved share, the law of the State of California violated the French international public policy. By its judgment of 2017, the French Supreme Court (Cour de Cassation) proved them wrong. It ruled that a foreign law that does not provide for the reserved share is not in itself contrary to the French international public policy and that it can only be set aside if its concrete application, in the case at hand, leads to a situation that is incompatible with the principles of French law considered as essential.

Professor Lagarde praised the solution as it adequately reflects the spirit of the public policy exception, which relies on in casu examination of the circumstances of the case. He explained that before setting aside the application of foreign law, it is necessary to examine, on a case-by-case basis, whether its application leads to an unacceptable situation, for example by leaving young children or children undergoing education with no resources.

Nonetheless, Professor Lagarde remarked that the case has by no means reached its end. In 2018, the children of Maurice Jarre brought their case before the European Court of Human Rights arguing the failure to respect the rights of the family and excessive infringement of their legal security.

He then went on to report on the recent developments in Monaco, where — during the elaboration of the new code on private international law — it had been initially proposed to follow the solutions somewhat similar to these of the Succession Regulation. However, Article 63 of the Code on Private International Law of 2019 provides ultimately in its second paragraph that "the law applicable to the succession may not have the effect of depriving an heir of the reserved share to which he or she is entitled under the law of the State of which the deceased was a national

at the time of his death, nor of imposing the reserved share where the law of the State of which the deceased was a national at the time of his or her death does not provide for such a regime".

Professor Lagarde remarked that the desire to impose on a Monegasque national, in the name of public policy of that State, the provisions of its law on the reserved share might be understandable. However, he deemed it more difficult to accept that the application of the Monegasque law to the succession of an Englishman domiciled in Monaco violates its public policy. He argued that second paragraph of Article 63 of the Code undermines the principle of the unity of succession and removes the reserved share from the scope of law applicable to succession by submitting it to the law of the nationality of the deceased. Concluding his remarks, Professor Lagarde observed that also under the Succession Regulation, the recourse to the public policy exception should by no means serve as a vehicle for disapplication of the provisions that offer lesser protection than the law of the nationality.

Closing up the panel discussion on the delimitation of the applicable laws, **Krzysztof Pacuła**, Legal clerk at the CJEU and a PhD in private international law, presented his remarks relating to the unitary approach to succession that underlies the system of Succession Regulation ("The Principle of a Single Estate and Its Role in Delimiting the Applicable Laws"). In his view, it also sets a tone for some interpretative techniques that tend to favor succession-related characterization of the issues having certain importance in the context of international succession (i.e. *effet utile* utile-driven characterization).

The president of the panel, **Andrea Bonomi**, encouraged then the participants to present their feedback and inquiries in relation to the remarks presented within the panel.

Among other inquiries, **Paul Lagarde** was invited to present his insights regarding the national provisions in force in the States that do not provide for a reserved share as it exists under French law. In these States (i.e. Poland), the freedom of the testator to dispose his estate is not restricted, yet closest members of the family have monetary claims corresponding to a certain portion of the estate's value. In particular, Professor Lagarde was asked whether these national provisions could be of a certain importance in the context of public policy exception and/or overriding mandatory provisions. He was also requested to elaborate on the scope of the law applicable to the succession and Article 1002 of the Polish Civil Code, which provides that a monetary claim of an heir passes upon his (her) only if the latter is also ab initio entitled to bring his (her) own monetary claim.

In turn, **Tomasz Kot** was encouraged to share more of his experiences on the practical implications of the Succession Regulation applicability for the notaries in Poland.

The lively debate seemed to remain unaffected by a short pause that followed, as the participants continued to engage into discussions until the conference deliberations were resumed.

4.

The second panel has been presided by **Cristina González Beilfuss**, University of Barcelona. Professor González Beilfuss invited the panelists to present their remarks in the discussion devoted to the issue of "Jurisdiction and the free movement of judgments and other instruments covered by the Succession Regulation".

Jürgen Basedow, University of Hamburg, Director emeritus of the Max Planck Institute of Comparative and International Private Law, was first to take the speech in the subsequent panel. Elaborating on the notion of "Member State" ("The term 'Member State' within the meaning of Article 39 of the Succession Regulation"), Professor Basedow explained that within the framework of the Succession Regulation three different categories of States may be distinguished: participating Member States, non-participating Member States and third States. He then put under scrutiny the dichotomous distinction (participating Member States/non-participating States), based on the assumption that the notion of "Member State" must be interpreted in a uniform way throughout the Succession Regulation. In disagreement with that view, he argued that this notion has to be interpreted accordingly to the context and the purpose of each individual provision.

Marcin Margoński, Dr. iur., presented then his insights on the issues residing on the highly practical side of the Succession Regulation's application ("Recording heirs with European Certificate of Succession, court decisions or authentic documents from other Member States in national property registers"). Setting the tone for his intervention, he observed at the outset that the issues relating to such recording are one of the main reasons explaining why the international regulation concerning succession is unpopular and mostly avoided at least by some States.

As to the Succession Regulation itself, he explained that the Member States' obligation to accept a European Certificate of Succession as a reg-

istration basis results directly from Article 65(5) of the Regulation. Providing a comparative insight, he noted that in some legal systems there had been no amendments concerning the acceptance of the Certificate as a registration basis (i.e. Poland), while in others the amendments for such effect had been made (Germany, Austria, the Netherlands).

Touching upon the "decisions" within the meaning of the Succession Regulation, he remarked that Article 39 does not contain a provision comparable to that of Article 65(5) of the Regulation. Such provision providing a registration basis as to the decision had not been necessary. As he observed, prior to the adoption of the Regulation, there had been no controversy as to the acceptance of decisions as the registration basis.

He then went to report on "authentic instruments" and noted that "acceptance" of these instruments provided for in Article 59 of the Succession Regulation is an entirely new concept that calls for CJEU guidance (i.e. in order to adequately address the registration of Polish notarial and/or court certificates by the German register offices).

Next, **Piotr Rylski**, University of Warsaw, delved into the analysis of Article 75 of the Succession Regulation and its implications with regards to the Members States having concluded bilateral agreements with third States ("The Influence of Bilateral Treaties with Third States on Jurisdiction and Recognition of Decisions in Matters of Succession — Polish Perspective").

Professor Rylski noted that from the Polish perspective, this analysis is of a particular practical importance due to the bilateral agreements concluded between Poland and Belarus, Russia and Ukraine and taking into account the migration of population between the parties to these agreements. He observed that the particularity of these agreements resides in the fact that they do not solely contain rules on conflict of laws but also rules on (direct) jurisdiction in matters of succession. Next, still reporting on the aforementioned agreements, he noted that they do not contain a provision providing for a public policy exception as a ground for non-recognition of the decisions issued in the parties to these agreements. He then went to address the question whether and, if so, how such exception could be introduced within the framework of the cooperation between these parties. In a similar vein, he addressed the question whether a European Certificate of Succession can be issued with regards to a succession falling within the scope of a bilateral agreement.

Following the clarifications of Jürgen Basedow on the notion of "Member State" within the meaning of the Succession Regulation, **Michael Wilderspin**, European Commission, presented his remarks on the notion of "court" in the sense of the Regulation ("Interpretation of a term 'court' in the Regulation and its consequences for the rules concerning

jurisdiction"). He too advocated a meticulous analysis of the notion in question. While the notion of "court" gave rise to a case law clarifying this notion under the Brussels regime, he deemed it not to be perfectly transposable to the Succession Regulation.

5.

As all the good things tend to do, ultimately the conference also had to reach its end. Closing the conference, **Maciej Szpunar** congratulated the participants for having addressed numerous issues of a paramount theoretical and practical importance and thanked them for their meaningful contribution in the discussion on the EU private international law. On the behalf of the conference organizers, he expressed the gratitude for allowing the Faculty of Law of Administration of University of Silesia to go down in history as the place where that contribution had been made.

The discussions initiated during the day lasted in a more cameral atmosphere long after the closure of the conference. Yet, the days to come were still about to bring more exciting and remarkable events that are presented in other contributions contained in this volume of "Problemy Prawa Prywatnego Międzynarodowego".

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