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Guide on international private law in successions matters

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With financial support from the "Civil Justice"
Programme of the European Union

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TABLE OF CONTENTS

FIRST PART - PRIVATE INTERNATIONAL LAW JURISDICTION AND CONFLICTS OF LAWS RULES IN MATTERS OF SUCCESSION	5
<i>Chapter I. Introduction</i>	<i>5</i>
§ 1. Introduction	5
§ 2. European successional systems diversity	6
§ 3. The unification of the conflict rules in the succession matter at European level ...	8
§ 4. The Scope of the Regulation	9
4.1. Material application	9
4.2. Territorial application	28
4.3. Regulation`s temporal application	28
<i>Chapter II. Theoretical aspects related to the jurisdiction of private international law in matters of succession</i>	<i>30</i>
§ 1. General jurisdiction of the Member States courts	30
1.1. General rule	30
1.2. Choice of the forum	33
1.3. Declining the jurisdiction	35
§ 2. Subsidiary jurisdiction	36
§ 3. Forum necessitatis	38
<i>Chapter III. Theoretical aspects related to the rules that settle conflicts of laws in matters of succession. Regulation principles</i>	<i>39</i>
§ 1. The principle of the inheritance unity	39
§ 2. The proximity principle	42
§ 3. The principle of predictability	44
§ 4. The principle of the inheritance author`s will	46
§ 5. The principle of solemnity and forms	47
§ 6. The principle of competition between the european inheritance systems	48
<i>Chapter IV. Theoretical aspects related to obtaining the foreign law content through the European Network of the Notaries and the European Judicial Network in Civil and Commercial Matters</i>	<i>50</i>
§ 1. A Notary Network for the European legal practice	50
§ 2. Missions and activities	50
§ 3. The relationship between the European Notarial Network and the European Judicial Network	52
§ 4. The European Judicial Network in Civil and Commercial Matters	52

<i>Chapter V. Practical cases regarding the determination of international jurisdiction</i>	54
§ 1. <i>Practical cases for judges</i>	54
§ 2. <i>Practical cases for notaries</i>	70
 <i>Chapter VI. Practical cases on conflicts of law</i>	 72

SECOND PART - THE EXEQUATUR PROCEDURE IN THE MATTERS OF SUCCESSION 96

<i>Chapter I. Theoretical aspects related to the exequatur procedure in the matters of succession</i>	96
§ 1. <i>The effects of foreign decisions in matters of succession</i>	96
§ 2. <i>Decisions in succession matter, issued by other Member States</i>	96
§ 3. <i>Recognition (determination of foreign decision proficiency to produce a regulatory effect in the legal order of the forum)</i>	97
§ 4. <i>Grounds for refusal of recognition</i>	98
a) <i>Public international order</i>	98
b) <i>The lack of notification</i>	98
c) <i>Incompatible decisions</i>	99
§ 5. <i>Enforcement</i>	99
5.1. <i>Recognition and enforcement of public acts</i>	100
5.2. <i>Authentic acts</i>	100
5.3. <i>Court settlement</i>	101

<i>Chapter II. Theoretical aspects related to the procedure for the issue of the European certificate of succession</i>	103
§ 1. <i>Optional character</i>	103
§ 2. <i>The competent authority</i>	103
§ 3. <i>Procedure</i>	104
§ 4. <i>Issue. Modification. Withdrawal</i>	104
§ 5. <i>Contents</i>	105
§ 6. <i>Effects</i>	106

<i>Chapter III. Practical cases regarding the recognition and enforcement of court orders and foreign authentic instruments</i>	109
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<i>Chapter IV. Practical cases regarding the European Certificate of Succession</i>	126
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FIRST PART - PRIVATE INTERNATIONAL LAW JURISDICTION AND CONFLICTS OF LAWS RULES IN MATTERS OF SUCCESSION.

Chapter 1. Introduction

§ 1. Introduction

When talking about the right of succession, the first image to crystallize in front of us is that of something very old and, above all, something very conservative. In addition, something always reminds us of death and of its consequences... It is certainly not only the most conservative part of the civil law, but also one of the parts that most profoundly reflects and integrates the traditions and customs of the country whose legal system it serves, even the character and the "way of being" of the nation to which it belongs ... Maybe because it is the one that most profoundly reflects the family. It tells us *how* the family *should be*... Even if the deceased (the author of the inheritance) appears in the foreground, those to whom the law of succession actually addresses are, as a rule, his/her descendants, his/her family. And, perhaps, there is no more clarifying moment to show how the family of the deceased is (presents itself) than this one, the moment of the succession's opening. Now is not only the moment of regret and pain, but also a moment for familial compassion and solidarity. Now you can really see how the deceased lived his/her life, the nature and the intensity of the bonds uniting all those who compose his/her family. The moment it becomes incident is a particular one, a sacred one, one that marks an ending but also a new beginning, not only for the author of the inheritance, but also, equally, for those (still) remaining *in hac lacrimarum valle* in this world of "fog, shadows and darkness" (*St. Tereza de Lisieux*).

The law of succession is not limited, therefore, only to an amount of technical, "accounting" rules intended for the distribution of one patrimony at risk of being ownerless, but its principles, intended for establishing the rules of the inheritance devolution, transmission and division, come to legitimize the departed one's posterity. It is concerned with maintaining and strengthening this posterity harmony, fixing what must represent reasonableness and family ethics. It is, therefore, closely linked to the idea of fairness and morality. These relate both to the inheritance author individual as well as, equally, to those who make up his/her family. Furthermore, both the equity and the morality of an attitude are concepts that evolve over time and cannot be dissociated from the spirit of the age in which the succession is opened.

Europe knows no uniform succession regime. Each Member State knows its own coding in the succession matter, which reflects the existing traditions specific and the peculiarities of historical development in each country.

§ 2. European successional systems diversity.

Inheritance implies a balance between the will of the one who plans beforehand the patrimony transmission (*der sich sein Erbschaft geplant*) and the one (or those) who "waits" (wait) (*der ein Erbschaft erwarten*). Equally, the successional transmission also puts into the equation the inheritance's creditors (*die Erbschaftsgläubiger – der gegen die ErbeAnsprüche aufrufen*). The relationships between these three categories of interest are regulated differently in the successional laws of the states, which favor either the interests of the interested party in planning his/her succession, either tries a "certain equilibrium" mitigating the discretion of the inheritance author, thus trying to protect his close family members (forced heirs). Not ultimately, the position of the succession creditors is also different, the Anglo-Saxon influence systems favoring the prior liquidation of the successional liability and the covering of the creditors' claims over the inheritance, thus avoiding their "dispersion" by transmission to the heirs.

The successions matter knows, therefore, the most diverse regulations in the world states laws¹. The main regulatory differences can be observed in the classes of heirs composition manner, including in determining the extent of the shares of the estate due to the legal heirs, the position of the surviving spouse, the existence, nature and extent of the forced heirship, the persons included in the forced heirs category, the extent of the heirs obligation to incur the successional² liability. Differences may also arise in relation to the manner and time of the estate

¹ For a presentation of the main regulatory differences, see Alain Verbeke, Yves-Henri Leleu, *Harmonization of the Law of Succession in Europe*, in *Towards a European Civil Code, second revised and expanded edition* (coord. A. Hartkamp, M. Hesselink, E. Hondius, C. Joustra, E. du Perron), Ars Aequi Libri – Nijmegen, Kluwer Law International – The Hague/London/Boston, 1998, p. 173-188 (cap.11); Y.-H. Leleu, *La transmission de la succession en droit comparé*, Antwerp, /Brussels, Maklu/Bruylant, 1996, no. 154, p. 491, no. 864, p. 500; Louis Garb, *International Succession*, Union Internationale de Notariat Latin, 1998; *Family and Succession Law* edited by Walter Pintens, International Encyclopedia of Laws, 1997 (in two tomes); Ferid/Firsching/Lichtenberger, *Internationales Erbrecht*, 4 Aufl., C. H. Beck, 1993; Flick/Piltz, *Der Internationale Erbfall. (Erbrecht. Internationales Privatrecht. Erbschaftsteuerrecht)*, C. H. Beck, Munchen, 1999; Zillmann, *Die Haftung der Erben im internationalen Erbrecht*, 1998; M. Goré, *L'administration des successions en droit international privé français*, Economica, Paris, 1994; F. Boulanger, *Les successions internationales, Problèmes contemporains*, Paris, 1981; Héron, *Le morcellement des successions internationales*, Paris, 1986. Also see C. Toader, *Harmonization of the Law of Succession in Europe*, in "Juridica" no. 4/2000, p. 136 and next, article which is largely inspired by Alain Verbeke, Yves-Henri Leleu, *Harmonization of the Law of Succession in Europe*, in *Towards a European Civil Code, second revised and expanded edition* (coord. A. Hartkamp, M. Hesselink, E. Hondius, C. Joustra, E. du Perron), Ars Aequi Libri – Nijmegen, Kluwer Law International – The Hague/London/Boston, 1998, p. 173-188 (chap.11).

² Without going into details, we highlight that from this point of view the specialty literature classifies succession systems in three categories: a) *the system of direct and immediate transmission, by the effect of the law, of the chart of heirs*. This system is recognized in our country, but also in countries such as France, Belgium, Germany, Greece, The Netherlands, and Switzerland. The chart of heirs is transferred to the heirs even since the moment of death of *de cuius*, without the need of any initiative from the heirs. As already said, "*Le mort saisit le vif son hoir le plus proche habile à lui succéder*" (A. Verbeke, Y.-H. Leleu, *op. cit.*, p.177). The heritage acceptance has only the role to confirm the succession transfer which has already taken place. The system is characterized, in principle, by the unlimited heirs' liability, who are accountable *ultra vires hereditatis*. Limited liability is, usually, found in case of incapable successors, or in case the heritage is accepted without ability to debts beyond the assets descended. By exception, the German succession system establishes the heirs' limited liability (*intra vires hereditatis*), seeking their protection; b) *the system of direct but postponed transmission of the chart of heirs*. This system – met in Austria – is characterized by that fact that, although the transmission of the chart of heirs operates directly to the heirs, the transmission moment does not coincide to that of succession opening (date of *de cuius death*), but occurs later, upon the heir's initiative, having the meaning of heritage acceptance (*aditio hereditatis*). In addition, in order to make the transmission valid, a court decision is required (*Einantwortung*), the date of court resolution coinciding to that of the hotchpot. Obviously, in this system, the seisin has no role to play. Although it shows the advantage of a controlled and orderly transmission, this system cannot though explain the void between the moment of succession opening and that of its transmission as an effect of the court decision (*hereditas jacens*); c) *the system of indirect and postponed transmission* is the third system specific to the countries which „do not find themselves in

transmission, conditions, forms and effects of dispositions for mortis causa, determining the nature of the State's right over the vacant succession, etc.

Unlike other institutions of the private law, the successions matter remained apparently forgotten, being left to the national legislator's discretion. Even at the conflict rules level intended for the international successions localization, the differences in approach are not at all neglectable. Thus, we encounter systems which, taking into account the nature of the succession, favor its unity, subjecting it to a unique law, regardless of the fact this law is the national law of the inheritance author in the moment of his/her death (§ 28 of the Austrian federal law on private international law, June 15th, 1978, IPR-Gesetz, Art. 25 of the introductory law to the German Civil Code - EGBGB, Art. 46 of the Italian law no. 218 from May 31st, 1995 on the reform of the Italian system of private international law; Art. 64 (2) of the new Polish private international law from February 4th, 2011; art. 28 of the Greek Civil Code from March 15th, 1940; art. 9 sect. 8 from the preliminary title of the Spanish Civil Code from 1889, etc.), whether it is the law of his/her last domicile³ or his/her last habitual residence⁴. On the other hand, we also meet factious systems mainly influenced by the old statutes theory that sequences the succession depending on the nature of assets (movable or immovable) composing the estate, thus making a difference regarding the applicable law, between the movable property mass, subject to a unique law, and the immovable property, subject to each law of succession belonging to the State on which territory they are found (*lex rei sitae*)⁵.

Gaius' classification", that is the *common law* countries. In this system, the chart of heirs is temporarily sent to a personal representative, the heirs and legatees having to wait until the succession liability is liquidated, which is a previous phase and not integrated in the actual succession procedure, but serves only to the latter's purposes. Consequently, on the date of succession opening, the first transfer is operated to the personal *representative*, by means of a judicial procedure (*probate procedure*). The personal representative position can be occupied by the instated testamentary executor, or, in his absence, by one of the heirs, in both cases by means of a court appointment. The personal representative is a mandated person, a temporary administrator, his prerogatives being limited both in time (liquidation of the succession liability), and as regards the nature of operations within his competence (pay-back the succession debts). During all this period, the heirs and legatees have only the quality of net succession assets creditors, in which position they can initiate actions against the testamentary executor or against the succession administrator. After the debts liquidation and the setting up of the net succession assets, the second succession transfer is operating – to the legal heirs and to the legatees. Worth mentioning is that in this system the object of succession transmission to the heirs is limited to the net succession assets, the debts being liquidated during the previous phase. This is the very reason for which the heirs' liability can be only a strictly limited one (**Ibidem**, p. 178).

³ Art. 90 and 91 of the Federal Swiss Law of private international law of December 18th, 1987 differentiates, as regards the applicable law to the heritage, by the fact whether the last domicile of the deceased is or not in Switzerland. In the first case, the succession will be governed by the Swiss law, allowing however to the foreigner to choose the law of the state whose nationality he/she has, provided he/she has the same nationality at the moment of his/her death and has not obtained the Swiss nationality. In the second case, when the last domicile of the deceased is abroad, the succession will be governed by the law nominated by the norm of conflict belonging to the state on whose territory the deceased had the last domicile. For details, see Honsell/Vogt/Schnyder/Berti (Hrsg.), *Internationales Privatrecht. Basler Kommentar*, 3 Auflage, Helbing Lichtenhahn Verlag, 2013, p. 749-768; B. Dutoit, *Droit international privé suisse. Commentaire de la loi fédérale du 18 décembre 1987*, 4 édition, Helbing Lichtenhahn, 2005, p. 299-307; A. Bucher, A. Bonomi, *Droit international privé*, 2 édition, Helbing Lichtenhahn, 2004, p. 219-224.

⁴ We encounter in this category, in general, newer legislations, influenced by the European trend in the matter, such as § 76 of the Czech private international law no. 91/2012, which stipulates that „the succession relations are governed by the law of the state where the deceased had his/her habitual residence at the moment of his/her death”. However, if the deceased had Czech nationality, and at least one of his/her heirs had the habitual residence in the Czech Republic, his/her succession would be governed by the Czech law. Similarly, art. 2633 of the Romanian NCC.

⁵ Telling in this sense is art. 3 of the Code of Napoleon, as in the French law the securities succession is subordinated to the law of the last domicile of the deceased, and the devolution and transmission of real estates, to the law of each of the states on whose territory they are located. Also in this category of dissentient systems we find the countries belonging to the *common law* (*lex domicilii* for the securities succession, *lex rei sitae* for real estates). Art 78 of the Belgian Code of private international law, adopted by the Law of July 16th, 2004, provides: “§1. The

§ 3. *The unification of the conflict rules in the succession matter at European level.*

Promoting and developing an area of freedom, security and justice, based on the free movement of persons, could not ignore the difficulties met in the succession matter showing foreign origin elements. There was a need to ensure greater predictability on determining the competent court or authority to administrate the estate and in establishing the applicable law thus providing effective levers for organizing the successional planning.

In this respect, the European Council, which met in Brussels on November 4-5th, 2004 adopted the "*Hague Program*" on strengthening freedom, security and justice in the European Union, which highlights the need to adopt at a European level of an instrument to unify the rules of conflict of laws in matters of succession, including the rules on international jurisdiction in this matter, ensuring mutual recognition and the enforcement of judgments in the matters of succession and the creation of a European Certificate of Succession. Also, the Brussels European Council of December 10th-11th, 2009 adopted a new multiannual program called "*The Stockholm Program - An open and secure Europe serving and protecting the citizens*", considering the need to extend the principle of mutual recognition to new areas, essential to everyday life, such as successions and wills. Thus, the direction of action for a future envisaged Regulation was launched, attempting, on one hand, to save national traditions and customs in this matter, and, on the other hand, to confer greater predictability for those willing to plan in advance the succession transmission, eliminating the distortions generated by the spirit of classical conflict method.

The Commission published on March 1st, 2005 the *Green Paper on succession and wills*, containing a questionnaire with questions related to the principles and rules of conflict in matters of succession, including related jurisdiction rules that were to be taken to the adoption of a future European instrument in this matter. The answers to the Green Paper were published on the Directorate-General for Justice, Freedom and Security website (http://ec.europa.eu/justice/index_en.htm#newsroom-tab).

Also, at the Commission - Directorate General for Justice and Home Affairs request, the German Notarial Institute (*Deutsches Notarinstitut – DnotI*) in collaboration with Professors Heinrich Dörner (Univ. of Münster) and Paul Lagarde (Sorbonne Univ.), have drawn up a comprehensive study of comparative law and private international law relating to the matters of succession - „*Etude de droit comparé sur les règles de conflits de juridictions et de conflits de lois relatives aux testaments et successions dans les États membres de l'Union européenne*”⁶. The study was elaborated based on 15 national reports, including the final summary report and conclusions, coordinated by Professors Heinrich Dörner and Paul Lagarde.

In October 2009 was launched the Proposal for a Regulation of the European Parliament and of the Council *on jurisdiction, applicable law, recognition and enforcement of court decisions and authentic instruments in matters of succession, as well as the creation of a European Certificate of Succession*. An extensive comment on this project's articles, with proposals to amend or change, was conducted by the *Max Planck Institute in Hamburg - Institut für Ausländisches und Internationales Privatrecht*, entitled "*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*".

succession is regulated by the law of the state on whose territory the deceased had the last habitual residence at the moment of his/her death. §2. Real estate successions regulated by the law of the state on whose territory the real estate is located. However, if the foreign law leads to the application of the law of the state on whose territory the deceased had the last habitual residence at the moment of his/her death, the law of that state is applicable”.

⁶ *Deutsches Notarinstitut – DnotI, Les Successions Internationales dans l'UE. Perspectives pour une Harmonisation / Conflict of Law of Succession in the European Union. Perspectives for a Harmonisation / Internationales Erbrecht in der EU. Perspektiven einer Harmonisierung, Bruxelles, 11.05.2004.*

The study was published in “*Rabels Zeitschrift für ausländisches und internationales Privatrecht*”, vol. 74 (2010), Heft 3 (Juli), p. 522-720.

On July 4th, 2012, was adopted the *Regulation (EU) No. 650/2012* of the European Parliament and of the Council *on the jurisdiction, applicable law, recognition and enforcement of court decisions and the acceptance and enforcement of authentic instruments in matters of succession and the creation of a European Certificate of Succession*.⁷

The Regulation shall apply to the successions of persons who have died since August 17th, 2015 while still allowing the choice of the inheritance applicable law, under the Regulation dispositions, even prior to that date (Art. 83 - *Transitional provisions*)⁸.

§ 4. *The Scope of the Regulation.*

4.1. Material application. The Regulation “applies to successions regarding the deceased persons estates” (art. 1, para. 1). The successions for mortis causa are considered.⁹ Art. 3, para. 1 letter a) defining the concept of succession, states that it “covers any form of transfer of assets, rights and obligations for mortis causa, be it a voluntary transfer as a disposition for mortis causa, or a transfer in the form of the ab intestat succession”. The European legislator adopts a broad conception of the notion of succession, stating in the recital 9 that it should include in its scope “*all civil-law aspects of succession to the estate of a deceased person, namely 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*”. Therefore, the scope of the Regulation is broad, including all matters which traditionally, within the internal law of the states, circumscribe in the successional field, except for some issues with punctual character.¹⁰

Thus, excluded from the scope of Regulation application are the aspects traditionally related to public law, such as those of fiscal¹¹, customs or administrative nature, exclusions which we also encounter formulated in other regulations (Art. 1 of Regulation (EC) no. 44/2001 regarding the jurisdiction recognition and enforcement of court decisions in civil and commercial matters (*Brussels I*)¹² art. 1 of Regulation (EU) no. 1215/2012 on jurisdiction and

⁷ Publ. in JOUE L 201, of July 27th, 2012.

⁸ For an analysis of inter-temporal provisions of the Regulation, see A. Bonomi, P. Wautelet, *Le droit européen des successions. Commentaire du règlement n 650/2012 du 4 juillet 2012*, Bruylant, 2013, p. 334 and the following; von Christoph Schoppe, *Die Übergangsbestimmungen zur Rechtswahl im internationalen Erbrecht: Anwendungsprobleme und Gestaltungspotential*, in IPRax, No. 1/2014, p. 27-33.

⁹ The matter of successions has been explicitly excluded from the application field of Regulation (EC) no. 593/2008 on the applicable law to contractual obligations – art. 1, para. 2, letter c): “the following shall be excluded from the scope of this Regulation: (...) (c) 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, and *wills and succession*” (s.n., DAP). Also see A. Rodríguez Benot, «*La exclusión de las obligaciones derivadas del derecho de familia y de sucesiones del ámbito material de aplicación del Reglamento Roma I*», in *Cuadernos der. transnacional*, 2009, I, p. 124 and next.

¹⁰ In this way, although they belong to succession scope, the matters are excluded from the application sphere of the Regulation if related to the form of the disposition of property upon death orally formulated (art.1, para. 2, pct. f). Art. 27, dedicated to the format conditions of the provisions by reason of death is explicitly considering only “those in written form”.

¹¹ About these aspects, see S. G. Cretti, *Successions internationales. Aspects de droit fiscal*, Helbing Lichtenhahn, Bâle, 2014.

¹² For an ample comment by the articles of this regulation, see *European Commentaries on Private International Law. Brussels I Regulation*, Ed. U. Magnus, P. Mankowski, 2 Revised Edition, Sellier, 2012. Also see, H. Gaudemet-Tallon, *Compétence et exécution des jugements en Europe. Règlement 44/2001, Convention de Bruxelles (1968) et de Lugano (1988 et 2007)*, L.G.D.J., 4e édition, 2010.

the recognition and enforcement of court decisions in civil and commercial matters (recast)¹³, art. 1 of the Regulation (EC) no. 593/2008 on the law applicable to contractual obligations (*Rome I*), art. 1 of Regulation (EC) no. 864/2007 on the law applicable to contractual obligations (*Rome II*). Therefore, are only considered the "civil law aspects" of the inheritance.

Important to note is the exclusion of fiscal nature implications of the successional transmission. Indeed, as shown in recital 10 of the Regulation, "national law to determine, for instance, how taxes and other liabilities of a public-law nature are calculated and paid, whether these be taxes payable by the deceased at the time of death or any type of succession-related tax to be paid by the estate or the beneficiaries. It should also be for national law to determine whether the release of succession property to beneficiaries under this Regulation or the recording of succession property in a register may be made subject to the payment of taxes". Therefore, the successional transmission tax, including its method of calculation, the taxes afferent to the goods that make up the estate, notary taxes and fees, stamp duties afferent to court proceedings, cadastral taxes, etc. shall be determined in accordance with Romanian legislation, regardless of the law applicable to the inheritance. We appreciate, however, that, to the extent the estate includes assets located abroad (movable or immovable property subject to a special tax regime and registration), the calculation of taxes shall be made only by taking into account the assets located in Romania, with the bringing into the heirs view of the obligation to bear the fiscal burdens afferent to the successional transmission in respect of the assets situated abroad, in accordance with the laws of each State on whose territory the assets that make up the estate are found.

Although Romania has concluded several double taxation avoidance conventions, their content does not refer to the tax on successions.¹⁴

¹³ This Regulation shall be applied as of January 10th, 2015, except for the articles 75 and 76, which shall be applied as of January 10th, 2014 (art. 81), abrogating Regulation (EC) no. 44/2001 (art. 80). As for Regulation (EU) no. 1215/2012, see as significant papers, T. Hartley, *Choice-of-Court Agreements under the European and International Instruments*, Oxford Univ. Press, 2013; A. Dickinson, E. Lein, *The Brussels I Regulation Recast*, Oxford (under way of publishing).

¹⁴ For instance, the Convention concluded by the Government of Romania and the Government of the Republic of Bulgaria for the avoidance of double taxation and tax evasion prevention related to the tax on income and on capital, signed in Bucharest on June 1st, 1994, ratified by the Law no. 5/1995 (Romania's Official Gazette no. 7 of January 17th, 1995), provides in art. 1 that it is applied to income obtained by the persons "who are resident in one or both contracting states". Art. 4 provides that the "expression resident of a contracting state means any person who, according to the legislation of that contracting state is submitted to taxation as a result of his/her domicile or residence, of the location of his/her effective management, or of any other criterion of similar nature. This expression does not include a person submitted to taxation in that state only because he/she obtains income from sources located in that state or has the capital placed there" (para. 1). At the same time, if "a natural person is resident of both contracting states, then the state will be established as follows: a) it will be regarded as resident of the contracting state where it has a permanently available dwelling; if it has a permanent dwelling in both contracting states, the respective person will be regarded as resident of the contracting state where his/her personal and economic connections are closer (centre of vital interests); b) if the contracting state, where the respective person has his/her centre of vital interests cannot be determined, or he/she does not have a permanently available dwelling in either of the contracting states, then he/she will be regarded as resident of the state where he/she is usually living; c) if this person is usually living in both contracting states, or in any of them, he/she will be regarded as resident of the contracting state whose national he/she is; d) if this person is a national of both contracting states, or of neither of them, the competent authorities of the contracting states will mutually agree to solve the issue" (para. 2). Consequently, the above mentioned convention considers the income obtained by resident persons. But the tax on inheritance is due irrespective of this quality of the heirs or of the inheritance author. Similar conventions were also signed with other states: for instance, with Estonia (2003, ratified by Law no. 449/2004, Romania's Official Gazette no. 1126/2004), Germany (1973, ratified by Decree no. 625/1973, Official Bulletin no. 197/1973 and a new convention in 2001, ratified by Law no. 29/2002, Romania's Official Gazette no. 73/2002), Greece (1991, ratified by Law no. 25/1992, Romania's Official Gazette no. 46/1992); France (1974, ratified by Decree no. 240/1974, Official Bulletin no. 171/1974), Poland (1994, ratified by Law no. 6/1995, Romania's Official Gazette no. 7/1995), Portugal (1997, ratified by Law no. 63/1999, Romania's Official Gazette no. 194/1999) etc. Otherwise, the signed conventions have a very similar content.

On the other hand, it must be highlighted that, although the successional taxation is excluded from the Regulation scope, it did, however, make the subject to several judgments of the Luxembourg Court, being treated in terms of the capital freedom of movement. Thus, by the Court Decision from September 11th, 2008 in Case C-11/07 - *Eckelkamp*, the Court ruled that the corroborated provisions of former Articles 56 EC and 58 EC (currently Art. 63 and 65 TFUE) "must be interpreted as meaning that they are opposing a national Regulation, such as that at issue in the main proceedings, concerning the calculation of succession taxes and the transfer of immovable properties payable for an immovable property located in a Member State which does not provide the deductibility of debts encumbering this immovable property in case the person whose succession is being administered was not residing, at the time of his/her death, in that State but in another Member State, while this deductibility is provided in case this person, at the same date, was residing in the State in which the immovable property making the object of succession is situated". Also, by the Court Decision from October 15th, 2009 in Case C-35/08, *Busley et Fernandez*, the Court ruled that the former Article 56 EC (currently Art. 63 TFUE) "is opposing the legislation of a Member State regarding the income tax which subordinates the right of individuals resident and fully subjected to tax payment to benefit both from the deduction from the taxable base of losses from the rental and leasing of an immovable property in their production year, as well as the application of degressive depreciation, within determining the income obtained from such an asset, under the condition that the latter is located on the respective Member State territory". Thus, in this exclusion ground conclusion (successions taxation) we note the following reference points:

- a) fiscal aspects related to successional transmission are entirely subject to each Member State national law;
- b) in terms of European law, the matters of succession cannot be separated from the principle of free movement of capital; as the Court stated, "*inheritances consisting in the transfer to one or more persons of the estate left by a deceased person, are included in the Heading XI of Annex I to Directive 88/361, entitled "Personal character capital movement", (...) inheritances, including those having the object of immovable property, constitute movements of capital within the meaning of Article 56 EC, except for the cases where their constituent elements are limited within a single Member State interior (see especially the Decision from February 23rd, 2006 van Hilten-van der Heijden, C-513/03, Rec., p. I-1957, Sections 40-42, Decision from September 11th, 2008, Arens-Sikken, C-43/07, Rep., p. I-6887, Section 30, Decision from January 27th, 2009, Persche, C-318/07, not yet published in the Repertoire, Sections 26 and 27, as well as Block Decision, cited above, Section 20)*".¹⁵
- c) concerning the restrictions on the free movement of capital, the Court stated that the measures prohibited by European law "include those likely to discourage non-residents from making investments in a Member State or to discourage the Member State residents from making investments in other countries"¹⁶. Also, "may be regarded as such restrictions not only the national measures susceptible to impede or limit the purchase of an immovable property located in another Member State, but also those which are likely to discourage the keeping of such an asset";¹⁷
- d) the fact that successions taxation is governed by the legislation belonging to each Member State on whose territory are found the assets composing the estate, does not exclude, under the principle of free movement of capital, taking into consideration, in

¹⁵ Decision of October 15th, 2009, in the case C-35/08, *Busley et Fernandez*, pct. 18.

¹⁶ *Ibidem*, pct. 20. Also see the Decision of January 25th, 2007, Festersen, C-370/05, Republished, p. I-1129, point 24, Decision of December 18th, 2007, A, C-101/05, Republished, p. I-11531, point 40, as well as the Decision of January 22nd, 2009, STEKO Industriemontage, C-377/07, point 23.

¹⁷ *Ibidem*, pct. 21. Also see the Decision of January 22nd, 2009, STEKO Industriemontage, C-377/07, point 24.

determining the net asset of the inheritance, the expenses made with the assets from the estate situated on the territory of another Member State;

- e) considering that there is no unitary policy among the Member States regarding the taxation of inheritances, but also taking into consideration the negative impact that the lack of coordination in this field has on the persons involved predictability, due to the absence of appropriate ways of avoiding cumulative taxation, the European Commission issued a *Recommendation on the avoidance of double taxation in case of successions*, from 12.15.2011¹⁸, aimed at "resolving cases of double taxation, so that the overall level of tax applied on a given inheritance is not greater than the applicable level if only the Member State with the highest level of taxation between the involved Member States would have had fiscal jurisdiction over all elements of the inheritance" (Sect. 3 - General Purpose)¹⁹. But, as they talk about a recommendation, it is not binding on the Member States, but gives only a possible direction, especially by the adequacy of the national laws in this field.

Along with exclusions based on the public law character of the concerned matters, the Regulation mentions a number of other exclusions, based on the lack of successional qualification. Are thus excluded from the scope of the Regulation, according to art. 1, para. 2:

- a) *the natural persons status and the family relationships and the relationships which, in compliance with the applicable law are considered as having comparable effects*. Thus, the marital status and the family relationships exceed the scope of the Regulation, even if the principles of legal devolution are founded on family relationships that connect the legal heirs with the author of the inheritance individual. Therefore, the determination of these family ties constitute a *preliminary issue*, subject, in terms of private international law, to the rules of conflict belonging to the forum (*lex fori*). Thus, for example, the conclusion of marriage is governed by art. 2586 NCC (regarding the substantive conditions) and art. 2587 NCC (regarding the formal conditions)²⁰, the nullity of marriage by art. 2588 NCC, the effects of the marriage by art. 2589 et seq. NCC, the filiation by art. 2603-2606 NCC, the adoption by art. 2607-2610 NCC. The exclusion targeted by the Regulation also regards the relationships that, according to the applicable law, "are considered to have comparable effects" with the family relationships. Are here considered different forms of unions and partnerships between persons of the same sex or different sex, known in several Member States;²¹

¹⁸ European Commission, Brussels, 15.12.2011, C (2011) 8819 final.

¹⁹ The text of the document recommends the member states to allow the exemption from the tax on succession considering the tax applied by another member state on the following goods: a) real estates on the territory of the other member state; b) movables which are professional premises of a permanent premise located on the territory of the other member state. At the same time, as regards the movables, other than the "professional premises" "a member state to which neither the deceased person, nor the heir have any personal relation, should refrain from applying the tax on succession, on condition that the respective tax is applied by another member state based on the personal relation of the deceased person and/or of the heir to that member state" (pct. 4.2.).

²⁰ However, we stress that the *marriage dissolution* is regulated by uniform rules at European level: Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 – regarding the international competence on divorce and the separation from bed and board, respectively the Regulation (EU) no. 1259/2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (*Roma III*) – regarding the applicable law to divorce and the legal separation. As reference works, see Ch. Althammer, *Brüssel IIa. Rom III. Kommentar*, C. H. Beck Verlag, München, 2014; U. Magnus, P. Mankowski, *Brussels IIbis Regulation (European Commentaries on Private International Law)*, Sellier, 2012; M. Ni Shuilleabhain, *Cross-Border Divorce Law: Brussels II Bis (Oxford Private International Law Series)*, Oxford Univ. Press, 2010; Th. Rauscher (Ed.), *Europäisches Zivilprozeß- und Kollisionsrecht 2: Bearbeitung 2010*, Sellier, 2010.

²¹ Our Civil Code is surprisingly prohibiting such unions or partnerships, refusing to recognize them in Romania, even if they are validly established abroad and even between foreign nationals, no matter if their national law allows them or not. Art. 277, para. 3 of NCC is categorical about that: "the civil partnerships between persons of

- b) *natural persons legal capacity*. It is about the **general capacity** of the person subjected, traditionally, to the national conflict rule. According to art. 2572 NCC, "the

opposite genre or of the same genre concluded or contracted abroad, either by Romanian nationals, or by foreign nationals are not recognized in Romania". We are in front of a norm of public order of the Romanian private international law. However, according to art. 2564 NCC, "the application of the foreign law is removed if it breaches the public order of the Romanian private international law (...). In case the enforcement of the foreign law is removed, the Romanian law is applied." However, we think the life span of this code article (art. 277) will not be very long, especially in the context in which the proposal has already been launched at European level: Draft Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships – Brussels, 16.3.2011 (COM(2011) 127 final). Aiming at facilitating trans-border recognition of civil partnerships, the Munnich Convention of September 5th, 2007 regarding recognition of registered partnerships was adopted under the aegis of the International Commission of Civil Status (CIEC). Art. 1 of the Convention defines the partnership as being "a commitment of joint living between two persons of the same genre or of different genre, which results in a registration by a public authority, excluding a marriage". For a comment on this Convention, see G. Goldstein, H. M. Watt, "La méthode de la reconnaissance à la lueur de la Convention de Munich du 5 septembre 2007 sur la reconnaissance des partenariats enregistrés", in *Journal du droit international* (Clunet) - Octobre 2010 - n° 4, p. 1085-1125. The authors understand by registered partnership "a relation of patrimonial or extra-patrimonial nature between two persons, irrespective of their sexual orientation, who make up an unmarried couple, persons living however as a married couple, or live together as a family, a relation which results in a registration and to whom the law confers similar effects to a marriage" (trad.n., DAP). Also see K. Boele-Woelki, A. Fuchs (eds.), *Legal Recognition of Same-sex Relationships in Europe. National, Cross-Border and European Perspectives*, 2nd ed., Intersentia, 2012; M. Revillard, « Le PACS, les partenaires enregistrés et les mariages homosexuels dans la pratique du droit international privé », *Deffrénois*, juin 2005, p. 461; M. Schmitt, « L'incidence en France des lois Belges et Néerlandaises introduisant le mariage homosexuel », *JCP* n°1, January 2004, 1006; Bureau Permanent de la Conférence de la Haye de droit international privé, *Aspects de droit international privé de la cohabitation hors mariage et des partenariats enregistrés: Document préliminaire no. 9*, La Haye, May 2000; A. Oprea, "About recognition of matrimonial status obtained abroad and European protection of the right to a family life" in *Studia UBB Iurisprudentia*, No. 4/2012, available on <http://studia.law.ubbcluj.ro/articol.php?articolId=522>; also see in this matter, CEDO resolutions, July 24th, 2003, *Karner c. Austria*, Af. 40016/98; CEDO, June 24th, 2010, Af. 30141/04, *Schalk & Kopf c. Austria*; CEDO, Resolution of March 15th, 2012, *Gas and Dubois c. France*, n° 25951/07, CEDO, February 19th, 2013, X and others c. Austria CEDO, November 7th, 2013, *Vallianatos and others c. Greece*.

Also see in this matter, CJCE Decision of April 1st, 2008, in the case C-267/06, *Tadao Maruko c. Versorgungsanstalt der deutschen Bühnen*, which established that a survivor's pension within a system of professional insurance falls within the application field of Directive 2000/78 of the Council of November 27th, 2000, and the combined provisions of Articles 1 and 2 of Directive "preclude legislation such as that at issue in the main proceedings under which, after the death of his life partner, the surviving partner does not receive a survivor's benefit equivalent to that granted to a surviving spouse, even though, under national law, life partnership places persons of the same sex in a situation comparable to that of spouses so far as concerns that survivor's benefit". As regards the marriages between persons of the same genre, see H. Fulchiron, "Le mariage entre personnes de même sexe en droit international privé au lendemain de la reconnaissance du « mariage pour tous », in *Journal du Droit International* (Clunet), No. 4/2013, p. 1055-1113, written from French perspective, considering the new French law of May 17th, 2013 (Loi n° 2013-404 du 17 mai 2013 ouvrant le mariage aux couples de personnes de même sexe) which instates a new rule of the conflict of laws, according to which "deux personnes de même sexe peuvent contracter mariage lorsque, pour au moins l'une d'entre elles, soit sa loi personnelle, soit la loi de l'État sur le territoire duquel elle a son domicile ou sa résidence le permet." The law introduces two new articles in the French Civil Code – articles 202-1 and 202-2 of the Civil Code, the first submitting the basic conditions of the marriage, as regards each of the spouses, to the personal law at the moment of marriage celebration (para.1), but also sanctioning an exception, in para.2: "(t)outefois, deux personnes de même sexe peuvent contracter mariage lorsque, pour au moins l'une d'elles, soit sa loi personnelle, soit la loi de l'Etat sur le territoire duquel elle a son domicile ou sa résidence le permet." The role of this provision is to allow marriage celebration between persons of the same genre if one of the would-be spouses is French or has the domicile or residence in France. Art. 202-2 regards marriage as valid, from the point of view of the form, if it complies with the formalities imposed by the law of the state on whose territory it was celebrated: "(l)e mariage est valablement célébré s'il a été conformément aux formalités prévues par la loi de l'Etat sur le territoire duquel la célébration a eu lieu." The law also changes art. 143 of the French Civil Code, stipulating that "(l)e mariage est contracté par deux personnes de sexe différent ou de même sexe." Also see *Circulaire du 29 mai 2013 de présentation de la loi ouvrant le mariage aux couples de personnes de même sexe (dispositions du Code civil)*, published in *Bulletin Officiel du Ministère de la Justice* (BOMJ), n°2013-05 du 31 mai 2013 – JUSC1312445C.

marital status and individual capacity are governed by its national law, it not otherwise stipulated by special provisions” (para. 1). The natural person’s national law is the law of the State whose nationality he/she has (art. 2568, para. 1 NCC) and if he/she has more nationality, the law of the “effective nationality”, meaning “the law of the State whose nationality he/she has and to which it he/she is most closely connected, in particular by his/her habitual residence” (art. 2568, para. 2 NCC). The habitual residence law shall also apply in respect of stateless persons and refugees (art. 2568, para. 3 and 4 NCC).

Thus, the capacity to accept an inheritance or waive it²² shall be governed by the national law of the person making such acts. Also, the protective measures for the incapacitated²³ individuals including their representation in the probate procedure shall be governed by the law governing such protection. In case of minors there shall be incidents on the international jurisdiction and the recognition of decisions regarding their legal representation, Brussels II bis Regulation provisions and regarding the applicable law, the provisions of the Hague Convention from October 19th, 1996 on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and the measures for the children protection.²⁴

However, the *specific (“special”) aspects of the capacity*²⁵ are integrated within the scope of Regulation, aspects which have a successional²⁶ incidence, such as: the capacity to inherit (art. 23, para. 2 letter c of the Regulation), the capacity to perform acts of disposition for mortis causa²⁷ (art. 26, para. 1 letter a of the Regulation), the

²² For some discussions, see Fr. Sauvage, “L’option et la transmission du passif dans les successions internationales au regard du règlement européen du 4 juillet 2012” in G. Khairallah et M. Revillard (ed.), *Droit européen des successions internationales. Le Règlement du 4 juillet 2012*, Deffrénois, 2013, p. 109-112. In exchange, the conditions and effect of the succession acceptance or waiver, or to the legate will, on the contrary, be submitted to the law of succession – *lex successiois* (art. 23, para. 2, letter e).

²³ For instance, the incapacity of the minors and of the court banned to dispose by liberalities (art. 988, para. 1, NCC), falling within the incapacity to use, consequent to the narrowing of the possibility to conclude such documents and for the purpose of protection (*absolute incapacity* to make a voluntary settlement) will be submitted to the personal law and not to succession law. In exchange, the *relative incapacity* to dispose by liberalities (art. 988, para. 2, art. 990 and art. 991 NCC), as they relate to persons in their full exercise capacity, usually having the ability to make a voluntary settlement, except in favor of certain categories of persons, will be submitted to the law governing the validity conditions of the liberality act, that is, by the case, to the law applicable to donation – *lex contractus*, established according to art. 3 or 4 of the Regulation (EC) no. 593/2008 on the applicable law to contractual obligations (*Roma I*) – or to the law which would have been applicable to the succession of the respective person if he/she had deceased on the day the provision was drafted (art. 26, para. 1, letter b of Regulation 650/2012).

²⁴ Ratified by the Law no.361/200, published in Romania’s Official Gazette, Part I, no. 895 of December 28th, 2007 and effective as of January 1st, 2011. Also see the Decision of the Council 2003/93/EC of December 12th, 2002 authorizing the member states, in the interest of the Community, to sign the Hague Convention of 1996 regarding the competence, the applicable law, the recognition, enforcement and cooperation regarding parental responsibility and the measures for children’s protection, published in the Official Journal of European Communities (JOCE) no. L 48 of February 21st, 2003.

²⁵ For that matter, in the law of the member states, the *special incapacities* are traditionally submitted to the applicable law of the respective act. The Romanian regulator acted in a similar way: “the special incapacities related to a certain judicial relation are submitted to the law applicable to the respective judicial relation” (art. 2572, para. 2 NCC).

²⁶ Succession capacity is submitted to the law applicable to succession, established according to the Regulation criteria (the last habitual residence of the author of the inheritance (art. 21), respectively, the chosen law, according to art. 22).

²⁷ The persons’ capacity to conclude disposition documents by reason of death is submitted to the law governing the substantive conditions of the document (art. 26 para. 1, letter a). The same law shall be applied, among others, also regarding conventional representation in drafting a disposition document by reason of death (art. 26 para. 1, letter c), but also as regards the vices of consent (art. 26 para. 1, letter e). In other words, we speak about the law which, based on the regulation, would have been applicable to the succession of the person who consented to the document conclusion if he/she was deceased on the day of the document drafting (art. 24 – hypothetical successoral

special incapacities (“special cases” of prevention) to dispose through mortis causa acts in favor of certain persons or to receive succession property from the person making the disposition (art. 26, para. 1, letter b). In other words, according to the Regulation, the concept of validity for the mortis causa disposition also includes the special causes of incapacity that prevent the individual who makes the disposition from making a liberation in favor of certain persons or restrict the capacity of some beneficiaries to receive liberalities from certain people²⁸; this solution - to subject these incapacities to the hypothetical successional status (*hypothetisches Erbstatut / legge successoria ipotetica / loi successorale anticipée*) - is one widely accepted in the Member States private international law.²⁹ The subjection of the “capacity” to conclude mortis causa disposition acts to the hypothetical law of succession is a rational solution that takes into account, on the one hand, the act of disposition’s successional purpose, its effects occurring only from the time of the succession opening, and in its consideration, and, on the other hand, the need for predictability of the person who concludes the act, who is unable to comply, at this time, to other rigors, of substance and form, than those imposed by a law of succession which could be known with certainty - the law of succession that would govern the succession if the author of the act would die on the day of its conclusion. In this perspective, the concept of “capacity” is not only related to the personal “skills” of the individual that concludes the act, by his/her judgment, but is considering the admissibility of the act’s conclusion according to the provisions of the competent law of succession. For example, a common testament, according to German law of succession, shall be

status / *hypothetisches Erbstatut*). However, we have to distinguish between the “capacity” to conclude a document *mortis causa*, understood as admissibility or permissiveness (*Zulässigkeit*) – submitted to the hypothetical successional status and the capacity of the minor (*Rechtsfähigkeit*) to conclude such a document, including his/her legal representation, understood as a measure of protection (*Vormundschaftsrecht*), the latter being however, submitted to the law of protection, usually to the law of the minor habitual residence (art. 15 of the Hague Convention of October 19th, 1996 regarding the children protection). As for the persons of age who are incapacitated, as Romania is not part of the Hague Convention of January 13th, 2000 regarding international protection of adults, their national law shall be applied (*lex patriae*), according to art. 2572 NCC.

²⁸ According to A. Bonomi, P. Wautelet, *Le droit européen des successions. Commentaire du Règlement n° 650/2012 du 4 juillet 2012*, Bruylant, 2013, p. 421.

²⁹ In this sense, art. 26 of the Introductory Law of German Civil Code (EGBGB), para. 1: “(e)ine letztwillige Verfügung ist, auch wenn sie von mehreren Personen in derselben Urkunde errichtet wird, hinsichtlich ihrer Form gültig, wenn diese den Formerfordernissen entspricht (...) des Rechts, das auf die Rechtsnachfolge von Todes wegen anzuwenden ist oder im Zeitpunkt der Verfügung anzuwenden wäre (pct. 5). According to para. 2 of art. 26 EGBGB, the norms limiting the forms of dispositions by reason of death by reference to age, nationality or other personal qualities of the testator will be qualified as related to the form. The same rule will also be applied to the conditions required for witnesses as regards the validity of a disposition by reason of death: “(d)ie Vorschriften, welche die für letztwillige Verfügungen zugelassenen Formen mit Beziehung auf das Alter, die Staatsangehörigkeit oder andere persönliche Eigenschaften des Erblassers beschränken, werden als zur Form gehörend angesehen. Das gleiche gilt für Eigenschaften, welche die für die Gültigkeit einer letztwilligen Verfügung erforderlichen Zeugen besitzen müssen.” Also see, in the same sense, § 30 of the Austrian federal law IPRG; art. 9 pct. 8 of Spanish Civil Code; art. 47 of the Italian law regarding the reform of the Italian system of private international law no. 218 of May 31st, 1995 (“*La capacità di disporre per testamento, di modificarlo o di revocarlo è regolata dalla legge nazionale del disponente al momento del testamento, della modifica o della revoca*”, that is the same law which, in the Italian law, governs succession, according to art. 46; in other words, the capacity to test, change or revoke the will is submitted to the hypothetical successional law, that is to the national law of the testator at the moment of testamentary disposition drafting); art. 94 of the Swiss federal law of private international law, of December 18th, 1987: “(a) person may make a disposition by reason of death if, at the time of disposition, he had testamentary capacity under the law of the State of his domicile or habitual residence or under the law of one of the States of which he was national”; art. 20, para. 5 of the Turkish private international law, no. 5718, of November 27th, 2007 (MÖHUK) – about this law; see G. Güngör, *The New Turkish Act on Private International Law and International Civil Procedure, in Specificity and complementarity in European private law. Conflict of laws and jurisdictions and European judicial integration* (Ed. Dan A. Popescu), Ed. Hamangiu, 2012, p. 528 and the next, etc.

concluded only between spouses (§ 2265 BGB)³⁰ or the members of a registered partnership (§ 10 Abs.4 of *Lebenspartnerschaftsgesetz* – LParG)³¹. Likewise, as we have seen, the capacity to test is subjected (along with the other substantive conditions of validity) to the law of succession³², determined according to the regulations, given its successional purpose (art. 26, para. 1 letter a);

- c) *questions relating to the disappearance, absence or presumed death of a natural person.* Although the law applicable to the succession under the Regulation is governing, among others, the "causes, time and place of the opening of succession" (art. 23, para. 2, letter a) determining the moment of death or, where appropriate, of the presumed date of death, given the circumstances in which it occurred, shall be made by applying the Romanian rule of conflict. In fact, according to art. 2573 NCC it is established as a general that "the beginning and termination of personality are determined by each person's national law". Also, according to art. 2574 NCC, the judicial declaration of death, the date of death setting, including the presumed date of death and the assumption that the missing individual is alive, shall be governed by the national law of the missing person - determined according to art. 2568 NCC - or, if that law cannot be identified, the Romanian law shall apply;
- d) *matters related to matrimonial regimes patrimonial aspects and the patrimonial aspects of relationships deemed, according to the law applicable to them, to have comparable effects to the ones of marriage.* If the author of the succession was, at the time of death, a married person, the composition of the estate³³ cannot ignore the rules of liquidation specific for the matrimonial regime governing the patrimonial effects of the relationship with the surviving spouse. In other words, the matrimonial regime has a direct impact on the regime of the assets acquired by the author of the inheritance. Determining the composition of the estate cannot be made until after the matrimonial regime was previously liquidated, taking its form into account. As it results from recital no. 12 of the Regulation "this Regulation should not apply to matrimonial regimes` patrimonial aspects, including matrimonial conventions, as they are known in some legal systems, to the extent in which such regimes do not have the object of matters relating to succession and the patrimonial aspects of the relationships deemed to have comparable effects to the ones of the marriage. The competent authorities regarding to a certain succession under this Regulation should, however, depending on the situation, consider resolving matrimonial regime patrimonial aspects or of a

³⁰ § 2265 of the German Civil Code (BGB) has the following content: "Ein gemeinschaftliches Testament kann nur von Ehegatten errichtet werden."

³¹ § 10 Abs. 4 of *Lebenspartnerschaftsgesetz* – LParG provides: "Lebenspartner können ein gemeinschaftliches Testament errichten. Die §§ 2266 bis 2272 des Bürgerlichen Gesetzbuchs gelten entsprechend."

³² According to M. Revillard, in G. Khairallah et M. Revillard (ed.), *Droit européen des successions internationales. Le Règlement du 4 juillet 2012*, Defrénois, 2013, p. 82 (no. 184).

³³ *The succession patrimony* includes the goods the author of succession left in his/her patrimony at the moment of his/her death. The establishment of this patrimony can be done only considering the liquidation rules of the existing matrimonial regime. On the other hand, the succession patrimony is distinguished from the *calculation estate of available reserve and quotity*, the latter being a broader notion, including "the patrimony the *de cuius* would have left if he/she had not made donations, that is a fictitiously reconstituted patrimony (accounting, by calculation on paper)" – D. Chirică, *Treaty of civil right. Successions and liberalities*. C. H. Beck, București, 2014, p. 410. According to art.1091, para. 1 NCC, the establishment of the calculation estate, depending on which the succession reserve and the available quotity are determined, is done considering the following operations: a) the establishment of the gross assets of inheritance, "by summing up the value of the existing goods in the succession patrimony on the date of inheritance opening (art.1091, para. 1, letter a); b) the establishment of the net assets of inheritance, by deducing the succession liability (art. 1091, para. 1, letter b); c) the fictitious reunion ("for calculation") of the value of donations made by the inheritance author (art. 1091, para. 1, letter c). In its turn, the *calculation estate* is distinguished from the *shareable estate*, the latter including only the succession goods submitted, based on the law or on the will, to universal transmission or with universal title, being therefore excluded the different ones with private title (*Ibidem*).

similar patrimonial regime of the deceased when determining the estate of the deceased and the respective shares of the beneficiaries". Therefore, from the scope of the Regulation are excluded the aspects of matrimonial regimes or patrimonial regimes liquidation considered to have effects comparable to marriage. The law applicable to the matrimonial regime is determined according to the rules of conflict belonging to each Member State³⁴. Thus, according to art. 2590 NCC, the law applicable to the matrimonial regime is the law chosen by the spouses, who can choose between: a) the law of the State on which territory one of them has his/her habitual residence at the date of making the choice; b) the law of the State whose nationality any of them has on the date of making the choice or c) the law of the State where they establish their first common habitual residence after the marriage. In the absence of choice, the matrimonial regime is governed by the law which, according to art. 2589, para. 1 NCC is applicable to the general effects of marriage, namely the common habitual residence of the spouses law or, in default, the law of their common nationality or, in default, the law of the State on which territory the marriage was solemnized. This law (that governs the general effects of marriage) shall also apply on the primary regime, from which the spouses may not derogate, irrespective of the chosen matrimonial regime (art. 2589, para. 2 NCC).³⁵

³⁴ At European level, the European Commission presented on March 16th, 2011, a draft regulation meant to harmonize the norms of private international law regarding matrimonial regimes – *Proposal for a Council regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes*, COM (2011) 126 final. The draft regulation defines the matrimonial regime as being the "set of rules concerning the property relationships of spouses, between the spouses and in respect of third parties" (art. 2, letter a), and the matrimonial convention is defined as being "the agreement by which spouses organise their property relationships between themselves and in relation to third parties" (art. 2, letter b). The draft regulation aims at regulating all civil aspects regarding matrimonial regimes, both in aspects dealing with the current administration of the spouses' goods, and in those related to the liquidation of matrimonial regime, as a result of the spouses separation or the death of one of them, however excluding from its application sphere, among others, the aspects related to the validity and effects of liberalities [submitted to Regulation Roma I – Regulation (EC) no.593/2008 of the European Parliament and of the Council of June 17th, 2008 on the applicable law to contractual obligations (*Roma I*) (JO L 177, 4.07.2008, p. 6), while as regards succession effects, related to their impact on succession reserve, to Regulation no. 650/2012], the publicity of these rights, the succession rights of the surviving spouse, company contracts concluded between spouses, the natural of real rights over the goods and the publicity of such rights. *As for the international competence*, seeking that the various connected procedures are assigned to the competence of the courts of the same member state, the Proposal assured the correspondence between the rules to set up courts competence on the liquidation of matrimonial regime and those already existing in other European instruments. In this way, the court to which succession matters are referred, according to art. 4 and the following, of Regulation (EU) no. 650/2012, shall also have jurisdiction to rule on matters of the matrimonial property regime arising in connection with the application (art. 3 of the Proposal Regulation). In the same way, the court, to which a divorce petition, a legal separation or a marriage annulment were referred, according to art. 3 of Regulation (EC) no. 2201/2003 (*Bruxelles IIbis*), will be able, "in case of such an agreement between spouses, to rule upon the aspects of matrimonial regime related to the request" (art. 4 of the Proposal Regulation). *As for the applicable law*, art. 16 of the Draft Regulation allows the spouses to choose one of the following laws: (a) the law of the State of the habitual common residence of the spouses or future spouses, or (b) the law of the State of habitual residence of one of the spouses at the time this choice is made, or (c) the law of the State of which one of the spouses or future spouses is a national at the time this choice is made.

Internationally, we encounter two main instruments regarding matrimonial regimes, adopted under the aegis of Hague Conference of Private International Law: Hague Convention of July 17th, 1905, relating to conflicts of laws with regard to the effects of marriage on the rights and duties of the spouses in their personal relationship and with regard to their estates (signed by Romania on July 17th, 1905 and effective on August 22nd, 1912) and the Hague Convention of March 14th, 1978, on the law applicable to matrimonial property regimes. The Convention is in force since September 1st, 1992, in France, Luxembourg and The Netherlands. Both conventions refer only to married couples.

³⁵ It is worth mentioning that, according to art. 2589, para 3 NCC, the rights of the spouses over the family dwelling, including the legal regime of the documents over that dwelling are submitted to the law applicable in the place where the dwelling is located (*lex rei sitae*). The solution is arguable, considering that the finality of this

Therefore, the law which shall be applied in relation to the matrimonial regime liquidation may coincide or differ from the one applicable to the deceased spouse succession. For example, if the law chosen by the spouses to apply to their matrimonial regime is the law of the State on which territory the author of the succession had his/her habitual residence at the date of making the choice (art. 2590, para. 2 letter a), the habitual residence which he/she kept until the time of death, not choosing as applicable law to the succession its nationality law, or unless the law chosen by the spouses in respect of the matrimonial regime is the law of the State of the deceased spouse nationality (art. 2590, para. 2, letter b), the law that he/she has chosen, in his/her turn, pursuant to art. 22 of Regulation (EU) no. 650/2012, to apply to his/her succession - then the two laws (the law of the matrimonial regime and the one applicable to the succession) shall coincide. Conversely, if, for example, the law chosen by the spouses to apply to their matrimonial regime is the law of the habitual residence of the surviving spouse or the law of the habitual residence of the deceased spouse, existing at the time of making the choice, but that no longer corresponds with the last habitual residence or if the latter has chosen his/her nationality law as applicable to the succession, then the two laws shall differ.

If the applicable law on matrimonial regime liquidation differs from the law applicable to the succession, qualification problems may arise. For example, § 1371 of the German Civil Code (BGB) establishes that in case of liquidation of the legal regime of participation in acquisitions (*Zugewinnngemeinschaft*) following the death of a spouse, the accumulated purchases equalization (*Ausgleich des Zugewinns*) shall be made through increasing by a quarter the legal succession share (*ab intestat*) due to the surviving spouse³⁶. They estimate, according to the majority opinion in the German doctrine, that this rule is applicable if the matrimonial regime of the spouses is governed by the German law, even if the law applicable to the succession of the deceased spouse is a foreign law (a law other than the German one)³⁷. Another example that could raise qualification issues is the revocation of wills as an effect of a subsequent marriage conclusion by the testator (*revocation by subsequent marriage*), revocation case known in Anglo-Saxon countries. In the English law, starting from the purpose of the special rule of wills revocation, namely to protect the surviving spouse, the jurisprudence qualified this revocation case as pertaining to the spouses patrimonial relationships regime³⁸ and not to the law of succession. In contrast, in the American law, this revocation case receives a successional qualification.

institution is that of protecting the non-proprietary spouse, having no connection with the real estate location, but only with the law governing the general effects of the marriage. Certainly, to protect the third parties of the state where the real estate is located, the obligation could have been imposed to meet the publicity requirements in the real estate registry known by the country where the respective real estate is located.

³⁶ § 1371 BGB, para. 1, has the following content: “(w)ird der Güterstand durch den Tod eines Ehegatten beendet, so wird der Ausgleich des Zugewinns dadurch verwirklicht, dass sich der gesetzliche Erbteil des überlebenden Ehegatten um ein Viertel der Erbschaft erhöht; hierbei ist unerheblich, ob die Ehegatten im einzelnen Falle einen Zugewinn erzielt haben.”

³⁷ Cf. H. Dörner, *Internationales Erbrecht*, Art. 25 EGBGB, in *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch, Einführungsgesetz zum BGB*, Sellier – de Gruyter, Berlin, 2007, nr. 34. Also see A. Bonomi in A. Bonomi, P. Wautelet, *op. cit.*, p. 84, no. 28.

³⁸ Cf. *Dacey, Morris and Collins on The Conflict of Laws*, Fifteen Edition, vol. 2, Sweet & Maxwell, Thomson Reuters, 2012, Rule 159, nr. 27-089, p. 1443: “a marriage *ipso facto* revokes any will made before marriage by either party to the marriage”. To determine if a will was revoked as a result of a marriage celebrated later, the domicile law should be considered at the moment of marriage celebration, and not the law of the last domicile, this revocation reason not being related to the succession status: “the question whether a marriage revokes a will as regards movables is determined by the law of the domicile, and that the relevant time is that of the marriage, not the death, of the testator. Thus, if a man makes a will and marries while domiciled in Scotland (country in which the testator’s marriage has no influence over the effects of the previous wills – a.n.), his will is not revoked by the

e) *maintenance obligations, other than those for mortis causa*. The basis of this exclusion is obvious, given that the private international law aspects relating to the maintenance obligations are subject of concern for a separate Regulation - the Council Regulation (EC) no. 4/2009 from December 18th, 2008 on the jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.³⁹ However, it is true that some successional systems award to some close relatives of the deceased, still in a state of economic dependence with him/her during his/her life, certain rights representing succession tasks, in the form of periodic patrimonial prestations (pensions, lump sums). For example, in some *common law* countries, in the absence of the forced heirship institution, the protection of certain relatives of the deceased is provided by the so-called "family provision". The law confers the court, at the request of the concerned person, the possibility to discretionary dispose that part of the successional assets shall go to certain persons to whom the deceased has not left (sufficient) property by will, if his/her last domicile was in England or Wales. According to Section 1 of The Inheritance (Provision for Family and Dependants) Act, from 1975, the categories of persons who could benefit from such an advantage are: a) the surviving spouse; b) a former spouse of the *de cuius* provided he/she has not remarried; ba) any person who has spent the last two years prior to the death in the same house with the author of the inheritance; c) a child of the *de cuius*, born or only conceived at the date of the testator's death; d) any person who, although not a child of the *de cuius*, during his marriage was considered or recognized by the deceased as a child of his marriage; e) any person who, immediately before the death of the *de cuius*, was financially supported in whole or in part, by the *de cuius*.⁴⁰

In fact, according to art. 23, para. 2, letter h of the Regulation (EU) no. 650/2012, the applicable law of succession shall regulate both the forced heirship regime and other restrictions on the freedom to test and the "claims that the people close to the deceased may have against the estate or the heirs", these rights ("claims") performing a function similar to the forced heirship. As shown⁴¹, the distinction between maintenance obligations of providing food incumbent to the author of the inheritance and those resulting from his death shall be made by taking into account the temporal criterion. If the *de cuius* was obliged to maintenance during the his/her life, the survival of this obligation shall depend on the law governing this obligation prior to

marriage, even if he subsequently becomes domiciled in England and remains domiciled there until his death" (*Ibidem*). The same qualification will also be applied, according to the English law, in case the will has as object real estates: "If the rule as to revocation of a will by the marriage is part of the matrimonial law and not of the testamentary law, it is difficult to see why or how there can be any distinction in this respect between movables and immovables" (Davies v. Davies (1915) *apud Dicey, Morris and Collins on The Conflict of Laws*, Fifteen Edition, vol. 2, Sweet & Maxwell, Thomson Reuters, 2012, Rule 159, no. 27-091, p. 1444-1445).

³⁹ Published in JOUE L7 of January 1st, 2009. As regards this regulation, see I. Burduf, V. Onaca, "Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, the Hague Protocol and Conventio of November 23rd 2007 on the applicable law to maintenance obligations and on the International Recovery of Child Support and other Forms of Family Maintenance", Part I, in Revista Română de Jurisprudență (RRDJ) (*The Romanian Jurisprudence Journal*), No. 3/2011, p. 291-344; *idem*, Part II, in RRDJ, no. 4/2011, p. 301-325; *idem*, Part III, in RRDJ, no. 5/2011, p. 268-296; *idem*, Part IV, in RRDJ, no. 6/2011, p. 223-240.

⁴⁰ For details, see Parry & Clark, *The Law of Succession*, Eleventh Edition, Sweet & Maxwell, London, 2002, p. 154 and next; J. Denker, in *European Succession Laws* (Hayton ed.), Jordans, 2002, p. 92: "There is no fixed definition as to what is 'reasonable financial provision' (which is measured either by the surviving spouse standard or alternatively by the lesser maintenance standard) because this will always depend on all the circumstances of the case: the size of the estate, the needs and assets of the person making a claim (taking account of provision made for him by the deceased in his lifetime, eg under trusts), the needs and assets persons who would be prejudiced by the claim, the earning power of the claimant, etc."

⁴¹ A. Bonomi, in A. Bonomi, P. Wautelet, *op. cit.*, p. 88, no. 34.

death. On the contrary, the birth of such a maintenance obligation in the trust of succession or the heirs shall depend on the law of succession applicable in the case⁴². It is noteworthy that the persons who can benefit from this right is much broader than the categories of forced heirs from the continental system. The probate court (*probate court*) can order in their favor either periodic payments, or a global cash amount, or the ownership transfer to some successional assets. An application for the award of such rights must be made personally, within 6 months after the initiation of the *Grant of Probate* procedure.

- f) *the formal aspects of the provisions on patrimonial aspects for mortis causa made in an oral form*. The Regulation governs the formal conditions of dispositions of mortis causa within art. 27, and is limited to those "concluded in written form" being explicitly excluded the ones "made in an oral form" (art. 1, para. 2, letter f of the Regulation). Oral wills are prohibited in some countries⁴³, while in others they are allowed in extraordinary circumstances.⁴⁴ In turn, the Hague Convention of October 5th, 1961 on the conflicts of laws in the matter of the testamentary dispositions form - applicable according to art. 75, para. 1, para. 2 of the Regulation, in the relations between Member States which are parties to this convention, instead of art. 27 - provides in art. 10 the possibility of an exception allowed for each contracting State to not recognize orally made testamentary dispositions, except in case of exceptional circumstances, by one of its nationals who does not possess another nationality. But, since such an exception would not have been possible on the Regulation, the European legislator considered appropriate to exclude from its scope the formal validity of oral testamentary dispositions.

Consequently, States which have ratified the Hague Convention of October 5th, 1961 on the conflicts of laws relating to the testamentary dispositions form without reserving the application of Art. 10, shall subject these wills to the alternative rules of conflict provided by art. 1, considering them valid to the extent that at least one of the national laws listed in this article recognizes them. Instead, the contracting Member States which have made use of the right to reserve the application of art. 10 (Belgium, Estonia, France, Luxembourg and the Netherlands)⁴⁵ shall refuse to recognize the oral testamentary dispositions made by a deceased possessing the nationality of that State. Finally, with regard to Member States which are not parties to the Convention - such as Romania - the provisions included in the national conflict rules shall apply.

⁴² *Ibidem*: "En effect, il paraît impossible de se baser sur un critère de type fonctionnel, car toute obligation alimentaire (avant et après le décès) vise à garantir l'entretien du créancier; le fait qu'elle remplace ou s'ajoute à d'autres droits successoraux de celui-ci ne paraît pas déterminant."

⁴³ As for the prohibition of verbal wills, see D. Chirică, *Treaty of civil right. Successions and liberalities*, C. H. Beck, Bucharest, 2014, p. 244-245.

⁴⁴ There are countries which admit verbal wills (nuncupative)⁴⁴, but the possibility to use such will is usually conditioned by certain circumstances preventing the testator to resort to another form of will. Therefore, art. 506 of the Swiss Civil Code – adopted on 10.12.1907, in force since 01.01.1912) – allows the testator in special conditions which prevent him/her to bequeath in another form (imminent danger of death, outbreak, traffic stop, war) to resort to an oral disposition of last will (*mündliche letztwillige Verfügung*). To this end, the testator has to declare his/her last will in the presence of two witnesses, who have to be simultaneously present. The witnesses are bound to draw up a document precisely specifying the testator's last will, as well as the venue, year, month and day of the disposition, and to sign the document. At the same time, the assistant witnesses will specify that the testator has legal capacity, giving the document to the competent legal authority (art. 507 Civil Code). Worth mentioning is that the verbal will becomes invalid after 14 days have lapsed from the date when the circumstances which justified such form of will ended (art. 508 Civil Code). Verbal wills are also recognized in other countries (Austria – §§ 584-586 ABGB; Germany - § 2250 BGB; Sweden – § 3 of Chap. 10 of the Swedish Succession Law no. 637 of 1958).

⁴⁵ For the complete *status* of this convention, see in the official site of Hague Conference, at the following address: http://www.hcch.net/index_en.php?act=conventions.status&cid=40

What will be the fate of an oral will made by a Romanian in a foreign country? Obviously, this will - in order to arise the recognition question - in the first instance, must be allowed by the law of the place of conclusion and must satisfy all conditions thereof, both those related to the circumstances in which they can be tested "in oral form", as well as the requirements for the fulfillment of which its effectiveness is conditioned in the concerned country. In our literature it was appreciated⁴⁶ that "verbal will made by a Romanian in a country in which this will be allowed, such as: Austria, Switzerland, Germany, Turkey, Brazil, etc., has no value in Romania. The *regit actum locus* rule would be would invoked in vain, for this rule is not subjected to solemnity each time they deal with a solemn act, as in the practical case. As this rule cannot be invoked in case of donations, matrimonial agreements and mortgages, also it cannot be invoked in case of wills and all solemn acts in general. Also, for these reasons, we believe that the verbal testament made by a foreigner in Romania is invalid, according to his/her personal law. Such testament could be considered valid by the foreign judges, but not by the Romanian judges; because, by our law, the will is a solemn act. However, the issue is very controversial - as the distinguished author acknowledges - and the Bucharest Court has validated the verbal testament made by an Ottoman subject in our country, according to his personal law, because the *locus regit actum* rule would be optional, not mandatory". Also, a different opinion was expressed, which considers valid the oral wills made by Romanians on the territory of some states which allow them.⁴⁷ We acquiesce in this latter opinion, believing that the oral wills do not contradict with the testamentary solemnity principle. Indeed, expressing the will of gratification - even orally - is not without formalities. The simultaneous presence of witnesses with the compliance of the conditions which they must fulfill according to the competent foreign law (age-related conditions, not having the quality of legatees, etc.), confirmation of the testator's judgment and the circumstances that prevented him/her to leave a will in written form, the elaboration of the ascertaining document by the assistant witnesses with the mandatory mentions required by the foreign law (indication of the place and date of elaboration, certification of the testator's legal capacity, indication of the circumstances, etc.) followed by the entrustment of the document ascertaining the will of the person who makes the disposition to the competent judicial authorities, etc., represent all, formalities that imprint solemnity to the testamentary act (*negotium*). You might even claim that the verbal will solemnity is even "stronger" than the one of the holograph will. The fact that our legal system solemnity of the will is reduced to complying with the obligation of certain requirements (formalities) compliance related to the document ascertaining the will of the testator, does not mean the solemnities could also treat matters other than those related to "writing" the will.

So being, we consider that the verbal disposition of last will falls within the will's form, since it is about the way of externalizing the will of the individual making the disposition. But what is really important is that the Romanian courts shall determine, in the first instance, whether such a way of expressing the last will is recognized by the competent foreign law and, if so, shall censor the strict compliance with the conditions imposed by the foreign law (both with regard to cases in which the testator

⁴⁶ D. Alexandresco, *Theoretical and practical explanation of the Romanian civil law*, tome IV² (book III, title II), p. 25-26.

⁴⁷ R. Meitani, *Nationality and the conflict of laws* (lithographed course), Bucharest, 1942, p. 389-390: "the same solution of validity should be admitted, even if the form in which a will is left is unknown to the Romanian law, as very well shown by Prof. Alfred Juvara in the comment made on a decision of the Court of Cassation which annulled the verbal will made by a Romanian in Austria in the form admitted by that country" (s.n.).

may appeal to such a form of will, as well as with regard to formal requirements which must be observed for this purpose).

The oral expression of the last will disposition, taking the form into account, shall be governed by the law which governs the form, specifically any of the laws listed by the rules of conflict indicated by art. 2635 NCC. According to this article, *"the elaboration, amendment or revocation of a will are considered valid if the document observes the applicable formal conditions, either or the date it was elaborated, amended or revoked, or the date of the testator's death, according to any of the following laws: a) the national law of the testator; b) the law of his/her habitual residence; c) the law of the place where the document was elaborated, amended or revoked; d) the law of the situation of the immovable property forming the subject of the will; e) the law of the court or body performing the procedure of transmitting the inherited assets"*.

Consequently, an oral will made by a foreigner in Romania could be recognized if, according to his/her national law or the law of his/her habitual residence, the law of the place of elaboration, the law of the location of the immovable property which constitutes the object of the will or the law of the forum, also such a will is recognized if, of course, the testamentary document meets all the requirements imposed for that purpose by the competent foreign law. The recognition of the verbal wills made by Romanians abroad or by foreigners in Romania - under the conditions and with the limits provided by the competent foreign law - corresponds to the idea that the will is a solemn act and not a literal title⁴⁸. Or, solemnity cannot be reduced - except by the explicit will of the "competent" legislator - the formalities associated with its ascertaining document. Finally, we do not think it can be argued - with grounding - that the verbal will made abroad (in compliance with the foreign law requirements) would affect our private international law public order. Taking into account the form of externalization of the testator's will (not substantive) the verbal will shall not prejudice any of the fundamental principles of our legal system because, in general, the formal matters are not contrary to the international public order. Related to this issue, the example of Argentine private international law might be reminded (one of the most nationalist) which also recognizes wills to the extent they are allowed by the competent foreign law, although they are not allowed in the internal law. Art. 515 (3) of the Civil Code. Arg. qualifies the obligations arising from oral wills as natural obligations. *"El derecho civil argentino –precizează distinsul profesor argentinian Antonio Boggiano⁴⁹–, que repudia la forma testamentaria verbal, califica, no obstante, como obligación natural la de pagar dichos legados. Ahora bien: una obligación que el derecho civil argentino califica de natural no puede contrariar el orden público argentino. Parece que podríamos afirmar genéricamente que las cuestiones formales no ofenden nuestro orden público"* (s.n.).

- g) *property rights and the assets created or transferred otherwise than by succession.* According to art. 1, para. 2 letter g) of the Regulation from its scope are exempted the *"property rights, interests and assets created or transferred otherwise than by succession, for instance by way of gifts, joint ownership with a right of survivorship, pension plans, insurance contracts and arrangements of a similar nature, without prejudice to point (i) of Article 23 (2)"*. Regarding donations inter vivos it is worth noting that the validity and their effects are subject, given their nature of conflict, to

⁴⁸ This is the very reason for which the will can be construed not only through its intrinsic elements, but also with the aid of extrinsic elements of the testamentary document, "to the extent that they are relying on the intrinsic ones" (art. 1039, para. 2 NCC).

⁴⁹ A. Boggiano, *Curso de derecho internacional privado. Derecho de las relaciones privadas internacionales*, Cuarta edición, Lexis Nexis, Abeledo-Perrot, Buenos Aires, 2004, p. 248-249.

the provisions of the *Rome I* Regulation, the parties of the donation contract being able to freely agree on the applicable law, according to art. 3 of the Regulation. Thus, we speak of the autonomy of will exercised in a wider perimeter, not limited, as in successional matters, by the law of the State of nationality of the person making the disposition (donor). The sole limitation in this matter is the one dictated by the private international law public order and the police laws (Art. 9:16 of *Rome I*). In the absence of the choice of the law applicable to the donation contract, it shall be governed by the law of the habitual residence of the donor (in case of movable property donations) - namely "the law of the country in which the contracting party conducting the characteristic performance has his/her habitual residence" (art. 4, para. 2), and the law of the State on which territory the immovable property is located (in case of immovable property donations, art. 4, para. 1, letter c). Nevertheless, the successional effects of the donation shall be governed by the law applicable to the succession, determined according to Regulation (EU) no. 650/2012. Thus, "*any obligation to restore or account for gifts, advancements or legacies when determining the shares of the different beneficiaries*" (art. 23, para. 2 letter i) shall be governed by the law of succession;

- h) *the matters regulated by the law of commercial companies and other bodies, constituted or not as legal persons, such as clauses included in the articles of incorporation and articles of association of commercial companies and other bodies, constituted or not as legal persons, which establish what exactly shall happen to the shares in case of their members death.* The share capital participation titles of companies or other such entities are part of the succession assets. Nevertheless, the Regulation excludes its application regarding the transfer of of such titles ownership as an effect of one of the associates death, their regime remaining subject, in principle, to the law that governs these entities organic status (*lex societatis*) regardless of whether they do or not have legal personality. On the other hand, acquiring the quality of an associate of the heirs or of the deceased associate legatees may affect the *intuitu personae* character of certain types of companies, thus being repugnant to the principles provided by *lex societatis*. The Regulation determines the law applicable to the succession of the deceased` associate, without ruling on the transfer of the equity investments in the share capital, nor on how the heirs or legatees shall exercise their rights on these equity investments, nor on the opposability against the heirs or legatees of the against corporate clauses that limit their transmission through succession;
- i) *dissolution, expiry of the duration and merging of commercial companies and other bodies constituted or not as legal persons.* This exclusion is a natural one, the targeted aspects pertaining to the companies law in the European legislator optics. Therefore, for example, the effects of an associate` death on the dissolution of a company shall be regulated by its organic statute law (*lex societatis*) and not by *lex successionis*;
- j) *establishment, management and dissolution of trusts.* Although trusts are often used, especially in the Anglo-Saxon law, as successional planning instruments, the Regulation excludes the application of its provisions on the establishment, administration and dissolution of trusts⁵⁰. However, as it results from recital no. 13 of

⁵⁰ According to art. 6 of the Hague Convention on the applicable law to the trusts and on their recognition, of July 1st, 1985, the trust setting up is governed by the law chosen by the settlor. Where no applicable law has been chosen, a trust shall be governed by the law with which it is most closely connected, especially taking into account the place of administration of the trust designated by the settlor, the situs of the assets of the trust, the place of residence or business of the trustee, the objects of the trust and the places where they are to be fulfilled (art. 7). Our legislator has taken over the Convention solution – however, without considering the contractual nature which

the Regulation, it "should not be understood as a general exclusion of trusts. In case a trust is constituted as a result of a will or a law on the ab intestat succession, the law applicable to the succession pursuant to this Regulation should apply with regard to the successional devolution and the beneficiaries' quality of expectant heirs". Therefore, the Regulation provisions become applicable in this matter, but on other issues than those related to the establishment, administration and dissolution of trusts, such as, for example, those concerning the validity and interpretation of mortis causa dispositions with the object of the establishment, modification or revocation of a trust or the mortis causa provisions on the establishment of heirs or legatees appointment. On the other hand, the liberalities made through a trust shall not affect the imperative provisions of the law of succession, determined in accordance with the Regulation provisions, regarding the forced heirship.⁵¹

- k) *nature of rights in rem*. In terms of rights in rem, especially when they bear on immovable properties, things seem, at least at the first glance, quite clear. The immovable properties are part of a territory, over which the State exercises its sovereignty. Their movement requires changing their rights in rem holders and not their "movement" from one national territory to another, as is often the case of the movable property. Therefore, in principle, the immovable properties cannot escape the control of the national legislator of the State on whose territory they are situated. Therefore, all aspects related to their status and movement were considered to be "at the wand" of the national legislator, not being allowed intrusions in this field. In other words, they would have the same legal regime as the territory itself, being joined ("absorbed") thereof, constituting an object of the concerned State' power and discretion. This means that both aspects related to the modes of acquiring the rights in rem over immovable properties, the content of these rights, the restrictions and limitations, including their mode of exercise, and, especially, the conditions required for the establishment, transmission and their termination, remain subject to the *rei sitae* law. Moreover, the application of the *lex rei sitae* rule is complemented by the exclusivity of jurisdiction one, regarding the disputes covering immovable property rights in rem belonging to the courts of the state on which territory they are located. And so, the circle is closed, and therefore we can talk about a double exclusivity: the one regarding the applicable law and the courts competent to "listen" the claims and decide on the right (*juris dicta*) in such disputes. For a long time, no one dared to break this wall, this double exclusivity. To the foreign law, whatever it may be and whatever its relation to the parties between which the legal relationship was born, is being refused *de plano* the application potentiality, even when it governs the ratio of

conferred the trust (art. 773 NCC), unlike the unilateral nature of the Anglo-Saxon trust –, submitting the trust to the law chosen by the settlor (art. 2659, al. 1, NCC). In the absence of the applicable law selection, or when the selected law does not know the fiduciary institution "the law of the state is applied to which the fiduciary has the closest relations. To this end, consideration should be given especially to: a) the administration location of the fiduciary patrimonial estate, established by the settler; b) the location of the fiduciary goods; c) the location of the fiduciary's habitual residence, or, as the case may be, his/her registered premise; d) the purpose of the fiduciary and the location where it will be achieved" (art. 2660 NCC).

⁵¹ In this matter, see the provision of art. 15, para.1, of the Hague Convention on the law applicable to trusts and their recognition, of July 1st, 1985, which provides: "*The Convention does not prevent the application of provisions of the law designated by the conflicts rules of the forum, in so far as those provisions cannot be derogated from by voluntary act, relating in particular to the following matters - a) the protection of minors and incapable parties; b) the personal and proprietary effects of marriage; c) succession rights, testate and intestate, especially the indefeasible shares of spouses and relatives; d) the transfer of title to property and security interests in property; e) the protection of creditors in matters of insolvency; f) the protection, in other respects, of third parties acting in good faith.*" (subl. ns. DAP). Romania is not part of this convention. For a reference work on this convention, see J. Harris, *The Hague Trusts Convention: Scope, Application and Preliminary Issues: The Private International Law of Trusts*, Hart Publishing, 2002.

obligations that constituted the basis for the actual transfer (*lex contractus*, for example) or other legal institution that constituted grounds for transmission, subject to the foreign law (*lex successionis* in systems that did not differentiate, regarding the applicable law, between immovable property and the movable property). *Rei sitae* law application in this filed leads, inter alia, to:

- the application of the law by the authority vested with the right's registration (tabulation) or, where applicable, the law of the court to which the dispute settlement was referred to;

- compatibilization of the real rights constituted or transmitted with the advertising system governed by the law of the place where the object is situated;

- the re-qualification of the right acquired according to the foreign law, if that right is unknown in the legal system belonging to the State on whose territory the immovable property is located. Thus, according to art. 31 of Regulation (EU) no. 650/2012), under the assumption that "a person invokes a right in rem to which he is entitled under the law applicable to the succession and the law of the Member State in which the right is invoked does not know the right in rem in question, that right shall, if necessary and to the extent possible, be adapted to the closest equivalent right in rem under the law of that State, taking into account the aims and the interests pursued by the specific right in rem and the effects attached to it". Adaptation of real rights is an expression of comparative functionalism (comparative law) towards finding some equivalents between what, according to a certain laws, is considered acquired and the extraterritorial efficiency of the recognized rights. *Lex succesionis* is the ground of the acquisition, while the *rei sitae* law is what establishes the 'being' of the rights, the form and content of property rights. Of course, the envisaged assumption is that in which the two laws (law of succession and the law of the assets location) do not coincide. Otherwise, the problem of adaptation is, obviously, meaningless. The adaptation technique is not, usually, an easy one. Law of the country of origin of the assets seems to have, eventually, the last word. It is the one controlling the legal regime of assets situated on its territory, it is the one that "seals", formalizing the rights, deciding even the moment of the ownership acquisition or of other real rights. However, the starting point and, equally, the approximation primary criterion must represent the will "of the one who transmits", "of the one who gives" meaning the one of the inheritance author. To the extent that the sent right cannot fit in the "conceptual puzzle" of the country on whose territory the assets are found, the adaptation shall be made having as formal reference point the *numerus clausus* established by the legal system belonging to this country. In other words, they shall try the equivalence of the law that the succession author intended to transmit, with the reference point of *lex succesionis*, according to the conceptual formalism established by the real system belonging to the country on whose territory the assets are situated. We are, therefore, in the presence of a qualification operation. Only that this qualification has a secondary character, and does not influence the solution of the conflict of laws. This "approximation" can, sometimes, be quite difficult. Thus, the successional transmission of a right arising from a *time sharing* convention, qualified as having an in rem nature of *lex succesionis* (e.g., the Romanian law chosen by the late Romanian national), but to which the legal system of the immovable property country of origin (Austria, France, Germany, Italy) does not recognize this character. It might be raised, in this context, the following question: who makes this adaptation? The court vested with the estate administration, according to the Regulation's rules of jurisdiction or the one at the place of the immovable property location? We believe that this task must be for the successional court because, on the one hand, it enjoys unlimited jurisdiction, being called to settle all those issues related

to the succession, whether they are of incidental character or they later appear in the course of the estate administration. On the other hand, according to the Regulation, a court decision pronounced by a competent court from a Member State enjoys recognition in all other Member States, being enforceable. Therefore, a decision that would defy the principles in the matter belonging to the country of the place where the immovable properties are situated would lead to an impossibility of enforcement in this country, being contrary to that Regulation reasoning and purpose. Additionally, the courts of the immovable properties country of origin are unable to "reform" the foreign decision;

1) *any entry in a rights of ownership register of immovable or movable property, including the legal requirements for such a recording, and the effects of the record or the failure to record such rights in a register.* Although successional transmission constitutes a distinct basis for the transmission of the ownership right or of other rights in rem with the object of movable or immovable property, these rights registration, based on the succession, cannot ignore the advertising registers organization (movable or immovable property promotion) existing on the State on whose territory the assets that make up the estate are found. These public publicity registries organizing rules, including the regime and the effects of the entries, are regulated by each targeted state internal legislation, being, therefore, excluded from the Regulation scope of application. And this exclusion has a general character, on all aspects related to the form and the entries' legal regime⁵². The explanation could be that the regime of entries in these publicity registries are related to a "public service organization"⁵³ specific to each state, which is assigned to a particular authority jurisdiction. Moreover, in some Member States national authorities enjoy exclusive jurisdiction over the investigation of acts or titles subject to registration. Thus, according to art. 29 of Law no. 7/1996 of cadastre and immovable property promotion, the tabulation or provisional registration in the land register shall only be based on an authentic deed "signed by a notary public in office in Romania" (art. 29, para. 1, letter c)⁵⁴. Therefore, subject to registration in the land register are only those documents that meet certain rigors being concluded "with the compliance of the formal conditions provided by law" (art. 29, para. 1 letter a), the legislature dedicating an exclusivity of jurisdiction in this matter in favor of the notary public "in office in Romania". The question that arises in this context is related to the question whether the formal exclusivity imposed by the legislator regarding the in rem transfers may (or may not) be accompanied, in non-contentious matters, of an exclusivity of recognized jurisdiction in favor of the notary from the immovable property country of origin. In other words, they may require and justify a "nationalism of the form"? The form - autonomous European concept or national "entity" garment imposed by the national legislator to protect the rigors related to movement of goods within the perimeter of the national system of law? In other words, we can speak of the "nationality" of form and formalism or, on the contrary, of the unique "community" reasons (European) of the formalism, which should be identical in all European space? If the answer to this latter question is a positive one, we talk about an "European exclusivism" characterized by a distribution of jurisdiction ascribed to the principle of equivalence,

⁵² Cf. P. Wautelet, in A. Bonomi, P. Wautelet, *op. cit.*, p. 125, no. 122.

⁵³ For details, see E. Jacoby, "*Le certificat successoral européen et les registres fonciers*", JCP, éd. N, 2013, act. 343, p. 5 and next.

⁵⁴ A similar provision is also found, for instance, in art. 710-1 of the French Civil Code (*Code civil*), with the following content: "*Tout acte ou droit doit, pour donner lieu aux formalités de publicité foncière, résulter d'un acte reçu en la forme authentique par un notaire exerçant en France, d'une décision juridictionnelle ou d'un acte authentique émanant d'une autorité administrative.*"

or, on the contrary, can we imagine a role for the national legislator? This would have allowed the latter to be stricter with respect of the formalism reasons and effects in the private law? Could the national legislator establish exclusivities with respect to the authorities entitled to "give" the form? To what extent might these "enrichments" affect or impede the free movement principles established at European level? Finally, to what extent the formalism reasoning should be linked to the legal act or, mainly, to the public registry credibility where it is subject to registration?

We specify from the beginning that the solution adopted by the Member States is not an unitary one. In some Member States a jurisdiction exclusivity is devoted in favor of a notary in the country on whose territory the immovable property is situated (France, Romania), while in others there is no such exclusivity.

In the Spanish law the authentic contracts concluded by the foreign notaries are recognized, but only if the foreign document meets the requirements of authenticity similar to those in Spain. More specifically, although currently an exclusivity jurisdiction is no longer recognized in favor of the Spanish notaries - the issue being recently resolved in this regard, by the Supreme Court of Spain - however they required that the foreign document to be similar to the Spanish one, meeting the authentic document criteria, which were also sanctified in the European plan (the Unibank cause, the Regulation (EC) 805/2004 on the European enforcement order for uncontested claims and, more recently, the Regulation (EU) no. 650/2012 in the matters of succession). Therefore, there can be no equivalence between the document drawn up by the *notary public* in the Anglo-Saxon system, which is limited to certifying the identity of the parties and their signature. Besides, the *notary public* is not, in most cases, the holder of legal knowledge, and it is sufficient that he is a person of trust in society ("*honorable man*"), without a criminal record. Therefore, the function of advising the parties regarding the act they intend to conclude is missing completely, as the control of the document's validity. Therefore, one cannot speak of a function similar to that reserved for the notary in the Latin law countries, where the notary enjoys a special status and responsibilities to match, having the position of a "non-contentious magistrate". On the other hand, the Latin law systems notary plays a preventive role, but also a public safety function, being the guarantor of the legal circuit safety (immovable property circuit especially), the one who gives this circuit credibility and trust, especially when the land registry corrigendum action can correct, within this action's limitation period (in our case 3 years), and against the acquiring third party for good and valuable consideration and in good faith. Moreover, the notary is responsible for direct duties related to the calculation and collection of taxes afferent to the properties transmitted through his/her document, while having the obligation to involve himself/herself in preventing and sanctioning money laundering (*money laundering*). The Spanish position is a balanced one: it does not recognize the exclusivity of the Spanish notary jurisdiction with respect to the immovable property situated in Spain, but requires an act to be considered valid in its country of origin and that meets minimum safety requirements, fulfilling a function similar to the authentic deed concluded by a Spanish notary⁵⁵. A recent decision of the Supreme Court of

⁵⁵ In this sense, see Pedro Garrido, *Real Property Law – Spain Report*, p. 33-34: "*But whenever the law governing the contents of these acts and contracts requires a special form or formality in order to be valid (which is in any case exceptional in Spanish law), it shall always be applied, even if they are executed abroad. (...) According to the Ley Hipotecaria, in order for acts of transfer of ownership or encumbrances on properties to be registered, these have to be included in a notarized act. This notarized act is usually executed before a Spanish notary, but it may also be before a notary of another country of the European Union, provided that it is equivalent to the Spanish notarized act with respect to formal and essential requirements (that is: that the notary not only verifies the parties' identity, but also their capacity, that the agreement contains their true will, and that it is in compliance with the Law). (...) This is the case in almost all the notarized acts of European Notaries, but it is not the case of the*

Spain, on June 19th, 2012, confirms this position, maintaining the solution of a previous court through which the entry was ordered to be made in the “*Registro de la Propiedad Puerto de la Cruz*” (Santa Cruz de Tenerife) of a contract of sale - purchase authenticated by German notary between two German nationals, concerning an undivided share in an apartment situated in Tenerife⁵⁶. In this decision’s reasoning, the Court considers that a solution contrary to the admission of the application for registration in the Spanish register of the property contract authenticated by a German notary (supported and motivated by the *Dirección General de los Registros y el Notariado*) would contravene the principle of freedom to provide services in the Union European. On the other hand, imposing the intervention exclusivity of a Spanish notary would mean a limitation on the free movement of goods, which would not be justified in the light of Spanish and European legal systems: “*Tal exigencia en relación con la escritura pública de compraventa de un bien inmueble situado en España, que sostiene la Dirección General de los Registros y del Notariado, no puede justificarse -como se ha dicho- en un adecuado entendimiento de las normas de Derecho Internacional privado español sobre la forma de los contratos, las obligaciones contractuales y la transmisión de los derechos reales. Por ello puede afirmarse que la negativa de efecto jurídico ante el Registro de la Propiedad español de la escritura otorgada ante un notario alemán carece de sentido cuando, además, la misma puede producir plenos efectos probatorios en España en los términos previstos en el artículo 323 de la Ley de Enjuiciamiento Civil y resulta evidente que el documento notarial alemán y el español son equivalentes en cuanto la función de fe pública ejercida por ambos es similar, sin que pueda resultar imprescindible la identidad de forma ya que -como también se ha razonado anteriormente- por el principio auctor regit actum cada notario aplica su propia legislación y por tanto la estructura, menciones e identidades de la escritura nunca coincidirán exactamente, por lo que tal requerimiento dejaría sin efecto y sin valor alguno en España a la mayor parte de las escrituras públicas otorgadas en el extranjero. El control de la seriedad formal en su otorgamiento -que no parece pueda ser discutido en el seno de la Unión Europea y, concretamente en este caso, en relación con Alemania- se extendería de modo impropio a la práctica exigencia de que el notario extranjero aplicara los requisitos de carácter administrativo vigentes en España, como parece exigir la Dirección General respecto de requerimientos que ni siquiera regían en España en el momento del otorgamiento de la escritura de que se trata (24 de octubre de 1984).*”

4.2. Territorial application. The Regulation shall apply in all Member States except Denmark (art. 1 and 2 of Protocol no. 22 on the position of Denmark, annexed to TEU and TFEU –O.J. C 326 of October 26th, 2012, p. 299), the United Kingdom and Ireland (according to Art. 1 and 2 of Protocol no. 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the TEU and TFEU - OJ C 326 from October 26th, 2012, p. 295).

4.3. Regulation’s temporal application. According to art. 83, para. 1 of the Regulation, it applies in respect of successions opened as of August 17th, 2015 (inclusively). Therefore, the choice of the law applicable to the succession, pursuant to Art. 22, would have been possible

Notaries of London, where the real property is verified but not the validity or legality of the business contained in the document. (...) In any case, the truth is that most Land Registries accept conveyances or power of attorneys written up by London Notaries, even though they do not exactly fit the Spanish legal concept of a notarized act” (s.n., D.A.P.).

⁵⁶ About this decision, see <http://conflictflaws.net/2012/foreign-notary-deed-in-spain/>

only if this choice was to be made as of August 17th, 2015. However, in order to stimulate predictability on the law applicable to the succession, when the choice was made before that date, but the succession was opened later (or on August 17th, 2015), the Regulation comes to greet the testator, by validating the choice made prior to starting its application. Thus, according to art. 83, para. 2 if "*the deceased had chosen the law applicable to his succession prior to 17 August 2015, that choice shall be valid if it meets the conditions laid down in Chapter III or if it is valid in application of the 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 in any of the States whose nationality he possessed*".

Conversely, if the succession is opened prior to August 17th, 2015, it was considered that⁵⁷ the validity of the applicable law choice shall depend on the internal rules of conflict belonging to each Member State. It is true that most rules of conflict in the matters of succession belonging to the Member States do not provide the possibility to choose the law applicable to the succession, the consequence being the invalidation of the choice made by the testator who died prior to August 17th, 2015.

Paragraph 3 of Art. 83 validates the *mortis causa* provisions made prior to starting the Regulation application (August 17th, 2015), if they meet the requirements provided in Chapter III of the Regulation or if they are considered admissible and valid in terms of substance and form, according to the private international law rules in force at the time of their establishment.

Finally, paragraph 4 of Art. 83 goes further validating the *mortis causa* provisions made prior to August 17th, 2015, if they are considered valid under the law which the deceased could have chosen, considering that the law was chosen as the law applicable to the succession.⁵⁸

⁵⁷ A. Bonomi, in A. Bonomi, P. Wautelet, *op. cit.*, p. 334, no. 84. However, the solution of Professor Bonomi is not, in our opinion, out of any discussion, especially since para. 2 of art. 83 of the regulation requires, for the validity of choice, only the exigency of meeting the conditions of chap. III of the regulation, that is the choice should relate to the whole succession, the chosen law should be that of the testator's nationality (or of one of his/her nationality), whether as of the choice date, or as of the date of his/her death, the choice should be explicit and unequivocally result and take the form of a *mortis causa disposition*. The text does not impose, for the effectiveness of the choice, the condition of opening the succession after the date of August 17th, 2015. On the other hand, the reason of recognizing an anticipated possibility of choice is that to confer predictability and safety to the author of the choice of the law to be governing his/her succession, as he/she is in impossibility to know and "control" the moment of his/her death

⁵⁸ For a vast study dedicated to the transitory issues of the regulation, see Ch. Schoppe, "*Die Übergangsbestimmungen zur Rechtswahl im internationalen Erbrecht: Anwendungsprobleme und Gestaltungspotential*", in *Iprax* nr. 1/2014, p. 27-33.

Chapter II. Theoretical aspects related to the jurisdiction of private international law in matters of succession.

§ 1. General jurisdiction of the Member States courts.

1.1. General rule.

The general rule of jurisdiction is phrased in art. 4 of the Regulation. According to this article, the courts *”of the Member State in which the deceased had his habitual residence at the time of death have jurisdiction to rule on the succession as a whole”*.

By this rule the jurisdiction focus was intended on the estate administration before a single authority,⁵⁹ thus avoiding multiple successional procedures before some authorities belonging to different Member States. The solution has the advantage arising from the proximity relationship between the succession and the competent authority invested with the administration of the estate, knowing that the succession’s assets (or most of them) are usually found on the territory of the State where the succession author had his last habitual residence. On the other hand, is thus facilitated the access to justice of the succession creditors or other interested persons who were in legal relationships with the author of the succession.

But, by far, the most important aspect in a position to ensure the *succession’s unity*, is the one related to the symmetry between the criterion for fixing the international jurisdiction in the matters of succession and the one for the determination of the applicable law - the last habitual residence of *”the departed one”* (Art. 4 and 21, para. 1). Indeed, according to recital no. 27, the Regulation dispositions aim *”to ensure that the authority dealing with the succession will, in most situations, be applying its own law. This Regulation therefore provides for a series of mechanisms which would come into play where the deceased had chosen as the law to govern his succession the law of a Member State of which he was a national”*.

The rule established by Art. 4 regards the situation where the deceased's last habitual residence is found on the territory of a Member State⁶⁰, in which case the authorities of that Member State shall have jurisdiction, covering with regard to the assembly of assets making up the estate, regardless of their nature. It should also be mentioned that this general rule (as the other rules of jurisdiction of the Regulation) regards the international jurisdiction of the courts, and not the internal one⁶¹. In other words, once the succession author’s last habitual residence was established, the *”internal”* jurisdiction of the courts shall be fixed with the internal

⁵⁹ By exception, there are also special competences, such as those related to the acceptance or waiver of the succession, of a legacy or of a reserved share, options which could be made in front of the competent court to debate the succession based on the will provisions, either in front of the court belonging to the member state where the declarant has his/her habitual residence (art. 13). At the same time, if the succession estate includes goods located on the territory of a third state, the court to which the case is referred *“can decide not to rule on one or more of such assets if it may be expected that its decision in respect of those assets will not be recognised and, where applicable, declared enforceable in that third State”* (art. 12). However, these derogations are of a precise nature, being justified by practical considerations, whether related to the proximity of those called to express their successional option, or to the risk of impossibility to enforce the decision related to the goods located on the territory of a third state, being unable to hinder the competence unity established by art. 4.

⁶⁰ By member state we mean the member states where the regulation is applicable (the member states *“bound”* by the regulation). The regulation will be applied in all member states, except for Denmark (art. 1 and 2 of Protocol no. 22 regarding Denmark’s position, annex to TEU and TFEU – J.O. C 326 of October 26th, 2012, p. 299), the United Kingdom and Ireland (according to art. 1 and 2 of the Protocol no. 21 regarding the position of the United Kingdom and Ireland regarding the space of freedom, security and justice, annex to TEU and TFEU – J.O. C 326 of October 26th, 2012, p. 295).

⁶¹ Cf. A. Bonomi, P. Wautelet, *Le droit européen des successions. Commentaire du Règlement n° 650/2012 du 4 juillet 2012*, Bruylant, 2013, p. 173.

legislation being the reference point. More specifically, in case of Romania, the court having territorial and material jurisdiction shall be the one determined according to the provisions of the new Code of Civil Procedure (art. 105⁶², art. 118⁶³ of the New Code of Civil Procedure)⁶⁴.

The national affiliation of the deceased is not relevant for the application of this Article.

An important explanation is related to the fact that the jurisdiction rules of the Regulation apply to the courts and notaries in the Member States in which they exercise judicial attributions in the matters of succession (like those in Austria, Czech Republic, Germany, Hungary). In other words, *”the term “court” should therefore be given a broad meaning so as to cover not only courts in the true sense of the word, exercising judicial functions, but also notaries or registry offices in some Member States who or which, in certain matters of succession, exercise judicial functions like courts, and the notaries and legal professionals who, in some Member States, exercise judicial functions in a given succession case by delegation of power by a court”* (recital 20).

The rules of jurisdiction of the Regulation do not apply to the notaries public in Romania, because they do not exercise judicial functions⁶⁵, the notary successional procedure being carried out exclusively before the notary public, not subject to judicial review. According to art. 3, para. 2, by the term ”court” are considered those authorities *”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 on the impartiality and the right of all parties to be heard and that the decisions ruled by them pursuant to the law of the Member State in which they operate: (a) may be made the subject of an appeal to or review by a judicial authority; and (b) have a similar force and effect as a decision of a judicial authority on the same matter”*.

Notaries know different forms of organization in the Member States, generally following, the rules of jurisdiction provided for this purpose in each Member State. Therefore, the incidence of notaries within the rules of jurisdiction provided by the Regulation ”should depend on whether or not they are covered by the definition of the ”court” notion (recital no. 21), as it is defined in art. 3, para. 2.

Therefore, in case of Romanian notaries public, since they exercise their powers in the matters of succession in their own names and not as a result of the jurisdiction delegation by a

⁶² The material competence will belong, where applicable, depending on the value of the gross assets of inheritance, to the Court of Law or to the District Court, depending whether the gross succession assets exceed or not RON 200,000, except for the partition, which falls within the competence of the district court, irrespective of the value. According to art. 105 NCPC, in matters of succession, “the competence by value is set up without deducting the inheritance encumbrances or debts”. For comment, see Gh.-L. Zidaru, in V. M. Ciobanu, M. Nicolae (coord.), *The new Code of civil procedure commented and annotated*, vol. I – art. 1-526, Publishing House Universul Juridic, Bucharest, 2013, p. 307-308; I. Leș, *The new Code of civil procedure. Comments by articles*, C. H. Beck, Bucharest, 2013, p. 181 and the following; A. Constanda, in G. Boroi (coord.), *The new Code of civil procedure. Comments by articles*, Publishing House Hamangiu, Bucharest, 2013, p. 299.

⁶³ From the territorial point of view, the exclusively competent court is the one situated at the last domicile of the deceased (art. 118 NCPC).

⁶⁴ The new Code of civil procedure establishes the exclusive international competence of the Romanian courts, among others, in the matters of succession for the “goods left in Romania by the deceased with the last domicile in Romania” (art. 1079, pct. 2). This provision will be applied only to the successions opened until August 17th, 2015. As for the successions opened on August 17th, 2015 or after that date, the regulation provisions will be applied (art. 83, par. 1, of the regulation).

⁶⁵ The differentiation regarding the exercise of the competence rules of the regulation between litigious procedures and the procedures of grace (where notaries do not exert judicial assignment or do not carry out their activity under the control of a judicial authority) is the main distortion factor, able to adversely influence the solution related to the conflict of laws, even if, from the point of view of the successions location technique and of establishing the applicable law, there is no difference between the litigious and non-litigious nature of the succession procedure. The regulation has been built up on the pillar of the inheritance unity principle. If such unity is to be achieved, the European regulator established a symmetry between the fundamental rule of international competence (art. 4) and that at the level of the conflict of laws (art. 21).

court or under its control⁶⁶, their jurisdiction, when the succession presents elements of foreign origin shall be determined by the internal legislation. For example, the same applies for France as well, and French notaries are also excluded from the Regulation's rules on jurisdiction: "(p)our la France, le *notaire* n'exerce pas une « fonction juridictionnelle » et n'est donc pas une « juridiction » au sens règlement; sa compétence relève toujours du droit national."⁶⁷

Romanian notary public international jurisdiction is established having the last domicile of the deceased as a reference point. Thus, if the last domicile of the deceased is not in Romania (or it is unknown), jurisdiction belongs to the notary public seised first, if there is at least one immovable property in its district (art. 102, para. 4 of Law no. 36/1995 on public notaries and notarial activity⁶⁸). If in the estate there are no immovable properties on the Romanian territory, the last domicile of the deceased not being in Romania, the jurisdiction shall belong to the notary public seised first, if there are movable properties in its district (art. 102, para. 5 of Law no. 36/1995). If the last domicile of the deceased is not in Romania, and the estate does not include assets on the Romanian territory, "the competent notary public is the one notified first" (art. 102, para. 6 of Law no. 36/1995)⁶⁹. We note that the notary public enjoys a general jurisdiction having jurisdiction over the successions with foreign origin elements, regardless of whether the succession author's last domicile is or is not in Romania, of whether the assets composing the estate are found on the Romanian territory or not. Practically, as you can see, the differences between the aforesaid assumptions are relevant only to the delimitation of jurisdictions between *the notaries public in office in Romania*.

The determination of the inheritance author's last domicile shall be made having as a reference point the law of the State on whose territory it is invoked.⁷⁰ Usually, the last domicile of the deceased is mentioned in the death certificate.

⁶⁶ Due to the fact that notarized documents are submitted, according to law, to the court control (art. 157 and 158 of the Law no. 36/1995, republished) – a general control extended over all notarized documents, irrespective of their object – the conclusion cannot be drawn under any circumstance that, in matters of international competence, the Romanian public notary is exerting judicial assignments (like notaries in some member states, for instance Austria, where the competence of issuing the certificate of inheritance (*Erbschein*) does not belong to the notary, but to the succession court (*Nachlassgericht*)). Within the succession procedure, the Romanian notary has appreciation liberty, and does not work under the control of a court of law.

⁶⁷ H. Gaudemet-Tallon, "*Les règles de compétence judiciaire dans le règlement européen sur les successions*", in G. Khairallah et M. Revillard (ed.), *Droit européen des successions internationales. Le Règlement du 4 juillet 2012*, Defrénois, 2013, p. 129; J. Sagot-Duvaurox, "*Les règles européennes de compétence directe en matière de successions internationales*", in E. Fongaro (coord.), avant-propos de J. Foyer, *Droit patrimonial européen de la famille*, Lexis Nexis SA, Paris, 2013, p. 21.

⁶⁸ Republished in Romania's Official Gazette no. 72 of February 14th, 2013, giving a new numbering to the texts.

⁶⁹ We think though that the usefulness of a recognized competence of the public notary, considering that neither the last domicile of the deceased is in Romania nor the goods in the succession estate are on Romania's territory, could be imagined, practically speaking, with regard to the issuance of the certificate of inheritance. A certificate of inheritance issued by the Romanian notary, having as object exclusively goods located abroad, will not enjoy recognition in those countries. In addition, in principle, the Romanian public notary is refused such competence if the goods in the succession estate (especially real estates) are located on the territory of certain member states where notaries exert competences delegated by a judicial authority or under the latter's control, being included in this way in the competence sphere of the regulation. While in the member states where the notaries have a similar position to that of the Romanian notaries, it is possible they enjoy exclusive competence over the real estates located on their territory.

⁷⁰ In this way, "the establishment whether the testator or the persons whose succession is concerned by the agreement as to succession, have had their domicile in a certain state, is regulated by the law of the respective state" (art. 26, par. 1 of R. 650/2012).

1.2. Choice of the forum.

The Regulation allows the interested parties to choose the court of the Member State whose law has been chosen, pursuant to art. 22, by the author of the succession. Thus, according to art. 5, if *”the law chosen by the deceased to govern his succession pursuant to Article 22 is the law of a Member State, the parties may agree that a court or the courts of that Member State are to have exclusive jurisdiction to rule on any succession matter”*. The agreement’s existence confers exclusive international jurisdiction for the court of the Member State whose law has been chosen.⁷¹

Some remarks are necessary:

a) First, the choice of forum is only possible in the assumption that the deceased had chosen the law applicable to the succession, under the conditions and limits set by the Regulation. In other words, the efficiency not only depends on the agreement of all the heirs, but also on the previously expressed will of the succession author, by choosing which he made on the applicable law. The succession’s internationality is primarily assessed by reference to its author. He/she is the one who determines the law applicable to the succession, whether this law is that of his last habitual residence, or it is the chosen law. Also, by the choice made, he/she creates the premise of establishing international jurisdiction. Indeed, the rule of jurisdiction is that of the last habitual residence of the deceased (Art. 4). But if the deceased had chosen the law of the Member State whose nationality he/she had (or one of the laws of the Member States whose nationality he/she had), the heirs may agree on the jurisdiction of the court of the Member State whose law has been chosen. But, without this first step, without this *”help”*, the heirs (*”concerned parties”*) shall not, even by unanimous agreement, be able to dislocate overall jurisdiction in the matter, established by art. 4 of the Regulation;

b) the purpose pursued by the European legislator through allowing the choice of the forum was, on the one hand, to promote freedom of action in this matter⁷², but also to ensure unity between jurisdiction and the applicable law (*Gleichlauf*), thus avoiding the situation that the court from the last habitual residence of the deceased would have to apply a foreign successional law to the succession (the chosen one). In this respect, recital no. 27 of the Regulation explicitly states that its provisions *”are devised so as to ensure that the authority dealing with the succession will, in most situations, be applying its own law. This Regulation therefore provides for a series of mechanisms which would come into play where the deceased had chosen as the law to govern his succession the law of a Member State of which he was a national”*;

c) choice could only regard the jurisdiction of a Member State (excepting Denmark, the United Kingdom and Ireland). If the deceased had chosen as the law applicable to the inheritance the law of a third country, the choice of forum by the heirs shall not be possible. As shown⁷³, the extension of jurisdiction of a third country authorities is not governed by the Regulation. Obviously, the deceased may choose the law of a third country to apply to his/her succession (art. 22), but such a choice will have no impact on the international jurisdiction of courts. The solution is explained by the fact that the

⁷¹ H. Gaudemet-Tallon, *“Les règles de compétence judiciaire dans le règlement européen sur les successions”*, in G. Khairallah et M. Revillard (ed.), *Droit européen des successions internationales. Le Règlement du 4 juillet 2012*, Defrénois, 2013, p. 131.

⁷² The possibility to choose the forum is also found in other European regulations: art. 23 and 25 of Regulation (EU) no. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (reformation) – Brussels Ibis, art. 12 of the Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 – Brussels IIbis.

⁷³ A. Bonomi, in A. Bonomi, P. Wautelet, *op. cit.*, p. 184 (no. 4).

Regulation jurisdiction rules can only regard the Member States courts (where it can be applied) and not the third countries, unlike the rules of conflict that have a universal character (art. 20)⁷⁴. Also, the choice of forum shall not be based on the national provisions in the matter, given, on the one hand, the prudence the legislator is acting with in this matter, and, on the other hand, the comprehensive character of the rules of jurisdiction phrased by Regulation;⁷⁵

d) in terms of form, the agreement of choice must be in the written form and be dated and signed by the "concerned parties"⁷⁶. The written form is related to the validity of the agreement. It may be noted that, in formal terms, if regarding the "agreement" the written form is sufficient, instead, the choice of the applicable law made by the author of the inheritance must take the solemn form of a mortis causa disposition (art. 22, para. 2);

e) with regard to the moment of choice, the forum choice agreement may be concluded after the succession opening (the typical targeted situation). But, also, the situation of the agreement conclusion made prior to the succession's opening cannot be excluded, to the extent that the author had chosen the applicable law (e.g. the choice of forum agreement is included in the text of an agreements to succession concluded between the deceased and his/her heirs). Nevertheless, in this latter assumption, the choice of forum agreement, becomes, however, obsolete if the *de cuius* subsequently revoked the prior choice, according to art. 22. It was also considered⁷⁷ that the choice of forum agreement cannot be concluded, even if the succession author had chosen his/her nationality law as the one applicable to the succession if his/her death occurs prior to starting the Regulation application (August 17th, 2015).

Choice of forum can be made even after the matter was referred to the court, accepting the jurisdiction of that court to which the matter was referred to (Art. 7, letter c);

f) according to the Regulation formulation, the choice of forum agreement is concluded between the "concerned parties". With this phrase the heirs and legatees are considered or "other beneficiaries" of a mortis causa of inter vivos disposition, the executors of the will. If an action with the object of the legacies possession handing over, the agreement between the legatees and heirs with seizin is sufficient. In case of a liberality restriction action, the agreement between the gratified and the forced heirs of the concerned deceased shall be sufficient⁷⁸. In other words, according to the quoted author, the choice of forum agreement cannot be considered a "mortis causa disposition" in the sense of Art. 3, para. 1 letter d) to be admissible and concluded as valid pursuant to the Regulation prior to August 17th, 2015, according to art. 83, para. 3 and 4.

⁷⁴ See, P. Lagarde, "*Les principes de base du nouveau règlement européen sur les successions*", in Rev. crit. DIP, 101 (4), 2012, p. 701 (no. 10).

⁷⁵ According to A. Bonomi, in A. Bonomi, P. Wautelet, *op. cit.*, p. 185 (no. 4).

⁷⁶ According to art. 5, para. 2, the agreement "to choose the forum is drawn up in writing, dated and signed by the interested parties. Any electronic communication allowing for the long-lasting registration of the agreement is regarded as equivalent to the written form." However, a simple exchange of e-mails is not sufficient, as long as they do not include the senders' electronic signature. In this sense, see A. Bonomi, in A. Bonomi, P. Wautelet, *op. cit.*, p. 188 (no. 12); H. Gaudemet-Tallon, "*Les règles de compétence judiciaire dans le règlement européen sur les successions*", in G. Khairallah et M. Revillard (ed.), *op. cit.*, p. 131: "(o)n remarquera toute-fois que puisque l'écrit doit être signé, la version électronique devrait faire l'objet d'une signature numérique au sens strict du terme, ce qui reste assez complexe."

⁷⁷ H. Gaudemet-Tallon, "*Les règles de compétence judiciaire dans le règlement européen sur les successions*", in G. Khairallah et M. Revillard (ed.), *Droit européen des successions internationales. Le Règlement du 4 juillet 2012*, Defrénois, 2013, p. 131: "*Si le défunt avait, avant le 17 août 2015, choisi la loi de sa nationalité pour régir sa succession (possibilité qui lui est offerte par l'art. 83 § 2), il semble toutefois que les héritiers ne pourront conclure un accord d'élection de for que si le de cuius est décédé après le 17 août 2015 (ou le 17 août 2015) car cet accord ne paraît pas pouvoir relever de la qualification « disposition à cause de mort » de l'article 83 § 3 et § 4: il faut donc que le règlement soit applicable pour que l'élection de for soit possible.*"

⁷⁸ According to A. Bonomi, in A. Bonomi, P. Wautelet, *op. cit.*, p. 187 (no.9).

There is no requirement, however, for the creditors' agreement, because their actions against the heirs are not regulated, nor in terms of jurisdiction or the terms of the applicable law, by the Regulation, but by the rules applicable to the respective claim; more precisely, a choice of forum agreement can be concluded in this case, under the conditions of art. 23 of the *Brussels I* Regulation (namely, art. 25 of the *Brussels Ibis* Regulation).

1.3. Declining the jurisdiction.

If the deceased had chosen the law applicable to his/her succession, according to art. 22, and this law is that belonging to a Member State (whether that is pursuant to Art. 4 or, where applicable, pursuant to art. 10 of the Regulation), art. 6 establishes two assumptions in which courts to which the matter was referred to *may* or *must* decline jurisdiction:

a) in the first assumption, at the request of one of the parties, the courts *may decline their jurisdiction* in favor of the courts of the Member State whose law has been chosen, if they believe they "are better able to decide on the succession, given the practical nature circumstances of the succession, such as the habitual residence of the parties and the place where the assets are situated" (art. 6, letter a). Hence we are talking about an assumption of *optional declination* of jurisdiction on the grounds of proximity, but also of the coincidence that thus occurs between the *forum* and *jus* between the competent jurisdiction and the law applicable to the succession. You might talk about a *forum non conveniens* theory inspiration from the *common law* countries, but without conferring unlimited powers to the magistrate, but rather framed and limited, given the parties' interests and the location of the assets making up the estate. Therefore, the mere will of the inheritance author, who chose the law applicable to it, is not sufficient, being also necessary the request of at least one of the parties and the assessment of the court to which the matter was referred to according to the case circumstances;

b) in the second assumption, we are in the presence of a *mandatory declination of jurisdiction* in favor of the Member State courts whose law has been chosen as applicable to the succession, if the parties to the proceedings have agreed, pursuant to a choice of forum agreement "to give jurisdiction to a court or courts of the Member State whose law has been chosen" (art. 6, letter b). This ground for the declination of jurisdiction requires a valid choice of forum agreement concluded, both in terms of substance and form. In case the validity of this agreement is challenged, the jurisdiction to rule on its validity belongs to the court to which the matter was referred to. The solution can be drawn from art. 7 letter a, which assigns the jurisdiction to the courts of the Member State whose law has been chosen by the deceased, pursuant to art. 22, in case "a court to which the matter was previously referred to has declined jurisdiction on the same matter pursuant to Article 6". In other words, the court whose jurisdiction results as an effect of declining jurisdiction ruled by a court from another Member State shall not be able to review the validity of the choice of forum agreement, considered valid by the court which declined, on that basis, its jurisdiction. The solution of declining jurisdiction of the court to which the matter was firstly referred to involves, therefore, the examination of all the conditions required in order for the declination to operate (validity of the choice of applicable law made by the deceased, the law chosen shall belong to a Member State in which the Regulation applies, including the validity of the choice of forum agreement). Consequently, as shown⁷⁹, in order to avoid a negative conflict of jurisdiction, the court chosen pursuant to the agreement shall not be able to not recognize this jurisdiction, considering the choice of forum agreement invalid.⁸⁰

⁷⁹ A. Bonomi, in A. Bonomi, P. Wautelet, *op. cit.*, p. 199-200 (no.17).

⁸⁰ Besides, as regards Regulation (EC) no. 44/2001 (*Bruxelles I*), the Luxembourg Court provided that Articles 32 and 33 of this Regulation must be interpreted as meaning that the "court before which recognition is sought of a

§ 2. *Subsidiary jurisdiction.*

If the last habitual residence of the deceased is not on the territory of a Member State, art. 10 of the Regulation confers jurisdiction to the courts of the Member State on whose territory the assets making up the estate are situated: "(1) Where the habitual residence of the deceased at the time of death is not located in a Member State, the courts of a Member State in which assets of the estate are located shall nevertheless have jurisdiction to rule on the succession as a whole in so far as: (a) the deceased had the nationality of that Member State at the date of death; or, falling that (b) the deceased had his previous habitual residence in that Member State, provided that, at the time the court is seised, a period of not more than five years has elapsed since that habitual residence changed. (2) Where no court in a Member State has jurisdiction pursuant to paragraph (1), the courts of the Member State in which assets of the estate are located shall nevertheless have jurisdiction to rule on those assets".

The last habitual residence rule, provided by art. 4 cannot apply if the deceased did not have, at the moment of death, his/her habitual resident on the territory of a Member State to which the Regulation is applicable. In this assumption, the courts of the Member States can enjoy jurisdiction, alternatively, if there are links to the Member State of the court to which the matter was referred to, either by the succession author nationality or by his/her previous habitual residence (provided that, based on the moment of referring the matter to the court, from the date of the habitual residence change, no more than 5 years have passed) or, in default, by the situation of some assets that make up the estate. In all cases mentioned in art. 10 of the Regulation, the presence of assets (or of some assets) from the estate on the territory of a Member State is a prerequisite for the recognition of its courts subsidiary jurisdiction.

Some remarks are necessary:

- a) Firstly, the courts cannot, when the criteria of jurisdiction listed in art. 10 are not met, establish jurisdiction on the internal dispositions, provided in the national law;
- b) the criteria of jurisdiction referred to in art. 10 have an exhaustive character, other situations of jurisdiction cannot be inferred. Thus, according to the recital no. 30, "*this Regulation should list, exhaustively, in a hierarchical structure, the grounds on which such a subsidiary jurisdiction may be exercised*";
- c) regarding the meaning of the concept of "subsidiary jurisdiction", it should be noted that "subsidiarity" "appears here by relation to other jurisdictions provided by the Regulation, including the general jurisdiction provided by art. 4. Subsidiary jurisdictions come into play when the general jurisdiction cannot be exercised in any Member State, the last habitual residence of the deceased being situated in a non-Member State. However, these jurisdictions are not in any way subsidiary to the jurisdictions of third States",⁸¹
- d) the competence criteria established by art. 10 do not have an alternate character (unlike, for example, those in Art. 3 of *Brussels Ibis* Regulation) but are hierarchical criteria, of the "scale" type; shall enjoy priority of jurisdiction the

judgment by which a court of another Member State has declined jurisdiction on the basis of a jurisdiction clause is bound by the finding – made in the grounds of a judgment, which has since become final, declaring the action inadmissible – regarding the validity of that clause, which is present in the justification of a decision remained final through which the action is declared as inadmissible" (Cause C-456/11, *Samskip GmbH*). Worth mentioning though is a change of optics in Regulation (EU) no.1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (reformation) – *Bruxelles Ibis*, which submits the validity of the convention to choose the forum to the exclusive jurisdiction of the chosen court (art. 31, para. 2: "where a court of a Member State on which an agreement as referred to in Article 25 confers exclusive jurisdiction is seised, any court of another Member State shall stay the proceedings until such time as the court seised on the basis of the agreement declares that it has no jurisdiction under the agreement"). For details, see T. Hartley, *Choice-of-Court Agreements under the European and International Instruments. The revised Brussels I Regulation, The Lugano Convention, and the Hague Convention*, Oxford Univ. Press, 2013, p. 135-140.

⁸¹ A. Bonomi, in A. Bonomi, P. Wautelet, *op. cit.*, p. 212 (no. 3).

courts of the Member State of the deceased nationality and only in the absence of a Member State nationality the courts of the Member State of the former habitual residence of the deceased;

- e) under the assumptions specified in para. 1 of Art. 10, when the courts of the Member State on whose territory the assets making up the estate become competent, or on grounds of the deceased nationality or, in default, on the basis of his former habitual residence, their jurisdiction extends on "the succession as a whole". Therefore, the Member State courts of the place where the assets are situated, whose nationality the deceased had at the time of his/her death or, in default, those of his/her previous habitual residence, shall enjoy a general jurisdiction, which extends over the "succession assembly" not only on the assets situated on the Member State of the court to which the matter was referred to, but, equally, on the assets that belonged to the deceased, situated on the territory of another Member State or the territory of third States. Instead, if the assumption from para. 2, where the deceased did not have the nationality of a Member State nor his/her former habitual residence on the territory of a Member State, but there are assets of the estate on the territory of a Member State, that Member State courts jurisdiction is limited only in respect of those goods;
- f) the author of the succession is not required by law to have chosen the law of the Member State whose nationality he/she had, but it is sufficient for the deceased to have had, at the time of death, the nationality of a Member State and on its territory to exist assets that make up the estate. Therefore, unlike art. 7, the jurisdiction is not founded in this case on choice of the law of the State of nationality of the deceased, but on its mere possession at the time of the succession opening;
- g) a previous nationality of the deceased is not relevant in this case, if he/she had lost it. According to art. 10, para. 1 letter a) requires that the author of the succession shall have "that Member State nationality at the time of death". Therefore, if regarding the choice of the law on applicable for the succession, art. 22 allows choosing the law of the nationality that a person has "at the moment of choosing the law or at the time of death" in this case the jurisdiction is found on the existence of the Member State nationality at the time of death. Also, in the assumption of art. 22, the choice can also regard the law of a third country, while subsidiary jurisdiction governed by art. 10, para. 1, letter a) is based solely on the existence of a Member State nationality at the time of death;
- h) if the deceased had at the time of death, several nationalities belonging to different Member States, taking into account the Court in Luxembourg⁸², it is obvious that courts may establish their jurisdiction on any of concurrent nationalities.⁸³ In other words, nationality effectiveness verification is not required. Therefore, any of the courts of the Member States on whose territories successional assets are found and whose nationality the deceased had at the time of death enjoy the jurisdiction pursuant to Art. 10, para. 1, letter a). In this case, the *lis pendens* rule shall find its application (art. 17), the jurisdiction being of the Member State court to which the matter was firstly referred to;
- i) previous habitual residence (Art. 10 para. 1, letter b) is a subsidiary criterion of jurisdiction in relation to that of the Member State nationality, which applies only when, according to art. 10, para. 1 letter, a), no court of a Member State enjoys the jurisdiction. Thus, for example, if the deceased did not have at the time of death, the nationality of any Member State, or, despite having the nationality of a

⁸² CJCE, July 16th, 2009, C-168/08, *Hadadi*, Rec. 2009, p. I-6871.

⁸³ A. Bonomi, in A. Bonomi, P. Wautelet, *op. cit.*, p. 218 (no. 17-18).

- Member State, did not leave assets on its territory, the jurisdiction shall be for the previous habitual residence Member State court, if the deceased left assets on that State's territory;
- j) the possession of nationality at the time of death or the previous habitual residence on the territory of a Member State are not, themselves, sufficient to confer jurisdiction to the concerned Member State courts if there aren't any successional assets on its territory;
 - k) Finally, art. 10 does not distinguish with regard of the nature of the goods. They may be movable or immovable property or intangible assets (claims, intellectual property rights etc.).

§ 3. *Forum necessitatis*.

If none of the courts belonging to the Member States do not enjoy jurisdiction under the Regulation dispositions, *"the courts of a Member State may decide, in exceptional cases, on the succession, in case the procedures cannot be reasonably initiated or cannot reasonably be conducted or would be impossible in a third State with which the case is closely connected"* (art. 11).

In order to guarantee free access to justice, the art. 11 of the Regulation governs the appropriate forum (*forum necessitatis*), seeking to avoid negative conflicts of jurisdiction and the denial of justice. The legislator's purpose and aim in this forum result from the wording of recital no. 31 of the Regulation: *"(i)n order to remedy, in particular, the situations of denial of justice, this Regulation should provide a forum necessitatis allowing a court of a Member State, on an exceptional basis, to rule on a succession which is closely connected with a third State. Such an exceptional basis may be deemed to exist when proceedings prove impossible in the third State in question, for example because of civil war, or when a beneficiary cannot reasonably be expected to initiate or conduct proceedings in that State. Jurisdiction based on forum necessitatis should, however, be exercised only if the case has a sufficient connection with the Member State of the court seised."*

Its scope is therefore quite narrow, "exceptional". It involves, on the one hand, the last habitual residence of the deceased in a third country, and on the other hand, the lack of subsidiary jurisdiction of the courts of other Member States.

If there are assets from the real estate located on Member States territory the necessary forum cannot be invoked, as the jurisdiction shall lie on, pursuant to art. 10, para. 2 to the Member State courts of the place the assets are situated. It is therefore necessary that both the habitual residence as well as the successional assets are situated on some third States territory.

An absolute impossibility condition is also required⁸⁴ (foreign authorities' jurisdiction or the existence of some circumstances of a non-legal nature: natural disasters, epidemics, wars, armed conflict zones) or relative ("proceedings cannot be reasonably initiated or carried out"-art. 11) to act abroad. Therefore, if the deceased's last habitual residence is in a third State, and no court of any Member State enjoys jurisdiction under the Regulation, the rule is that this jurisdiction belongs to the third State courts.

Finally, the necessary forum also implies that the legal relationship must have a sufficient relation with the Member State of the court to which the matter was referred to on that basis. Such a relation could be the succession author's nationality or previous habitual residence in those cases where these circumstances do not generate jurisdiction pursuant to art. 10, for example when there are no assets on the concerned Member State territory. It also might be in question a previous habitual residence of the deceased in the Member State of the court to which the matter was referred to, older than five years from the date of its change, at the time the matter was referred to the court.

⁸⁴ *Ibidem*, p. 227.

Chapter III. Theoretical aspects related to the rules that settle conflicts of laws in matters of succession. Regulation principles.

The matter of successions demonstrates that, despite numerous unification attempts exercised on the private law field, still there is not a common legal language (*a common European legal language*). You cannot yet speak of a *jus successionis europaeum*, but rather about a plurality of successional systems - more even than the number of Member States - a plurality of "software" set on the European common "hard" which are activated and running by the conflict caused triggering.

Regulation is based on certain principles - some common ones related to European international law methodology, other specific for the matters of heritage - considered by the European legislator in order to facilitate, from this point of view also, the freedom of movement and mutual recognition ("acceptance") of decisions.

1. The principle of the inheritance unity, seen in a double aspect: on the one hand, the application of a single law of the inheritance, regardless of the nature of the assets that make up the estate and regardless of the location of such assets and, on the other hand, the identity of principle between the law governing the succession and the court (or authority) which is competent to administrate it. This unity is tailored around the habitual residence of the deceased from the time of his/her death (last habitual residence – *letzte gewöhnliche Aufenthalt der verstorbenen* – art. 4 of the Regulation on international jurisdiction, respectively art. 21 para. 1 of the applicable law of succession). In this respect, recital (27) mentions that *"the rules of this Regulation are devised so as to ensure that the authority dealing with the succession will, in most situations, be applying its own law. This Regulation therefore provides for a series of mechanisms which would come into play where the deceased had chosen as the law to govern his succession the law of a Member State of which he was a national."*⁸⁵. The principle of the inheritance unity is the most important achievement of the European legislator, bearing in mind that in the Member States conflict law there is no unitary position on this issue. Even in our case, under the rule of Law no. 105/1992 on the Regulation of private international⁸⁶ law reports, international successions localization was made differently, depending on the nature of the goods making up the estate: on movable property and the trade fund of the national law of the deceased shall apply (*lex patriae*), while on the immovable property, the law of the State on whose territory each of these assets were situated (*lex rei sitae*). This disjunction (*dépeçage / spaltung*⁸⁷) on determining the law applicable to the inheritance was a reminiscence of statutes

⁸⁵ This is the possibility conferred to the heirs to sign an agreement for the selection of the forum which assigns the exclusive jurisdiction to the courts of the member state whose law was chosen by the author of succession (art. 5), or, by the case, to request the apprehended court, based on art.6, to decline the jurisdiction, or based on art. 10, of the Regulation, which establishes the subsidiary jurisdiction in favour of the authorities of the member state whose nationality the deceased had at the time of death, or, in default of that, of the member state of his/her previous habitual residence, if the respective residence is not older than 5 years since its change, or, where applicable, of the member state where the goods within the succession estate are located.

⁸⁶ At present, abrogated by the Law no. 71/2011 for the application of Law no. 287/2009 regarding the Civil Code (art. 230 letter q, which abrogated art. 1-33 and art. 36-147 of the law), respectively by the Law no.76/2012 for the application of Law no. 134/2010 regarding the Code of Civil Procedure (art. 83 letter e, which abrogated the whole law).

⁸⁷ As regards this institution, see A. Aubart, **Die Behandlung der dépeçage im europäischen Internationalen Privatrecht**, Mohr Siebeck Verlag, 2013; Symeon C. Symeonides, "Issue-by-Issue Analysis and Dépeçage in Choice of Law: Cause and Effect", in "The University of Toledo Law Review" (U.Tol.L.Rev.), 45 (2013): "(i)ssue-by-issue analysis means that, if a case (or, more precisely, a cause of action) comprises more than one issue on which the substantive laws of the involved states conflict, each issue should be subjected to a separate choice-of-law analysis. If such an analysis leads to the application of the substantive laws of different states to the different issues, then the resulting phenomenon is called *dépeçage*. Thus, *dépeçage* is the application of the *substantive* laws

theory, inherited from the Middle Ages, which, due to the attraction that the immovable properties exerted, remained, unfortunately, until today. Eventually, the application of a single rule of conflict on the inheritance represents the returning to normal, given its nature: a unique estate, a unique author, a unique cause, a unique transmission, with universal character (or universal title), and not a *sumuum* of particular transmissions, differentiated depending on the movable or immovable nature of the assets that belonged to the deceased. The *Savigny* that, in determining the law applicable to a legal situation, we should always seek its "center" it - "the legal relationship center" considered ("*der Sitz der Rechtsverhältnisse*" / "*the seat of the legal relationship*") – falls thus into place.⁸⁸ According to Savigny, any legal relationship is registered, depending on its nature, to a certain legal institutions, to which it belongs. The legal relationship (*Rechtsverhältnis*) is nothing but the relationship subordinated to a certain rule: "*das Lebensverhältnis den zu entscheidenden Rechtsfall*". Therefore, the mission of the legal relationship center is to indicate, for each specific relationship, taking into account its specificity nature and elements, the legal system to which it belongs, thus accounting for the application jurisdiction in the case: "*daß der Sitz (die Heimat) jedes Rechtsverhältnisses ermittelt werden müsse*"⁸⁹. Thus, Savigny moved away from the spirit of statutes theory which subordinated the availability of each material right (*Sachrecht*) to his will (*gemäß seinem "Geltungswillen"*). He was not preoccupied for the legal norms classification according to the field which they govern, but the classification of "life situations" (*Lebenssachverhalte*) according to nature and "center" to which they belong, thereby causing the law applicable to each of them. Therefore, he changed the approach, leaving the deductive method in favor of the inductive one⁹⁰. If in case of the statutory theory, the starting point is represented by the law, the question being asked regarding its regulatory domain, *Savigny* changes perspective starting from the concrete situation, wondering to which law or legal system it is allocated to. Although, as the Professor noted *Gerhard Kegel*, the finality of both methods is, in the end, from the logical point of view, the same, their starting point is different. However, this is likely to lead, in psychological terms, to a certain difference in approach: one that starts the analysis from the actual situation (*Lebenssachverhalt*), wondering whose legal system it belongs to, is, generally, favorable to a certain opening, equally admitting the possibility of own law application or of the foreign one; instead, the one who glances first on the norms, wondering about their scope, shall generally end favoring the territoriality.⁹¹

of different states to different issues of the same *cause of action*." Often qualified in jurisprudence as "a mystical theory", "a judicial theory", "an approach", "a procedure", "a technique", "a principle", "a rule", or "a process", *dépeçage*, as already shown, "is not the goal of the choice-of-law process, not even the goal of issue-by-issue analysis. Rather, *dépeçage* is the potential and occasional result of issue-by-issue analysis" (*Ibidem*). Also see Ch. G. Stevenson, Note, *Dépeçage: Embracing Complexity to Solve Choice-of-Law Issues*, 37 Ind. L. Rev. 303 (2003); H. Batiffol, P. Lagarde, *Droit international privé*, 8th ed., 1983, p. 273; B. Audit et L. D'Avout, *Droit international privé*, 6th ed., 2010, p. 125 and 288

⁸⁸ Fr. C. von Savigny, *System des heutigen römischen Rechts*, vol. VIII, Berlin, 1849, p. 28 and 108: "*daß bei jedem Rechtsverhältnis dasjenige Rechtsgebiet aufgesucht werde, welchem dieses Rechtsverhältnis seiner Eigentümlicher Natur nach angehört oder unterworfen ist (worin dasselbe seinen Sitz hat)*". It might be said that, in general, all national systems of private international law are convergent in this matter.

⁸⁹ *Ibidem*, p. 120. Also see Albert A. Ehrenzweig, *Savigny and the Lex Fori, Story and Jurisdiction: A Reply to Professor Briggs*, in California Law Review, Vol. 53, Issue 1, p. 535-539 and especially R. Michaels, *Globalizing Savigny? The State in Savigny's Private International Law and the Challenge of Europeanization and Globalization*, in Duke Law School Legal Studies, Paper No. 74; C. S. Ramirez, "*Consideraciones históricas acerca de la responsabilidad precontractual antes-by Rudolf von Jhering. Aproximación doctrinal*", in Revista de Derecho Privado, No. 22 Enero-Junio, 2012, p. 277-298; M. Lehmann, "*Auf der Suche nach dem Sitz des Rechtsverhältnisses: Savigny und die Rome I-Verordnung*", in *Festschrift für Ulrich Spellenberg: Zum 70. Geburtstag*, Sellier, 2010.

⁹⁰ A. Junker, *Internationales Arbeitsrecht im Konzern*, Mohr Verlag, Tübingen, 1992, p. 48-49.

⁹¹ "*Das Rechtsverhältnis ist ein Eckpfeiler seines gesamten Rechtssystems. Indem er es hier in den Vordergrund schiebt, ändert er die Blickrichtung: Die Statuentheorie ging von den Rechtssätzen aus und fragte, über welche Tatbestände sie herrschten. Savigny geht zwar noch nicht vom Lebenssachverhalt aus, wie vielfach behauptet wird.*

In terms of the law applicable to the inheritance, Savigny was the adept of the principle of unity in accordance with the Roman principle of the inheritance universality, considering that the law of the last domicile of the deceased is entitled to be applied (§ 376 *System...*). Returning to the Regulation provisions, we can say that this principle - of the inheritance unity - is one of its cornerstones. The inheritance unity is provided both in the absence of applicable law choice, but also when the succession author has chosen its applicable law. In the first case the unity is tailored around the last habitual residence, and in the second, the unity is ensured by the limitation imposed to the testator to choose a single law – belonging to the State or, where appropriate, one of the States whose citizenship he/she has – which shall apply to the inheritance whole: "A person may choose the law applicable to his/her succession as a whole to be the law of the State whose citizenship he/she has when choosing the law or at the date of death.

A person who holds several citizenships may choose the law of any States whose citizen he/she is when choosing the law or at the time of death" – art. 22 (1). Thus, we conclude that, unlike the system of the Hague Convention from August 1st, 1989 on the law applicable to successions for mortis causa, allowing, also, a secondary choice, in respect of the assets that make up the estate, but without jeopardizing the mandatory provisions belonging to the applicable law on a principal basis, according to art. 3 or 5 (1) of the Convention (art. 6)⁹², the Regulation, just because of the desire to preserve the inheritance unity prevents such a possibility of partial choice. In addition, the unity on the applicable law also follows from the extensive design on its scope, *lex succesionis* governing all aspects of the succession, from its opening (causes, time and place) and until the inheritance division (partition). In other words, according to art. 23, the law of succession established under the Regulation provisions "regulates the succession as a whole". Finally, we mention that the principle of the inheritance unity cannot be defeated even when, in the absence of choice of applicable law, the court calls the exception clause provided by art. 21 (2) because, on the one hand, the exceptionality relates to "all circumstances of the case" (being no partial exceptionalities) and, on the other hand, the obviously closer link must exist "with a state other" than the one whose law would normally have applied, and not with other (several) states.

It should however be said that keeping the unity shall not always be possible. More specifically, when the law applicable to the inheritance, determined according to the rules of the Regulation, is that of a third⁹³ state, breaking the unity becomes possible in the extent that the rule of conflict belonging to it partially resends to another country's law. Likewise, in case of a

*Das Rechtsverhältnis wird wohl als im Kern vorgegeben angesehen, so daß das anwendbare Recht nur die Ausgestaltung übernimmt, weswegen Savigny auch der Meinung ist, daß diejenigen 'Rechtsinstitute eines fremden Staates' von vornherein von der Anwendung ausgeschlossen seien, 'deren Dasein in dem unsrigen überhaupt nicht anerkannt ist.' Die 'Rechtsverhältnisse' sind aber eng an die Tatbestände gebunden, so daß Savigny in der Sache von diesen ausgeht und fragt, welchen Rechtssätzen sie unterworfen sind. Logisch ist dies dasselbe wie die Frage nach dem Anwendungsbereich der Rechtsätze, was Savigny selbst hervorhebt. Aber psychologisch besteht ein Unterschied. Denn wer vom Rechtsverhältnis ausgeht, hat einen der Statuentheorie gleichwertigen Ausgangspunkt und ist doch frei vom Denkwang ihrer Dreiteilung. Er kann stets unbefangen das Rechtspolitisch richtige Ergebnis suchen und bei der Darstellung dem System des materiellen Privatrechts folgen, das jedem Juristen vertraut und bequem ist" (Kegel/Schurig, **Internationales Privatrecht**, 9 Auflage, Verlag C.H. Beck, 2004, §3 IX, p. 184).*

⁹² The Convention has not yet entered into force, being signed by only four countries (Argentina, Switzerland, Luxembourg and the Netherlands), and there are minimal chances in this sense, considering the Regulation adoption. However, despite the rather complicated system, it has exerted a strong influence over the national codes that followed, recognizing the autonomy of will in the matter of successions by opening the possibility to choose the applicable law. In this sense, art. 5 (1) of the Convention is even more generous than art. 22 of the Regulation, offering the author of succession the possibility to choose also the law of his/her habitual residence at the moment of appointment: "(a) person may designate the law of a particular State to govern the succession to the whole of his estate. The designation will be effective only if at the time of the designation or of his death such person was a national of that State or had his habitual residence there" (s.n., DAP).

⁹³ This is possible by virtue of the principle of universal application (also found in other European regulations), expressed in art. 20: "any law mentioned in the present regulation is applied irrespective if it is or not the law of a member state."

deceased with his/her habitual residence in a Member State of the Regulation application, who has not used the *professio juris*, but whose estate contains immovable properties situated on the territory of a third State whose law is deemed competent to govern the successional transmission of these immovable properties pursuant the *lex rei sitae* (e.g. immovable properties situated in the United Kingdom, to which the Regulation does not apply). Also, exceptionally, as well, to the extent that the law of the place where some immovable properties or other assets categories situation devotes in their regard, a distinct successional regime, derogating from the common law one, this regime shall apply, being removed from the competition with other laws of succession. Thus, according to art. 30 of the Regulation, “*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 successions 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*”.⁹⁴

2. The proximity principle – a general principle of private international law, which consists in locating the succession taking into account the really relevant elements in this matter. Although the inheritance institution is closely related to the one of the deceased family, often trying, through its rules, to achieve a balance between the departed one’s last will and the interests of his immediate family members (forced heirs - *Pflichtteilsberechtigter*), however, the person who is the author of the inheritance receives precedence. This precedence should be explained by the prevalence of the deceased’s will, but, also, in terms of private international law, by the connections` uniqueness: one person ("the departed"), compared to the number of heirs, and the latter can have (and often have) factors of different affiliation (different nationalities, domiciles or habitual residences situated in different countries). Last but not least, the deceased is the one who "created" (coagulated) the estate which is now subject to the successional transmission.⁹⁵ And this proximity is tailored, in the absence of choice, around the "habitation place" (the last habitation place) - the habitual residence of the succession author

⁹⁴ We are, in this case, in the presence of a double exception. On one side, it is about only those legal systems which establish a distinct succession jurisdiction, *in rem*, derogatory from that of common law in their internal legal system, and on the other hand, this jurisdiction cannot be extended, as it has a special and limiting character, being applied only to certain special categories of goods, considering their special dedication and the policies promoted by the regulator in certain fields regarded as of national interest. The recital (54) is pretty clarifying in this sense: “*for economic, family or social considerations, certain immovable property, certain enterprises and other special categories of assets are subject to special rules in the Member State in which they are located imposing restrictions concerning or affecting the succession in respect of those assets. This Regulation should ensure the application of such special rules. However, this exception to the application of the law applicable to the succession requires a strict interpretation in order to remain compatible with the general objective of this Regulation. Therefore, neither conflict- of-laws rules subjecting immovable property to a law different from that applicable to movable property nor provisions providing for a reserved share of the estate greater than that provided for in the law applicable to the succession under this Regulation may be regarded as constituting special rules imposing restrictions concerning or affecting the succession in respect of certain assets.*”

⁹⁵ The nature of inheritance is shown at present as having a *preponderantly acquiring* character, as the assets are the result of *de cuius* acquisition (“work”), removing in this way the former reality of *linearity*, when an important part of the succession assets (often the whole assets or most of it) is the result of the work of previous generations, being taken by the inheritance author consequent to certain successive succession transfers; hence the concern not to waste this estate, but to preserve it and transfer it from generation to generation, the succession reserve, established in kind and expressing a substantial part of the inheritance meeting this very purpose. However, at present things have changed. While, usually, the succession estate mainly stands for the expression of the acquisition effort of *de cuius*, it would be imposed *mutatis-mutandis* both the change of the reserve nature (into a simple receivable right – *pars bonorum / valoris / Pflichtteilsrecht*), and, especially the substantial cut down of its extent, conferring a much larger autonomy to the inheritance author and stimulating in this way the *succession planning*.

(*letzte gewöhnliche Aufenthalt der Verstorbenen*).⁹⁶ We shall allocate a separate part to this concept, of cardinal importance for the European private international law (and not only) in one

⁹⁶ However, it is true that the Regulation also operates with an escape clause (*escape clause / Ausnahme-, Ausweich- or Berichtigungsklausel / clauses d'exception*), allowing, in an exceptional way and in the absence of selection of the inheritance applicable jurisdiction, for the application of another succession jurisdiction than that of the last habitual residence, recently obtained (a few time before death), to the extent to which it can be appreciated, starting from the analysis of the case circumstances, that there are obviously closer connections to another jurisdiction than the latter one. Thus, according to art. 21 (2), "(w)here, by way of exception, it is clear from all the circumstances of the case that, at the time of death, the deceased was manifestly more closely connected with a State other than the State whose law would be applicable under paragraph 1, the law applicable to the succession shall be the law of that other State" (s.n.). The quoted text does not provide any details regarding the circumstances which might trigger the mechanism of the escape clause, but it is obvious that the European regulation has had in view the case in which all elements related to succession are located in a certain state (the goods in the succession estate, the heirs' domicile or habitual residence – the deceased's family, even maybe his/her nationality) including the former habitual residence of the deceased, to the extent to which the last habitual residence was recently obtained (a few time before death). In other words, to activate the escape clause, it is not enough to have all these connections with another state than that of the former habitual residence, but the last habitual residence has to be "inconsistent", that is recently obtained, often leaving doubts about the real intention of the deceased, especially if he/she also kept his/her residence in the country of origin. In this sense, the recital (25) of the Regulation specifies that "the authority dealing with the succession may in exceptional cases – where, for instance, the deceased had moved to the State of his habitual residence fairly recently before his death and all the circumstances of the case indicate that he was manifestly more closely connected with another State – arrive at the conclusion that the law applicable to the succession should not be the law of the State of the habitual residence of the deceased but rather the law of the State with which the deceased was manifestly more closely connected." Still a question which could be raised would be the following: had not been much easier that, instead of justifying the application of the escape clause, the Court (or the Notary) qualified the last habitual residence in the country to which the connections were closer? Obviously, the answer can only be a positive one. That is why we think that the activation of the escape clause (either ex officio, or upon the request of one of the parties) intervenes practically speaking in front of the apprehended authority based on art. 4, that is of the jurisdiction of the new habitual residence (and the last one). At the same time, if the escape clause is to step up, the condition is imposed that the inheritance author had not chosen the jurisdiction applicable to the inheritance under the conditions of art. 22. The purpose of the escape clauses is to induce certain flexibility when the abstract rule of the norm of conflict would lead to unjust results related to the location of the considered legal case. In other words, it represents an exceptional correction to the norm of conflict, considering the variability of the daily reality. Its finality is to contribute to the conflicts justice, as part of it ("conflicts justice" or "kollisionsrechtliche Gerechtigkeit" / "internationalprivatrechtliche Gerechtigkeit" – Kegel/Schurig, *Internationales Privatrecht*, 8th Auflage, 2000, p. 114), aimed at assuring equity in the determination of legal proximity. This *internationalprivatrechtliche Gerechtigkeit* also has its own soul and specific method, seeking all the time the legal system which is the "closest" to the parties of the legal relationship (generally speaking), and not necessarily geographically, but from the point of view of the elements of legal integration. The conflicts justice aims at identifying the centre of life (interest) of the person, the "premise of the legal relation" establishing, depending on the circumstances and on the nature of the envisaged institutions, the applicable jurisdiction. It operates with the concept of legal proximity, setting up the determination criteria and methods, being a *rechtsanwendungsrecht* which should act "without peeping" to the substantial content of the laws to which the respective relation shows connections and which could potentially become applicable to the case. It is only this way that we can discover the truth, giving voice to that *internationalprivatrechtliche Geist* anchored in the reasonable expectation of the parties, in the spirit of predictability and, in any case, wishing safety for establishing the competent authority and the applicable law to the case. In addition, reasonableness and predictability mean using "almost no" escape clauses... *Escape clauses* scan the state of affairs, qualitatively assessing each circumstance and then, considering the whole particularities (specificities) of the relation, find out and impose the applicable jurisdiction. Metaphorically speaking, it aspires to becoming a kind of equity of conflicts justice. Still, there is also a risk. The excessive use of escape clauses, and mainly, in unjustified situations, can lead to the risk of unpredictability about the applicable law, averting in this way the purpose of the conflicts norm. That is why, the Courts (or Notaries) should resort to these "adjustment" clauses with great precaution, only in very exceptional cases, that is only when obvious and beyond any doubt relevant connections of the legal relations impose that, refusing to give satisfaction to any request made in this sense speculatively by the parties. Hence, their name: escape clauses! However, we think it would have been wiser to give up this "technique" in the matter of international successions, as, on one hand, in this field the localization should start from a single "key" – the person of the deceased, the "exception" elements being more rare and, in any case, less relevant (placement in another location of the goods or of the great majority of the goods in the succession estate, the habitual residence of

of the next issues of RRDP. Also, the legal idea of proximity is considered in cases where *the exception clause* is appealed to, only in this case, the proximity fixation technique is different. When localization is done by applying the rule of conflict, proximity is the result of the "mechanical" application of the connection established in the abstract by the rule of conflict with jurisdiction in the matter (in our case the last habitual residence of the *de cuius*), while in case of the exception clause activation we talk about a casual operation (exceptional and casual) of determining the legal proximity, being in the presence of concrete and subjective evaluative process (*approach debate* or *issue by issue debate*).

3. The principle of predictability, facilitating the succession author the ability to think in advance, to plan for the safe and confident transmission, both as it regards the law applicable to this transmission and, equally, the authority which will have the jurisdiction to formalize it. Predictability favors the successional planning (*succession planning*) and is directly connected

the heirs), while, on the other hand, the risk of abusive use of the escape clauses cannot be underestimated, especially in countries which are not used to live under an exception condition... (For a philosophical work dedicated to the exception condition, we recommend G. Agamben, *State of exception (Homo sacer II, 1)*, Ed. Idea Design & Print, Cluj, 2008). Therefore, the escape clause was tailored for a very narrow corridor; it should not invade the practice of the Courts, bringing the exceptional into our daily life. On the other hand, even if the deceased has recently changed (recently before his/her death) the habitual residence, this should not have been a reason to apply the escape clause in favour of the country of the previous habitual residence, as the change of habitual residence could also be a sign of the intent to integrate into the legal system of the new country. Moreover, if the deceased was also a national of that country, the failure to explicitly choose the succession jurisdiction of the latter – to eliminate any doubt and, thus, also the possible application of the escape clause stipulated by art. 21 (2) – can derive from his/her belief that such a choice would have been redundant, as this jurisdiction (of the new habitual residence) would have anyway benefited of the enforcement, based on art. 21 (1), as the jurisdiction of the last habitual residence. In other words, the application of the escape clause could distort the last will and belief of the deceased, "surprising" him/her *post mortem*... Regarding the escape clause in private international law, see A. Bucher, "La clause d'exception dans le contexte de la partie générale de la LDIP" in 21^e Journée de droit international privé – 20 mars 2009; T. Hirse, *Die Ausweichklausel im Internationalen Privatrecht*, Tübingen 2006; P. Rémy-Corlay, *Mise en oeuvre et régime procédural de la clause d'exception dans les conflits de lois*, Rev.crit. 2003, p. 37-76; H. Gaudemet-Tallon, "Le pluralisme en droit international privé : richesses et faiblesses (Le funambule et l'arc-en-ciel)", *RCADI* 312 (2005), p. 9-488 (327-338); J. D. González Campos, "Diversification, spécialisation, flexibilisation et matérialisation des règles de droit international privé", *RCADI* 287 (2000), p. 9-426 (253-262, 297-303); P. Lagarde, "Le principe de proximité dans le droit international privé contemporain", *RCADI* 196 (1986-I), p. 9-237 (97-126); U. Blaurock, *Vermutungen und Ausweichklausel in Art. 4 EVÜ*, in *Festschrift für Hans Stoll*, Tübingen 2001, p. 463-480. **The escape clause cannot lead to depeage, allocating different jurisdictions to succession**, depending on the nature and location of the goods. In other words, it cannot defeat the principle of inheritance unity, its action remaining subordinated to this principle. Besides, the regulation itself speaks of the possibility to apply the escape clause (art. 21, paragraph 2) when, "according to art. 21 (2), "(w)here, by way of exception, it is clear from all the circumstances of the case that, at the time of death, the deceased was manifestly more closely connected with a State other than the State whose law would be applicable under paragraph 1". At the same time, the recital (25) specifies that, under exceptional situations, when the "the deceased had moved to the State of his habitual residence fairly recently before his death and all the circumstances of the case indicate that he was manifestly more closely connected with another State", the escape clause can be activated. At the same time, the escape clause does not represent a localization method subsidiary to the conflict norm, being no alternative to it any time the identification of its connecting point turns into a difficult operation due to the case circumstances: "the closest connection should not be resorted to as a subsidiary connecting factor whenever the determination of the habitual residence of the deceased at the time of death proves complex" (recital 25). In other words, **the escape clause is not subsidiary to the conflict norm, but exceptional to this**. In addition, the principle of inheritance unity only recognizes the exceptions explicitly established by the regulator: "under the reserve of the case in which the present regulation includes contrary provisions, the jurisdiction applicable to succession as a whole is that of the state where the deceased had the habitual residence at the moment of death" (art. 21 (1)). An example of derogatory provision in this sense is that stipulated by art. 30: "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."

with the freedom of will that can be practiced in this matter. In addition, the author of the succession may, even before the Regulation application (August 17th, 2015 - art. 84 (2)), choose the law that shall govern his/her succession, if the document containing the *electio juris* clause meets the substantive and formal conditions, as provided for in Chapter III of the Regulation or, as appropriate, if the choice "is valid to the application of private international law rules which were in force at the time of making the choice, in the state in which the deceased had his/her habitual residence or in any states whose nationality he/she had" (art. 83, para. (2)). Moreover, even if the author had not an active succession, and did not choose the law applicable for his/her inheritance para. (3) art. 83 validates the *mortis causa* disposition, made before August 17th, 2015, if it meets either the substantive and formal conditions provided in Chapter III of the Regulation, or those imposed by the law determined as a result of the application of private international law in force dispositions, at the time the disposition was made, in the state on whose territory the deceased had his last habitual residence or, where appropriate, in any of the states whose nationality he/she had, or those provided by the authority of the Member State to which the matter of the estate administration was referred to (*lex fori*).

In order to facilitate recognition of court decisions in the matters of succession and the free movement of certificates of inheritance, given that the rights in rem transmitted through the inheritance may know a Regulation different from one Member State to another, the Regulation regulated the qualification problem by providing the *adaptation of rights in rem* in compliance with the legislation forms and criteria of the state on whose territory the assets which are transmitted through inheritance are situated.⁹⁷

Adaptation of real rights is an expression of comparative functionalism (comparative law) towards finding some equivalents between what, according to a certain laws, is considered acquired and the extraterritorial efficiency of the recognized rights. *Lex succesionis* is the ground of the acquisition, while the *rei sitae* law is what establishes the 'being' of the rights, the form and content of property rights. Of course, the envisaged assumption is that in which the two laws (law of succession and the law of the assets location) do not coincide. Otherwise, the problem of adaptation is obviously, meaningless. The adaptation technique is not usually an easy one. Law of the country of origin of the assets seems to have, eventually, the last word. It is the one controlling the legal regime of assets situated on its territory, it is the one that "seals", formalizing the rights, deciding even the moment of the ownership acquisition or of other real rights. However, the starting point and, equally, the approximation primary criterion must represent the will "of the one who transmits", "of the one who gives" meaning the one of the inheritance author. To the extent that the sent right cannot fit in the "conceptual puzzle" of the country on whose territory the assets are found, the adaptation shall be made having as formal reference point the *numerus clausus* established by the legal system belonging to this country. In other words, they shall try the equivalence of the law that the succession author intended to transmit, with the reference point of *lex succesionis*, according to the conceptual formalism established by the real system belonging to the country on whose territory the assets are situated. We are, therefore, in the presence of a qualification operation. Only that this qualification has a secondary character, and does not influence the solution of the conflict of laws. This "approximation" can, sometimes, be quite difficult. Thus, the successional transmission of a right arising from a *time sharing* convention, qualified as having an in rem nature of *lex succesionis* (e.g., the Romanian law chosen by the late Romanian national), but to which the legal system of the immovable property country of origin (Austria, France, Germany, Italy) does not recognize this character. It might be raised, in this context, the following

⁹⁷ Subject to art. 31 of the Regulation, "where a person invokes a right *in rem* to which he is entitled under the law applicable to the succession and the law of the Member State in which the right is invoked does not know the right *in rem* in question, that right shall, if necessary and to the extent possible, be adapted to the closest equivalent right *in rem* under the law of that State, taking into account the aims and the interests pursued by the specific right *in rem* and the effects attached to it" (s.n., DAP).

question: who makes this adaptation? The court vested with the estate administration, according to the Regulation's rules of jurisdiction or the one at the place of the immovable property location? We believe that this task must be for the successional court because, on the one hand, it enjoys unlimited jurisdiction, being called to settle all those issues related to the succession, whether they are of incidental character or they later appear in the course of the estate administration. On the other hand, according to the Regulation, a court decision pronounced by a competent court from a Member State enjoys recognition in all other Member States, being enforceable. Therefore, a decision that would defy the principles in the matter belonging to the country where the immovable properties are situated would lead to an impossibility to execute it in this country, contrary to reason and purpose of the Regulation. In addition, the courts of the country of origin of the immovable properties are unable to "reform" the foreign decision.

4. The principle of the inheritance author's will, although unformulated explicitly, but undoubtedly resulting from the extending of will autonomy to a matter in which, traditionally, most national encodings either could not recognize the possibility of any initiative on his part, or severely limited its scope, making it practically insignificant. This principle assumes that the deceased is not only this transmission's artisan and the creator of the estate, but also, equally, the one that binds and unites all the inheritance 'beneficiaries', giving them the quality of expectant heirs. That is why, in principle, the succession's internationality is primarily assessed by reference to its author. He/she is the one who determines the law applicable to the inheritance, whether this law results from his/her last habitual residence, or it is the chosen law. Also, by the choice made, he/she creates the premise of establishing international jurisdiction. Indeed, the general rule in the matter of jurisdiction is that of the last habitual residence of the deceased (Art. 4). But if the deceased had chosen as the law of succession the law of his nationality (or one of nationalities he/she possessed), the heirs shall be entitled to choose the competence of the chosen law's state. But, without this first step, without this "help", the heirs shall not, even with unanimous agreement, be able to dislocate overall jurisdiction in the matter, established by art. 4 of the Regulation.⁹⁸

⁹⁸ The choice of the applicable jurisdiction by the succession author has a definitive and irrevocable character after his/her death. Nobody and nothing can no longer take away the application vocation to the chosen succession jurisdiction (within the Regulation limit). The incidence of the *escape clause* is also excluded in this case. Not even the agreement of all the heirs could change the situation. The solution is explained by the prevalence of the will of "the one leaving". It is his/her legacy... Eventually, most times, each of us live in both situations: that in which we behave like a heir, listening to the will of the deceased, and that in which we are planning our own posthumous condition, looking to those remaining... And if we were forced to choose between the power we want in each of these two moments – the power to interfere with the estate and will of another (irrespective of our "emotional" or blood connection we have with that person), or, on the contrary, the power to decide our own fate, assessing ourselves the intensity of some family bonds – we think the reason should lead us to this last version. That is how the autonomy of will in the matter of successions is explained and substantiated, recognized at least, after long lasting discussions and hesitations. It is true though we are talking about autonomy of limited will, stuck between boundaries, which do not offer too much choice to the one intending to plan his/her succession. The desire for a certain mitigation, considering on one hand, the interests of the author's family, but also, on the other hand, the unilateral (most times) nature of the instrument of succession planning (the will), which opens the door for the "planner's imagination" (unlike the matter of contracts, where this possible discretion is mitigated by the antagonism of interests which is normally opposing the contracting parties) made us reach this limited freedom. Certainly, much too limited, if we consider the right of choosing other jurisdictions, such as the jurisdiction of the country regulating the matrimonial regime of the author of succession, or even the jurisdiction of the country on whose territory are located, for instance, all the real estate making up the succession estate, or the jurisdiction of the habitual residence of the deceased family, all the more as the heirs making up his/her family would be more familiar to that succession law, weighting their expectations by comparison to its provisions. Of course, the European regulator has been rather shy and apprehensive in this matter, reluctant to risk too much, also influenced by the fears of the states (such as France) which did not recognized so far *professio juris* in successions. On the other hand, it also feared the possible speculative intention of the author of succession by opening a much too wide horizon, inciting him/her to the study of comparative law in the matter of successions and to legal geography. The policy of the European regulator was that of small steps, wanting maybe first "to put up with" this new place of the exercise of the will autonomy. However, it would be desirable that things change in the future, widening the sphere

5. The Principle of Solemnity and Forms. The law of succession is, by excellence, a law of solemnities and forms. If in other matters, such as the one of the contracts, the formalism represents the exception to the rule, instead, in matters of succession, the formalism is the rule. The formalism is met in a double aspect: on the one hand, the formalism of the successional planning acts and, on the other hand, the formalism of the successional procedure itself. In the first case we talk about the formalism of the documents underlying the successional planning and here we should distinguish between the solemn form requirement (“*substantiality of the form*”)⁹⁹ and the procedure of form attribution (“*formalism of the form*”)¹⁰⁰. The first is dictated by *lex successionis*, and the latter by the law of the State of that

of succession planning options by including other jurisdictions, showing connections to the inheritance, all the more as even under current conditions, there is still a margin of speculation, not due to the right of choice, but rather by the establishment of the last habitual residence.

⁹⁹ The problem of formalism in the European private international law (and not only) is a rather delicate one, its approach not being unitary and uniform. While *in the national Court*, the solutions are relatively simple, the documents formalism being imposed by imperative provisions, whose non-observance leads, almost invariably, to the absolute nullity of the document defying the form requirements, while *in private international Courts* things are being looked at in more keys as regards the form. There is yet a paradox: while in the national Court, the solemn form is sometimes imposed for the very protection of the person’s consent (for instance, in testamentary matter), its reason and purpose being to get an informed consent, drawing the testator’s attention to the “seriousness” of its effects over his/her patrimony, in exchange, in private international law this very protection of the testator’s will overturns the exigency of this kind of formalism, sacrificing it on the shrine of compliance with the last will (*favor testamenti*). Certainly, the form has no value in itself. Its value and reason are reduced to the extent to which, attiring the testator’s will, it can actually serve.... The form attire should serve the interest of the person whose will it is meant to protect. It should not suffocate it only for the sake of keeping the form unaltered (that is for its own sake), as this is not a purpose in itself. By sacrificing the testator’s will, that is the content of the (protected) document, the form will die, too. And all turns into a void... Consequently, if the will has been drawn up in a foreign country which is more relaxed as regards the form, if the testator is a foreign national and has complied with the pre-set forms by the tradition of his/her country or, irrespective of his/her nationality, has complied with the law of the country on whose territory he/she had the domicile or the habitual residence at the moment of the document conclusion, or if he/she has complied with the formal conditions imposed by the law of the real estate location, or “by chance” the document meets the form requirements of the Court or of the Notary achieving the succession procedure (*lex fori*), – the rational solution can be nothing but to sacrifice the “protecting coat” in order to give life to the substance this coating (formal) was meant to protect. The form surrenders to its own vocation – to protect the testator’s will. In this way, through its own sacrifice, the form manages to give birth to the one meant to cover and protect: the last will of the departed one... Hence, the solution of alternative forms is established in almost all the national legislations of private international law (art. 2635 NCC), in international conventions (art. I of the Hague Convention on the conflicts of law relating to the form of testamentary dispositions of October 5th, 1961) and more recently, in the European Regulation dedicated to successions. Thus, Regulation (EU) no. 650/2012 of the European Parliament and of the Council of July 4th, 2012, regarding the jurisdiction, applicable law, recognition and enforcement of Court decisions and the acceptance and enforcement of authentic succession documents and regarding the issue of an European certificate of inheritance – art. 27, dedicated to the form conditions of the disposition on property upon death: “A disposition of property upon death made in writing shall be valid as regards form if its form complies with the law: (a) of the State in which the disposition was made or the agreement as to succession concluded; (b) of a State whose nationality the testator or at least one of the persons whose succession is concerned by an agreement as to succession possessed, either at the time when the disposition was made or the agreement concluded, or at the time of death; (c) of a State in which the testator or at least one of the persons whose succession is concerned by an agreement as to succession had his domicile, either at the time when the disposition was made or the agreement concluded, or at the time of death; (d) of the State in which the testator or at least one of the persons whose succession is concerned by an agreement as to succession had his habitual residence, either at the time when the disposition was made or the agreement concluded, or at the time of death; or (e) in so far as immovable property is concerned, of the State in which that property is located”. It can be noticed that the European regulator’s intention to safeguard and fulfil the last will of *de cuius* is so strong that it significantly enlarged the sphere of the laws able to formally validate the document of the last will of the succession author, also including laws which have actually no other role in the regulation economy, such as that of the testator’s domicile, or, as the case may be, of at least one of the parties whose succession is envisaged by the effects of an agreement as to succession.

¹⁰⁰ By the phrase “*formalism of the form*” we mean its “*procedural side*”, indissolubly connected to the nature of assignments and competences recognized to the authority achieving them. This “*procedural formalism*” is

document's origin (*lex originis actus*). The latter is inextricably linked to the nature of powers conferred by the law of the competent "public officer's" place (notary public). He/she must always observe the authentication procedure provided by its own law.¹⁰¹

In conclusion, in matters of succession, the formalism debuts from the moment of the successional planning by the *ad validitatem* form, imposed to this planning instruments, and perfects itself by the completion and fulfillment of the successional procedure (notary or judicial), the latter imparting a strong control function to the formalism.

6. The principle of competition between the European inheritance systems, exercised through the autonomy of will. It is true, the autonomy of will is not a very generous one in this matter, not allowing, to the inheritance author, too much freedom of movement. Of course, nobody expected a total freedom or one identical to that found in the matter of contracts. The explanation seems simple enough: whether in contractual matter the autonomy is, by the nature of its spring, tempered by the antagonism of interests which contrasts the parties of a contract, instead, in the successional matter, things are completely different; here, the unique actor of this autonomy is the testator (*der Erblasser*). So, we talk about a limited autonomy, a 'framed' one. We cannot help but notice that an ampler freedom would have been preferable, either after the

mainly regulated by the Law of Notaries Public and Notary's activity no. 36/1995 (republished in Romania's Official Gazette no. 72 of February 4th, 2013). From the point of view of private international law, the "formalism of the form" is invariably submitted to the law of the state the "public officer" belong to (the Notary), that is *lex fori*. In other words, as regards the "form substance", the rule is to apply the law governing the respective document content (*lex causae*), and sometimes, due to the wish to "save" the document (*favor actus*), consecrating the alternation of multiple conflict norms, and not the famous *Kegel* scale (*exempli gratia* in testamentary matter art. 2635 NCC – *favor testamenti*). In exchange, as we have seen, the "formalism of the form" is submitted without exception to *lex fori*. The form is nothing else but a coat of the act regarded as *negotium juris*, a coat providing it strength and reliability in the eyes of third parties, turning into a reliable instrument of securitization of civil circuit. And the one who gives this form – the Notary Public – is not limited only to look into the party's eyes, but is also looking into the eyes of that who recognized the importance of the reason to be. He is working in the service of both private and public interest at the same time. He is both the guarantor of the conscious and freely expressed will of the parties, and equally of the security of the private circuit as a whole.

However, it is also equally true that under other circumstances, the form is the one providing the act substance and safety. Although it cannot exist in itself, but only stuck to the content, the form is the one giving life to the tailored substantiality. When, due to various considerations (most diverse ones) the regulator imposes the form *ad validitatem*, this is what secures efficiency and transferability.

The reasons of formalism are multiple and they are often depending on the nature of the act whose solemnity is imposed for its very existence and efficiency. The concern for the approval of a property right prevails in testamentary matters (or of other real rights) having as object real estates. The form secures the public control over the act, but also the compliance with the requirements related to the security of the real estate circuit, an aspect detached from the parties' private interest when signing such categories of documents.

That is why, in private international law, the consequence of violating the form conditions is also different: while in testamentary matters, for instance, it is attempted to save the act, and with it the will of its author, being sufficient that the testamentary document meets any of the form conditions imposed by any of the systems the will shows a reasonable proximity¹⁰⁰ to, in exchange, ***consequences are completely different when the form seeks to get a control over the circulation of certain categories of goods, such as the real estates***. This formalism implies a double control: 1.) one over the clerk (Notary, public agent) who is bound to meet certain "exercise competences", as well as certain "formalities in force" (transaction reporting to the competent national authority in charge with money laundering prevention and control, fiscal verification, etc.); 2.) one over the document itself, meaning the control for compliance with validity conditions (legal effectiveness control). Yet, it is true that the Notary is not recognized at **European level** as a public authority in the meaning of art. 51 of TFEU (ex-art. 45 TCE), as resulting from the Resolutions of Luxembourg Court (the Great Chamber) of May 24th, 2011, in the case C-47/08, in the case C-50/08¹⁰⁰, C-51/08, C-53/08, C-54/08 and C-61/08.

¹⁰¹ In this context, complications might occur if the Notary legislation and tradition of certain countries sanction a certain "easiness" in this matter, regarding as sufficient the *signature legalization* for a document to be used in another member state, in view of signing a solemn (authentic) document in that country. Here, we think, the systematic and functional interpretation of the legal expert in the country of the document destination should be used (the case of proxies), starting from the *principle of forms equivalence and equipollence*. See in this sense, the study accompanying the Resolution of Santiago of 2007 made by the Institute of International Law, available on the Institute official website at the address: http://www.idi-iil.org/idiF/resolutionsF/2007_san_01_fr.pdf

1989 Hague Convention model, either to allow the testator the possibility to choose, besides the law of the state (or states) whose nationality he/she possesses, and the law governing his/her matrimonial regime. Especially since both institutions are closely interlinked, with a familial finality.¹⁰² This freedom conferred to the inheritance author implicitly leads to a competition between encodings between successional systems that may become, potentially, incidents: the one from the last habitual residence of the inheritance author, the one whose nationality the deceased possessed, either at the time of making the choice, either at the time of his/her death (art. 22 para. 1). If the deceased had several nationalities, also the laws of inheritance belonging to these states come into play (art. 22 para. 2). Therefore, the inheritance author shall be tempted to compare the "Regulation offer" contained in the laws of those countries, to examine *in concreto* the freedom conferred by each internal coding comparing available quosity recognized by each of these laws. Shall be tempted to learn the compared law of succession...

Thus the national legal systems being deterritorialized, their application vocation not resulting automatically from the territoriality criterion anymore when there is a foreign origin element, even if it is one of a sensitive nature - such as the coexistence of two national affiliations, belonging to different Member States - so they end up in a position to "beg" their application before those who intend to legally connect. From now on they compete with each other and shall no longer apply under their own authority, but only under the will of the parties, the only able to appreciate their quality and value, to the extent to which they meet (their) envisaged expectations; it will, thus, balance tradition with innovation, "*semper*" with "*novum*", the way of thinking and mentality of the national legislator with the way of thinking and the will of those to whom it is really addressed to. In fact, a dialogue is born, only participating in this dialogue, along with the one who intends to enter into the legal relationship, all national normative systems that are connected with the respective relationship, each leaving their own "offer" first. In other words, these normative systems are activated, becoming weightless, "floating" above the community area (federal). And this weightlessness creates a constellation of equals ... Each normative product shall henceforth apply to any national territory. Each will apply on a "piece" of the European territory, not mechanically and reiterated, but only when this application was desired ("bound" or "required") by those who entered into the legal relationship.

¹⁰² Would it not be natural to allow the author of succession to choose, for instance, the law governing his patrimonial relations to the other spouse? We think that the European regulator was rather shy and careful not to disturb too much the countries which were not favourable to the recognition of an autonomy of will in this matter (such as France) and which were afraid of the possibility to circumvent the internal provisions on succession reserve, all the more as, according to jurisprudence and the majority opinion of the doctrine, this institution is not regarded as belonging to the public order of private international law even in those countries. However, it is disputable if, by case, the effectiveness of a certain protection with succession finality could not be questioned – using the mechanism of public order of private international law – in case of some heirs of the deceased (to whom the succession law of the forum recognized the quality of forced heirs) completely without any income or in a material dependence to the author of succession (underage children or spouse with a serious disability, incapable of work). In that case we can speak of the obligation of a minimal family solidarity.

Chapter IV. Theoretical aspects related to obtaining the foreign law content through the European Network of the Notaries and the European Judicial Network in Civil and Commercial Matters.

§ 1. A Notary Network for the European legal practice

The Council of the Notariats of the European Union (CNEU), the official and representative association at the continental level of the civil law notary profession, decided, in Marseille, on October 11th, 2006, the creation of the European Notarial Network (ENN). The CNEU network was, thus, launched on November 1st, 2007 as a national interlocutors structure, with the main objective to bring legal information support to the European notaries confronted, on daily basis, with the cross-border type files.

Today, the network interlocutors serve the notaries public from the following UE Member States: Austria, Belgium, Bulgaria, Croatia, Estonia, France, Germany, Greece, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Czech Republic, Romania, Slovakia, Slovenia, Spain and Hungary.

By the ENN activity, the European notary actively participates in deepening the European area of civil justice. The number of nationals who maintain links with the nationals of another state for professional or family reasons is continuously growing in the European Union. This can be readily seen in the case of Romania. On the notary plan, there is, therefore, a strong need for counseling and adapted professional accompaniment to the legal relations arising from the European mobility of persons. The implementation of the European legal instruments having incidence on the notary activity, which often require the practitioner to apply another EU Member State law, brings an increase in the demand for information from law professionals with respect to the content of the substantive law of the European States in the area of notary competence.

The European dimension of legal security and equality of the access to justice for citizens and families becomes a fundamental component of the notaries mission in society to whose accomplishment decided to contribute concretely through the European Network of the Notaries.

§ 2. Missions and activities:

2.1. ENN interlocutor's primary mission is to bring a **direct** technical support to the notaries called to deal with files with foreign origin element. ENN **does not offer legal advice** in specific cases, **but an abstract support for notaries**, with information, usually, about substantive and procedural law of other Member States within the jurisdiction of the notaries, about formal validity criteria for various deeds of the notary activity, etc. This basic task is performed by transmitting replies and complete materials or fragments of legislative, jurisprudence, articles or studies texts.

Modus operandi: Each notary may submit a written request to its national interlocutor. The latter shall process it immediately, if it already holds the information or shall decide to contact the homologue interlocutor in one of the 22 Member States to which the case presents foreign origin elements in order to elaborate the reply. The requests must be formulated in the form of some specific questions and cannot be transmitted in the form of a file. Interlocutors use for the communication between them an *online* informatics platform with alert system hosted on the network intranet. Also, the fact that the personal relations, of collegiality and cooperation are

very good between this network's members, which meets twice every year, the increases the efficiency and speed of the given replies.

In this context, the ENN interlocutors have the task of informing and linking notaries with their colleagues from other states, speakers of certain languages to facilitate direct cross-border cooperation between them in different concrete files.

2.2. In addition to these activities of *direct* support and cooperation with law practitioners, the European Notarial Network has contributed to the **performance of some "macro" projects providing answers to the European level to the notaries information needs** on the foreign law content and on the European law application.

The portals "Successions in Europe» are to be mentioned here www.successions-europe.eu, « Couples in Europe» www.coupleseurope.eu where the information available in all European languages regards the Regulation into the national systems of the successions and matrimonial regimes in the EU Member States. Another project available on the ENN intranet, which is being transferred on national notaries intranets is the "European Map of Authentication" designed to provide notaries in all states, in their own languages, detailed information of the validity conditions in terms of the form provided by national legislations for 110 of the most commonly encountered deeds in the civil and commercial circuit, so in the notary activity, as well as for the proxies afferent to these deeds. In 2013 the portal "Vulnerable Adults in Europe" was created <http://www.vulnerable-adults-europe.eu/> available so far in the Europe working languages, with a section about vulnerable adults, which shall be completed in 2014 with a section on the protection of minors.

ENN interlocutors inform notaries and contribute to the application by them of the **EU legislation in their own states in terms of notary activity**. In 2012 the "European Notarial Legislative Observatory" was created (on the ENN intranet), and in 2013, ENN has provided European notaries with a "Livret", translated into 19 European languages, with practical cases on the application of the EU Regulation 650/2012 on the international successions.

All these projects have been achieved **with the European Union co-financing** in the form of grants for actions or operational grants (for operating) which the Network has obtained over the years, from the European Commission.

In addition to these projects consisting of precious legal information databases for practitioners and citizens, also within its working programs in the recent years approved and financed by the European Union, the ENN has also created some **practical instruments** to support the notary activity. The most important may be considered **the bilingual form which allows the cross-border verification of the mandates content** (and their revocation) between the notary who uses the mandate for the investigation of a deed and the one issuing the deed, from abroad (the form can be downloaded in any language combination between 19 European languages). Based on the same principle, in 2014 the ENN works for creating a „**Notary passport for legal entities**” designed to equip a company or any entity wishing to enter into legal and economic relationships in another Member State, with an information sheet referring to company in general, its current status and the representation powers holders and scope. This information is summarized by the notary of the country of origin in a bilingual form - easily readable by the notary from the State of destination - after consulting the public records and the documents of the company and the mandates given by it.

2.3. The ENN also has a section for "training" the notaries, responsible for the promotion of initial and continuous formation of notaries in the EU law and that has dealt with the foundation of the CNEU project "Europe for Notaries - Notaries for Europe". In this project also the international seminars in Bucharest during 19 to 20 September 2013 were conducted and from 8 to 9 May 2014 addressed to a target public of approx. 500 notaries from Romania, Hungary, Bulgaria, Greece and Portugal.

This structure closely works with the European Commission on annual evaluations performance on the objectives of legal professions training in European law until 2020.

§ 3. The relationship between the European Notarial Network and the European Judicial Network.

One of the political objectives of creating the European Notarial Network was to facilitate the integration of European notaries in the European Judicial Network activity in civil and commercial matters, on medium and long term. It should be noted that the European Notarial Network in the CNUE was established from the beginning after the European Judicial Network model and there is a close collaboration with it.

The Council of Ministers of Justice of the EU Member States adopted in June 5th, 2009, the decision to amend the legislative framework regarding the functioning of the European Judicial Network in civil and commercial matters. This decision has also received the endorsement of the European Parliament, given on June 18th, 2009. The most important aspect in terms of the legal professions is, undoubtedly, confirming in the text of the decision 568/2009/EC of the fact that "*professional associations representing legal practitioners, in particular lawyers, notaries and bailiffs directly involved in the application of the Community and international instruments concerning civil matter, can become members of the network through their national organizations in order to contribute, along with the contact points, to some of the tasks and activities specific to the network*" (recital 12 of the Preamble).

Thus, art. 1 concerning the European Judicial Network, provides for the inclusion of **the professional associations representing at national level in the Member States legal practitioners directly involved in the application of community and international instruments concerning judicial cooperation in civil and commercial matters**, and „**the Member States shall designate the mentioned professional associations (...). For this purpose, the Member States obtain the agreement of the concerned professional associations on their participation in the network**".

European Parliament and Council Decision 568/2009/EC leaves at the Member States discretion the designation of national professional associations to be part of the national contact structure of the European Judicial Network, depending on each country's legal system specificity.

§ 4. The European Judicial Network in Civil and Commercial Matters.

The European Judicial Network in civil and commercial matters was established by the Council Decision No. 470 of May 28th, 2001 (2001/470/EC)¹⁰³, as amended by Decision no. 568/2009/EC of the European Parliament and of the Council of June 18th, 2009.

According to the decision, the term "Member State" means all Member States except Denmark (art. 1, para. 2).

The network is composed of central contact points designated by each Member State, liaison magistrates, other authorities as well as professional associations of legal professions practitioners that, through their activity, are in contact with the application of European and international instruments in civil and commercial matters.

The network aims to facilitate judicial cooperation between the Member States in civil and commercial matters, by setting up an information system for its members, facilitating the access to justice by providing relevant information relating to the application of European and international instruments in civil and commercial matters, facilitating procedures with cross-border implications.

¹⁰³ Publ. in JO L 174, 27.6.2001, p. 25.

The network has its own website with updated information, accessible at the following address: http://ec.europa.eu/civiljustice/index_ro.htm or on the E-Justice European portal: <https://e-justice.europa.eu/home.do?action=home&plang=ro>

The Member States courts, confronted with the application of foreign laws in the disputes with foreign origin elements, can obtain information on the content of foreign law applicable for the dispute, formulating requests for judicial cooperation addressed to the central point of contact in the country of origin of the court to which the matter was referred to. The contact points are required to respond to the received requests within 15 days of the request receipt, except for complex situations.

In successional matter, general information can be accessed, related to the Member States right, and on the portal: <http://www.successions-europe.eu>

Also, information related to the foreign laws content could be obtained, applicable in the case, and under the European Convention in the field of the foreign law information, adopted in London on June 7th, 1968¹⁰⁴. Romania adhered to this Convention in 1991 (Official Gazette, Part I, no. 63bis of 03.26.1991).

¹⁰⁴ For details related to the application of this convention, see the website of the Ministry of Justice: <http://www.just.ro/Sectiuni/Cooperarejudiciarăinternățională/Ghiddecooperareînmateriecivilășicomercială/tabid/736/Default.aspx>

Chapter V. Practical cases regarding the determination of international jurisdiction.

§ 1. Practical cases for judges.

Practical case I. Choice of Forum Convention. Third States. Subsidiary Jurisdiction. Lis pendens. A, Romanian national with last residence in Israel, dies leaving assets on the territory of Romania, Moldova and Israel; understanding to contest the will, the wife and children of the second marriage conclude, two weeks before his death, an agreement conferring jurisdiction in favor of Romanian courts. The son from his first marriage, who referred a similar request to the Israeli courts, challenges the Romanian courts' jurisdiction. What should they decide?

Comments and settlement

1. Establishing international applicability of the Regulation 650/2012

Regulation 650/2012 does not include rules on its spatial applicability. The doctrine, however, agrees on the *erga omnes* character of the rules established¹⁰⁵ that replace national civil procedural rules with a similar object, and occur even when the case presents connections (sometimes even dominant) with third states. For that matter, the European legislator expressly provided for special rules that could be applied to establish courts of different Member States of the European Union when the deceased's habitual residence is located in a third state (Articles 10 and 11).

The second condition for the Regulation 650/2012 applicability is to establish, by the clause conferring jurisdiction, the jurisdiction of the courts of a Member State of the EU; it does not raise problems in this practical case, the courts to which the matter was referred to being the Romanian courts. If the interested persons option should have regarded the courts of a third State, the afferent clause would not have been governed by the Regulation (applicable only in what regards the jurisdiction of the Member States courts), but by the corresponding rules in the State of the chosen court.

2. Verification of the Validity Conditions for the Choice of Forum Convention.

Formal Validity. In terms of the conventions conferring jurisdiction form, Article 5§2 of the Regulation establishes a series of explicit requirements - written document (the electronic form being admissible), dated and signed by the parties concerned - who must be punctually verified.

In this practical case, the first part that could raise discussions is the time of signing the agreement. The doctrine considers however that this is indifferent: the choice of the forum can intervene both before the death (because it does not influence the successional rights of the parties) and subsequently, even after the matter was referred to the court¹⁰⁶.

The second problematic aspect regards the persons required to sign the Convention. Article 5§1 of the Regulation states "the concerned parties" (interested parties), including, without a trace of doubt, the heirs, legatees, mortis causa provisions beneficiaries or the executor of the will. In this practical case, one of the heirs dispute the validity of the agreement

¹⁰⁵ A. Bonomi, in A. Bonomi, P. Wautelet (dir.), *Le droit européen des successions, Commentaire du Règlement n° 650/2012*, Bruylant, 2013, p. 33-34, n° 22, p. 165, n° 3. A. Davi, A. Zanobetti, „Il nuovo Diritto internazionale privato delle successioni nell' Unione Europea”, *Cuadernos de Derecho Transnacional*, 10. 2013, vol. 5, n° 2, pp. 5-139, n° 131, p. 112.

¹⁰⁶ See. A. Bonomi, *op. cit.*, n° 15-18, p. 188-189; see art. 7.c) of the Regulation.

(which probably he/she did not sign); although recital 28 in the preamble reading¹⁰⁷ gives the impression that sometimes could be possible the conventions conferring jurisdiction only accepted by some of these persons¹⁰⁸, because the dispute concerning the validity of the will interests all heirs, without the consent of one of them, no prorogation shall be effective and, based on Article 9§2, the "chosen" court must decline its jurisdiction.

Substantial validity. Justifications for the admission of the agreements conferring jurisdiction in matters of succession being especially of practical nature - ensuring the coincidence between jurisdiction and the legislative competence¹⁰⁹ - the European legislator has set two cumulative conditions, essential to their validity: a) choice of forum conventions are allowed for the disputes in the matters of succession only if the *de cuius* has chosen, in accordance with article 22 of the Regulation, for its national law as the law of succession¹¹⁰; b) the interested persons decide to confer the jurisdiction to the courts of the State whose law has been chosen by the testator to govern the succession. By hypothesis, the first of these conditions not being satisfied in the practical case, the courts shall have a second reason to be declared without jurisdiction, without the need for substantial validity verification of the interested parties consent (in accordance with the law of the court to which the matter was referred to).

3. Verification of Subsidiary Jurisdiction Criteria

The habitual residence of the deceased not being located in Romania and choice of forum convention not being validly concluded, it must additionally be verified that the Romanian courts could declare as having jurisdiction based on other texts of the Regulation. In particular, Article 10 (subsidiary jurisdiction) is of interest. Two of the conditions of this text applicability are satisfied in this case by definition: (i) the deceased did not have his/her last habitual residence in a Member State and (ii) part of the successional assets are located on the territory of the State of the court to which the matter was referred to. These shall be combined with one of the requirements hierarchically provided in Article 10§1. letter a) or b) of the Regulation (the nationality of the state of the forum or the previous habitual residence in the state of the forum). Because in the practical case the deceased was a Romanian national, the Romanian courts have jurisdiction to rule (art. 10§1.a).

4. Assessment of the Lis Pendens Rules Applicability

An additional aspect is likely to raise problems - the possible renvoi of the matter to the Israeli courts with a dispute having the same object, the same cause and the correlative creation of a lis pendens situation. Article 17 of Regulation 650/2012 shall be inapplicable, because it only concerns disputes pending before the courts of different Member States, which is not the practical case. The idea of ensuring a coordination between jurisdictions and the prevention of irreconcilable decisions, taking into account the rules of the State of the forum regarding international lis pendens (article 1075 NCPC) could be envisaged¹¹¹; the Romanian court should confirm if the matter was referred to it first (in which case the proceedings shall continue) or the second (in which case they might consider staying the proceedings, in accordance with the mentioned article rules).

¹⁰⁷ "It would have to be determined on a case- by-case basis, depending in particular on the issue covered by the choice-of-court agreement, whether the agreement would have to be concluded between all parties concerned by the succession or whether some of them could agree to bring a specific issue before the chosen court in a situation where the decision by that court on that issue would not affect the rights of the other parties to the succession".

¹⁰⁸ As well as in case of a recovery claim promoted by a legatee against the heir holding the asset, when the agreement of the two is sufficient.

¹⁰⁹ See recitals 27 and 28 of the preamble and art. 6 para.2; A. Bonomi, *op. cit.*, n° 5, 6, p. 185.

¹¹⁰ The condition is not met if we were only in the presence of a partial choice, according to art. 24§2 or 25§3 of the regulation.

¹¹¹ See in this sense, A. Bonomi, *op. cit.*, n° 6-10, p. 258-260. The possibility to use internal rules regarding international lis pendens could easily make the object of a preliminary question addressed to the Court of Justice.

Practical Case 2. Optional Declination of Jurisdiction. Member State. X, English national with his last habitual residence in Romania, drafted a will by which, along with the option in favor of the English law of succession, he disinherits his daughter. Subsequent to X's death, she contests the will in the Romanian courts; the widow asks for the declination of jurisdiction in favor of the English courts. How should the Romanian judges proceed?

Comments and settlement

Verification of the Applicability of Article 6 of Regulation 650/2012.

Following the objective of ensuring the coincidence between the jurisdiction and the legislative competence, the European legislator provided in Article 6§1 of Regulation the opportunity for declining jurisdiction in favor of a better placed court, based on a discretionary assessment of the de facto elements by the court to which the matter was referred to (having, in fact, jurisdiction, to rule the case)¹¹²; the margin of discretion which it enjoys is significant, among the issues which can be taken into account being the foreign law of succession ease of knowledge and application, the facilitation of taking of evidence or the interest of the parties (avoiding difficulties arising from their cross-border movement or recognition of decisions regarding the assets administration or transmission)¹¹³.

The addition of subjectivity and uncertainty thus introduced regarding the decision on jurisdiction are counterbalanced by a careful delineation of the conditions under which this declination can operate: (i) the original court to which the matter was referred to, a court of a Member State, has jurisdiction for the judgment of the case on the merits (the validity of the will); (ii) the testator has made a *professio juris*, in accordance with art. 22 of the Regulation in favor of a Member State law; (iii) one of the parties to the dispute requested for the jurisdiction declination in favor of the courts in the Member State whose law is applicable to the succession¹¹⁴.

If the first of these conditions does not raise particular difficulties in the present case under review (Romania being the state in which the last habitual residence of the deceased was located, non-litigious issue in the practical case), the last two conceal a possible difficulty, related to the meaning of the expression "Member State". In fact, in order to not affect the systematic and coherent interpretation of the Regulation, it is generally accepted that in the context of the rules of jurisdiction laid down in Chapter II of the Regulation (but not only), this expression does not designate "any Member State" of the EU, but precisely that "*Member States which participated in the Regulation adoption*"¹¹⁵. Because in the application of art. 1 and 2 of Protocol 21 on the position of Great Britain and Ireland regarding the acts adopted for achieving the area of freedom, security and justice, these states are not bound by the Regulation 650/2012¹¹⁶, namely in the practical case subject to discussion, the Romanian court must refuse the declination of jurisdiction.

¹¹² This is a particular and singular application of the English doctrine *forum non conveniens*, reluctantly accepted in the European private international law (see, before, the firm refuse of its acceptance in the context of Regulation 44/2001 - CJUE, March 1st, 2005, *Owusu*, C-281/02, and the timid consecration in art. 15 of Regulation no. 2201/2003, for litigations in matter of parental responsibility).

¹¹³ Among others, the European regulator mentions as an example, the habitual residence of the parties, respectively the succession assets location (in the state in favour of jurisdictions requested to decline their competence).

¹¹⁴ Declination is not possible ex officio (a different case as to that regarding the parental responsibility - art. 15 of Regulation no. 2201/2003 -, where the public interest to safeguard the superior interest of the child is extremely present), so that the parties enjoy a certain control over the procedure.

¹¹⁵ A. Bonomi, *op. cit.*, p. 166, n° 4.

¹¹⁶ Also see recital 82 of the Regulation preamble; a similar position is consecrated for Denmark by art.1 and 2 of Protocol 22 regarding the position of that state regarding the space of freedom, safety and justice.

Practical Case 3. Declination of Jurisdiction. Jurisdiction in Case of Choice of Law. X, Romanian national, holding assets in Romania and Spain, made a will in which the Romanian law was chosen as the applicable law. In the last years of his life he established for the treatment of a lung disease, his habitual residence in Spain, the country where he also died. One of his sons contests the will before the Spanish courts, but at the other son's request, they decide in favor of the declination of jurisdiction in favor of the Romanian courts. Express your opinion on their jurisdiction.

Comments and settlement

Basis for a possible jurisdiction of the Romanian courts is, in the practical case, Article 7 of the Regulation, which establishes two minimal conditions of application¹¹⁷. The first, justified by practical arguments - the desire to maintain the coincidence between the jurisdiction and legislative competence and the correlative facilitation of courts' mission - concerns the designation by the testator of that State's law as *lex successionis*. The second is that of declining jurisdiction by the court to which the matter was referred to first, in accordance with article 6 of the Regulation. If these conditions are met, the court to which the matter was referred to has no other option but to declare itself as having jurisdiction¹¹⁸ (which the Romanian court in the practical case should do). In order to prevent the denial of justice that could result from a negative conflict, it is not authorized to verify whether the court to which the matter was referred to first did or did not correctly apply article 6 when it decided this declination - it shall not carefully check the validity of the *electio juris* clause, or if the foreign court properly assessed the circumstances that justified the declination¹¹⁹.

Practical Case 4. Habitual Residence in a Third State. Subsidiary Jurisdiction. Provisional and Conservatiion Measures. A, French national, dies having the last habitual residence in Israel; part of his succession are assets located in France, Israel and Romania (country where he lived briefly, 20 years ago). X, Romanian national, claiming to be his daughter, referred to the Romanian courts a petition of heredity and calls for an inventory of the assets of the estate. Express your views on the Romanian courts' jurisdiction.

Comments and settlement

In this case, a distinction should be made between the two heads of claim regarding the substance of the dispute, namely obtaining of protective measures.

1. Jurisdiction for Judging on the Merits.

Petition of inheritance is real action that interests the dispute's merits, so that Romanian courts' jurisdiction should be checked in accordance with art. 4-11 of the Regulation. In the practical case, because the deceased's habitual residence is located in a third state (and the applicability of Art. 4 cannot be seriously raised), particularly Article 10§1 of the Regulation is of interest, which takes into account as liaison criteria the place where the assets are situated, the nationality, respectively the habitual residence of the deceased. Although one of the drawbacks of the text is that it allows positive conflicts of jurisdiction (especially between Member States courts and third states courts), for the relations between the Member States the mentioned

¹¹⁷ The third condition – actual apprehension of the Romanian Courts by one of the interested persons – it is implied.

¹¹⁸ A. Davi, A. Zanobetti, *op. cit.*, p. 118, n° 142.

¹¹⁹ See A. Bonomi, *op. cit.*, n° 17, p. 200, n° 19, p. 201, n° 2, p. 203.

criteria are hierarchically organized, so that it can be minimized¹²⁰: the courts of the Member State where the assets are situated and where the deceased had a history of habitual residence (Art. 10§1.letter b)¹²¹ can be declared as having jurisdiction unless there are not any assets in another Member State whose nationality the deceased had (Article 10§1.letter a).

Given this priority and that in the practical case the deceased was a French national and part of successional assets are located in France, the Romanian court should declare as not having jurisdiction to settle the petition of heredity. In accordance with article 15 of the Regulation, the lack of jurisdiction exception must be raised by default, even if the defendant/defendants does/do not invoke it; although the text does not expressly provide, it is irrelevant whether the court having jurisdiction under the Regulation was effectively seised or not.

2. Jurisdiction for Provisional and Protective Measures

Regarding the second head of claim - the inventory of successional assets - in the practical case must be verified the possibility of using Article 19 of the Regulation, whose applicability is not conditioned by the jurisdiction of the court for judging the merits of the dispute¹²² or that the matter was referred or could have been referred to another court for the trial of the case¹²³. The text generally aims the „provisional and protective measures provided by the law of a Member State” (law of the forum), and for their delimitation the definition given by the Court of Justice under the rule of the Brussels Convention shall be useful: measures intended to maintain a de facto or de jure situation to safeguard the rights for the recognition of which is sought on the merits¹²⁴. The inventory of the assets, sought in the practical case, falls within this definition.

Article 19 in particular does not condition the jurisdiction of the court to which the matter was urgently referred to in taking measures (but the reference to the law of the Member State shall imply the compliance of the requirements provided by this law) or any connection between the case and the state of the forum. However, for the corresponding provision of the Brussels Convention/Regulation 44/2001 (art. 24 CB/art. 31 R), written as vague as article 19 of Regulation 650/2012, the latter was imposed by the Court of Justice jurisprudence¹²⁵ : „provisional or conservative measures granting [...] is subordinated, in particular, to the condition of the existence of a real link between the sought measures object and the territorial jurisdiction of the contracting state whose courts were referred to with the matter”. Because a part of the successional assets is located in Romania, which is a sufficient and appropriate

¹²⁰ In the relations between member states, the rules can also operate regarding the *les pendens* and connection (art. 17 and 18 of the regulation), so that the risk of multiplying the litigations is rather low.

¹²¹ Besides, the exigencies provided for by article 10§1.b) of the regulation are not met in the case, the text referring to a usual residence which did not stop existing by more than five years before the Court apprehension.

¹²² Certainly, although the regulation does not specifically provide this, the competent Court to judge the merit of the case will also be authorized to pronounce for provisional and protective measures – see, regarding correspondent disposition of Brussels Convention/Regulation 44/2001 (art. 24 CB/art. 31 R), CJUE, November 17th, 1998, C-391/95, *Van Uden*.

¹²³ See, as regards art. 24 of Brussels Convention, the resolution *Van Uden*, CJUE, November 17th, 1998, C-391/95, § 28 and 29 : „...l'article 24 de la convention s'applique même si une juridiction d'un autre État contractant est compétente pour connaître du fond pour autant que l'objet du litige relève du champ d'application matériel de la convention [...]. Le seul fait qu'une procédure au fond a été engagée ou peut l'être devant une juridiction d'un État contractant ne prive donc pas la juridiction d'un autre État contractant de sa compétence en vertu de l'article 24 de la convention”.

¹²⁴ CJCE, March 26th, 1992, C-261/90, *Reichert II*, RCDIP, 1992, p. 714, obs. B. Ancel, § 34 („Il y a donc lieu d'entendre par “mesures provisoires ou conservatoires” au sens de l' article 24 les mesures qui, dans les matières relevant du champ d' application de la convention, sont destinées à maintenir une situation de fait ou de droit afin de sauvegarder des droits dont la reconnaissance est par ailleurs demandée au juge du fond » ». Also see *Van Uden*, CJUE, 17 novembre 1998, C-391/95, § 37.

¹²⁵ CJUE, November 17th, 1998, C-391/95, *Van Uden*, §41 : „l'octroi de mesures provisoires ou conservatoires en vertu de l'article 24 est subordonné, notamment, à la condition de l'existence d'un lien de rattachement réel entre l'objet des mesures sollicitées et la compétence territoriale de l'État contractant du juge saisi ».

connection, the measure of the inventory (referred to in article 1115 para. 2 and 3 of the Civil Code.) may be ordered by the Romanian courts.

An issue not regulated by article 19 of the Regulation is the territorial extent of this measure (if it may cover undoubtedly the assets located in the state of the forum where its enforcement is unproblematic). The broader wording of the text suggests that it can also target assets localized abroad¹²⁶. Its effectiveness in the Member State competent to judge the merit shall be assessed in accordance with the flexible rules provided in Chapter IV of the Regulation¹²⁷, and in any third countries in accordance with their specific procedural rules.

Practical Case 5. Habitual Residence in the State of the Forum. Limitation of procedures. X, Moroccan national, Muslim, established 10 years ago along with his family in Romania, country where he opened a business, dies. His entire estate, composed of assets situated in Romania and Morocco, is left to his two sons; A, Romanian, Orthodox, his daughter born out of wedlock, addresses Romanian courts with an action in restriction. Express your views on the Romanian courts` jurisdiction.

Comments and settlement

1. The jurisdiction of the deceased` habitual residence

According to Article 4 of Regulation 650/2012, the general criterion of jurisdiction in matters of succession is the one of the habitual residence of the deceased at the time of death. Justified by the proximity between competent authorities and the succession, it is likely to facilitate access to justice for the interested persons.

As indicated in recital 23 in the Regulation, as well as the position of the European Court of Justice in the case *Mercredi* (December 22nd, 2010, C-497/10), the last habitual residence should be considered located in the state where the person has established his/her permanent center of interest, determined/assessed on a set of the de facto circumstances (duration and regularity of the stay, family life, personal relationships, social integration, professional activity and patrimonial interests). In the practical case, all of them lead to Romania, so that the applicability of article 4 for the Romanian courts` jurisdiction justification is not problematic, especially since the text does not provide other conditions for application: in principle, the deceased nationality (which may be the one of the state of the forum, another EU Member State or a third country), the nationality or residence of the heirs or other persons participating in the proceeding, and the place the assets that make up the estate are situated (in the state of the forum, in another Member State or a in a third state) do not matter; also, the court to which the matter was referred to based on Article 4 would not be able to decline jurisdiction because another would be better placed to hear the case unless in the extremely restrictive conditions provided in Article 6 (not met in the practical case).

2. Limitation of procedures

Conditions. The rule of jurisdiction of the courts of the State of the deceased`s habitual residence knows however an important temperament, whose justification lies in the concern for the cross-border effectiveness of the decisions pronounced by the European judges: according to Article 12§1 of the Regulation, although a court of a Member State has jurisdiction to rule on

¹²⁶ The doctrine has still stressed the need for a territorial limitation of measures, invoking as minimal argument the fact that article 19 stands for a derogation from the normal rules of jurisdictional competence – P. Wautelet, in A. Bonomi, P. Wautelet (dir.), *op. cit.*, n° 5, p. 276.

¹²⁷ See art. 3, §1 letter g) of the regulation for the legal definition of the term “resolution”, which also includes the decisions made based on the special rule stipulated in art. 19 - P. Wautelet, *op. cit. supra*, n° 39, p. 150.

the succession integrity, when assets located in third states are part of the estate¹²⁸, where their decision may not be recognized or enforced, it may decide to limit the proceedings. Regardless of whether the risk of refusing the recognition or enforcement may be detected since the beginning of the trial (in Romania) or at a later stage thereof, it must be a concrete one, any doubt limiting the possibility of using Article 12 of the Regulation; its assessment shall be performed in compliance with the law of the foreign state in the case, which complicates the judges mission. In general, such a refusal in the third state might be occasioned, for example, by an eventual exclusive jurisdiction of that state courts concerning the assets in question, by the lack of reciprocity, the contrariety with an already pronounced decision to that State or by the undermining of its public order made through the concerned decision.

In the practical case this latter aspect may be of importance. If the law of succession is the Romanian law (from the last residence of the deceased, according to article 21), the daughter born out of wedlock may invoke in its favor the provisions of the Civil Code regarding the reserve and the restriction. If the law of succession is the Moroccan law (the national law of the testator, chosen in compliance with Article 22), it may be removed by the Romanian courts pursuant to article 35 of the Regulation (public order exception) due to the discrimination it makes on the one hand, between children born in the wedlock and those born out of wedlock and, on the other hand, between Muslims and non-Muslims in respect of the succession of a Muslim¹²⁹; the rights of the daughter could still be observed in Romania. At the same time, Morocco is a state that refuses paternal filiation determination of illegitimate children, and along with this the related successional rights, also; moreover, it firmly applies the rule according to which a non-Muslim cannot inherit a Muslim, so the risk of refusal to recognize the Romanian court's decision in this country is extremely present.

Enforcement and effects. Even if the three conditions imposed by article 12 of the Regulation are met - requesting the procedure limitation by one party, the location of some of successional assets in a third state, the high risk of refusing the recognition or enforcement of the decision in the respective third country - the Romanian court is not bound to order the limitation of proceedings (the legal text speaks of a mere possibility). Between the elements that could be considered in its final assessment, also, the proximity between the dispute and the foreign authority could count, the probability for the Romanian decision to be recognized and enforced voluntarily by the parties to the dispute, the eventual effective renvoi of the foreign courts, the content of the law applicable in the third state. Even if the court has a discretionary power of appreciation, it will not be exempt from the decision motivation.

Finally, an additional aspect must be mentioned. Even if the court decides to limit the trial, both the estates thus created (the Romanian one governed by the Romanian law, namely the Moroccan one, governed by the Moroccan law) must not be understood as perfectly hermetical, independent. Invoking the unitary spirit that inspires the Regulation 650/2012, as well as the need to avoid inconsistencies and inequities, the most approved doctrine maintains that, for example, when the available quotity and the reserve should be established, the courts having jurisdiction may take into account the assets located abroad (which were excluded from the procedure)¹³⁰. Because in the practical case the Moroccan authorities would apply the Moroccan law, which refuses the illegitimate child's inheritance rights, non-Muslim, is all the more justified that the Romanian courts shall, however, take into account the value of the goods in Morocco when calculating the daughter's rights in the estate governed by the Romanian law.

¹²⁸ The regulation does not distinguish depending on the nature of the respective assets; however, art. 12§1 is susceptible to intervene in practice, most of the times when real estates are involved, about which numerous states establish the exclusive jurisdiction of the authorities at the assets location and therefore refuses to recognize foreign decisions pronounced in violation of this criterion.

¹²⁹ Also see A. Oprea, "Exception of international public order in PIL and succession reserve", n° 13, *Studia UBB – Iurisprudentia*, no. 2/2013 (<http://studia.law.ubbcluj.ro/articol.php?articolId=582>).

¹³⁰ A. Bonomi, *op. cit.*, n° 14-15, p. 236.

Practical Case 6. Lis pendens. A Romanian-French binational, holding more assets in Romania, France and Switzerland, dies with the last habitual residence in this latter state. Shortly after, one of his two children referred to the French courts with an action for partition and the other referred to the Romanian courts seeking the annulment of the will. How to proceed?

Comments and settlement

For ensuring a proper administration of justice in the European judicial area, the European Regulation 650/2012 provided in article 17 concerning the rule of *lis pendens* situations which, establishing a chronological priority for the writs of summons, allows the avoidance of parallel disputes and possible irreconcilable decisions. Because both Romania and France are Member States participating in the adoption of the Regulation, the premise of the mentioned rule intervention - which operates only in relations between Member States - is met.

Conditions for the Article 17 Application

The question of knowing whether in accordance with article 17 of the Regulation 650/2012 the *lis pendens* only occurs when courts in two states are equally competent to hear the case or even when only one of the courts to which the matter was referred to has jurisdiction is questionable¹³¹ and could make the object of a preliminary question addressed to the Court of Justice. However, in the practical case under review both the courts to which the matter was referred to could declare as having jurisdiction based on article 10§1.a) from the Regulation, which provides that, in the absence of the deceased's habitual residence in the EU, the courts of the Member State in which he/she held assets and whose nationality he/she had are competent¹³², so it is possible to address more delicate issues related to the condition of dispute identity ("actions having the same object and the same parties") provided by article 17 of the Regulation. In order to resolve the difficulties raised by it, is useful to consider the CJEU jurisprudence, afferent to article 21 of the Brussels Convention/article 27 of the Regulation 44/2001 on the jurisdiction in civil and commercial matters, whose wording is almost identical.

According to the Court, the identity of the parties may be retained irrespective of their specific procedural position in the disputes started¹³³. In the practical case, because both the action for partition and that for the annulment of the will are carried out between the two heirs, the subjective identity condition is unproblematic. As it regards the objective identity („*actions having the same object*”, in the Romanian version, respectively „*demandes ayant le même objet et la même cause*” in the French version or „*domande aventi il medesimo oggetto e il medesimo titolo*” in the Italian version¹³⁴), the Court of Justice considered a wide position. It was not

¹³¹ See, supporting a more restrictive conception, H. Gaudemet-Tallon, *«Les règles de compétence judiciaire dans le règlement européen sur les successions»*, in (dir.) G. Khairallah, M. Revillard, **Droit européen des successions internationales**, Paris, 2013, p. 127, sp. p. 138, n° 304 ; sharing, on the contrary, a broader conception, see A. Bonomi, *op. cit.*, p. 256-258, n° 3-5.

¹³² Art. 10§1 of the regulation does not specifically approach the case in which the deceased was bi-national, but in the light of jurisprudence *Hadadi* a CJUE (July 16th, 2009, C-168/08), each of the two nationalities can be used to justify the jurisdiction.

¹³³ CJCE, December 6th, 1994, *Tatry*, C-406/92, §31: „...l'identité des parties doit être entendue indépendamment de la position de l'une et de l'autre dans les deux procédures, le demandeur à la première procédure pouvant être le défendeur à la seconde”.

¹³⁴ The fact that the Romanian version lacks the reference to the cause of action should not exonerate the Courts from its check-up (see, for instance, the position of the Court of Justice in the case *Gubisch Maschinenfabrik* of December 8th, 1987, C-144/86, regarding art. 21 of Brussels Convention: « *Même si la version allemande de l'article 21 ne distingue pas expressément entre les notions d' "objet" et de "cause", elle doit être comprise dans le même sens que les autres versions linguistiques qui connaissent toutes cette distinction* » / « *even if the German version of art. 21 does not make a clear distinction between the notions of object and cause, it should be*

limited to the formal identity of the claims, but rather prefers a substantial criterion: their central issue, their goal¹³⁵. In the practical case, the two disputes are based on the same state of facts, arising out of the same legal situation (identity of cause) and aim, both, the efficacy of the will, so that the condition of identity object can also be considered met.

Lis Pendens Effects

Based on Article 17§1 of the Regulation, the Romanian court to which the matter was referred to second - condition which shall be specifically verified in accordance with the provisions of article 14 - must suspend ex officio the trial of the case (even if the parties or one of them did not ask for this) until the French court first to which the matter was referred to first shall decide on its own jurisdiction¹³⁶. An issue unresolved by the Regulation is the one of the precise moment when the foreign court jurisdiction must be regarded as established - the moment when it rejected the motion to dismiss for lack of jurisdiction or when the means of appeal have used up against the decision to reject the motion (which can be one fairly advanced in time if the procedural law of the state which allows simultaneous trial of the issues of jurisdiction and, respectively, the merits). The legal security requires preferring the second alternative¹³⁷.

If the court to which the matter was referred to first is declared as having jurisdiction (a situation more than plausible in the practical case), the Romanian court must decline jurisdiction in its favor; if, on the contrary, it declares itself as not having jurisdiction (wrongfully applying, for example, article 6 letter a) of the Regulation), the Romanian court shall continue the trial of the case.

Practical Case 7. Forum situs. Forum necessitatis. Mrs. X, the Romanian wife of Y, Ukrainian national, deceased, having the last habitual residence in Donetsk, notifies Romanian courts with an action for the acknowledgment of the caducity of legacies contained in his will. She invokes in this respect the death of the legatees in the same bloody riots which led to her husband's death which and forced her to very quickly leave Ukraine in order to return the common property apartment, located in Iasi. Express your views on the Romanian courts' jurisdiction.

Comments and settlement.

In the absence of the deceased's last habitual residence on the territory of an EU Member State, the Romanian courts' jurisdiction could be justified only under the restrictive provisions of articles 10 and 11 of the Regulation.

*understood in the same sense as the other linguistic versions which are all familiar with this distinction – our translation) » (§ 14, final). However, according to doctrine, the broad conception promoted by the Court about the condition of identity as object of the actions in Court, makes that once it is met, the condition of the identity of cause is also met (Bonomi, *op. cit.*, p. 266, n° 26).*

¹³⁵ CJCE, December 8th, 1987, C-144/86, *Gubisch Maschinenfabrik KG* (§16-19), in which the Court appreciates there is identity of object between two requests, one related to the contract annulment or rescission, while the second related to its enforcement; CJCE, December 6th, 1994, 406/92, *Tatry*, §37-45, in which the Court appreciates there is identity of object between two requests, one related to the damages from the defendant, and the second, the absence of plaintiff's responsibility for the incriminated actions (contamination with hydrocarbons of the transported goods).

¹³⁶ According to the jurisprudence of the Court of Justice related to art. 21 of Brussels Convention (art. 27 of Regulation no. 44/2001), the first apprehended judge enjoys priority in appreciating his own jurisdiction and even if he would obviously not be competent (as there is a valid attributive clause of variable jurisdiction, most probably), the second apprehended Court cannot refuse the judgment suspending (C-116/02, March 9th, 2003, *Gasser*); due to the critics this decision was submitted to, the European regulator decided to change the solution by law, in Regulation no. 1215/2012, which abrogates and replaces as of 2015 the Regulation 44/2001 (art. 31§2).

¹³⁷ Also see A. Bonomi, *op. cit.*, p. 267, n° 29, *in fine*.

Article 10§2 Application. In the *forum situs* Regulation in Article 10 of the Regulation, the European legislator has introduced a distinction in terms of the extent of the courts' jurisdiction based on the criterion of the location of one or some of the successional assets. In particular, when, as in the practical case, the deceased had the nationality of a Member State or a previous habitual residence in a Member State (article 10§1), the courts to which the matter was referred to shall not be entitled to rule on the succession integrally, but on the assets located in the state of the court to which the matter was referred to (article 10§2). In these circumstances, the Romanian courts' jurisdiction depends, on the specific case, on the legacies' object: if they bear on the share of the testator of the common property, they may consider the case for trial. If the legacies concern assets located in Ukraine, the conditions of article 10§2 of the Regulation application are not met. However, the courts shall not declare as not having jurisdiction before checking potential intervention of article 11 of the Regulation (*forum necessitatis*).

Article 11 Application. Inspired by the objective of preventing the denial of justice (according to recital 31 in the Preamble), article 11 establishes an absolutely exceptional jurisdiction, residual, intended to operate only when none of the criteria provided by other texts of the Regulation cannot legitimize any European courts' jurisdiction (habitual residence of the deceased in a Member State, the assets of the deceased in a Member State, the option for the interested people in favor of the courts of a Member State).

The European legislator has provided two positive conditions for the applicability of the text, which still leaves a not negligible margin of discretion to the courts to which the matter was referred to. First, the case must have a sufficient connection with the state of the forum's judicial bodies (article 11§2), which is unproblematic in the practical case because the applicant is a Romanian national¹³⁸. Secondly, it is necessary that the dispute cannot be introduced or developed, reasonably, in the third state with which the case has close connections; due to terrorist riots in Ukraine, which endanger the lives of people and affect the functioning of the state apparatus, and this condition may be considered as met in the practical case¹³⁹, so that the courts could consider the case for trial. The applicable law of succession shall be most likely a foreign law, determined in accordance with article 21 and the following of the Regulation.

Practical Case 8. Determination of the Deceased's Habitual Residence. *A Romanian national opens a business in Germany, where he spends much of his time, but periodically returns in the country, where his wife and children live. His journeys to Germany are frequent and regular, being required by his business promotion and development. Within a year, he stays, cumulatively, approximately seven months in Germany. Following his death, the heirs refer the estate administration to the Romanian court, pursuant to art. 4 of the Regulation (EU) No. 650/2012. Express your views on the Romanian courts' jurisdiction.*

Comments and settlement.

Art. 4 of Regulation establishes the general rule of international jurisdiction, considered to be the "pivot of the Regulation"¹⁴⁰, attributing this jurisdiction to the judicial authorities belonging to the Member State on whose territory the deceased had his habitual residence at the time of death.

¹³⁸ The condition could have been regarded as met even if the heir had his habitual residence in Romania, or if the deceased had a Romanian nationality (but not goods here), or would have had in the far past his habitual residence in Romania – see A. Davi, A. Zanobetti, *op. cit.*, n° 145, p. 120.

¹³⁹ Also see recital 31 of the preamble, which specifically mentions the case of a civil war; in addition to this reason, the doctrine also mentions the incompetence or the unjustified lack of foreign Courts activity, exaggerated corruption, natural catastrophes, serious epidemics, genocide, persecution or discrimination of the potential heirs abroad - A. Bonomi, in A. Bonomi, P. Wautelet *op. cit.*, p. 227, n° 8-9.

¹⁴⁰ A. Bonomi, in A. Bonomi, P. Wautelet, *op. cit.*, p. 169, no. 1.

The habitual residence criterion is not new in the European landscape, it is also used by other European regulations, both for establishing international jurisdiction (e.g. art. 3, para. 1, letter a), art. 8 of the Regulation (EC) no. 2201/2003 (*Brussels IIbis*)), and for determining the applicable law (art. 4-6, 8, 19 of the Regulation (EC) no. 593/2008 (*Rome I*), art. 4, para. 2, art. 5, para. 1, letter a), art. 10, para. 2, art. 12, para. 2, letter b) of the Regulation (EC) no. 864/2007 (*Rome II*), art. 5, para. 1, letter a) and b) of the Regulation (EU) no. 1259/2010 (*Rome III*)).

The habitual residence is an autonomous concept distinct from the one used by the national legislators, which shall be construed in a uniform manner. The Court of Justice has repeatedly set the milestones of the habitual residence, stating that it is "the place where the interested person has established, with the intention of conferring a stable character, the permanent or habitual center of his interests, being understood that, in order to determine this residence, it is important to take account of all its constitutive factual elements"¹⁴¹. The Court also established that, in order to establish the habitual residence of a person, they have to take into account the continuity of residence before the person concerned to be moved, the length and purpose of the absence, the nature of the occupation in another Member State, and the intention of the person concerned, as it appears from all the circumstances: „*and the intention of the person concerned as it appears from all the circumstances*”¹⁴².

In another case, in the application of the *Brussels IIbis* Regulation¹⁴³ in the parental responsibility matter (art. 8, para. 1), Court established that the concept of habitual residence “must be interpreted in the meaning that this residence corresponds to the place which reflects some degree of integration of the child in a social and family environment. To this end, they must especially take into account the duration, regularity, conditions and reasons for the stay on the territory of a Member State and the family's relocation to that State, the child's nationality, the place and conditions of education, the language skills, as well as the family and social relationships of the child in that State. It is for the national court to determine that the habitual residence of the child, taking account of all the circumstances specific to each case”¹⁴⁴.

In the *Mercredi* case, the Court established, in the context of art. 8 and 10 of the *Brussels IIbis* Regulation application that the habitual residence "corresponds to the place which reflects some degree of integration of the child in a social and family environment. To this end, when the issue is the situation of a young child who lives of just a few days along with his mother in a Member State, other than that of the habitual residence, in which he was moved, must be especially taken into consideration on the one hand, the duration, regularity, conditions and reasons for staying on the territory of that Member State and of the mother relocation in the respective state and, on the other hand, particularly given the child's age, geographical and family origins of the mother, as well as the family and social relationships which she and her child have in the same Member State”¹⁴⁵.

8.1. Habitual Residence and Nationality.

Habitual residence and nationality exist in a relationship of rivalry. They both attempt to provide the "particular" with an alternative of location; each proposes its own version on the determination of legal proximity of the person: the first based on the prevalence (proximity) of the place of stay effectiveness, the latter based on that stay's "sentimentality" or ideality. A

¹⁴¹ CJCE, Decision of February 17th, 1977, in case C-76/76, Did Paolo, CJCE April 23rd, 1991, European Court Reports 1977 -00315.

¹⁴² *Ibidem*.

¹⁴³ As regards the concept of habitual residence in the context of the Regulation, *Bruxelles IIbis*, see, R. Lamont, “*Habitual Residence and Brussels II-bis: Developing Concepts for EU Private International Family Law*”, *Journal of Private International Law*, 2007, pp. 261-281, at 261.

¹⁴⁴ CJCE, Decision of April 2nd, 2009, in case C-523/07, recital 44, LI:EU:C:2009:225.

¹⁴⁵ CJCE, Decision of December 22nd, 2010, in case C-497/10 PPU, recital 56.

perfect residence, spiritual, not involving the "trespassing" of the territory, but the person's spiritual and intellectual connection; by choosing the law of nationality, we might say that the person establishes his/her habitual residence of his/her spirit in the country whose nationality he/she has, whose traditions he/she wishes to pursue and to which he/she feels emotionally connected, thus evoking his/her intention of cultural and legal integration in this space where he/she finds himself/herself and which he/she contemplates wherever he/she shall settle. To whom, in fact, belongs the person or the legal relationship in which he/she entered? To the place where he/she established his/her center of interest or the place whose spirituality he/she presumably follows, even if he/she does not "touch" the place that he/she "walks" on or, conversely, the place whose song he/she sings? Therefore, if in the habitual residence case we talk about the "materiality" of a stay, however, when choosing the law of citizenship we talk about the stay's "spirituality".

The criterion of nationality has the advantage of determination safety and simplicity, the nationality of a person being easy to establish, not being affected by its mobility. Establishing that a person possesses the nationality of a particular state is done taking into account the rules of the state whose nationality is invoked (art. 2569 NCC). It is, however, true that this criterion may raise difficulties for people with dual or multiple nationality¹⁴⁶. In the *Micheletti* case¹⁴⁷, a person with dual nationality, Argentine and Italian, requested a permanent residence in Spain as a Community national. The Spanish authorities have refused the request according to the Spanish law which, in case of dual nationality, confers priority to the nationality of the state of the applicant's habitual residence, in the practical case to the Argentine one. The Court from Cantabria (*Tribunal Superior de Justicia*) addressed the European Court of Justice with a request for a preliminary ruling on the interpretation of some provisions of the EEC Treaty at that time, and the relevant secondary EU legislation¹⁴⁸. The Court stated that, although, in accordance with international law, each Member State has jurisdiction to determine the conditions for the acquiring and loss of own nationality, that jurisdiction must be exercised in observance of the Community law. In other words, a Member State legislation may not restrict the effects of acquiring the nationality of another Member State: "*it is not in the jurisdiction of a Member State jurisdiction to limit the effects of the award of nationality of another Member State, by imposing an additional condition for the recognition of this nationality for the exercise of fundamental freedoms provided by the treaty*"¹⁴⁹. In the *Hadadi* case¹⁵⁰, the Court of Justice reaffirmed the equality of the Member States nationalities positions in terms of the exercise of international jurisdiction rules in divorce matters.

The conclusion that can be drawn is that although European Union law cannot affect the conditions under which the Member States grant nationality to a person, however, once acquired

¹⁴⁶ For some studies on the effect of double or multiple nationality see S. de Vido, „*The Relevance of Double Nationality to Conflict-of-Laws Issues Relating to Divorce and Legal Separation in Europe*”, in *Cuadernos de Derecho Transnacional* (Marzo 2012), Vol. 4, No 1, pp. 222-232, ISSN 1989-4570 - www.uc3m.es/cdt.

¹⁴⁷ The Court of Justice, Decision of July 7th, 1992, *Mario Vicente Micheletti and others c. Delegacion del Gobierno en Cantabria*, C-369/90, *EC Reports*, 2009, 1992, p. 4239 *et seq.*

¹⁴⁸ The reference was especially made regarding articles 3(c), 7, 52, 53 and 56 of the former EEC Treaty and regarding the Directive of the Council no. 73/148/CEE of May 21st, 1973 on the elimination of circulation and residence within the Community for the nationals of member states in matters of settling and services performance (JO L 172, 28.6.1973, p. 14).

¹⁴⁹ The Court of Justice, case *Micheletti*, Decision of July 7th, 1992, paragraph 10. Also see, Jessurun D'oliveira, "*Case C-369/90, M.V. Micheletti and others v. Delegation del Gobierno en Cantabria, Judgment of 7th July 1992*", *Common Market Law Review*, 1993, pp. 623-637; D. ruzié, "*Nationalité, effectivité et droit communautaire*", *Revue générale de droit international public*, 1993, pp. 107-120.

¹⁵⁰ The Court of Justice, Decision of July 16th, 2009, *Laszlo Hadadi (Hadady) c. Csilla Marta Mesko, épouse Hadadi (Hadady)*, case C-168/08, *EC Reports*, 2009, p. 6871 *et seq.* Also see, L. Tomasi, "*Doppia cittadinanza e giurisdizione in materia matrimoniale nel Reg. n. 2201/2003 (Bruxelles II bis)*", *Int. 'l Lis*, 2008, pp. 134-141; V. Egea, «*Compétence européenne: divorce d'époux ayant une double nationalité*», *Recueil Dalloz*, 2009, pp. 2106-2107.

the nationality of a Member State, the person is entitled to all the rights and guarantees derived from European Union law. Therefore, acquiring the nationality of a Member State is sufficient to include a person among European Union citizens, regardless of whether that person also has nationality of a third country and even if he/she maintains significant relations with a non-European state¹⁵¹.

On the other hand, when the person does not live in the State whose nationality he/she has, this location criterion value significantly decreases. As shown, in case of nationality "its location value is greatly reduced where the deceased is established in another Member State than the one whose nationality he/she has. The frequency of this latter hypothesis opposed to the nationality consecration as a criterion of jurisdiction, otherwise the Member States courts being unable to rule on the succession of foreigners who would reside or would possess assets on their territory. To accept this criterion in order to settle the conflicts of laws in the Member States that have a unitary system in matters of succession (Germany, Italy, Greece, Spain, etc.) would be possible, but this option would not have led to the identity between the state of the forum and the state whose law is applicable. Also, such an option would have given rise to inconsistencies in the private international law, still forming and attached to the last habitual residence criterion"¹⁵².

European private international law leaves this option for the European citizen individual who, before belonging to the state of nationality, belongs to Europe, that is the multicultural space in which the state of the chosen nationality integrates, in its turn. Interesting to note is that you cannot only belong to Europe unless "adhering" to the values of its "partiality", acquiring in advance, the national affiliation of a Member State. And yet, once created this premise, you first become European. National values cannot be opposed to the European ones, the partiality cannot oppose to the holistic image of the whole that integrates it, nothing from the national specific cannot contradict or obstruct what belongs to the European *status*. You become European with the national "identity card" and, being European (European citizen), you set your own proximity, your own center of interest, without being forced to look through the window of the "partiality" that brought you in Europe. But you can do this if you choose legal and cultural traditions that formed you, finding yourself in its construction and spirit.

8.2. Habitual Residence and Domicile.

Trying to look at the two concepts by comparison, the habitual residence and domicile, we note that, despite the differences in design and optics, they also know points of convergence. Thus, they both involve the person's "stay" in a certain place. What makes them different is the time and, especially, the intensity of that stay. Unlike the domicile which has a formal and declarative character, the habitual residence always involves an assessment of the duration and intensity of a stay in a certain place, so that, at a certain time, it would reveal the center of interest of the person concerned. This assessment involves a detailed analysis of all life circumstances of the person that connect that person to a specific territory. After all, it is about a

¹⁵¹ See, de Vido, *op. cit.*, p. 226. Also see, in this sense, B. Nascimbene, *Nationality Laws in the European Union*, Milano, Giuffrè, 1996, 4:"the main importance of the nationality of a member state is eventually sufficient to exclude any relevance of the nationality of a third state, with no distraction between the nationality held, and without any future condition imposed in this sense, such as the subject's habitual residence". Cf. J. Basedow, "Le rattachement a la nationalite et les conflits de nationalite en droit de l. Union europeenne", in *Revue Critique de Droit International Prive*, 2010, pp. 427-456 la 441; S. Corneloup, "Relfexion sur l'emergence d.un droit de l.Union europeenne en matiere de nationalite." in, *Journal de droit international*, 2011, pp. 492-516, to p. 499, where it appreciates that the European Court (European Court of Justice) adopted a functional approach as regards the conflict regarding nationality, giving priority to the nationality allowing a person to benefit of his fundamental right guarantees by treaties.

¹⁵² P. Lagarde, "Les principes de base du nouveau règlement européen sur les successions", in *Rev. crit. DIP*, 101 (4), 2012, p. 698-699.

comparative assessment, assuming the "compared" appreciation of different "stays" intensity, unlike the domicile which is established exclusively according to the rules of the internal law of the state on whose territory the domicile of the person is invoked to be established. So, in terms of recognition of domicile, it is irrelevant that the person concerned has recognized a domicile according to another country's law, not being thus raised the problem of "choosing a domicile" between the ones formally recognized in several states. This is because the concept of a national character domicile (not an autonomous one) being settled exclusively according to *lex fori*. In fact, there are countries that recognize explicitly the possibility of a person to have, at the same time, two or more domiciles (BGB § 7: "(1) Wer sich an einem Ort ständig niederlässt, begründet an diesem Ort seinen Wohnsitz. (2) Der Wohnsitz kann gleichzeitig an mehreren Orten bestehen. (3) Der Wohnsitz wird aufgehoben, wenn die Niederlassung mit dem Willen aufgehoben wird, sie aufzugeben.)".

The domicile is therefore a declared and formalized stay. The habitual residence expresses, in contrast, an alive, "intense" and de-formalized stay, being appreciated not in abstracto (by reporting the stay "to itself", according to the "domiciled" will and the formal rules of that country), but, on the contrary, in concreto, by comparing "multiple stays", both in terms of their duration, and the presence of elements of the "subjective connection" that reasonably lead to believe that the person involved has his/her center or life in one of these places (in a certain place).

Unlike the domicile, the habitual residence can never have an occult nature, it involves convergence between what is said or intended and what is in fact the reality.

On the other hand, the habitual residence involves a more sensitive and finer barometer of appreciation than the domicile. It is always appreciated by reference to a particular time and not generally, taking into account a longer period of time. Any "walk" of the person, characterized by a certain length of the stay, can cause it... For example, the fact that the author of a succession has spent the last few years (or even sometimes the last few months) prior to his/her death in another country, where he/she attended medical treatment, buying (or renting) for this purpose, a house, may lead to the conclusion of the acquiring a new "center of interest" of a new habitual residence, even if, according to legal system milestones belonging to the country on whose territory he/she initially established domicile, he/she did not lose the domicile in this country.

In determining the habitual residence it is not important what the person says, but what it does.

But it is true that determining the habitual residence can often provide surprises, both for the person concerned and sometimes for the third parties. Unlike the domicile, which, once established, enjoys stability, its alternative stays being unable in principle to jeopardize it, being, thus, known *ab initio*, the habitual residence is assessed and found *a posteriori*¹⁵³, namely when it comes to locating the person in order to determine the international jurisdiction or the law applicable to the situation that presents foreign origin elements. There is therefore a time lag and a certain dose of unpredictability inherent to this fluid and sensible concept. But it can be removed whenever the subjects choose the law applicable to their report. Only in the absence of choice of applicable law shall appeal to the habitual residence objective criterion. (It is true that in case of international competence the choice targets the institution of habitual residence itself, or, where appropriate, the nationality of one spouse - art. 3 *Brussel IIbis*).

In extremis it may even be concluded, by comparing alternative (successive?!) stays, that none of them can convince before the others' competition. Of course, we do not believe that from such exceptional situations it may be concluded as a "habitual residence non-compulsoriness". Any persons has a habitual residence, an own center of interest. Man is an

¹⁵³ We could even say that many times the habitual residence *is determined* by the authority mandated to solve the conflicts of justice, being at its choice to appreciate the consistency of the dwelling periods and of the intensity of connections to a certain place.

inhabiting being. Every moment of his life he forms attachment to a certain place, "which he inhabits", with which he identifies himself at a certain moment and from where he observes the world.

The habitual residence, as, otherwise, the residence (or maybe even more than the domicile), requires the continued stay in a certain place, the habitation... Usually, habitation suggests an action that began sometime, but which continues until the present time. Most often a person's "habitation" is visible, perceptible by those around: is the place from where the person leaves and to which he returns every day. And we see "this ritual" (of leaving and returning) practiced continually, every day. The habitual residence is, therefore, the place where "the habitation" occurs, meaning the place where, the person is most likely to be found ("met"), the place where his presence is "felt" and perceived. The "habitation" requires a certain space, a well-defined place, in principle inaccessible to others - the place where the "living" is experienced, where there is no past (the past becoming a valuing aspect of the present), but only the present, the continuous present, the present of the lived existence - the place where our loyalty is measured against those with whom we share it and to ourselves - the place from which our salvation examination begins ... There is not, therefore, a certain geographical place, one that adds to others, but instead the place through which we are connected to the world we live in and from where we watch, the place where we breathe the eternal spirit through this finite world.

The habitual residence is not a quantitative concept because it does not reduce to an arithmetic operation for calculating the extent of a stay in a certain place and comparing this duration of time with the one spent in another place, but a qualitative one that is centered around the intimate and reasonably presumed will of the person. It is not "stay" but "habitation". By this we mean that the constant physical presence of the person in that place is important but not decisive.

From this point of view one can notice the inconsistency of the NCC provisions, which, on the one hand, enable a person to have a single residence, but on the other hand, in the part allocated for the private international law define and regulate a person's habitual residence. It is true that sometimes the concepts of residence and habitual residence may overlap (in case of "sedentary" persons). But not always the person's habitual residence is where his/her residence is listed. The domicile is often a formal connotation, declarative - depending on the legal nature of a stay in a certain place, implying its subordination to the authorization of the stay and the meeting of certain administrative formalities, especially in case of foreigners (national belonging to third states) - while, in principle, the habitual residence does not imply this. It is a true domicile, "simplified", stripped of any administrative formalities, lacking any formal connotations. On the other hand, unlike the domicile, which in the new Regulation lacks the attribute of "habitation" with more "procedural" contour intended for the of civil rights exercise (...), the habitual residence implies, *ad esentiam*, the habitation. However, what do we need to understand by the latter? Most often, "the habitation" implies the long and constant physical presence in a particular place. In other words, it must be current ("habitual"), actual, habitual, not in the least transient. In most cases, the constant presence of a person in a certain place for several years is able to shatter any doubt about it. The legislator does not specify the minimum extent of your stay in a certain place in order to talk about the habitual residence recognition. Precisely because it is a quite volatile concept. Her presence (of the habitual residence) is always appreciated *in concreto*, taking into account all peculiarities and circumstances that individualize a particular person, and not *in abstracto*. Sometimes an uninterrupted stay of one year (or even *in extremis* several months) may be edifying for the recognition of the habitual residence in that place. We must, therefore, also take into account the subjective element - the concerned person's intention, drawn from all the circumstances of life which particularize it. Therefore, the term "habitation" becomes a qualitative one (not quantitative). It should not be mechanically, rigidly construed. In other words, it should not be reduced to a physical presence

which makes the person "always present" in that place. The presence "interruptions" shall be qualitatively assessed, their duration and frequency, but also the purpose of departures, including the fact of "staying" more and more constant in another place, where the concerned person's family is, etc. From here one cannot conclude that the physical presence for a few months shall be revealing by itself in any conditions, for the qualification of the habitual residence there.

It is not possible that the interpretation given by our courts to this concept shall be one partially different from the similar European concept, although, ultimately, the European law was the one that influenced the prevalence of this concept in Europe, exerting a strong influence on the national legislations in the field. In such a situation, obviously, we shall use the meaning given by the Romanian jurisprudence only in terms of determining the scope of the conflict rules contained in the NCC. However, we shall use the community meaning of habitual residence regarding the application of European rules and regulations, being about a unitary concept in all the Member States, with an identical, unique meaning (autonomous interpretation of the CJEU).

It may be noted that the European legislator did not feel the need to define the habitual residence. He even kept away from this! He went on *common law* courts reasoning, leaving at their discretion the habitual residence setting, depending on each case particularities. Our legislator - like the Belgian one in 2004 - "risked" a definition, but with a certain degree of generality not to divert this connection point's inherent flexibility. We do not believe that this concept definition was absolutely necessary, but rather the reference to the European concept of habitual residence (with the afferent jurisprudence continuously evolving) would have been preferable. Perhaps the Belgian legislator solution has exercised an irresistible attraction on our legislator also, eager to transpose "in text" which often proves to be too vast and complex, combined, maybe, with the fear of leaving too much freedom for the courts.

8.3. Habitual Residence in the Notary Procedure.

Establishing the habitual residence is done in the same manner regardless of the nature of the localization procedure (legal or gracious). Therefore, even if we are in the presence of a non-contentious proceedings (gracious), the notary public shall not be limited to parties' statements, but shall have to examine all the elements of fact and law, able to lead to the habitual residence determination, requesting additional documents from the parties, related, as appropriate, to the place of work or the place of fulfilling professional obligations, the property situation, the place of the family location, the place of school attendance by children, as appropriate, or any other *de facto* elements able to circumscribe the scope of the concerned person's focus of interest. In other words, ***the notary has the obligation to establish habitual residence certifying it*** based on all the evidence related to this issue corroboration, being unable to limit to the statements of the parties present in the notarial procedure. *Thus the notary public has a creative role, fulfilling the mission of determining the person's proximity, its "headquarters", taking into account all the de facto circumstances inventory, actually able to leave relevant clues on its place of establishment. He, therefore, exerts a control function, of qualitative quantification of all these circumstances, weighing them individually and giving prevalence to those which, given the concrete of the situation, express the intention of the person's legal integration (not necessarily its declared intention). He is not a simple "official examiner" of the place of habitual residence declared by the parties.*

The habitual residence represents a flexible concept, rooted in reality, in the specificity of each person's living individuality. This concept's factuality and flexibility is consistent with the increasing mobility of people and the principles of free movement in the European law. And the European law primarily addresses the mobile, the "active" the moving, people eager to improve

their chances of getting a better job, a higher form of training, a greater chance of professional affirmation, a higher standard of living.

As a conclusion, returning to the presented practical case data, we can assert that the Romanian court to which the matter was referred to, enjoys international jurisdiction, according to art. 4 of the Regulation, as the last habitual residence of the deceased in the presented practical case can be considered as being in Romania. Indeed, despite the fact that the author of the succession spent a consistent period of time in Germany, however, relevant to the habitual residence determination is not only the "quantitative" criterion of the duration of stay, but also the analysis of all actual life circumstances of the concerned person, including the consideration of the place where his family lives and where it can be considered as the author of the succession's center of interest (life).

§ 2. Practical cases for notaries.

1. A deceased having Romanian nationality, and the last domicile in Israel, dies in this country. The estate comprises two immovable properties located in Bucharest municipality. His heirs (surviving wife and child) seise a notary public in Bucharest for the estate administration. Establish the seised notary's jurisdiction.

Answer. Notaries Public in Romania, failing to exercise their activity under the court's control or delegation, do not fall within the Regulation jurisdiction rules (art. 4 et seq.). Therefore, the international jurisdiction of notaries is established by the national law.

According to art. 102, para. 4 of Law no. 36/1995¹⁵⁴, if the last domicile of the deceased is not known or is not on Romanian territory, the jurisdiction shall belong to the first seised notary public, "provided that in its district shall exist at least one immovable property". Consequently, given that the immovable properties that make up the estate are located in Bucharest municipality, the seised notary shall enjoy jurisdiction.

2. A deceased having Romanian nationality, with his last domicile in Germany dies in this country. The estate comprises several movable properties representing a collection of art (paintings and statues) exposed in a building rented by the deceased in Cluj-Napoca municipality and an apartment situated in Berlin. The heirs of the deceased notify a notary public for the estate administration in the district of Cluj-Napoca court of first instance. Establish the seised notary's jurisdiction.

Answer. According to art. 102, para. 5 of Law no. 36/1995, if the last domicile of the deceased is not in Romania and in the estate there are not immovable properties located on Romanian territory, the jurisdiction for the estate administration shall belong to the first seised notary public, if there are movable properties in its district. Consequently, since the estate left by the deceased from the practical case includes a movable property universality located in the municipality of Cluj-Napoca, the first seised notary public shall enjoy the jurisdiction of instrumentation.

3. A deceased having Romanian nationality, with his last home in Lisbon, leaves an estate including several movable properties located in Lisbon, as well as several immovable properties located in Lisbon and Munich. His heirs seise a

¹⁵⁴ Republished, Romania's Official Gazette no.72 of 4.2.2013.

notary public in the district of Deva court of first instance in order to release a certificate of inheritance.

Answer. According to art. 102, para. 6 of Law no. 36/1995, if the last domicile of the deceased is not in Romania, and the estate does not include assets located in Romania, "the first seised notary public has jurisdiction". Therefore, in this case the notary public shall enjoy, according to the law, the jurisdiction to issue the certificate of succession as requested by the heirs of the deceased.

4. A Republic of Moldova national dies, with his last domicile in Romania. The estate includes movable property located in Romania, as well as two immovable properties, one located in Iasi and one in Bălți. The deceased left a widow and two sons. They open the succession procedure addressing to a notary public in the Iași court of first instance jurisdiction. Determine the solution of the practical case on the international jurisdiction.

Answer. Romania has concluded a treaty with the Republic of Moldova on July 6th, 1996 on the legal assistance in civil and criminal matters¹⁵⁵. Chapter III, Section II contains provisions relating to succession.

Regarding the jurisdiction, art. 43, section 1 confers jurisdiction on the succession opening, the succession procedure and the successional disputes with the object of movable property "to the authorities of the contracting party whose national was the deceased at the time of death", except for the situation when all the movable property remaining from the deceased, national of one of the contracting parties, are situated on the territory of the other contracting party, and all successors agree with the jurisdiction of the contracting party on whose territory the successional movable properties are located (art. 43, section 3). Regarding the immovable property the jurisdiction of "the contracting party on which these assets are situated" (art. 43, section 2).

Therefore, given the fact that all the immovable properties in the present practical case are situated in Romania, and that all heirs have seised a notary public in Romania for the estate administration (thus resulting, their agreement), the jurisdiction shall lie with the seised Romanian notary public, with respect to the devolution and successional transmission of movable properties universality as well as with respect to the immovable property situated in Iasi. The devolution and successional transmission of the immovable property situated in Bălți (R. of Moldova) shall fall within the Republic of Moldova authorities jurisdiction (in this case a notary public in this country, given the heirs` agreement).

5. A deceased having Romanian nationality, with his last home in Rome, leaves an estate comprising three immovable properties, one located in Bistrița, and two located in Rome. His heirs seise a notary public in the district of Bistrița court of first instance for the estate administration. Establish the seised notary public jurisdiction.

Considering that, although the last domicile of the deceased in the practical case is not in Romania, the seised notary shall enjoy jurisdiction, given that in its district there is "at least one immovable property." Indeed, according to art. 102, para. 4 of Law no. 36/1995, "if the last domicile of the deceased is not known or is not on Romanian territory, jurisdiction lies with the first seised notary public, provided that in its district shall exist at least one immovable property". Therefore, the notary public shall enjoy the jurisdiction of instrumentation.

¹⁵⁵ Ratified by Law no. 177/1997, published in Romania's Official Gazette no. 310 of November 13th, 1997.

Chapter VI. Practical cases on conflicts of law¹⁵⁶.

1. A 16 years old child, with Romanian nationality and habitual residence in Paris, writes a holographic testament, leaving his ½ share of the estate to his friend from school. When he turns 17 he comes back in Romania, together with his parents. Afterwards, he dies in a road traffic accident. His parents contest the testamentary disposition, deeming their child's will reversible, based on art. 998 para. 1 from NCC.

Determine the applicable law and the practical case solution, according to the Regulation (EU) no. 650/2012.

Practical case solution:

In this case, the issue is of determining the law applicable to testator capacity arises. The question presents practical importance, because according to the Romanian law, testamentary capacity is acquired upon coming of age. According to art. 988 NCC, *“(1) The one lacking legal capacity or with restrained legal capacity cannot dispose of his own assets by liberalities, excepting the cases provided by the law. (2) Under relative invalidity sanction, not even after acquiring the full legal capacity can the person dispose by liberalities in the advantage of the one who had the function of his legal representative or guardian, before having received from the guardianship court discharge for its administration. The situation in which the representative, or, depending on the case, the legal guardian is the ascendant of the one making the disposition is excluded.”*

Consequently, in our law, the incapacitated persons (minors and judicially interdicted persons) do not dispose of liberalities elaboration use capacity, regardless their form (gifts or legacies), unlike the previous Regulation, which allowed to the minors who are 16 years old to dispose, by testament, of half of what they could dispose if at document conclusion date they were majors (art. 806 C civ. From 1864). Obviously, the capacity to dispose condition “must be fulfilled from the date when the person making the dispositions expresses his/her consent” (art. 987, para. 2 NCC), and the right to the invalidation action for use capacity lack belongs to his/her residuary legatees or with universal title, being prescriptible in term of 3 years from document conclusion date.

As shown in the doctrine, the reason of this minors use incapacity “is based on the idea of their protection necessity and of their legatees against the documents whose consequences they cannot appreciate by themselves because of the insufficient mental development and of the influences to which they can be easily submitted by other persons. That is why the sanction for violating the legal dispositions with reference to this incapacity is, mainly, the relative invalidity of the liberality.”¹⁵⁷

In exchange, according to art. 904, para. 1 from the French civil code, a minor can dispose by will of half of the succession: *“(l)e mineur, parvenu à l'âge de seize ans et non émancipé, ne pourra disposer que par testament, et jusqu'à concurrence seulement de la moitié des biens dont la loi permet au majeur de disposer.”*

Such being the case, if we apply regarding the capacity to test the Romanian law, the will would be invalid, whilst, according to the French law it would be valid.

¹⁵⁶ As for the establishment of the applicable law to successions with foreign elements, there are no differences depending on the nature of succession procedure. The applicable law will be established following the same rules, irrespective if the succession procedure is a contentious one, or, on the contrary, a non-contentious one.

¹⁵⁷ D. Chirică, *Treaty of civil law. Successions and liberalities*, C. H. Beck, Bucharest, 2014, p. 122.

Quid iuris?

According to art. 24, para. 1, from the Regulation, “(a) disposition of property upon death other than an agreement as to succession shall be governed, as regards its admissibility and its substantive validity, by the law which, under this Regulation, would have been applicable to the succession of the person who made the disposition if he had died on the day on which the disposition was made” (s.n., DAP).

Also, according to art. 26, para. 1, let. a, “the capacity of the person making the disposition for a mortis causa to make such a disposition” is deemed to be a substantive condition, being subjected to the to the hypothetical successional law (*hypothetisches Erbstatut*), which means to the law which would have governed the succession of the person in question if he/she had deceased in the day of the practical case testamentary disposition elaboration.

Consequently, having regard to the fact that, upon will conclusion date, the testator had the habitual residence in France, his capacity shall be governed by the French law, and not by the Romanian one (the country of his last habitual residence), the will being fully valid.

2. A 16 years old German child, with the habitual residence in Germany, being in touristic purpose in Romania, writes here a holographic testament. At his return in Germany he deceases in a plane crash. Will validity issue is raised afterwards.

Practical case solution:

In this case, two questions must be analyzed from the point of view of applicable law determination: on one hand, the question of capacity condition fulfillment (substantive condition), and on the other hand, written will formal validity question (formal condition).

In what concerns the testing capacity, according to the Romanian law, the practical case will would be reversible, having regard to the fact that the testator did not have, at will elaboration date, full legal capacity (art. 988, para. 1 NCC). In exchange, according to the German law, the will would be, from this point of view, valid, because in this law system the testamentary capacity is acquired at the age of 16¹⁵⁸. Actually, according to § 2229 para. (1) from the German Civil code (BGB), a minor can write a will at the age of 16: “(e)in Minderjähriger kann ein Will erst errichten, wenn er das 16. Lebensjahr vollendet hat”, without needing his/her legal representatives’ consent.¹⁵⁹

In what concerns the will form, the practical case will observes the rigor of the Romanian law, fulfilling holographic will validity formal conditions, being completely written, dated and signed *manu propria* by the testator (art. 1041 NCC), even if it does not observe the dispositions regarding the testing capacity. In exchange, the practical case will not observe German law requirement, which imposes to the minor testator the exigency of authentic form, in protection purpose. § 2233 para. (1) from BGB provides to this end that if the testator is minor, he/she could only conclude the will in front of a notary, either by a verbal statement in front of the public notary and consigned by them, or by the remittance of an open document. “(i)st der Erblasser minderjährig, so kann er das Testament nur durch eine Erklärung gegenüber dem Notar oder durch Übergabe einer offenen Schrift errichten.” Consequently, the practical case

¹⁵⁸ In exchange, the underage (in general, the persons who are incapacitated) could not conclude an agreement as to succession § 2275 (1) BGB: “Einen Erbvertrag kann als Erblasser nur schließen, wer unbeschränkt geschäftsfähig ist.”

¹⁵⁹ “Der Minderjährige bedarf zur Errichtung eines Testaments nicht der Zustimmung seines gesetzlichen Vertreters” (§ 2229 par. (2) BGB).

testament, not observing these mandatory formal rigors, is deemed null (“*nichtig*”) according to the German right (§ 125 BGB – *Nichtigkeit wegen Formmangels*).¹⁶⁰

But which shall be the solution regarding will validity? Could it be deemed invalid, having regard to the fact that none of these law systems wherewith it presents connections – the Romanian one (by its conclusion place) and the German one (by testator national affiliation) – recognizes its legal effects? Could the private international law change something?

In order to be able to answer these questions, we shall prior identify the law applicable to the will in our practical case.

Quid iuris?

In order to determinate the solution in laws conflict plan, we shall dissociate, regarding the law applicable to the testament, between testator capacity (substantive condition) and testamentary written document form (formal condition).

In what concerns testator’s capacity, according to the art. 24 in the Regulation (EU) no. 650/2012, “(a) *disposition of property upon death other than an agreement as to succession shall be governes, as regards its admissibility and its substantive validity, by the law which, under this Regulation, would have been applicable to the succession of the person who made the disposition if he had died on the day on which the disposition was made*” (s.n., DAP). The testamentary capacity (the capacity to conclude a disposition for a general mortis causa) is deemed to be a substantial condition (art. 26, par. 1, let. a).

Consequently, having regard to the fact that the testator from our practical case had, at will elaboration date, the habitual residence in Germany, being only occasionally in Romania (in touristic purposes), his/her testamentary capacity shall be governed by the German law, which allowed him to conclude the testament.

In what concerns the form of the will, art. 27 of the Regulation, applicable regarding the “formal conditions of the mortis causa dispositions elaborated in written form”, following to save the will, (*favor testamenti*) if it observes the formal strictness of at least one of the laws that the testator could reasonably have into regard upon testing moment. Thus, the testamentary registered is deemed valid “*if its form complies with the law: a) of the State in which the disposition was made or the agreement as to succession concluded; (b) of a State whose nationality the testator or at least one of the persons whose succession is concerned by an agreement as to succession possessed, either at the time when the disposition was made or the agreement concluded, or at the time of death; (c) of a State in which the testator or at least one of the persons whose succession is concerned by an agreement as to succession had his domicile*¹⁶¹, *either at the time when the disposition was made or the agreement concluded, or at the time of death; (d) of the State in which the testator or at least one of the persons whose succession is concerned by an agreement as to succession had his habitual residence, either at the time when the disposition was made ot the agreement concluded, or at the time of death; or (e) in so far as immovable property is concerned, of the State in which that property is located.*”

We are in the presence of *alternative conflict rules*¹⁶², being sufficient for the testament, from formal point of view, to observe the rigors of any of the laws enumerated by the legislator.

¹⁶⁰ According to D. Leipold, *Erbrecht*, 19 Auflage, Mohr Siebeck, 2012, p.151 and next.

¹⁶¹ Unlike the habitual residence, which is a uniform concept, the domicile represents a concept qualified as a milestone of the internal law of the state on whose territory it is invoked. Art. 27, paragraph 1, p. final: “*the determination of the question whether or not the testator or any person whose succession is concerned by the agreement as to succession had his domicile in a particular State shall be governed by the law of that State.*” For the Romanian law, see the domicile definition given in art. 87 NCC: “The domicile of the individual, in view of exercising his/her civil rights and liberties, is where he declares his main dwelling.”

¹⁶² Also see art. 1, paragraph 1 of Hague Convention, of October 5th 1961, on the conflicts of laws relating to the form of testamentary dispositions: “*A testamentary disposition shall be valid as regards form if its form complies with the internal law: a) of the place where the testator made it, or b) of a nationality possessed by the testator,*

The holographic will in the analyzed practical case accomplishes the formal rigors of its elaboration place (*locus regit actum* - art. 27, par. 1, (a), namely of the Romanian law, being, thus, also deemed valid from a formal point of view.

In conclusion, subjecting the capacity of habitual residence law from the moment of the concluding the will, and the form of an alternative conflicts spectrum, which make almost impossible testamentary registered formal invalidation, the practical case will shall be deemed one validly closed, following to be recognized both in Romania and in Germany, although, according to the internal law of any of these states it could not have been deemed (of different reasons – capacity related, in the formal Romanian law or German law) as being a valid one.

We also insist on mentioning that, according to art. 27 of the Regulation, dedicated to the mortis causa dispositions formal conditions, to the end of this article “*any provision of law which limits the permitted forms of dispositions of property upon death by reference to the age, nationality or other personal conditions of the testator or of the persons whose succession is concerned by an agreement as to succession shall be deemed to pertain to matters of forum. The same rule shall apply to the qualifications to be possessed by any witnesses required for the validity of a disposition of property upon death.*” (par. 3 – s.n., DAP)¹⁶³. Consequently, limiting the forms to test on testator age reason is qualified as form-related, being, thus, subjected to the disposition of art. 27 par. 1 of the Regulation. So, we do not have to draw the wrong conclusion that testing capacity limitation, on testator age reason, would represent a formal condition. The testing capacity is deemed a substantive condition and it is subjected to art. 24 of the Regulation (art. 26, par. 1, let. a). In other words, as it was consistently shown in the recent specialty literature, the application of the dispositions of art. 27 **regarding the formal conditions about testator age** has as purpose the validation of a testament elaborated by a minor, without observance of the formal exigencies imposed by the law applicable regarding the substantive validity conditions of the will¹⁶⁴. As a matter of fact, this interpretation can easily be detached from Regulation reason (53) elaboration, according to which “*(f)or the purpose of this Regulation, any provision of law limiting the permitted forms of dispositions of property upon death by reference to certain personal qualifications of the person making the disposition, such as, for instance, his age, should be deemed to pertain to matters of forms. This should not be interpreted as meaning that the law applicable to the formal validity of a disposition of property upon death under this Regulation should determine whether or not a minor has the capacity to make a disposition of property upon death. That law should only determine whether a personal qualification such as, for instance, minority should bar a person from making a disposition of property upon death in a certain form.*” (s.n., DAP).

Consequently, according to the Regulation, **the testamentary capacity** is governed by the

either at the time when he made the disposition, or at the time of his death, or c) of a place in which the testator had his domicile either at the time when he made the disposition, or at the time of his death, or d) of the place in which the testator had his habitual residence either at the time when he made the disposition, or at the time of his death, or e) so far as immovables are concerned, of the place where they are situated.” Although Romania is not part of this Convention, it served as an inspiration for the Romanian regulator, both in 1992 (art. 68, para. 3 of Law no.105/1992 – at present, abrogated), as well as in 2009 (art. 2635 NCC). However, it is true that the Romanian regulator was not so generous (failing to include among the “validation” laws of the will form that of the testator’s domicile at the moment of his death, or on the date of drawing up the testamentary document).

¹⁶³ The inspiration source of this paragraph 3 of art. 27 derives from art. 5 of Hague Convention of October 5th, 1961, on the conflicts of laws relating to the form of testamentary dispositions: “*for the purposes of the present Convention, any provision of law which limits the permitted forms of testamentary dispositions by reference to the age, nationality or other personal conditions of the testator, shall be deemed to pertain to matters of form. The same rule shall apply to the qualifications that must be possessed by witnesses required for the validity of a testamentary disposition.*”

¹⁶⁴ A. Bonomi in A. Bonomi, P. Wautelet, **Le droit européen des successions. Commentaire du Règlement n° 650/2012 du 4 juillet 2012**, Bruylant, 2013, p. 419: “*L’application de l’article 27 aux conditions formelles liées à l’âge peut avoir pour conséquence de valider un testament rédigé par un mineur sans respecter les formalités exigées par le droit régissant la validité au fond.*”

law which would have been applied to testator succession of he would have "left" in will signing day, either that it is the law chosen by the testator (based on art. 22 of the Regulation), or the law which would apply to the succession in the absence of the choice (testator habitual residence at will closure moment *Erbstatut* or *Errichtungsstatut*, art. 21 corroborated with art. 24 and 26, para. 1, let. a).

But whenever a law of succession applicable to the substantive conditions of the will, ***restricts the forms of bequeathing taking the age into consideration*** (or other "personal characteristics of the individual who made the disposition"), we are in the presence of formal matters, subject to art. 27 of the Regulation, which governs the formal conditions of the mortis causa dispositions.

One can see that, by doing so, the Regulation considerably widens the permissiveness on the ability to bequeath. Although it cannot remove the minors lack of legal capacity, if it is provided by the hypothetical law of succession it might, however, validate the testamentary dispositions made by minors (legally unqualified), regardless of the form of testamentary document in which they are made, even if the law of succession requires the compliance with a certain form regarding the minors (authentic form). It is therefore sufficient that the law governing the substantive conditions shall allow minors to conclude testamentary dispositions.

Therefore, we can notice a certain "cut" which the Regulation application produces in the competent law on succession` provisions on the capacity. The national law of succession recognizing the ability to bequeath for the minors of a certain age, allows this in the consideration of a particular protection conferred to the minor by imposing the authentic form of the will (unlike other national laws, also in the consideration of such protection, interdicting the testamentary capacity for the legally unqualified). Interesting to notice is that the Regulation, aiming to protect the testator also, except from another perspective - saving his will, acts *favor testamenti*. The result is conclusive: what should prevail, at long last, when it comes to cross-border legal circuit, is the saving of the minor`s testamentary will if his will observes the formal requirements of at least one of the laws listed in art. 27 (considered to present relevant links concerning the form) in the detriment of the "forms of protection" established by the internal law of succession hypothetically applicable.

3. A 15 years old minor, having Romanian nationality and the habitual residence in Madrid, concludes here a holographic will establishing two particular legatees. Subsequently, at age 16, he returns with his parents in Romania, and they establish their habitual residence in the Hunedoara municipality. Here he concludes another holographic will through which he amends the will previously concluded in Madrid, imposing an obligation for the first legatee and revoking the second particular legatee. He dies, at age 17, in Hunedoara. Subsequently, the issue of the holographic will validity raises, concluded in Madrid and in Hunedoara.

Quid iuris?

In terms of testamentary capacity, the minor in the practical case had, regarding his first will, this capacity according to the Spanish law of succession, which governs the substantive validity of this (first) will provisions, given the testator`s habitual residence in Madrid at the time of the will`s conclusion (art. 24 and 26, para. 1, letter a). Indeed, according to art. 662 of the Spanish Civil Code, the testamentary capacity is enjoyed by all those for whom the law does not interdict explicitly: "*Pueden testar todos aquellos a quienes la ley no lo prohíbe expresamente*". Are considered as lacking the capacity to bequeath, according to art. 663 of the Sp. Civil Code – "*Están incapacitados para testar: 1. Los menores de catorce años de uno y otro sexo; 2. El que habitual o accidentalmente no se hallare en su cabal juicio.*" Therefore,

after reaching the age of 14 years old, the minor enjoys testamentary capacity in the Spanish law¹⁶⁵. It is true that the Spanish law limits the access to the holographic form only to the individuals who are of full age (art. 688, para. 1 of the Sp. Civil Code: “*El testamento ológrafo sólo podrá otorgarse por personas mayores de edad*”), but, as we have already seen, in terms of the Regulation (EU) No. 650/2012, it is a matter of form, subject to the alternative rules of conflict governing the formal conditions of the mortis causa provisions made in writing (art. 27, para. 3).

Regarding the second holographic will concluded in Hunedoara municipality, given that the testator changed his habitual residence from Madrid to Hunedoara, his (second) will would have to be voidable according to the hypothetical law of succession, namely according to the Romanian law (art. 988, para. 1 NCC). However, given that the testator already acquired the capacity to bequeath according to the Spanish law (the law of his former habitual residence) and 'used' it by concluding a will, ***subsequent change of the law applicable to the succession does not affect his capacity to amend or revoke a previous will***, even though, under the new law of succession (Romanian law) the testator in the practical case does not have testamentary capacity. Art. 26, para. 2 of the Regulation provides explicitly that “*in case a person has the capacity to make a mortis causa disposition based on the law applicable in accordance to Articles 24 or 25, the applicable law further change does not affect its ability modify or revoke such a disposition*”. As noted¹⁶⁶, we are in the presence of a derogation to the principle disposition of art. 24, para. 3, according to which the applicable law on the admissibility and substantial validity of the will shall also govern its amendment or revocation.¹⁶⁷

Consequently, both holographic wills are valid in terms of the condition of the testamentary capacity.

In terms of form, even though the Spanish law of succession prohibits the holographic will form for the minor (art. 688, para. 1 of the Sp. Civil Code), being in the presence of a limitation on the form to bequeath on the grounds of age, shall be applicable the provisions of art. 27, para. 3 of the Regulation, which assimilates to the form any limitation regarding the forms allowed by mortis causa dispositions “*by reference to age, nationality or other personal conditions of the testator*” (s.n., DAP). Therefore, the concerned wills shall be considered valid in terms of form, due to the fact that the form of the will is recognized by Romanian law, namely the law of the State whose nationality the testator has (art. 27, para. 1, letter b).

4. A Republic of Moldova national dies *ab intestat*, with his last habitual domicile in Romania. The estate includes movable property located in Romania (in Iași), as well as two immovable properties, one located in Iasi and one in Bălți. The deceased left a widow and two sons. They open the succession procedure addressing to a notary public in the Iași court of first instance district. Determine the practical case solution regarding international jurisdiction and the law applicable to the succession.

¹⁶⁵ According to M. Albaladejo, *Curso de derecho civil. V Derecho de sucesiones*, Nueva edition, Edisofer, 2008, p. 212-213; H. P. Schömmmer, D. Gebel, *Internationales Erbrecht. Spanien*, C. H. Beck Verlag, München, 2003, p. 106-107.

¹⁶⁶ A. Bonomi in A. Bonomi, P. Wautelet, *Le droit européen des successions. Commentaire du Règlement n° 650/2012 du 4 juillet 2012*, Bruylant, 2013, p. 420.

¹⁶⁷ According to art. 24, paragraph 3 of the regulation, the hypothetical succession law that is the one which “would have been applicable to the succession of the person who made the disposition if he had died on the day on which the disposition was made.” (art. 24, para. 1), “shall apply, as appropriate, to the modification or revocation of a disposition of property upon death other than an agreement as to succession. In the event of a choice of law in accordance with paragraph 2, the modification or revocation shall be governed by the chosen law.” (art. 24, para. 3).

According to art. 75 of the Regulation, it "*does not affect the application of international conventions to which one or more Member States are parties at the date of the hereby Regulation adoption and which concern the matters covered by this Regulation*". Therefore, to the extent that, on the date the Regulation was adopted (July 4th, 2012), there are international treaties or conventions concluded by the Member States with third states containing provisions on successions, they shall continue to apply also in respect of the successions opened after the Regulation implementation has started (August 17th, 2015).¹⁶⁸

Romania has concluded a treaty with the Republic of Moldova on July 6th, 1996 on the legal assistance in civil and criminal matters.¹⁶⁹ Chapter III, Section II contains provisions relating to succession.

Regarding the jurisdiction, art. 43, section 1 confers jurisdiction on the succession opening, the succession procedure and the successional disputes with the object of movable property "*to the authorities of the contracting party whose national was the deceased at the time of death*", except for the situation when all the movable property remaining from the deceased, national of one of the contracting parties, are situated on the territory of the other contracting party, and all successors agree with the jurisdiction of the contracting party on whose territory the successional movable properties are located (art. 43, section 3). Regarding the immovable property the jurisdiction of "*the contracting party on which these assets are situated*" (art. 43, section 2).

Therefore, given the fact that all the immovable properties in the present practical case are situated in Romania, and that all heirs have seised a notary public in Romania for the estate administration (thus resulting, their agreement), the jurisdiction shall lie with the seised Romanian notary public, with respect to the devolution and successional transmission of movable properties universality as well as with respect to the immovable property situated in Iași. The devolution and successional transmission of the immovable property situated in Bălți (R. of Moldova) shall fall within the Republic of Moldova authorities' jurisdiction (in this case a notary public in this country, given the heirs' agreement).

In terms of the applicable law, art. 40 of the Treaty stipulates: "*1. The right to succession on movable properties is determined by the law of the contracting party whose nationality the succession author had at the time of death. 2. The right to succession on the immovable property is determined by the law of the contracting party on the territory of which such assets are situated. 3. Successional assets are considered movable or immovable property in compliance with the law of the contracting party on whose territory they are situated*".

Therefore, **in terms of the applicable law**, the estate is divided into two estates (*dépeçage*): the Romanian one, governed by the Romanian law of succession, including the building located in Iași municipality and the one governed by the Republic of Moldova law of succession, including movable property universality situated in Bălți city.

The Romanian notary public seised with the estate administration shall also apply to the estate and to the immovable property situated in Bălți the Republic of Moldova law of succession, and as regards the immovable property situated in Iași municipality, the Romanian law of succession.

5. A Romanian citizen, a medic, unmarried, was declared admitted following an interview for filling a vacancy for a job of a medic in Munich, moves to this locality to exercise his profession, based on a contract of employment concluded for a period of ten years. Dies after one year from the date of his establishment in Germany, leaving several immovable properties situated

¹⁶⁸ Art. 83, paragraph 1.

¹⁶⁹ Ratified by Law no. 177/1997, published in Romania's Official Gazette no. 310 of November 13th, 1997.

in Romania, and, as legal heirs, two parents and a brother with the habitual residence in Romania. What law shall govern the succession?

According to art. 21, para. 1 of the Regulation, *“the law applicable to the succession as a whole is that of the State in which the deceased had his habitual residence at the time of death”*. The European legislator does not define the habitual residence, as this shall be determined taking into account all the circumstances relating to the succession author.

From the practical case data reasonably results that the deceased has established his habitual residence in Munich, locality where he had established in order to exercise the medical profession, under a contract of employment concluded for a period of ten years.

However, given that the deceased has established quite recently his habitual residence in Germany (a year prior to his death), while maintaining consistent relationships with his country of origin, where his parents and brother live, and that the immovable properties that make up the estate are in Romania, we can say that in this case, despite the succession author's last habitual residence, there are closer manifest linkages with Romania (country of his former habitual residence) than with Germany. Thus, art. 21, para. 2 of the Regulation establishes ***an escape clause*** (*escape clause / Ausnahme-, Ausweich- or Berichtigungsklausel / clauses d'exception*) from the rule formulated in paragraph 1 (the one of the last habitual residence) allowing exceptionally and in the absence of choice of the law applicable to the inheritance, the application of a law of succession other than that from the last habitual residence, recently acquired (shortly before death), to the extent that it can be considered, starting from the analysis of the case circumstances, there are obviously closer links with a law other than the latter. Thus, according to art. 21 (2), *“(in case when, by way of exception, all circumstances of the case clearly indicate that at the time of death, the deceased was obviously more closely connected to a state other than the state whose law would be applicable according to paragraph (1), the law applicable to the succession is the law of that other state”*(s.n.). The quoted text does not provide details on these circumstances that could trigger the escape clause mechanism, but it is clear that the European legislator had in mind the situation in which all the elements related to succession are located in a particular state (assets from the estate, domicile or habitual residence of the heirs - the family of the deceased, possibly even his nationality), including the deceased's former habitual residence, to the extent that his last habitual residence was acquired recently (shortly before death). In other words, in order for the escape clause to be activated it is not enough to have all these relationships with a state other than the one of the former habitual residence, but it is also required that the last habitual residence to be an "inconsistent" one, namely recently acquired, leaving often doubt on the deceased's real intention, especially given that he has also kept the house in his home country. In this respect, recital (25) of the Regulation states that *“the authority dealing with the succession may, in exceptional cases when, for example, the deceased had moved to the state of his/her habitual residence quite recently before his/her death and all the circumstances of the case indicate that he/she obviously had a closer relationship with another state, to conclude that the law applicable to the succession should not be the law of the state where the deceased had his/her habitual residence, but rather the law of the state with which the deceased obviously had a closer connection”*. However, a question that might raise is the following: "Wouldn't it have been much easier if, instead of justifying the escape clause application, the court (or the notary) would have qualified his last habitual residence in the country with which he had the closest relationships? Obviously, the answer cannot be, in principle, but a positive one. Therefore, we believe that the escape clause activation (either ex officio or at the request of either party) occurs, practically speaking, before the authority seised pursuant to art. 4, namely that of the new habitual residence (and the last).¹⁷⁰

¹⁷⁰ Unlike our former regulation of the relations in private international law (in Law no. 105/1992), the new Civil Code consecrates, in general, the escape clauses in art. 2565. According to that article, paragraph 1, *“exceptionally, the application of the law established according to the present book can be removed if, due to the case*

However, it may be argued that the escape clause "perimeter" in the matters of succession is limited to situations where the succession author's habitual residence determination is recent based on the date of his/her "departure", and all other relevant connections (family members habitual residence, successional assets location) are related to the previous habitual residence state.

However, it should be stressed that the application of the escape clause is entirely excluded in terms of international jurisdiction in matters of succession. In other words, the competent authorities of the succession author's last habitual residence shall decide on the applicable law, without being able to decline jurisdiction based on the escape clause.¹⁷¹

Also, in order for the escape clause to intervene, also the requirement that the inheritance author has not opted for choosing the law applicable to the inheritance according to art. 22. Escape clauses' mission is to lead to a certain flexibility when the conflict rule's abstract rule would produce unfair results regarding the envisaged legal situation's location. In other words, it is an exceptional correction brought to the conflict rule, taking into account the variability of the everyday life concrete. Its goal is to contribute to the making of conflict justice, being a part thereof ("*conflicts justice*" or "*kollisionsrechtliche Gerechtigkeit*" / "*internationalprivatrechtliche Gerechtlichkeit*")¹⁷², with the purpose of equity determination of the legal proximity. This *internationalprivatrechtliche Gerechtlichkeit* enjoys a spirit and a

circumstances, the legal relation has a very far connection to that law. In this case, the law to which the legal relation shows the closest connections shall be applied." However, it is excluded the application of escape clauses "in case of laws regarding the marital status or the person's capacity, as well as when the parties chose the applicable law (paragraph 2). General escape clauses can also be found in other national legislations of private international law. For instance, art.19 of the Belgian Code of private international law, adopted by the Law of July 16th, 2004, provides: "*§ 1. Le droit désigné par la présente loi n'est exceptionnellement pas applicable lorsqu'il apparaît manifestement qu'en raison de l'ensemble des circonstances, la situation n'a qu'un lien très faible avec l'Etat dont le droit est désigné, alors qu'elle présente des liens très étroits avec un autre Etat. Dans ce cas, il est fait application du droit de cet autre Etat. Lors de l'application de l'alinéa 1er, il est tenu compte notamment :*

- *du besoin de prévisibilité du droit applicable, et*
- *de la circonstance que la relation en cause a été établie régulièrement selon les règles de droit international privé des Etats avec lesquels cette relation présentait des liens au moment de son établissement.* § 2. *Le § 1er n'est pas applicable en cas de choix du droit applicable par les parties conformément aux dispositions de la présente loi, ou lorsque la désignation du droit applicable repose sur le contenu de celui-ci.*" Translation of the text in art. 19 of the Belgian Code of DIP: §1. The right designated by the present law is not exceptionally applicable when it is obvious that, given all circumstances, the situation has only a very weak connection to the state whose law is designated, but it shows very close connections to another state. In this case, the law of the latter state shall be applied.

The application of paragraph 1 shall consider especially:

- the need of predictability of the applicable law, and
- the circumstance that the respective relation was correctly determined, according to the norms of private international law of the state to which this relation shows connections at the moment of its determination. §2. Paragraph 1 is not applicable in case the parties have chosen the applicable law, according to the provisions of the present law, or when the choice of the applicable law is based on its content. At the same time, art. 15 of the Swiss Federal Law of private international law of December 18th, 1987, provides „*1. Das Recht, auf das dieses Gesetz verweist, ist ausnahmsweise nicht anwendbar, wenn nach den gesamten Umständen offensichtlich ist, dass der Sachverhalt mit diesem Recht in nur geringem, mit einem anderen Recht jedoch in viel engerem Zusammenhang steht. 2. Diese Bestimmung ist nicht anwendbar, wenn eine Rechtswahl vorliegt.*" Text translation: 1. The right designated by the present law is not exceptionally applicable when it is obvious that, given all circumstances, the situation has only a very weak connection to that right, but shows much closer connections to another right. 2. This disposal is not applicable in case of the choice of law.

¹⁷¹ According to H. Gaudemet-Tallon, "*Les règles de compétence judiciaire dans le règlement européen sur les successions*", in G. Khairallah et M. Revillard (ed.), *Droit européen des successions internationales. Le Règlement du 4 juillet 2012*, Defrénois, 2013, p. 129; A. Bonomi, in A. Bonomi, P. Wautelet, *op. cit.*, p. 291. The possibility to decline the competence, based on art. 6, paragraph 1, letter (a), in favour of another Court from another member state, "*considering the practical circumstances of the succession, as well as the parties' habitual residence and the place where the goods are located*" can be done only if the author of the succession choses as applicable law for his succession, the law of the respective member state, and not based on the escape clause.

¹⁷² See, Kegel/Schurig, *Internationales Privatrecht*, 8th Auflage, 2000, p. 114.

particular method, specific, always seeking the legal system which is "the closest" to the legal relationship parties (generally speaking), but not necessarily in terms of geography, instead in terms of legal integration elements. Conflict justice has the purpose of identifying the person's life center (interest), the "legal relationship governing rules", determining the applicable law according to the circumstances and the nature of the concerned institutions. It operates with the legal proximity concept, setting criteria and methods for its determination, being a *rechtsanwendungsrecht* that must act without "peeking" at the substantive content of laws with which the relationship shows links and which could become potentially applicable in the practical case. This is the only way to discover the truth, expressing that *internationalprivatrechtliche Geist* anchored in the parties' reasonable expectation, in the spirit of predictability and, in any case, the desire for security for determining the competent authority and the law applicable in the case. In addition, reasonableness and predictability means to "almost never" appeal to the escape clauses...

The escape clause radiographs the de facto state, qualitatively assessing each circumstance, and then, taking into account all the report's peculiarities (specifics), notes and imposes the applicable law. Therefore, the escape clause application cannot be dictated by an abstract reasoning, but only following a concrete assessment, causal, yet made very cautiously so, as far as possible, the predictability regarding the law applicable to succession shall not be greatly altered, which will be inconsistent with the Regulation objective.¹⁷³ Either way, its application is in itself generating uncertainty, at least to a certain extent. Metaphorically speaking, it is like some kind of the conflicts of laws' *equity*. There is also a risk. The escape clauses overuse, especially in unjustified situations leads to the unpredictability risk on the applicable law, thus diverting the point and purpose of the conflict rule. Therefore, the courts (or notaries) must use these "adaptation" clauses very cautiously, in very exceptional situations, namely only when clearly and undoubtedly all relevant links of the legal relationship require this, refusing to give satisfaction to any claims made in this regard, speculatively, by the parties. Hence their name: escape clause! *We believe, however, that it would have been wiser to give up this "technique" in the matters of international successions, because, on the one hand, in this field the location must start from a single "key" - the deceased, the "exceptional" elements being more rare, and, however, less relevant (the location elsewhere of the assets or the vast majority of assets that make up the estate, the heirs habitual residence) and, on the other hand, the risk of escape clauses abusive use cannot be underestimated, especially in countries that are accustomed to live in the state of exception*¹⁷⁴ ...

Therefore, the escape clause was tailored to run on a very narrow lane; it should not flood the courts and notaries' practice, bringing the exceptional in our everyday lives. On the other hand, even if the deceased has recently changed his habitual residence (shortly before his death), this should not *in itself* constitute a ground for the escape clause application in favor of the country of the previous habitual residence, because changing the habitual residence could constitute a sign of legal integration intention in the new country. Moreover, to the extent that the deceased also has this country's nationality, not explicitly choosing the law of succession belonging to the latter - in order to remove any doubt and, thus, the possible application of the escape clause provided under art. 21 (2) - may be due to his/her belief that such a choice would

¹⁷³ Thus, according to the recital (37) of the regulation, "in order to allow citizens to avail themselves, with all legal certainty, of the benefits offered by the internal market, this Regulation should enable them to know in advance which law will apply to their succession. Harmonised conflict-of-laws rules should be introduced in order to avoid contradictory results. The main rule should ensure that the succession is governed by a predictable law with which it is closely connected. For reasons of legal certainty and in order to avoid the fragmentation of the succession, that law should govern the succession as a whole, that is to say, all of the property forming part of the estate, irrespective of the nature of the assets and regardless of whether the assets are located in another Member State or in a third State".

¹⁷⁴ For a philosophical work dedicated to the exception state, we recommend G. Agamben, *The Exception state* (*Homo sacer* II, 1), Ed. Idea Design & Print, Cluj, 2008.

have been redundant anyway ("unnecessary"), since this law (of the new habitual residence) would have had the enforcement jurisdiction anyway according to art. 21 (1), as the law of the last habitual residence. In other words, the application of the escape clause could distort the deceased's last will and faith, "surprising him" *post mortem*¹⁷⁵ ...

The escape clause cannot lead to depeage allocating different laws of succession, depending on the nature and position of the goods. In other words, it cannot infringe the principle of the inheritance unity, its action remaining subordinate to this principle. Besides, the legislator itself speaks of the possibility of applying the escape clause (art. 21, para. 2) when, "by way of exception, all the circumstances of the case clearly indicate that, at the time of death, the deceased was manifestly more closely connected with a state other than the state whose law would be applicable under paragraph (1)". Also, recital (25) states that in exceptional circumstances, when "the deceased had moved to the state of his habitual residence rather recently before his/her death and all the circumstances of the case indicate that he/she was manifestly more closely connected with another state", can lead to the escape clause activation. However, the escape clause is not a method of locating subsidiary conflict rule, not an alternative to it whenever they identify that the connecting factor is due to circumstances of the case, a difficult operation: "it should not resort to the use of the link obviously the closest as a subsidiary connecting factor whenever it proves complicated the establishment of the habitual residence of the deceased at the time of death" (recital 25). **In other words, the exception clause is not subsidiary to the conflict rule, but exceptional to this.** In addition, the principle of the inheritance unity knows only the exceptions which are explicitly established by the legislator: "subject to the case where this Regulation provides otherwise, the law applicable to the succession as a whole is that of the state in which the deceased had his/her habitual residence at the time of death" (Art.21 (1)). An example of a derogatory disposition in this respect is that provided according art. 30: "(w)here the law of the state in which certain immovable property is situated, certain enterprises or other special categories of assets contain specific rules which, for economic, family or social considerations, impose restrictions on succession or inheritance affecting the respect of those assets, those special rules shall apply to the succession in so far as, under the law of that state, those rules are applicable irrespective of the law applicable to the succession".

As a conclusion, following the application of the exception clause under the Regulation in paragraph 2 of Art. 21, the law applicable to the succession of the deceased within the present analyzed case will be the Romanian succession law.

6. A Romanian citizen, after 25 years in Málaga (Spain), where he had his habitual residence and his workplace, plans to return to Romania, having three months to retirement. For this purpose, he sells the immovable properties he owned in Málaga, buying a house in the Deva city. His family returns to the country and settles here. Meanwhile he dies without actually having time to establish himself in Romania, leaving a wife and two daughters. What law shall govern the succession?

¹⁷⁵ As to the escape clause in private international law, see A. Bucher, "La clause d'exception dans le contexte de la partie générale de la LDIP" in 21^e Journée de droit international privé – 20 mars 2009; T. Hirse, *Die Ausweichklausel im Internationalen Privatrecht*, Tübingen 2006; P. Rémy- Corlay, *Mise en oeuvre et régime procédural de la clause d'exception dans les conflits de lois*, Rev.crit. 2003, p. 37-76; H. Gaudemet-Tallon, "Le pluralisme en droit international privé : richesses et faiblesses (Le funambule et l'arc-en-ciel)", *RCADI* 312 (2005), p. 9-488 (327-338); J. D. González Campos, "Diversification, spécialisation, flexibilisation et matérialisation des règles de droit international privé", *RCADI* 287 (2000), p. 9- 426 (253-262, 297-303); P. Lagarde, "Le principe de proximité dans le droit international privé contemporain", *RCADI* 196 (1986-1), p. 9-237 (97-126); U. Blaurock, *Vermutungen und Ausweichklausel in Art. 4 EVÜ*, in Festschrift für Hans Stoll, Tübingen 2001, p. 463-480.

From the practical case data it undoubtedly results that at the time of his death, the deceased had his last habitual residence in Málaga, city where he lived with his family, uninterruptedly, for 25 years and where he also had his workplace.

Although it undeniably results that the succession author's intention was to change his habitual residence, this change never occurred because of the unexpected death; therefore, at the date of his death, his habitual residence was in Spain. According to art. 21, para. 1 of the Regulation, the succession was supposed to be governed by Spanish law - the law of last habitual residence.

However, given that all relevant goods that make up the estate are located in Romania, that his family had at the moment of opening the inheritance, the habitual residence in Romania, it can be argued reasonably that the closest relations of the succession's author at the date of his death, were with Romania, a country where he was determined to establish whether death had not intervened.

Therefore, the court (or notary public), considering the circumstances, may apply *ex officio* or at the request of the heirs, **the escape clause** under art. 21, para. 2, which provides that where, *"by way of exception, all the circumstances of the case clearly indicate that at the time of death, the deceased was manifestly more closely connected with a State other than the State whose law would be applicable under paragraph (1), the law applicable to the succession is the law of that other State"*.

So we have to deal with an exceptional situation of removing the mainly competent law for governing the devolution and successional transmission (law of the last habitual residence of the inheritance author), justified on the basis of proximity to the right of other than that of last habitual residence. Removing competent law principle does not occur on account of its actual content (as in the case of public policy invoked by private international law- art.35 of the Regulation¹⁷⁶), but by reason of proximity—the links "closer" to a country other than the last habitual residence of the deceased, dictated by "all the circumstances of the case".

We are in a situation reverse to the previous practical case (no. 5), where we found a recently established habitual residence, shortly before death, the succession author manifestly having a closer connection with the state of his previous habitual residence. Here, on the contrary, we speak of an "indisputable" habitual residence; the closer ties with the law of another state being due to his undeniable intention to settle himself in his home country (Romania), place where all assets that make up the estate are held at the time of death.

We point, however, that the use of this clause, as shown in the semantics of its name should not become a habit, especially when due to multiple locations of the author the succession, it becomes difficult to establish his habitual residence. As shown in the final part of recital no. 25, *"they should not resort to the use of the closest connection clearly as a subsidiary connecting factor whenever it proves complicated to establish the habitual residence of the deceased at the time of death"*. In other words, *the escape clause has no application subsidiary to the conflict rule, but it is exceptional to this, taking into account all the circumstances of the case, leading to a much greater proximity connection with a state other than that the one of the last habitual residence.*

Obviously, the escape clause is also applicable only in respect of determining the applicable law, excluding the scope of its fixation on international jurisdiction.¹⁷⁷

¹⁷⁶ According to this article, *"The application of a provision of the law of any State specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (ordre public) of the forum."*

¹⁷⁷ According to P. Lagarde, *"Les principes de base du nouveau règlement européen sur les successions"*, in Rev. crit. DIP, 101 (4), 2012, p. 700; A. Bonomi, in *op. cit.*, p. 291; H. Gaudemet-Tallon, *"Les règles de compétence judiciaire dans le règlement européen sur les successions"*, in G. Khairallah et M. Revillard (ed.), **Droit européen des successions internationales. Le Règlement du 4 juillet 2012**, Defrénois, 2013, p. 129.

It was sustained that the application of the clause could be imagined "in case of a deputy or consul deceased in the country where he held office for many years already. Although the habitual residence seems to be the country where he died, the law of the sending State shall be applied, and one can reasonably believe that he kept closer ties with this country. But, in this case, couldn't it be said that the diplomat kept his habitual residence in the country of origin? If we admit such a supposition, the escape clause would prove useless. But it would keep inconvenience to have broken the unity criterion establishing jurisdiction and the applicable law of succession.¹⁷⁸

7. A Romanian national (of Hungarian origin), with his habitual residence and all assets in Romania, chooses, through testamentary clause, the Hungarian law applicable to his succession as a whole, though, at the date of the concluding the will, he had no Hungarian nationality. He acquires Hungarian nationality three months later, and soon dies. What law shall govern the succession?

Regulation establishes freedom of action in matters of succession, allowing the choice of law applicable to them. According to art. 22, the testator "*may choose that the law to be applied to his succession as a whole to be the law of the state of his nationality he has when choosing the law or at the date of death*". Although we are not talking about a very extensive autonomy of will, but rather a limited one, framed, however, the permission of the succession law choice is able to give more predictability on the law applicable to the succession, thus avoiding the uncertainties inherent in determining the place of last habitual residence, especially when the succession author lived successively, in different time intervals, in several Member States. Also, the advantage of choosing the applicable law (*professio juris*) is to maintain the applicable law (the choice of law) despite changes that might occur by changing the habitual residence of the one that plans beforehand the succession since the conclusion of the will (or agreement as to succession) until the time of his death. As shown, the stability of the applicable law, guaranteed by its own choice, is able to facilitate the free movement of persons, the successive change of habitual residence not affecting the rules applicable to the succession.¹⁷⁹ In this way, through the exercise of choice "the mechanisms of successional anticipation are appealed to"¹⁸⁰, stimulating the conclusion of such documents which, being conform to the relevant provisions of the chosen law, are protected from risk of the possibility of amending the applicable law.

If a person has multiple nationalities, he shall be able to choose the law applicable to his succession "the law of any states whose citizen he is when choosing the law or at the time of death" (art. 22, para. 1 fin.).

Therefore, returning to the practical case data, we find that the author of the succession, although he did not acquire Hungarian nationality at the time of making the choice, had that nationality at the time of his death. Also, the choice was made explicitly, taking the form of a mortis causa disposition (art. 22, para. 2).

Therefore, the succession shall be governed by the Hungarian law of succession under its choice by the succession author.

One question that might still rise is related to the possible occurrence of fraud to law¹⁸¹, to the extent that they would appreciate that the acquisition of a second (or third) nationality would

¹⁷⁸ *Ibidem*, p. 701.

¹⁷⁹ A. Bonomi, în *op. cit.*, p. 302.

¹⁸⁰ *Ibidem*.

¹⁸¹ In the famous *Bauffremont affair*, which marked the theory of fraud to law in the French law, the French Cassation decided, by the decision of March 18th 1878, that the fact that Princess Bauffremont obtained the German nationality as a result of her naturalization in Saxe-Altenburg Duchy, taking advantage of the separation from bed and board from her husband, Prince de Bauffremont, obtained on August 1st 1874, was exclusively made to circumvent the disposals of the French law which did not allow at that time the divorce: "*il a [...] constaté en fait que [...] la demanderesse avait sollicité et obtenu cette nationalité nouvelle, non pas pour exercer les droits et*

have been done with the sole purpose of subjecting the succession to that country's law of succession, which was considered more favorable to the testator. We believe, in agreement with the recent doctrine¹⁸² and jurisprudence of the Court in Luxembourg¹⁸³ that there is no question of the exercise of fraudulent choice, on the ground that the law chosen has no relevant links to the succession. **The mere possession of one or multiple nationalities enables that person to discretionary choose between these nationalities, the law of succession belonging to any of the States whose nationality he possesses, when exercising the choice or at the time of death.** Thus, we speak of the potestative right of the testator to choose any of the inheritance laws of the states whose nationality he/she has. It is sufficient the possession of nationality, its "effectiveness"¹⁸⁴ is not required. Therefore, the French Cassation decision in *Bauffremont* case has become obsolete and irrelevant today, being contrary to the spirit of national affiliations equality promoted by the CJEC. This is a fundamental change of perspective in the context of new developments and realities of the European landscape.

But what happens if, after the exercise of choice, the state authorities whose law has been chosen shall deprive him/her of his/her nationality on the grounds of fraudulent acquiring? The

accomplir les devoirs qui en découlent, en établissant son domicile dans l'Etat de Saxe-Altenbourg, mais dans le seul but d'échapper aux prohibitions de la loi française en contractant un second mariage, et d'aliéner sa nouvelle nationalité aussitôt qu'elle l'aurait acquise; qu'en décidant, dans ces circonstances, que des actes ainsi faits en fraude à la loi française et au mépris d'engagements antérieurement contractés en France n'étaient pas opposables au prince de Bauffremont, l'arrêt attaqué a statué conformément au principe de la loi française sur l'indissolubilité du mariage, et n'a violé aucune des dispositions de la loi invoquées par le pourvoi; Par ces motifs— Rejette” (s.n., DAP). Asupra acestei decizii, inclusiv comentariul, see B. Ancel, Y. Lequette, *Les grands arrêts de la jurisprudence française de droit international privé*, 5^e édition, Dalloz, 2006, p. 47-59.

¹⁸² G. Khairallah, “La détermination de la loi applicable à la succession”, în G. Khairallah et M. Revillard (ed.), *Droit européen des successions internationales. Le Règlement du 4 juillet 2012*, Defrénois, 2013, p. 55; A. Bonomi, în *op. cit.*, p. 307-308; A. Davi, “Il nuovo diritto internazionale delle successioni nell'Unione Europea” în Cuadernos de Derecho Transnacional (Octubre 2013), Vol. 5, No 2, p. 40: “almeno nell'ipotesi in cui una o più delle cittadinanze concorrentemente possedute fossero cittadinanze di paesi membri dell'Unione, un'interpretazione tendente a restringere la possibilità di avvalersi a volontà di ciascuna di esse sarebbe stata incompatibile con la consolidata giurisprudenza della Corte di giustizia, che nega l'ammissibilità sia del rifiuto di riconoscere gli effetti del loro possesso nei rapporti tra paesi membri sia dell' introduzione di qualsiasi ordine di preferenza tra le stesse. E' peraltro vero che la soluzione liberale adottata dal regolamento può consentire la scelta della legge di uno Stato con cui l'interessato non abbia mantenuto che scarsi legami, come ad esempio è avvenuto nel noto caso svizzero Hirsch c. Cohen.”

¹⁸³ CJCE, July 16th 2009, the case C-168, *Hadadi*, in which, in the context of applying the Regulation *Bruxelles II bis*, the Court has decided that if case the spouses who introduced the divorce action have (both of them) the nationality of the same member states, “the article 3, paragraph (1) letter (b) of Regulation no. 2201/2003 is opposed to the removal of Courts jurisdiction of one of these member states because there are no other connection elements between the plaintiff and the respective state. That court must, on the contrary, take into account the fact that the spouses also hold the nationality of the Member State of origin and that, therefore, the courts of the latter could have had jurisdiction to hear the case”.

¹⁸⁴ With reference to the criterion of the habitual commune residence of the spouses as an attributive factor of international jurisdiction in divorce matters, in separation from bed and board and marriage annulment, based on the Regulation *Bruxelles II bis*, the Court stipulated that “nothing in the wording of Article 3(1)(b) to suggest that only the ‘effective’ nationality can be taken into account in applying that provision. Article 3(1)(b), inasmuch as it makes nationality a ground of jurisdiction, endorses a link that is unambiguous and easy to apply. It does not provide for any other criterion relating to nationality such as, for example, how effective it is.” (CJCE, July 16th, 2009, the case C-168, *Hadadi*, pct. 51). At the same time, “moreover, no basis can be found in the objectives of that provision or in the context of which it forms part for an interpretation according to which only an ‘effective’ nationality can be taken into consideration for the purposes of Article 3(1) of Regulation No 2201/2003” (*Idem*, pct. 52). At the same time, in the same case *Hadadi* the Court specifies that “an interpretation would restrict individuals’ choice of the court having jurisdiction, particularly in cases where the right to freedom of movement for persons had been exercised” (*Idem*, pct. 53). At the same time, also see CJCE, July 7th, 1992, C-369/90, *Micheletti*; the case C-148/02, October 2nd, 2003, *Garcia Avello*: “It is not permissible for a Member State to restrict the effects of the grant of the nationality of another Member State by imposing an additional condition for recognition of that nationality with a view to the exercise of the fundamental freedoms provided for in the Treaty” (pct. 28).

consequences of this situation shall be reflected on the validity of the previously made choice, that is, in other words, shall they only be produced *ex tunc* or *ex nunc*? In principle, the deprivation of nationality acquires effect for the future, not affecting the enforcement of state whose law has been chosen. However, in case of fraudulent acquiring¹⁸⁵, the nullity sanction, we believe that *ex tunc* effects shall occur, with the consequence of invalidating the law chosen on that basis.

In conclusion, we would like to point out that there is no question of fraudulent exercise of the right to choose the law applicable to the succession whenever the testator's choice falls within the limits provided by art. 22, para. 1 and 2 of the Regulation: law of any of the states whose nationality the author of the choice has, when making the choice or at the time of his/her death.¹⁸⁶

The fact that acquiring nationality would have been made subject solely to the law of that state succession cannot be described as a fraudulent maneuver intended to evade the law of

¹⁸⁵ As for the applicable sanction in case of fraud, the law does not show a unitary opinion. Some authors think the fraudulent acts are void (see H. Batiffol, P. Lagarde, *Droit international privé*, tome 1, 8e édition, nr. 375), while others appreciate that the sanction should be the non-opposability of the fraudulent act (J.-P. Niboyet, *Traité de droit international privé français*, t. 3, nr. 5 1090, *idem*, *Cours de droit international privé*, Recueil Sirey, 1947, nr. 540, p. 541-542. More recently, for an ample study dedicated to fraud in matters of nationality, see P. Lagarde, "La fraude en matière de nationalité" in *Mélanges en l'honneur du Professeur Bernard Audit. Les relations privées internationales*, LGDJ, Lextenso éditions, 2014, p. 511-523. Professor Paul Lagarde distinguishes, as regards fraud in matters of nationality, between the fraud by forging the marital status documents (*la fraude documentaire*) – when "*la fraude est avérée*" – and that by simulating the private law documents (*la simulation d'actes de droit privé*), when the fraud intention is difficult to prove, with a great temptation to resort to fraud presumptions, with the related risks ("et la tentation est grande de recourir à des présomptions de fraude, avec les dangers qu'elles comportent"); as for the fraud sanctions, Proff. Lagarde distinguishes between the sanctions regarding the fraud author, on the one side, and the repercussion to third parties, on the other side. While in the first case, the sanctions are drastic (nullity, including penal sanctions), in the second case, the fraud effects can be mitigated as regards the third parties. For instance, the French Cassation established that "*l'annulation d'une déclaration de nationalité française ne produit aucun effet sur la nationalité de l'enfant du déclarant devenu majeur*" (Cass. civ. 1^{re}, 10 mai 2007, n^o 04-17022, Bull. civ. I, n^o 177, *apud* P. Lagarde, *op. cit.*, p. 523. Also see B. Audit, *La fraude à la loi*, Dalloz, Bibl. de droit international privé (preface by Y. Loussouarn), 1974.

¹⁸⁶ However, the Regulation contains a general reference to the fraud to the law in recital no. 26, mentioning that the application of the regulation "*should prevent a court from applying mechanisms designed to tackle the evasion of the law, such as fraude à la loi in the context of private international law*". We think this is a more theoretical hypothesis ("le choix de loi peut théoriquement être écarté comme contraire à l'interdiction de la fraude à la loi et de l'abus de droit. (...) Compte tenu du fait que le choix de la loi applicable à la succession a pour but d'assurer la prévisibilité et la stabilité de la loi applicable, *il est peu probable qu'un tel choix puisse être considéré comme abusif pour le seule et simple raison que la personne concernée a des liens faibles avec l'Etat don't la loi a été choisie. En effet, la prise en compte de l'intensité des liens est susceptible de créer une grave incertitude quant à la validité du choix, ce qui est difficilement compatible avec les objectifs de l'article 22.*" – A. Bonomi, in *op. cit.*, p. 332, our underlining., DAP). Professor Bonomi offers a possible example of abusive choice of the law applicable to succession, the one made by the immigrants of the second and third generation, who, preserving the nationality of their state of origin of the family they are coming from, choose the law of that state as applicable of the Court of Luxembourg, the condition of nationality "effectiveness" is not required, that is of some consistent connections between the state of nationality whose law was chosen and the respective person. For instance, in the case *Hadadi* (C-168/08, Decision of July 16th, 2009 CJCE) the Court stipulated – in the context of interpretation of art. 3, paragraph (1) letter (b) of Regulation Brussels IIbis – that the seising the courts of a Member State of which both spouses hold the nationality, is not contrary to the objectives pursued by that provision "even in the absence of any other link with that Member State" (pct.57). In addition, gaining a nationality to the exclusive purpose of submitting the succession to the law of that state is a circumstance which is difficult to prove. The fraud to the law would rely on the "interested" choice of the most advantageous succession law belonging to one of the states whose nationality the testator holds, in the absence of some proximity connections, others than the nationality, to that state. Therefore, the fraud to the law would be a means of correction based on the idea of proximity. The same finality is also found in the escape clause, allowing to submit the succession to the law of another state than that of the last habitual residence of the author of succession, when "*all the case circumstances clearly show that at the moment of death, the deceased obviously had a closer connection to another state*" (art. 21, paragraph 2). But this (this "correction") is not possible when the author of succession chooses the applicable law to it (A. Bonomi, *op. cit.*, p. 293). And then, why would it be possible by the fraud of law?

succession of the state whose law would have applied in the absence of the nationality acquiring. Therefore, it is not, in principle, the issue of fraud in the current law in private international law in this matter, even if it is the nationality of a third state¹⁸⁷, "even if the chosen law does not provide for choice of law in matters of succession" (recital 40). Yet, we could talk, eventually, about the fraud of the law practiced in the area of the national law of the state whose law on nationality acquiring was subjected to fraud, to the extent that the testator, not meeting the conditions required for the acquiring of such nationality, uses false civil status documents or other fraudulent maneuvers to illegally acquire nationality of the respective state. It is the fraud of that respective state national law (fraud to law in the national law), only that its effects are reflected in terms of conflict of laws.

The Regulation has created a balance between the will of the succession author, establishing the freedom of will designed to stimulate the successional planning with the landmark of the chosen law and predictability of the law of succession to be applied on the one hand and the interests of heirs, limiting the choice possibilities for the testator only to the laws of the states whose nationality he/she has (at the date of choice or the date of opening the succession), thus discouraging the "abusive" exercise of choice.

In fact, the Court in Luxembourg (CJEU) was very reluctant to readily admit the possibility of eviction of the applicable law, on the grounds of fraud to the law or abuse of rights due to the risk of uncertainty, especially when the person uses the freedoms conferred by the European law.¹⁸⁸ As noted, "(l)'individu acquiert une dimension autonome au plan transnational. Il résulte de cette consécration de l'autonomie que chaque situation ou rapport juridique n'est pas forcément rattaché à un seul ordre juridique mais rayonne et peut être appréhendé par plusieurs. Il en résulte également que l'hypothèse de l'autonomie participe à un besoin de réglementation d'un rapport par la collaboration des ordres juridiques concernés, sans porter, autant que possible, atteinte à la cohérence du rapport privé."¹⁸⁹

8. A deceased of Romanian nationality, with last habitual residence (and domicile) in London, leaves a will, comprising two universal legatees: one in favour of the wife and one in favour of the two daughters (leaving the wife ½ share of his immovable property and all his bank accounts and for the daughter the remaining part of ½ share of the immovable property estate). Also, he institutes his daughter from his first marriage as particular legatee, leaving her the apartment located in the Sighișoara municipality. The estate is composed of two apartments and a house located in London, an apartment in Cologne, an apartment in Sighișoara and multiple bank accounts. Determine the law applicable to the succession.

Romanian probate court to which the matter was referred to – having jurisdiction pursuant to art. 10, para. 1 letter a) of the Regulation - in resolving this practical case shall start from the general rule laid down in art. 21, para. 1 of the Regulation that stated that "the law applicable to

¹⁸⁷ The choice can also regard the law of a third state or of a member state where the regulation is not applicable (Denmark, Ireland, the Great Britain). Also see G. Khairallah, "La détermination de la loi applicable à la succession", in G. Khairallah et M. Revillard (ed.), *Droit européen des successions internationales. Le Règlement du 4 juillet 2012*, Defrénois, 2013, p. 55.

¹⁸⁸ For details, see S. Vrellis, "«Abus» et «fraude» dans la jurisprudence de la Cour de justice des Communautés européennes", in *Liber amicorum Hélène Gaudemet-Tallon*, Dalloz, Paris, 2008, p. 646: "ces quelques arrêts de la CJCE auraient laissé au lecteur, on dirait que si la Cour n'a pas manqué d'ériger la sanction de l'abus et de la fraude en principe général de l'ordre juridique communautaire, elle s'est néanmoins souvent montrée hésitante à appliquer systématiquement ce principe dans les cas dont elle fut saisie, ce qui risque de ne pas rendre suffisamment «efficace» un principe en soi «généreux»".

¹⁸⁹ C. Pamboukis, "La renaissance-métamorphose de la méthode de reconnaissance", *Revue Critique de Droit International Privé* (Rev. crit. DIP), 2008, vol. 97, pp. 513-560, to p. 527.

the succession as a whole is that of the State in which the deceased had his habitual residence at the time of death". Consequently, the English law shall be applied to the movable and immovable property succession with the object of the two apartments and the house located in London, the German law as a result of the renvoi disposed by the English law with regards to the apartment in Köln and the Romanian law, as an effect of that renvoi, on the apartment located in the Sighișoara municipality.

Therefore, since the habitual residence of the succession author at the time of death is located on the territory of a state to which the Regulation is not applicable, we get to fragmentation of the succession in terms of applicable law, contrary to the principle of the succession unity established by the Regulation.

The Regulation, attributing regulatory jurisdiction, on the whole of the succession, for the English law (the law of the last habitual residence of the deceased) accepts the jurisdiction in the matters of succession in respect of the movable property estate (considering the last domicile of the deceased in London¹⁹⁰) and the immovable property estate located in the United Kingdom, but refers back regarding the other buildings in favour of the law of the Member in whose territory they are located. We are talking about a renvoi (*Rückverweisung*) to German law (on the apartment located in Cologne) and the Romanian law (regarding the apartment located in Sighișoara).

Indeed, according to art. 34, para. 1 *"the law applicable to any third state specified by this Regulation means the application of the rules of law in force in that state, including its private international law, in so far as those rules make a renvoi: (a) the law of a Member State; or (b) to the law of another third state which would apply its own law"*.

In the case in question, both buildings (which are not within the United Kingdom) being located in Member States, we find ourselves in the assumption from art. 34, para. 1 letter a), the renvoi disposed by the English rule of conflict being made (partially) to the German law, the Romanian respectively.

In consequence, the succession of the deceased in the practical case shall be divided in terms of the law applicable to it: devolution, transmission and division of movable properties and immovable properties situated in London shall be governed by the English law of succession (as the law of the last habitual residence, in terms of the Regulation and as the law of the last domicile of the deceased, from the perspective of English private international law), while devolution, transmission and division having as an object the apartment in Köln shall be governed by the German law, and the apartment in Sighișoara by the Romanian law of succession - in both situations as a result of the renvoi ordered by the English law to the law of the place where the concerned immovable properties are situated (*lex rei sitae*), renvoi accepted.

9. An English national, with the last habitual residence in Tokyo, leaves two buildings, one located in Tîrgu Mureș and the other in Orăștie. What law shall govern the succession of the deceased?

Romanian court to which the estate administration was referred to, enjoying the jurisdiction under Art. 10, para. 2 of the Regulation shall start in solving the conflict of laws from the rule of the last habitual residence of the inheritance author (art. 21, para. 1), which refers to the Japanese law. The Japanese conflict rule, subjecting the succession to its author's national law, refers back to the national law of the succession author, refers back to the English law (first degree renvoi - *Rückverweisung*), which, in turn, given the immovable property nature

¹⁹⁰ Unlike the concept of habitual residence, the domicile is classified according to the system of domestic law belonging to the state on whose territory the domicile is invoked. Consequently, establishing whether the testator or the persons whose succession is envisaged by an agreement as to succession had the domicile in a certain state is regulated by the law of the respective state. (art. 26, paragraph 1 of Regulation (EU) no. 650/2012).

of the inheritance, refers back to the Romanian law (second degree renvoi - *Weiterverweisung*). Following this renvoi, the court shall apply to the succession the Romanian law of succession.

It may be noted that in this practical case, unlike the earlier practical case (no. 8), the admission of the *renvoi*¹⁹¹ does not lead to the fragmentation of the succession in terms of the law applicable to it, but to its unity. The Romanian law shall apply in respect of the devolution and successional transmission of both immovable properties. Also, there is unity between the court enjoying jurisdiction (Romanian court) and the law which it applies (Romanian law of succession).

10. Two United Kingdom nationals spouses, both having their habitual residence in Lebanon, and the domicile in England (*domicile of origin*) according to English law conclude a mutual will (*mutual will*) with the object of two immovable properties located in Exeter and a bank account opened with a bank in London in front of an English public notary. Subsequently, they established in Romania, changing their habitual residence in Brasov. Following the death of one of them for the Romanian courts (having jurisdiction based on art. 4 of the Regulation) rises the problem of the validity of this mutual will, considered valid according to English law.

Quid juris? May this will be considered by the Romanian court vested with the estate administration?

Romanian court shall first have to qualify the nature of the will, with art. 3 of the Regulation as landmark. According to art. 3, para. 1 letter b), the mutual wills are assimilated, in terms of their legal nature, to the agreement as to succession. According to this article, "*an agreement as to succession*" means an agreement, including an agreement resulting from mutual wills¹⁹², which, with or without consideration, creates, modifies or terminates rights to the future estate or estates of one or more persons party to the agreement".

That being the case, the court shall start examining the mutual testament validity from art. 25, para. 2 provision, according to which "*an agreement as to succession regarding the succession of several persons shall be admissible only if it is admissible under all the laws which, under this Regulation, would have governed the succession of all persons involved if they had died on the day on which the agreement was concluded.*"

Therefore, the mutual will admissibility, assimilated by the European legislator to the agreements on the successions, is governed by the hypothetical law of succession (*Errichtungsstatut* or *hypothetisches Erbstatut*) applicable to the succession of both spouses if

¹⁹¹ As for *renvoi*, see A. Davi, "*Le renvoi en droit international privé contemporain*" in *Recueil des cours*, t. 352 (2012), p. 347 and next; P. Lagarde, "*Les principes de base du nouveau règlement européen sur les successions*", in *Rev. crit. DIP*, 101 (4), 2012, p. 704-706.

¹⁹² From the regulation perspective, the wills are qualified as reciprocal (or mutual) when they assume an agreement between the testators; in the absence of such an agreement, they will be conjunctive (non-mutual). The first are similar to the agreement as to succession, being submitted as regards their admissibility and validity, to the disposals of Art. 25, while as regards the latter, the provisions of art. 24 will be applied. As shown before, "la qualification des testaments mutuelle dépend de l'existence d'un accord entre les testateurs: il s'agit là d'une question de fait. Cet accord ne doit pas revêtir de forme particulière, ni même être exprès: comme cela est admis dans les droits nationaux qui connaissent cette institution, l'accord peut ressortir de manière implicite du contenu des dispositions (comme le dit l'article 3, paragraphe 1^{er}, point b, l'accord peut « résulter » de testaments mutuels); tel est le cas dans les systèmes de *common law*. En particulier, l'accord peut être révélé par le lien d'interdépendance entre les (ou certaines) dispositions des testaments concernés (comme cela est admis en droit allemand). En revanche, comme indiqué, l'unité d'acte n'est pas une condition pour les testaments mutuels: des testaments séparés (*separate wills*) peuvent être qualifiés de mutuels s'ils reposent sur un accord ou s'ils contiennent des dispositions interdépendantes" (A. Bonomi, *op. cit.*, p. 141). Also see Dutta / Herrler (Ed.), *Die Europäische Erbrechtsverordnung* – unjeder the aegis of Deutsches Notarinstitut, C. H. Beck, 2014, p. 65.

they had died on the day of its conclusion, meaning, in this case, that we are not in the presence of a choice of the applicable law, the law of the habitual residence of the spouses when concluding the act – the Lebanese law (which considers both wills and agreement as to succession equally void¹⁹³). But the Lebanese conflict rule subjects the succession to the national law of the succession author¹⁹⁴, referring back to the English law (second-degree *renvoi* - *Weiterverweisung*) accepted *renvoi*¹⁹⁵ that shall lead to the application, on the mutual will admissibility, of the English law, which consider it acceptable and valid.

Consequently, the Romanian court to which the matter was referred to shall consider admissible the will in the practical case, taking into account its effects in the estate administration.

11. Two spouses of Romanian nationality, with the habitual residence in Aachen, conclude a joint will in front of a notary public in this locality by which the heirs are established. Later they return in Romania establishing their habitual residence in Oradea. Soon after, one of them dies, rising to the admissibility of this will.

Quid juris?

Our law of succession prohibits the mutual will (joint), stating that "*two or more persons cannot decide by the same will, one in favour of the other or in favour of a third party*" (art. 1036 NCC), the provided penalty being that of the absolute nullity of the will.¹⁹⁶

Prohibition of the conjunctive will was explained by the imperative of maintaining the unilateral character of the testamentary document and, hence, by maintaining unaltered the discretionary right to revoke, the will being considered, by essence, a revocable act.¹⁹⁷ Therefore, the testator may not waive his right to revoke his will to change it anytime later because, as noted, the renunciation of the will is the faculty to revoke an agreement as to succession, prohibited by law.¹⁹⁸ "The will must be the work of one will expressed in such a way and in such condition as not to oppose no obstacle whatsoever that hinders free faculty to retract it to the end. This concern of the legislator to ensure the revocability character of the testamentary dispositions explains the prohibition of Article 857 concerning the joint will which was admitted in the Roman law, and by the reciprocal character of the dispositions appears as an obstacle to the free revocation faculty for each of the testators. The same prohibition based on the same reason we find in art. 938 on donations between the partners who, as an exception to the principles on inter vivos donation, by nature, are revocable by the free will of the donor spouse. It is joint and therefore invalid not only that will (either by holographic or mystical or genuine) through which two persons merge their last will dispositions into a single context. Nothing

¹⁹³ See, Ch. Hertel in Limmer/Hertel/Frenz/Mayer (Ed.), *Würzburger Notarhandbuch*, 3 Auflage, C. Heymanns Verlag, 2012, p. 2689.

¹⁹⁴ *Ibidem*, p. 2656.

¹⁹⁵ We notice that while the Romanian PIL traditionally admits only the 1st rank *renvoi* (art. 2559, para. 2 NCC), in succession matters, starting with the application date of the Regulation (EU) no.650/2012 (August 17th 2015), 2nd rank *renvoi* will be admitted. The solution is justified, assuring the coordination of the legal systems when the succession shows connection elements to third states, facilitating in this way the recognition of the solution pronounced as regards the conflicts justice.

¹⁹⁶ The same prohibition was also consecrated by the Civil Code of 1864, in art. 857.

¹⁹⁷ D. Alexandresco, *Theoretical and practical explanation of the Romanian civil law*, tome IV¹ (book III, title II), p. 20; M. A. Dumitrescu, *Manual of civil law. Successions and donations (art. 644-942 Civil Code)*, "Viața Românească" S.A., Bucharest, 1921, p. 340.

¹⁹⁸ Revocability considering the will essence, it results that "during the testator's life, the will is nothing else but a project, which he can change depending on his free will. Thus the legatee has nothing but a hope, an expectation until the testator's death, as the latter disposed only for the time when he will no longer be alive" (D. Alexandresco, *idem*, p. 24).

prevents two people from making their will reciprocally one in favour of another or from comprising in the will stipulations which supplement or explain one by another, rather than each of both testaments, being made at the same time, even on the same paper, to constitute a legal act separate from the other" (s.n., DAP).¹⁹⁹

The analysis of the institution of the joint will is not without interest, particularly in terms of private international law. The attitude of national legislators differs in this respect, too: while some legislations prohibit the joint wills²⁰⁰, others expressly admit them.²⁰¹ That's why, the

¹⁹⁹ Matei B. Cantacuzino, *Elements of civil law*, Ed. "Cartea Românească" S.A., Bucharest, 1921, p. 348-349.

²⁰⁰ Concluding conjunctive wills is prohibited in France (art. 968 Civil Code). At the same time, art. 589 of the Italian Civil Code forbids such wills: "*Non si può fare testamento da due o più persone nel medesimo atto, nè a vantaggio di un terzo, nè con disposizione reciproca.*" (s.n.); for details, see R. Triola, *Codice civile annotato con la giurisprudenza*, Terza edizione, Giuffrè Editore, Milano, 2003, p. 385-386. The same interdiction is also met in art. 1717 of the Greek Civil Code (of 1940), in art. 968 of the Belgian Civil Code, art. 372, paragraph 2 of the Albanian Civil Code, art. 3618 of Argentinian Civil Code. The latter stipulates: "*Un testamento no puede ser hecho en el mismo acto, por dos ó más personas, sea en favor de un tercero, sea á título de disposición reciproca y mutua.*" (s.n.). In the same sense, also see art. 1630 of the Brazilian Civil Code: "*É proibido o testamento conjuntivo, seja simultâneo, recíproco ou correspectivo*"; art. 15 of the Bulgarian succession law (of January 18th 1949, amended several times); art. 1003, para. 2 of Chilean Civil Code; art. 669 of Spanish Civil Code: "*No podrán testar dos o más personas mancomunadamente, o en un mismo instrumento, ya lo hagan en provecho recíproco, ya en beneficio de un tercero.*" (s.n.). Also, art. 733 of the Spanish Civil Code establishes that conjunctive wills are not regarded as valid if concluded by Spanish persons in a foreign country, even if they are recognized by the laws of the nations where they were made: "*No será válido en España el testamento mancomunado, prohibido por el artículo 669, que los españoles otorguen en país extranjero, aunque lo autoricen las leyes de la Nación donde se hubiese otorgado.*" To be rigorous, we have to stress that we do not have a unitary succession legislation in Spain. In Spain, besides the succession system of the Civil Code, there are other 6 local succession systems (foral), corresponding to the autonomous lands of Catalonia, Galicia, Aragon, Navarre, The Basque Country and Balearic Islands. In Aragon and in Galicia the spouses can dispose *mortis causa* by conjunctive will ("*testamento mancomunado*"); similarly, the conjunctive will is allowed in Navarre ("*testamento de hermandad*") and in The Basque Country – art. 49-52 of Law no.1 of July 1st, 1992 regarding the foral civil law of The Basque Country admitting it between spouses. For details, see J. D. González Campos in *European Succession Laws (Hayton ed.)*, second edition, Jordans, Bristol, 2002, p.443; Ferid/Firsching, *Internationales Erbrecht*, Band VI, C.H.Beck, 2003, p. 1-434; S. T. Escamez in Lois Garb & Union Internationale du Notariat Latin (eds.), *International Succession*, Kluwer Law International, 2001- (Spain, p. 33); H.-P. Schömmmer, D. Gebel, *Internationales Erbrecht. Spanien*, C.H.Beck, München, 2003. The conjunctive will is also foreign to the Tunisian succession law, where – although it is not specifically forbidden (being not mentioned), the conclusion is resulting from art. 171 of *Code de Statute Personnel* from 13.08.1956 which defines the will as being "*L'acte par lequel une personne transfère à titre gratuit, pour le temps où elle n'existera plus tout ou partie de ses biens, en pleine propriété ou en usufruit.*" (s.n.); besides, art. 177 of the same Code stipulates the will revocability. Similarly, conjunctive will is also forbidden by § 975 of Japanese Civil Code (*Mimpō*) of 21.06.1898, by art. 704, paragraph 2 of Québec Civil Code, by art. 968 of Luxembourg Civil Code, by art. 977 of Dutch Civil Code, in Poland by art. 74 of the Decree regarding successions of 08.10.1946, respectively art. 942 of the Polish Civil Code – which provides that a will can include only the disposals of one testator. The conjunctive will is also prohibited in Portugal – art. 2179, 1 of the Portuguese Civil Code, regarding the will as a unilateral and revocable act (according to FA Ferreira Pinto in *European Succession Laws (Hayton ed.)*, second edition, Jordans, Bristol, 2002, p. 412). Also see art. 2311 Portuguese Civil Code.

²⁰¹ The joint wills are allowed in Germany (§ 2265 din BGB – "*gemeinschaftliches Testament*"); in Austria (§ 1248 ABGB); Malta (the will "*unica charta*"), Great Britain ("*joint will*" / "*mutual will*", see, Ferid/Firsching..., Band III, Großbritannien, p.67 and 127); Ireland (where we see both the "*joint will*", and the "*mutual will*"), Israel (Ferid/Firsching..., Band III, Israel, p. 55); Denmark (§ 47 and § 48 of Succession Law – no. 215 of May 31st, 1963 – speak about the revocation of conjunctive wills); Norway (§ 58 of the Succession Law – no. 5 of March 3rd, 1972 – which distinguishes – as regards the possibility of the surviving spouse to revoke the testamentary disposals regarding the inheritance distribution after the death of both spouses – depending on the fact that the will includes dispositions in favour of the legal heirs of the survivor, or in favour of some third parties); Sweden (§ 7 of Succession Law, no. 637/1958 – which establishes that unilateral revocation or modification of the disposals of a mutual will leads to the loss of the right to benefit of that will. In the Swedish law, the conjunctive will can be concluded by two or even several persons together – Ferid/Firsching, *op. cit.*, Band V, (2003), Schweden Grdz. G 39). In this matter, a special position is shown by the Civil Code of Costa Rica, which, although admitting conjunctive wills, allows to each testator to independently revoke the disposal *mortis causa*. In this sense, art. 625 of the Civil Code of Costa Rica: "*Cuando dos o más personas testan en un mismo acto, cada una puede revocar independientemente sus disposiciones.*"

issue that arises is that of knowing to what extent joint wills concluded on the territory of some countries that admit them can be invoked and recognized in countries whose laws prohibit the conclusion of such wills.

a) The solution adopted in the Romanian private international law.

To unravel the above problems, our doctrine and jurisprudence had to determine, in advance, the law applicable to the joint will, meaning to determine the jurisdiction whose law enters "the will's joint character".²⁰² In other words, we are in the presence of a qualification problem, that of determining the nature of the joint character of wills prohibition: is this related to the substantive rules of the will? Or, on the contrary, must it be regarded as a formal matter of the will? Depending on the answer to these questions it may be established, for example, if a joint testament concluded by two Romanian citizens abroad, according to the laws there, could be considered or not available in our country. Prohibition of the joint will was qualified in the majority doctrine²⁰³, as well as in jurisprudence²⁰⁴ as one of form²⁰⁵, as related to the

²⁰² For details, see D. A. Popescu, "Is the recognition of a conjunctive will concluded abroad admissible in Romania?" in P.R. nr. 4/2004, p. 159 and the following.

²⁰³ M. B. Cantacuzino, *Elements of civil law*, Ed. "Cartea Românească" SA, Bucharest, 1921, p. 348-349; D. Chirică, *Treaty of civil law. Successions and liberalities* C. H. Beck, Bucharest, 2014, p. 248 (nr. 585); R. Meitani, *Nationality and the conflicts justice* (litho course), Bucharest, 1942, p. 388-389, which also appreciated that we have to admit the "only" logical conclusion, namely that a conjunctive will made by a Romanian abroad has to be regarded as valid if the country where it has been made admits that form. No other reasoning can be used once one admits the rule "locus regit actum", in the special matter of the will, as there is no doubt that, being not a matter of capacity, we got back to the field of form matters". Also see, Fr. Deak, *Treaty of successoral law*, second edition, updated and completed, Universul Juridic, Bucharest, 2002, p. 181-182; also see M. Eliescu, *Inheritance and its devolution in RSR law*, Ed. Academiei, Bucharest, 1966, p. 245-246; *idem*, *Course on successions*, Humanitas, Bucharest, 1997 (edition printed after the lithographed version of the Course of 1947); E. Safta-Romano, *The inheritance right in Romania*, vol. I, Ed. Graphix, Iași, 1995, p. 180-183.

²⁰⁴ see Trib. Timiș, Civil Dec. no. 1061/2001 and Civil Dec. no. 2160 of September 4th, 2001 of the Timișoara Court of Appeal (civil section), published in Jurisprudence Bulletin of Timișoara Court of Appeal – **Collection of judicial practice 2000-2001**, Ed. Lumina Lex, Bucharest, 2002, p. 139. Timișoara Court of Appeal, by the decision no. 2160 of September 4th, 2001, preserved the Tribunal solution, considering that the banning of the conjunctive will – imposed by art. 857 in the Civil Code – should be regarded as "**a condition of the will form**, meant to protect the testator's wish and to express the unilateral character of the wish expressed." Consequently, the disposal of the Romanian law forbidding the conjunctive will seeks the protection of the testator's will, that is a private interest (and not of international public order), reasons for which it cannot be said it would be conflicting to the fundamental principles of the Romanian law. The Court rightfully stipulated that "the application of the foreign law can be removed only assuming that its disposals contravene the order of private international law, or the disposals of the Romanian law forbidding the conjunctive will do not have such a character, as they protect private interests" (s.n., DAP).

²⁰⁵ For this qualification in the French law, see Cass. 1^{re} civ., November 21st, 2012, *Obs. M. Grimaldi*, in R.T.D. civ., 2013, p. 162; M. Revillard, *Droit international privé et pratique notariale*, Defrénois, Paris, 2001, p. 301: "*La majorité des auteurs estiment que la prohibition des testaments conjonctifs relève uniquement de la forme. Cette qualification a été retenue par les tribunaux français. Quand le testament a été rédigé dans un pays où la loi permet les testaments conjonctifs, les tribunaux ont tendance à admettre que l'article 968 est un règle de forme, par application de la règle locus regit actum. Cette position a été confortée par une décision très claire du tribunal de grande instance de Paris, qui a décidé que « l'interdiction de procéder à des testaments conjonctifs édictée par l'article 968 du Code civil est incluse dans les règles générales établies par ce Code sur la forme des testaments et que cette prohibition, qui n'a trait ni à la capacité personnelle du testateur, ni à la validité des dispositions sur le fond prises par le testateur, est relative à des conditions de forme et non à des conditions de fond ». Il en résulte que le testament conjonctif fait en Norvège par deux époux est valable en vertu de la convention de La Haye du 5 octobre 1961, la loi norvégienne (du lieu de rédaction) admettant cette sorte de testament.*" Also see, in this sense, H. Batiffol, P. Lagarde, *Droit international privé*, t. II, 7^e éd., 1983, n^o 653; P. Mayer, V. Heuzé, *Droit international privé*, 9^e édition, Montchrestien, 2007, p. 605; L. Barnich, N. Geelhand, H. Jacobs, St. Mahieu – cap. III *din Régimes matrimoniaux. Successions et libéralités dans les relations internationales et internes I* (under the aegis of Union Internationale du Notariat Latin – Commission des Affaires Européennes et de la Méditerranée), Bruylant, Bruxelles, 2003, p. 826-827. Also see, in this sense, M. Grimaldi, *Droit civil. Libéralités. Partages*

ascertaining document, which facilitated the recognition of wills concluded in countries that admit them.

In German law joint wills are governed, in terms of content and effects, of *lex successionis* (art. 25 EGBGB) and on the form by any of the laws listed in art. 26 of the Introductory Law to the German Civil Code (EGBGB).²⁰⁶

b) European legislator solution.

We noted that in some Member States joint wills and agreements as to succession are recognized and regulated, while others are prohibited whether this prohibition is regarded as one of substance (in some states²⁰⁷), subject to the law which governs the substantive conditions, or formal (in others²⁰⁸), subject to the law of form, or, finally, in others, is governed by the law of the forum (*lex fori*),²⁰⁹ but taking into account the rationality and purpose of the prohibition according to the targeted foreign law (“*ist jedoch auf den Sinn und Zweck der ausländischen Verbotsnorm abzustellen und dessen Bedeutung von Standpunkt des ausländischen Rechts zu würdigen*”)²¹⁰. Thus, as noted, “*la prohibition est considérée comme relevant de la forme si son but est de faciliter l’établissement et la preuve de la volonté du testateur; en revanche, elle relève du fond si elle vise à protéger cette volonté d’influences externes et à garantir la libre révocabilité du testament*”.²¹¹ The solution cannot be considered acceptable as qualification of

d’ascendants, Ed. Litec, 2000, p. 301: “*La jurisprudence rejoint la doctrine dominante. En matière de conflits de lois, terrain d’élection des qualifications, elle analyse la prohibition comme une règle de forme, qu’il s’agisse d’un conflit de lois dans l’espace ou dans le temps. Et, en droit substantiel, la Cour de cassation a défini la conjonctivité en des termes qui font de la prohibition légale une règle de forme.*” Professor Grimaldi appreciates that for being in the presence of a conjunctive will, “it requires two testators who have the same wishes, two wills in one. More accurately, a single text body is required which, followed by two signatures, regulates two successions”. (*op. cit.*, p. 302).

²⁰⁶ From the point of view of the disposal capacity, the German private international law distinguishes between the joint will (*gemeinschaftlichen Testament*) and the bilateral agreements as to succession (*zweiseitigen Erbvertrag*), on one side, and the unilateral agreements as to succession (*einseitigen Erbvertrag*), on the other side. In the case of the first ones, both spouses signing a joint will (respectively, both parties of a bilateral succession contract) should have the disposal capacity according to the law of the hypothetical succession state (*hypothetisches Erbstatut* or *Errichtungsstatut*). It is true that in the German law, *lex successionis* is the national law of the author of succession, that is the law of the state whose nationality he had at the moment of death (*lex patriae*). But this is only in principle, as art. 25, paragraph 2 of EGBGB allows the testator to choose, as regards the real estates located in Germany, in favour of the law *rei sitae*. At the same time, *lex successionis* can be different from the national law of the author of succession also as a result of *renvoi*. In exchange, the capacity to sign an unilateral succession contract (*einseitigen Erbvertrag*) is submitted – as regards the person who makes no disposal act, but only accepts the disposal of the other party – to the law which is generally governing the person’s capacity (art. 7 EGBGB). It goes without saying that the person who disposes *mortis causa* through a succession contract (unilateral or bilateral) should have the capacity to dispose according to the succession law. For developments, see H.-P. Schömmel, H. Faßold, K. Bauer, *Internationales Erbrecht. Österreich*, Verlag C. H. Beck, München, 2003, p. 29-30.

²⁰⁷ The Spanish law forbids the Spanish submitted to the Spanish Civil Code to conclude conjunctive wills abroad, even if they were allowed by the law of the will conclusion place (art. 733 Civil Code sp.). Thus, we are in the presence of a unilateral conflicting norm which is addressing only to the Spanish submitted to the Civil Code, consecrating their incapacity to conclude conjunctive wills abroad. Therefore, the analysed prohibition is related to the capacity. For details, see Calvo Caravaca in Gonzáles Campos et al, *Derecho internacional privado. Parte especial* (1991), vol. II, p. 533; J. D. Gonzáles Campos and Alegría Borrás in *European Succession Laws* (Hayton Ed.), 2002, p. 452.

²⁰⁸ For recent French jurisprudence, see Cass. 1^{re} civ., 21 nov. 2012, Nr. 10-17365, JCP éd. G 2012, Actualité, p. 1298, *Obs. M. Grimaldi*, in R.T.D. civ., 2013, p. 162.

²⁰⁹ In the German law, the admissibility (*Zulässigkeit*) of joint wills is governed by *lex fori*. According to A. Bonomi, A. Öztürk, in Dutta / Herrler (Ed.), *Die Europäische Erbrechtsverordnung* – under the aegis of Deutsches Notarinstitut, C. H. Beck, 2014, p. 65; A Bonomi, in A. Bonomi, P. Wautelet, *op. cit.*, p. 429.

²¹⁰ A. Bonomi, A. Öztürk, in *op. cit.*, p. 65.

²¹¹ A Bonomi, in A. Bonomi, P. Wautelet, *op. cit.*, p. 429.

prohibition would depend on the reason for which foreign law aimed at justifying this prohibition, which would lead to an inconsistent application of the Regulation.

Therefore, the issue of admissibility of joint wills will be subject to the law which governs the substantive conditions of mortis causa dispositions, depending on their nature - art. 24 and 25 of the Regulation. The joint wills containing reciprocal and interdependent institutions (*gemeinschaftliche Testamente mit wechselbezüglichen Verfügungen*), not allowing the unilateral revocation during the lifetime of the other spouse ("mutual wills"/"*gegenseitige Testamente*" - art. 3, para. 1 letter b), shall be subject to (as we speak of an "agreement"²¹²) art. 25 of the Regulation (applicable to agreements as to succession), while regarding the other wills ("joint wills" / "*gemeinschaftliches Testamente*") art. 24 shall be applied.

In case of mutual wills (namely those containing *wechselbezüglichen Verfügungen*), being therefore in the presence of an agreement between testators (in the sense of Art. 3, para. 1, letter b of the Regulation), generating a relationship of interdependence between the testamentary provisions, this shall affect, in the plan of effects, in limiting the possibility to revoke them. Therefore, in terms of Regulation, we find ourselves in the presence of a substantive point, the admissibility (*Zulässigkeit*) of concluding such wills (assimilated to agreements as to succession) is subject to the hypothetical law of succession (*hypothetisches Erbstatut*), according to art. 25, para. 2 and 3²¹³. Therefore, mutual testament (mutual) is assimilated, in terms of the law applicable to its substantive admissibility and validity to the agreements as to succession. And this regardless of whether such an "agreement" between the testators is apparent from the same document (most frequent assumption) or different testamentary documents.²¹⁴

Instead, in case of joint wills, namely those concluded by "two or more persons in one act", characterized by the existence of a formal element – the testamentary document that contains two unilateral wills (art. 3, para. 1 letter c) their admissibility shall be governed by the hypothetical law of succession applicable to each individual who prepared the disposition, law to be applied as well as regards the substantive validity, according to art. 24.²¹⁵

²¹² Such an agreement we also encounter in case of mutual wills ("*gegenseitige Testamente*"), regulated in § 2271, paragraph 2, BGB, which stipulates that the revocation of a disposal of property upon death which is in an interdependence relation to that of the other testator-spouse cannot be unilaterally done during the latter's life time: "(d)er Widerruf einer Verfügung, die mit einer Verfügung des anderen Ehegatten in dem in § 2270 bezeichneten Verhältnis steht, erfolgt bei Lebzeiten der Ehegatten nach der für den Rücktritt von einem Erbvertrag geltenden Vorschrift des § 2296. Durch eine neue Verfügung von Todes wegen kann ein Ehegatte bei Lebzeiten des anderen seine Verfügung nicht einseitig aufheben."

²¹³ A. Bonomi, in A. Bonomi, P. Wauteleit, *op. cit.*, p. 431: "**le Règlement considère manifestement la recevabilité des testaments mutuels comme une question de fond, et non pas de forme: dès lors, cette question, comme celle de l'effet contraignant de ces actes, est régie par la ou les lois désignées à l'article 25, paragraphes 2 et 3. Ainsi, sous réserve d'un choix de loi, la loi applicable à ces questions est la loi successorale « hypothétique »; si les lois applicables aux successions des testateurs sont différentes, il faudra les appliquer de manière cumulative**" (s.n., DAP).

²¹⁴ According to A. Bonomi, in A. Bonomi, P. Wauteleit, *op. cit.*, p. 140 (no. 15).

²¹⁵ According to A. Bonomi, A. Öztürk, in Dutta / Herrler (Ed.), *Die Europäische Erbrechtsverordnung* – under the aegis of Deutsches Notarinstitut, C. H. Beck, 2014, p. 66; E. Fongaro, "*L'anticipation successorale à l'épreuve du « règlement successional »*", in *Journal du Droit International (Clunet)*, n° 2/2014, p. 490. We notice though that Prof. Andrea Bonomi seems to reach another conclusion as regards the joint wills in A. Bonomi, P. Wauteleit, *op. cit.*, p. 432 (no. 18): "Si deux ou plusieurs testaments sont rédigés dans un même acte, il s'agira néanmoins de testaments « conjonctifs », selon la définition de l'article 3, paragraphe 1^{er}, point c. Dans ce cas, l'unité d'acte n'a généralement aucune conséquence sur les effets des testaments, notamment sur leur révocabilité et la seule question qui se pose est celle de leur validité formelle; celle-ci relève de l'article 27 ou de la Convention de la Haye de 1961, comme cela est d'ores et déjà admis dans certains États membres." However, at p. 140-141 (no. 15) the application of art. 24 of the regulation as regards the dispositions of the last will of each testator within non-mutual conjunctive wills is asserted.

Finally, the qualification of a will as mutual or joint shall be based on the finding of the existence or not of an "agreement" between the testators or of a link of interdependence between the testamentary provisions. But such a link cannot be presumed or inferred from the mere fact that testamentary provisions in question are contained in the same document.

Therefore, the prohibition of joint wills is limited to the conclusion of such acts between persons whose hypothetical succession law (either chosen, or applicable in the absence of choice) binds them to the prohibitive law, whether they are nationals or foreigners.

In conclusion, returning to the practical case data, since testators in question had, at the date of the will, their habitual residence in Germany, the will in question shall be considered admissible and valid according to the hypothetical law of succession of both testators (German law) - art. 24 of the Regulation.

SECOND PART - THE EXEQUATUR PROCEDURE IN THE MATTERS OF SUCCESSION

Chapter I. Theoretical aspects related to the exequatur procedure in the matters of succession

§ 1. The effects of foreign decisions in matters of succession.

Regarding the effectiveness of **foreign decisions** the 650/2012 Regulation follows the line started in general in the civil and commercial matter by the Brussels Convention and the 44/2001 Regulation, from which it fully drew upon; its stated objective, in accordance with the 59 recital of the preamble, is to ensure " the *mutual recognition of pronounced decisions in the Member States in succession matter*", in fact a seldom retrieved principle in bilateral or multilateral conventions with the same object, but facilitated within the European context by the unification of jurisdiction and legislative rules and the correlative reduction of the forum shopping risk.

Without going as far as other European instruments of unification of civil procedure rules in international litigations in which the *Exequatur*²¹⁶ procedure is abolished, the 650/2012 Regulation keeps a classical distinction between recognition and enforcement. Its IV-th chapter introduces a flexible system, which takes advantage only of decisions from the Member States, regardless whether the Courts of First Instance jurisdiction has been established or not based on the Regulation rules, if this were competent or not to try the case²¹⁷ or if the decision has been delivered in a international litigation.

§ 2. Decisions in succession matter, issued by other Member States.

The legal definition of the term decision is provided in the Article 3.1 g) of the Regulation: „*any determination made in the Succession matter pronounced by a Court from a Member State, regardless its name, including a decision regarding the establishment of a Registrar of the Court costs*”²¹⁸. Two requirements must be considered. First, the decision, by its subject, should enter into the Regulation scope (succession matter). Secondly, the decision must come from a Member State Court, a term clarified within the 3§2 Article of the Regulation²¹⁹. By Member States we understand only those Member States in which the Regulation is mandatory (are therefore excluded Denmark, Ireland and the United Kingdom²²⁰).

²¹⁶ Article 41 and 42 of Regulation No 2201/2003, Article 20 of Regulation 805/2004, Article 39 and next of Regulation 1215/2012.

²¹⁷ From the exhaustive regulation of the recognition grounds for refusal in Article 40, it should be inferred that the control it is not possible, into the enforcement country, of the First Instance jurisdiction.

²¹⁸ A similar definition is found in Article 32 of the 44/2001 Regulation.

²¹⁹ Article 3§2: "For the purposes of this Regulation, the term 'court' means 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 State in which they operate: (a) may be made the subject of an appeal to or review by a judicial authority; and (b) have a similar force and effect as a decision of a judicial authority on the same matter."

²²⁰ Ireland and the United Kingdom have an opportunity, by exercising its right of opt-in, to adhere to the provisions of law evenly so established (see recital 82 from the Preamble).

Exceptionally, in accordance with Article 75, any international conventions in force²²¹ shall be able to receive application, despite the homogeneity which the Regulation proposes to carry it out. Recognition and enforcement of decisions from states in which the Regulation is not applicable (United Kingdom, Ireland, Denmark, non-member States of the EU) will be made in accordance with the rules of domestic law in European states (for Romania, Article 1093-1109 NCPC), in which there will be, therefore, once with the effective applicability of the Regulation, two different regimes.

§ 3. Recognition (determination of foreign decision proficiency to produce a regulatory effect in the legal order of the forum)

The solution retained by European legislator, inspired by the principle of mutual recognition, a basis in the judicial cooperation in civil matters, is laid down in Article 39 §1 of the Regulation: full right recognition, automatic, without the need for any specific procedure. The recognized decision shall produce the effects which are normally attached to it in the State of origin; a possible *De facto* inability in its enforcement in the State of destination does not constitute an obstacle for the recognition. Requirements regarding the decision may be deducted indirectly, on the basis of Article 40 a) - d), which sets out the grounds for the refusal to recognize (infringement of international public order compliance with the inconsistency, incompatibility with a decision pronounced in the Member State referred to or in advance in a third state); however, in the absence of an opposition, their control is out of the question.

The recognition can be also determined as principal issue and by incidental question.

The incidental recognition may be requested, in the event of denial of the substantial right as a result of decision by the Court of First Instance, by any interested party / parties to the proceedings scrolled in the state of origin, any heirs or habentes causam or other entitled persons concerned (their potential transferees or subrogates of rights). First, the procedure involves a non-litigating phase, in which the authority shall verify the submitted documentation and pronounces a decision of formal recognition²²². In the event of objections to it, the Court shall examine the grounds for the refusal to recognize (in accordance with Article 40). According to doctrine, the right to ask for recognition is imprescriptible.

Recognition by incidental question of the decision, the most common hypothesis in practice, occurs when in a dispute initiated in the State of destination the interested person invokes the law of the case with respect to the question itself or in respect of a specific problem,

²²¹ For Romania, prior to the entry into force of the Regulation, a series of International Treaties (with different current EU member states) were interested in the successions: the Treaty between the Popular Republic of Romania and the Popular Republic of Bulgaria, on legal aid in civil, family and criminal cases, ratified by the Decree 109/1959, Of.B. No. 11 of 31.03.1960; Treaty between the Popular Republic of Romania and the Popular Republic of Poland, on legal aid in civil, family and criminal cases, ratified by Decree 323/1962, Of.B. No. 505/1958, Of.B No 2 of 17.01.1959. Treaty between Romania and the Czech Republic regarding judicial assistance in civil matters, signed in Bucharest on July 11th, 1994, ratified by the Law no. 44/1995, published in the Official Gazette of Romania no. 106 of 31 May 1995; the Treaty between the Popular Republic of Romania and the Popular Republic of Yugoslavia, ratified by decree no. 24/1961, published in Of. B. No. 6 of February 6th, 1961 (applicable in a declaration of succession with Slovenia and Croatia); the Treaty between the Popular Republic of Romania and the Czechoslovak Republic regarding legal assistance in civil, family and criminal cases, ratified by Decree no. 506/1958, published in Of. B. No. 6 of February 18th, 1958. (applicable in a declaration of succession with Slovakia). After the entry into force of the Regulation, the Treaties referred to will no longer be able to receive application for succession; the solution is expressly ascertained within the framework of Article 75 § 2 to grant the prevalence of Regulation 650/2012 in relation to the "conventions concluded only between two or more Member States, to the extent that these conventions should affect matters covered by this Regulation".

²²² Its competence shall be determined in accordance with Article 45 §2 of the Regulation, which establishes the residence criterion of the party against whom is requested recognition /enforcement, i.e. the place of decision enforcement.

incident in its solving. If the decision of recognition will be unequivocally operational in ongoing litigation, an issue to be discussed is to know if may also cause effects other litigations.

§ 4. Grounds for refusal of recognition.

For the cases in which Foreign decision recognition is contested, the legislator has exhaustive provided four grounds for refusal of recognition, for the application and restrictive interpretation.²²³ They may not be invoked ex officio by the court²²⁴ and operates, in accordance with Article 51, including the enforcement of the foreign decision.

a) Public international order. Mechanism of exception, intended to protect the legal order of the forum against the intrusion of a series of laws or foreign decisions which affect its fundamental principles, the public order is the first of the grounds for refusal of recognition as referred to in the Article 40 of the Regulation. Although the values of which it is composed range naturally from country to country, it includes of course a mutual fund, which is composed by fundamental human rights and the principles of EU law²²⁵. To ensure the exceptional character of this mechanism in the European region and restrict its negative implications from the perspective of freedom of movement, the legal text has expressly provided that the refusal of recognition is admissible only when the infringement brought to public order is manifested; at the same time, in accordance with Article 41 the foreign decision cannot be the subject of a revision on the merits (which actually makes impossible for the judge to interfere even if the solution established by the foreign law differs significantly from that which would have been delivered by the state's forum); finally, as guarantor, the Court of Justice has expressly reserved its right to control the limits within which the Member States intend to use this mechanism²²⁶. In the same way as for the governing law, the exception for international public order can operate when foreign decision may prejudice substantive²²⁷ or procedural principles²²⁸ from the requested State.

b) The lack of notification. Inspired by the desire to ensure a person the right to be heard, the second reason to refuse recognition affects the notification/communication of the summons

²²³ For reasons other than those expressly referred to in the legal text - for example, lack of competence of the court of origin, the fact that it has applied to a law other than that which would have been applied in the States forum, the decision enforcement in the State of origin - cannot be taken into account.

²²⁴ J. Foyer, "Reconnaissance, acceptation et exécution des jugements étrangers, des actes authentiques et des transactions judiciaires", IN G. Khairallah, M. Revillard (engines to), *droit des successions européen internationales*. Le règlement du 4 juillet 2012, Defrénois, Lextenso, 2013, p. 141, sp. p. 156, No. 376, reluctant however toward such a solution.

²²⁵ V. A. Oprea, „Convenția Europeană a Drepturilor Omului și aplicarea normelor străine în dreptul internațional privat”, *Rev. română de drept internațional privat și drept privat comparat*, 1/2006, p 341, sp. P. 371 and seq.

²²⁶ CJEU, March 20th, 2000, C-7/98, *Krombach*, §23; CJUE, May 11th, 2000, *Regie Renault*, §27.

²²⁷ Problems may arise regarding the foreign orders which confer succession rights to gay husband or to wives from a polygamous marriage or devotes an inequality between heirs on the basis of sex, religion, or the not legitimate nature of their birth. Even in these situations, public order should be used with the greatest caution, in order to preserve its character of exceptional mechanism and not to ruin the objective of Regulation: hassle-free movement of decisions in the European region - see A. Oprea, „Despre recunoașterea statutului matrimonial dobândit în străinătate și protecția europeană a dreptului la viață familială”, *Studia Universitatis Babeș Bolyai – Jurisprudentia*, 4/2012, p. 149-169.

²²⁸ In particular it refers to an infringement of the right to a fair trial: E.g. Foreign shall establish a bail extremely high, blocking access applicant to justice (see In France, Cass Civ March 16th, 1999, *Pordea*, *JDI*, 1999, note A. Huet), has been delivered in a dispute in which the rights of defense of the defendant was gravely infringed (CJUE March 28th, 2000, C-7/98, *Krombach*, *JDI*, 2001, p. 651, Note A. Huet) or in which it has not been given the opportunity to be heard (CJUE, April 2nd, 2009, C- 394/07, *Gambazzi*).

act²²⁹ by the defendant in due time, so that it becomes aware of the litigation in due time and to be able to defend themselves. Regulation affects decisions given in default of appearance: the defendant has not been party to the litigation, not by himself, either by a lawyer commissioned by him.

c) **Irreconcilable decisions.** As referred to in the last two grounds for refusal of recognition, inspired both by the *res judicata* principle, the legislator has introduced a distinction, as foreign decision is irreconcilable²³⁰ with a decision delivered by the State forum, respectively in another State. In the first case, rarely known in practice because of the significant preventive role played by Article 17 regarding to *lis pendens*, decision of the States forum will prevail, regardless of whether or not it is earlier than foreign decision and regardless of whether or not this falls within the purpose of the Regulation²³¹. In the second case - two irreconcilable foreign decision, which both meet conditions for recognition - the conflict is resolved based on the precedence rule, the first decision has priority²³²; the conditions to characterize irreconcilability are more stringent and it is necessary that the two decisions come from proceedings having the same object and the same cause.

§ 5. Enforcement.

In the continuation for answers already found in the European legislation, Regulation 650/2012 makes the enforceability of a decision originating from a Member State of obtaining a declaration of enforceability (*Exequatur*) in the Member State of destination, after the completion of the simplified procedure²³³, regulated in Article 46 and seq.

The interested party will submit to the Courts from the Member State of enforcement (Courts), whose territorial jurisdiction is determined on the basis of the criterion of residence of person against whom the enforcement is sought or that of the place of enforcement, a request that shall be accompanied by a copy of the decision which shall meet all the conditions necessary to establish its authenticity and (optional) a certificate issued in a European form, by the court or the competent authority of the Member State of origin (Articles 47); where appropriate, the Court may require, in addition, a translation of these documents. The submission procedure of the application shall be governed by the law of the Member State of enforcement, without being necessary that for the applicant to have in that state a mailing address or an authorized representative. The enforceable character (even temporarily) of the decision in the State of origin, an essential requirement for bringing the *exequatur*, will be appreciated in accordance with the law of the State of origin, being certified by the authority which decrees the Certificate.

In accordance with Article 48, the first phase of the procedure has a unilateral character, administrative (the person against whom enforcement is sought does not participate and may not set forth his defense), and once the deposit and formal verification of the documents were made,

²²⁹ The phrase shall be interpreted in accordance with the case-law of the European Court of Justice associated with the Brussels Convention/Regulation 44/2001, e.g. CJUE, July 13th, 1995, C-474/93, *Hengst*

²³⁰ The phrase "irreconcilable decisions" shall be interpreted in accordance with the jurisprudence CJUE, within the meaning of decisions involving legal consequences which are mutually exclusive - see (4 February 1988, C-145/86, *Hoffman c. Kriegg*, §22; CJUE, June 6th, 2002, C-80/00, *Leather or Italian SpA*.

²³¹ Pretelli, *Cit. op.*, N° 41, p. 604, It justifies this solution through a transparent position regarding incompatibility registered into the content of Article 40 letter c) of the Regulation.

²³² The European legislator does not impose to the judge the pronouncing of a decision *ex officio* - See II. Pretelli, *Article 40, Op. Cit.*, No. 37, p. 602.

²³³ If the enforcement is expected to be performed in several Member States, in each of which it must run through the procedure to obtain the *exequatur*

the foreign decision is directly declared enforceable²³⁴. It is also admissible a partial exequatur (Article 55), at the request of the interested party or when only certain parts of the decision are likely to be recognized and enforced in the state of the forum. The decision the declaration of the enforceability must be brought to the notice of: (a) the applicant and (b) to the party against whom enforcement is sought, accompanied by the applicant request (Article 49).

After communication, the procedure becomes contradictory and any interested party may contest the decision (Article 50, 51). The first term for in order to formulate the appeal is of 30 days from the service and, exceptionally, of 60 days, when the party against whom the decision is executed is not domiciled in the State of the forum. The reasons able to justify the exequatur denial are only those on the basis of which it may be disposed the recognition refusal, presented here.

When the decision in question is the subject of an appeal in the State of origin, whose consequence is suspending its enforceability, the party that is against to enforcement may request the exequatur Court to suspend the proceedings; this will be arranged automatically, unlike the recognition proceedings, where the court enjoys some margin in assessing the suitability of the measure.

Provisional or protective measures may be requested in accordance with the legislation of the Member State of enforcement, without the need for a prior declaration of enforceability.

5.1. Recognition and enforcement of public acts. In a appropriate manner and in spite of some pretty extensive, the Regulation shall apply in respect of graceful acts- acts resulting from non-contentious procedures, which are extremely frequent in the succession matters.

5.2. Authentic acts. Establishing the equivalence between foreign authentic instruments and authentic instruments of the forum, art. 59 of the Regulation provides that an authentic act drawn up in a Member State has in other Member States the evidentiary effects which they have in the Member State of origin or their effects are almost the same. The texts importance is even bigger the more the range of acts that can take this form and which will circulate more easily in the European region is wider enough: wills and succession agreements, acts of acceptance or remission of succession, the inventory or partition deed, heir certificates.

The legal definition of the authentic act term, set out in Article: 3 §1. (i) of the Regulation,²³⁵ is inspired by the one given by the Court of Justice in Unibank²³⁶ practical case; the requirements for authenticity will be double: The ones from the State of origin of the act, referred to the European ones (the last ones regarding the signature and the content of the act, the intervention by a public authority or empowered²³⁷). The genuine character of the act must not be confused with the substantial validity (as negotium), it must be assessed in accordance with the classical rules of conflict.

The European legislator distinguishes between the acceptances (recognition, in the Romanian language²³⁸) of authentic acts, i.e. their enforceability.

²³⁴ The enforcement itself will be made subsequently in accordance with the national rules of procedure (for Romania, Article 662 and seq. NCPC).

²³⁵ *A document in the succession matter drawn up or registered in any formal way as an authentic act in a Member State but whose authenticity: (i) refers to the signature and the content of the authentic act; And (ii) has been drawn up by a public authority or any authority empowered to do so by the Member State of origin*.

²³⁶ CJUE, June 17th, 1999, C-260/97, *Unibank*

²³⁷ See recital 62 of the Preamble: "The 'authenticity' of an authentic instrument should be an autonomous concept covering elements such as the genuineness of the instrument, the formal prerequisites of the instrument, the powers of the authority drawing up the instrument and the procedure under which the instrument is drawn up. It should also cover the factual elements recorded in the authentic instrument by the authority concerned, such as the fact that the parties indicated appeared before that authority on the date indicated and that they made the declarations indicated."

²³⁸ Should be emphasized in this context the faulty English translation of the text, the language in which it is used the term recognition instead of acceptance, though there was an entire debate regarding the adequacy or inadequate

As regards the acceptance, the principle is formulated in Article 59 para. 1: the effects of procedural authentic act (such as its evidentiary effects with regard to the acknowledgement of the authority or declarations made by the parties involved, as delimited in the State of origin, will be accepted in all Member States. Practically, this movement is facilitated with an opportunity for the persons concerned to gain a form, of the issuing authority, which describes these effects (Article 59 §1.final). The State of origin law must be taken into consideration to see to what extent the proceedings for annulment can be possible against the authenticity of the document, or of the information contained within it. For the assumptions in which the Member State of destination does not know the institution of the authentic act or it shall confer effects quite different from those in the State of origin, the legislator has provided for granting European "the comparable effects"; the authorities of the Member State of destination are thus empowered to determine, based on their legislation, what would be the most suitable equivalent for the evidentiary effects of the foreign act, procedure whose difficulty has been stressed into the doctrine²³⁹.

In accordance with Article 59 para. 2 and 3, the evidentiary effects of the authentic foreign act and, with that, the possibility to use it in any proceedings shall be suspended²⁴⁰ when the act is challenged. The challenge shall be made before the Courts/authorities of the State of origin, when it is in question its authenticity²⁴¹, in question before the competent Courts in the successional matter in accordance with Chapter II of the Regulation (will apply "*lex successionis*"), *when in question is the merits of the act (operation or the ratio of law formalized therein as authentic); exceptionally, the challenge to the acts content may also be made by incidental question in a litigation with another principal subject, before the competent courts regarding it*²⁴².

As regards the exequatur (conferment for authentic acts enforceable in the State of origin, of the enforceability in the State of destination), the procedure for obtaining it is the same as that prescribed for judicial decisions, the only difference is that the only reason for refusal is infringement of public international order in the State in question. Once conferred the exequatur, the authentic act will be able to have, in the Member State of destination, the enforceability acknowledged in the State of origin and will be able to justify including the provisional and protective measures.

5.3. Court settlement. In accordance with Article 61 of the Regulation, the court settlement in succession matters, enforceable in the Member State of origin, shall be declared enforceable in accordance with the same simplified procedure as Court orders (Article 45 and seq.). Partial Exequatur is possible.

(see M. Kohler, M. Buschbaum, La „reconnaissance” des actes authentiques prévue pour les successions transfrontalières. Réflexions critiques sur une approche douteuse entamée dans l’harmonisation des règles de conflit de lois”, *RCDIP*, 2010, p. 629: usually, regarding the authentic acts the recognition should not be brought into discussion, because in their case the issuing public authority can only receive the act without exerting on their contents a special power of decision; the validity and the effects of authentic acts must be valued in accordance with the law friction rules, they may result from recognition procedure (as for contracts a recognition action is not required, nor for authentic acts this is not necessary).

²³⁹ P. Wautelet, *Article 59, op. cit.*, no. 21-27, p. 668-671.

²⁴⁰ Recital 65 2nd phrase is of such a nature as to curb effects of the enforceability: "If the challenge concerns only a specific matter relating to the legal acts or legal relationships recorded in the authentic instrument, the authentic instrument in question should not produce any evidentiary effects in a Member State other than the Member State of origin with regard to the matter being challenged as long as the challenge is pending."

²⁴¹ In accordance with Article 59 Paragraph 2.1: "Any challenge relating to the authenticity of an authentic instrument shall be made before the courts of the Member State of origin and shall be decided upon under the law of that State." See recital 62 of the Preamble.

²⁴² Article 59 §3 and 4 of the Regulation.

The meaning of the term “court settlements” is specified in Article 3.1 (h) of the Regulation, in autonomous definitions inspired from the European Court of Justice ²⁴³ jurisprudence. The exequatur procedure is based on an application claimed by any interested party (the transaction parties, but also any creditor of one of the parties), which may or may not be accompanied by relevant documents (an authentic copy of the court settlements and a certificate issued by the authority before which has been concluded the court settlements); they are not required any attestations or signatures of these documents (Article 74), and examination of the application may not be subject to the require a deposit or payment of a stamp duty calculated based on the amount in question (Article 57 and 58). The Court shall verify, in a first non-contradictory stage, the enforceable character of court settlements in the state of origin, the Member State in which the Regulation is applicable, as well as their intervention "in succession matters"²⁴⁴. The pronounced decision is likely to be contested. The enforcement refusal will only be possible in case the effects of enforcement infringe on the public policy in the State of destination; the Court is not empowered to verify respect for the rights to defense, or of the Courts of the State of origin²⁴⁵ jurisdiction procedure.

²⁴³ See CJUE, June 2nd, 1994, C-414/92, *Solo Kleinmotoren*, *The Court asserted on the contractual nature of the court settlement, even when this is approved by an executive body or completed before the court during the trial and revealed difference compared to decision, namely that in the latter instance the Court shall decree on a controversial matters between the parties* (§ 17).

²⁴⁴ If the court settlement exceeds beyond the scope of the Regulation 650/2012, *the Exequatur will be granted under the provisions of the corresponding Brussels Regulation I (bis)*.

²⁴⁵ See P. Wautelet, *Article 61, cit. op., No. 12-13, p. 698-699*.

Chapter II. Theoretical aspects related to the procedure for the issue of the European certificate of succession.

Major breakthrough in the successions European law, the European certificate of succession is a standard form intended to allow heirs, legatees, executors or estate administrators to prove their quality and rights (Article 63), in the open successions from August 17th, 2015²⁴⁶. To materialize the free circulation of decisions, makes easier to resolve quickly and efficiently the Succession problems, particularly caused by the effects of evidence and legitimacy.

§ 1. *Optional character.* In accordance with Article 62 of the Regulation, the use of European certificate of succession is optional; it can be used in conjunction with the national heir certificates or other internal documents used for similar purpose²⁴⁷ for whom it is no substitute²⁴⁸ or including in countries in which previously could not be issued such certificates (e.g. Italy). If its issuance is conditioned upon the utility of the certificate to be used in other Member States²⁴⁹, it shall produce effects including in the state of origin (Article 62 para. 3 second sentence); avoiding any eventual opposed discrimination, the solution becomes of a particular importance in particular in those Member States which do not know the heir certificate institution, with whom internal successional right it interacts, and that's the reason for being so criticized²⁵⁰.

The relationship between the European certificate of succession and the national heir certificate is not fully clear. Thus, the Regulation does not specify which of them should take priority in the event of a conflict²⁵¹ or how things should be done when such authorities from different states have been requested at the same time for their issuance²⁵². Any eventual intromissions of the European Court of Justice will clear things, but in their absence uncertainty persists.

§ 2. *The competent authority.* In accordance with Article 64, the European certificate of succession may be issued not only by the judicial authorities (such as defined in Article 3 §2 of

²⁴⁶ The idea of establishing such a certificate has been inspired, perhaps, from the Hague Convention of October 2nd, 1973 regarding the international administration of succession - see R. Crône, "Le certificat successoral européen", in G. Khairallah, M. Revillard (dir.), *Droit européen des successions internationales. Le règlement du 4 juillet 2012*, Defrénois, Lextenso, 2013, p. 169, sp. p 172, no. 416.

²⁴⁷ For an overview of the judicial heir certificate of the German law (Erbschein) Greek or Austrian or of notary certificates (notorious) of French law, Belgian or Dutch; see P. Wautelet, *Article 62, cit. op.*, p. 703-706, no. 5-10. For details of the differences which exist between national legal systems, see A. Davi, A. Zanobetti, "Il nuovo Diritto internazionale privato delle successioni nell' Unione Europea", *Cuadernos de Derecho Transnacional*, 10, 2013, vol. 5, n° 2, pp. 5-139, no. 166, p. 133-134.

²⁴⁸ See Article 62 §3 and recital 67 of preamble, which explains the solution on the basis of the principle of subsidiary.

²⁴⁹ Of course, the certificate could be used in the Member States which are not linked to the Regulation 650/2012, but in these assumptions its effects and efficiency will not be assessed in accordance with the rules of Article 69 of the Regulation, but also on the basis of the rules in force in each requested State

²⁵⁰ See M. Koehler, M. Buschbaum, "La "reconnaissance" des actes authentiques prévue pour les successions transfrontalières. Réflexions critiques sur une approche douteuse entamée dans l'harmonisation des règles de conflit de lois", *RCDIP*, 2010, p. 629, sp. p. 635-637.

²⁵¹ In the sense that this priority should be recognized by the European certificate, see P. Lagarde, "Les principes de bases du nouveau règlement européen sur les successions", *RCDIP*, no.4/2012, p. 72. For the purposes of that in Romania should prevail of their national heir certificate, authentic act, see I. Olaru, *Dreptul european al succesiunilor internaționale*, Ghid practic, ed. Notarom, 2014, p. 154

²⁵² The solution proposed by the doctrine - the use of rules relating to pendency of case -, although sufficiently effective, does not allow full prevention contradictory documents - see P. Wautelet, *Article 62, cit. op.*, no. 37, p. 717.

the Regulation), but also by other authorities which, under domestic law, are competent in the Succession matters; this means that including notaries of states like Romania, the Czech Republic, Austria (where they are not regarded as "judicial authorities") qualify for a certificate issuance²⁵³. International jurisdiction is to be assessed in accordance with the general rules of jurisdiction laid down in Chapter II of the Regulation (Article 64 para. 1), which keeps the "judicial monism"²⁵⁴ found in matters of court orders, and internal territorial jurisdiction in accordance with the rules in force in the State forum. The Certificate will have to contain a mention regarding the jurisdiction validity.

§ 3. Procedure. The Procedure for obtaining a European certificate of succession is detailed in the articles 65-68 of the Regulation.

This implies an application²⁵⁵ made by the interested party - heir, legatee, executor, administrator - , which may or may not be accompanied by several documents (ID cards, birth, marriage, death certificates, matrimonial agreements, testament, acknowledgement statements or succession remission), in certified copies or in original, including relevant information relating to the applicant, the deceased; and his family or at the succession itself; a detailed list of the information concerned is laid down in Article 65 para. 3 of the Regulation. It's not necessarily that they allow the international character of the succession, the certificate can be used itself subsequently to the collection of any data for this purpose²⁵⁶; also, it is irrelevant whether the succession has been or not definitively settled.

The Issuing Authority (which checks in advance its jurisdiction, according to the rules of Chapter II of the Regulation) must examine actively the documents and information received, their force and their evidentiary effects. It can conduct official inquests, it may require additional proofs, or solemn declaration by the applicant; it shall inform the succession appointee in respect of the application, which will have the ability to interfere and to communicate pertinent information. The cooperation with the authorities from other Member States (land register, marital status, the register of commerce) is also possible, without The Regulation to assign details of the specific arrangements for the implementation of this resolution.

§ 4. Issue. Modification. Withdrawal. In accordance with Article 67, once taking into account the applicable law to succession, the elements desirable to be certificated have been laid down, the requested authority shall issue without delay²⁵⁷ the certificate, using standard form drawn up by the commission. The beneficiaries (the applicant, but also other persons interested in solving the succession) shall be informed. Two possible reasons for refusal to issue the certificate are specifically mentioned, but boundless²⁵⁸ in the legal text. The first one regards the existence of a litigation, formulated in the independently judicial proceedings or directly in front of the requested authority, in respect of the elements which certification is desirable; the refusal will not occur automatically, the requested authority while maintains itself unconstrained, after clearing its valid character, of deciding on the possible issuance of a partial certificate, with

²⁵³ See recital 70 of preamble.

²⁵⁴ A. Davi, A. Zanobetti, *cit. op.*, no. 166, p. 134.

²⁵⁵ A standard form of application will be proposed by the Commission (but its use is not mandatory). Detailed rules for the submission of the application (number of copies, record) shall be governed by the law of seised authority. If legalization or similar formalities are not required, the Regulation does not oppose for a stamp duty payment or a public notary fee.

²⁵⁶ See A. Davi, A. Zanobetti, *cit. op.*, no. 167, p. 134.

²⁵⁷ Even if this imperative of expediency is not accompanied by the European sanctions in the text, it is not out of the question any appeal to national rules for the enforcement or endorsement the courts which unduly delay the certificate issuance.

²⁵⁸ Completion is possible under the national legislation governing the issuing authority activity (e.g. Article 86 of law 36/1995).

respect only to the irrefutable data. The second reason for refusal, with more serious consequences, is represented by the existence of a Court order with respect to items whose certification is desired, without it the Certificate would not be considered legal.

The issuing authority shall keep the European certificate of succession, after which issues to the applicant and, on request, to any person demonstrating a legitimate interest, certified copies²⁵⁹, with a duration of six months²⁶⁰, that can only be extended by exceptionally reasons and solid justified cases (such as the use of a copy in a procedure that has not yet been completed). Issue of new copies is possible (Article 70), except in the case in which effects of the certificate will be suspended.

The authority (court or notary public) which issued such a certificate is solely responsible for its rectification, modification or withdrawal (Article 71); if the first operation will entail a simple correction of material errors of redaction (such as the incorrect spelling of a surname, the transcription of a wrong data or identification number)²⁶¹, the other two can occur in the event of more serious errors in respect of the mentions contained in the certificate, which does not correspond to the truth (as well as the discovery of a new heir or of a codicil to the will). The immediate information of all persons to whom certified copies have been issued shall be compulsory in any of these cases (Article 71§3); the suspension effects of the European certificate of succession, at the request of the persons demonstrating a legitimate interest (Article 73§1.a).

Any measure of issue, rectification, modification, withdrawal or refusal to issue a European certificate of succession can be challenged before a *judicial authority* in the Member State in which the issuing authority is situated²⁶². During these procedures, at the request of the persons who challenge the decision and with the information of all holders to whom certified copies have been issued, the judicial authority may temporarily suspend the effects of the European certificate of succession (Article 73 §1.b). The issuance of a certificate (or its withdrawal), its modification or rectification can be carried out either directly by the requested court with the challenge, either by the issuing authority, which has been retransmitted the dossier for review and taking a further decision.

§ 5. Contents. Trying to operate a standardization to facilitate the movement of the European certificate of succession, Article 68 of the Regulation specifies in detail its content. When the seised authority is not in a position to carry out its final completion (for example, to ensure that the procedure is still at the beginning, because the position of all heirs is not yet known or because they need additional evidence), it may issue a partial certificate or release refuse until the situation is clarified²⁶³.

The certificate must contain a set of specific information, as well as those concerning the applicant (name, nationality, civil status, the relationship with the deceased), the purpose for which it is requested, the people interested in the succession, the deceased; (civil status, nationality, residence...) and death (date, place). The reasons for which the authority has declared its jurisdiction, but also the law applicable to succession and how to set it, should also be mentioned.

²⁵⁹ In the absence of details in the Regulation, the specific rules relating to the conservation regime of the original, at drawing up the list of people who have obtained copies, at its preservation and amendment, the regime of access to this will be the same as those laid down in each Member State by the authorities requested.

²⁶⁰ The expiration date should be included express in the document; in the absence of which, the validity of the copy is affected, the time limit of six months by calculating on the basis of the date of issue. The justification for the limited time established by Regulation lies in his desire to ensure correspondence between the content of the document and reality (which may develop over time).

²⁶¹ See Procedure laid down in Article 88 of Law 36/1995.

²⁶² See Article 143 and 144 of Law 36/1995

²⁶³ P. Wautelet, *Article 68, cit. op.*, no. 2-4, p. 765.

More importantly, the European certificate of succession should include information relating to the items arising from the executors' rights and/or powers from or from the administrators of succession heritage, the heirs or legatee, to the existence of a matrimonial convention, of any testament, or of a statement of acceptance or remission of succession. He should specify the portion of succession and the corresponding rights due each heir, the list of goods due an heir or legatee determined, but also possible casual restrictions (a inalienability a disruption of property, a possible reducibility of legatees rights because of the heir who cannot be totally disinherited existence); To do this, it is imperative to be taken into consideration the Succession applicable law.

§ 6. Effects. In accordance with Article 69, European certificate of succession is presumed to certify the existing items listed, it by testing "the exact elements set out under the law applicable to succession or by virtue of any other applicable law specific elements". The certificate is effective automatically in all the Member States (including that of origin), without the need for any special procedure. In accordance with Article 74 legalization or other similar formality will not be able to be required with regard to the acceptance of its effects; also, it is not allowed its control in the state of destination from the public order point of view, of the jurisdiction of issuing authority or even the compliance with form referred to in Article 67§3²⁶⁴; the challenge covered in Article 71 and 72 regarding only the authorities of the origin Member State.

The effects of the certificate are detailed in the Article 69 and they are primary of probative nature²⁶⁵. These concern mainly items laid down according to *lex successionis* (determining heirs/legatees, rights due to each person, of executors or of administrator), but also matters, even governed by its own laws, have a direct effect on the content of the certificate (e.g. basic conditions of a provision for the cause of death).

Persons designated within the European certificate of succession as heir, legatee, executor or administrator shall be presumed²⁶⁶ to dispose of the status and the rights referred to in the certificate²⁶⁷. They could be overridden by the quality referred to, without being able to require that, in addition to legal copy, documents or additional proofs (for example, a birth or marriage certificate).

In correlation, third parties which have acted on the basis of the certificate are protected. Transactions made by such persons shall be deemed to be valid, except in the case in which they knew that the information contained in the certificate do not correspond to the truth²⁶⁸ or were not aware of this fact because of their serious negligence²⁶⁹. Thus, in principle, any entity (e.g. a

²⁶⁴ P. Wautelet, *Article 69, cit. op.*, no. 8, p. 782. Although the Regulation does not expressly cover the case of false documents, it is clear that they may not take effect.

²⁶⁵ See the recital no. 71 of the preamble, which states that the certificate should not be considered enforceable.

²⁶⁶ With regard to the option given by the possibility that the certificate might be contested (and in correlation of its withdrawal, rectification or modification), the presumption can only be a simple one- see R. Crône, *cit. op.*, no. 422, p. 183.

²⁶⁷ The certificate is not but the only way this proof can be made: succession law is governing in general. The determination of the beneficiaries, of their respective shares and of the obligations which may be imposed on them by the deceased, and the determination of other succession rights, including the succession rights of the surviving spouse or partner (*lex filiationis, lex matrimonii*), for the purpose of establishing detailed rules for the quality of proof of heir or legatee; despite simplification made by regulation for authentic documents and transactions, the circulation of national documents may still encounter difficulties – See P. Wautelet, *Article 62, cit. op.*, no. 23-30, p. 711-714.

²⁶⁸ This may be the case when the third party has not been informed about the withdrawal, modification or rectification of certificate or has acted fraudulently together with one of the heirs. See the recital no. 71 of the preamble which refers to the third party's good faith action.

²⁶⁹ This may be the case when the third party has not been informed of the formulation of legal remedies against the certificate and acted without inquiring about how to end it. A special due diligence can return of such third party

bank) that transferred goods or has made payments on the basis of a European certificate of succession of is released of the obligations which he returned and cannot be held to pay again (personal effect). Also, any person who has acquired ownership or another right of property based on information contained in a European certificate of succession will not be considered as having contracted with a person who had the power to dispose of the object in question and shall not be obliged to repay or to reimburse the equivalent inquiring to its true owner. However, the Regulation does not resolve any problems related to getting a valid acquirement²⁷⁰, but only those relating to the contracts with the person designated in the certificate, i.e. the good or bad faith of third parties.

At the same time, wanting to promote the European certificate of succession, the Regulation allows access to public registers through it: in accordance with Article 69 para. 5, the European certificate of succession constitutes a valid title (in the versions of Romanian, Italian, Spanish language), namely, a valid document (in the versions in French, English, German, Portuguese language) for the entry of transfer of succession assets in the registers of a Member State (land books, the register of commerce, Romanian State Office for Inventions and Trademarks - OSIM), without the need for a specific procedure. Rule must be correlated, however, with the one set out in Article 1 §2. (l), which excludes from the scope of the Regulation matters relating entries in the public registers²⁷¹. This allows the safeguard of national requirements (in particular with regard to the form of documents, fairly strict) and will involve, at least sometimes, the appraisal of equivalence nature of European certificate and the documents required by national law²⁷².

Application of Article 69 also assumes that the law of the Member State in which it the operation was carried out shall allow legal effects, which the certificate has in view, in the circumstances in which, in accordance with Article 2, para.1. letter k) are excluded from the purpose of the Regulation the problems related to "rights in rem nature" on a specified territory. When the European certificate of succession speaks of a property dismemberment in the legislation of the State of destination, an adjustment in accordance with the procedures detailed in Article para. 31 might still be taken into consideration, in order not to deter completely the certificate of efficiency.

The effects of the certificate may not be extended to matters which do not fall within the purpose of the Regulation, as well as those of proprietary nature, the family relationship between the deceased and a beneficiary, i.e. the matrimonial regime or patrimonial aspects of the relations which are considered to be, in accordance with the law which is applicable as having comparable effects with those of the marriage²⁷³. Of course, for example, to establish the

when the certificate, issued in a first stage of the procedure as an argument, only covers dimensions ideal due each heir, without final decisions (assumed by a reduction, a report or to pay its succession debts).

²⁷⁰ See the final recital no. 71: "*Whether or not such an acquisition of property by a third person is effective should not be determined by this Regulation*". This certificate presence does not oppose thus to the challenge of validity of/effectiveness of operation for reasons such as inability or incorrect expression of third party's consent, a possible failure to observe a solemn form of the contract, the contracts price, the non-payment or not performing other obligations.

²⁷¹ Article 1, para. 2: "*The following shall be excluded from the scope of this Regulation : (...) (l) any recording in a register of rights in immovable or movable property, including the legal requirements for such recording, and the effects of recording or failing to record such rights in a register*".

²⁷² See P. Wautelet, Article 69, *cit. op.*, no. 62-66, p. 802-805. In this context the divergence of translation referred to above may have non negligible consequences: the existence of a "valid title" automatically gives the right to sign up/to change registers, while "the valid document" yet allows a significant margin of appreciation for the authorities. Doctrine considers for example that a European heir certificate is not in itself sufficient to be able, in Germany or France, to proceed in the updating of land registers (see P. Wautelet, *cit. op.*, sp. no. 65, p. 804, 804, German and French quoted authors).

²⁷³ Art. 1§2.d) and §12 of the Preamble exclude aspects of matrimonial arrangements from the purpose of Regulation ("*12. Accordingly, this Regulation should not apply to questions relating to matrimonial property regimes, including marriage settlements as known in some legal systems to the extent that such settlements do not*

successors or heritage patrimony and respective shares of the beneficiaries, the competent authorities must decide, on the basis of the rules of PIL, and on the existence of the family relationship or on heritage aspects of the matrimonial matters (see recital 12 of preamble). The presumption of veracity of Article 69 §2 of the Regulation will not function in their case; the authorities of the Member State in which the certificate will be used remains free to judge, on the basis of its own rules (up to the time of the adoption of uniform rules in European matters), whether or not the family relationship is envisaged in the certificate²⁷⁴ or if solving the matrimonial regime problems has, or has not been done properly.

deal with succession matters, and property regimes of relationships deemed to have comparable effects to marriage. ...”)

²⁷⁴ With regard to the possibility of recognition of some effects of a marriage between persons of the same sex concluded abroad and the modulation of international public order exception effects, see A. Oprea, „Despre recunoașterea statutului matrimonial dobândit în străinătate și protecția europeană a dreptului la viață familială”, *Studia Universitatis Babeș Bolyai – Iurisprudentia*, 4/2012, p. 149-169, sp. no. 28.

Chapter III. Practical cases regarding the recognition and enforcement of court orders and foreign authentic instruments

Practical case 1 (for courts). The applicability of Regulation 650/2012. The recognition of the decision coming from member states and third-party states of the EU. Grounds for refusing the recognition – irreconcilability. *A, German citizen, dies in Turkey, state in which his last known residence was. His assets include immovable properties located in Germany, Turkey and Romania. Between his two sons – X, German citizen living in Germany and Y, Turk citizen living in Turkey – begins a litigation regarding the quotas each of them deserves, and the German courts are seised. They issue a decision for the recognition of which is requested in Romania by X. Y opposes the recognition, invoking on the one hand art. 1096 letter e) New Code of Civil Procedure (NCPC) in conjunction with 1079 paragraph 1 NCPC, and on the other the existence of a previous Turkish court decision ascertaining X's lack of inheritance rights. How should you proceed?*

The international applicability of Regulation 650/2012. One of the declared objectives of Regulation 650/2012 is to eliminate, through its application in the member states, of “obstacles against the free circulation of persons currently facing difficulties in exercising their rights in the context of an inheritance with elements of foreign origin” (recital 7 in the Preamble). In this context, the rules in chapter IV “Recognition, enforcement force and enforcement of decisions” were instituted, uniformly destined to prevail against the national norms having the same object. This prevalence, however, still needs to be recognised only if the conditions of temporal, material and spatial conditions of the Regulations are met.

The first one – temporal applicability (assumed from the hypothesis as met in the case) – forces the joint taking into consideration of articles 83 and 84 in the Regulation: if art. 84 states that the rules instituted (including those regarding the recognition) are to be applied in theory starting with 17 August 2015, art. 83 regarding the transitional provisions introduces a further condition: the Regulation is applicable only to the inheritance of persons deceased after and including 17 August 2015. The existence of a double requirement can be explained by the fact that the suppleness in the recognition process of the decisions is the correlative of the following of the newly instituted uniform jurisdictional and legislative rules, so as to avoid the *forum shopping* phenomenon and assure a level of adequate proximity (between the litigation, the court and the competent law respectively)²⁷⁵. When he wanted to introduce a favorable regime for the decisions issued before the starting date of the application of the present Regulation, the European legislator has made this expressly, introducing requirements as well in order to assure a minimum of guarantees in the matter.²⁷⁶

The material applicability of the rules instituted in Chapter IV of Regulation 650/2012 requires the examination of the fact, the decision the recognition of which is required intervenes in inheritance matters (in other words it regulates, according to art. 3§1 a), a transfer of goods, rights and mortis causa obligations), respecting the exclusions mentioned in art. 1§1 phrase 2 and 1§2 in the Regulation. As such, neither the decision establishing the heirs, the quotas and the assets due to each of them, nor that ascertaining the lack of inheritance rights poses extraordinary problems; especially, in the case of the latter, it is well known that even if art. 1§2b) excludes problems regarding the legal capacity of physical persons from the sphere of Regulation application, it expressly reserves the right of inheritance, for which it establishes the jurisdiction of the *lex successionis*, as it does for the lack of inheritance rights as well (cases of lack of rights, effects, regime) (art. 23§2 letter c and d).

²⁷⁵ See, for a similar solution see art. 43 and 47 in the Regulation 1346/2000 regarding the cross-border insolvency.

²⁷⁶ See art. 64 from Regulation No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility.

Finally, the applicability of chapter IV of Regulation 650/2012 depends on the origin of the decision the recognition of which is required in the destination Member State: the supple regime instituted profits exclusively the decisions coming from other EU Member States²⁷⁷; for other decisions, the courts from the state required to recognise them will apply the domestic law in the matter (their own rules, internal or potentially conventional, regarding the efficiency of foreign decisions; for Romania, it is art. 1095 and following from the NCPC). Because in this case the parties invoke two decisions, one coming from a Member State, the other coming from a third-party state, each one of them will have to undergo the specific treatment regarding the recognition.

Although according to art. 39 para. 1 from Regulation 650/2012, “*the decisions issued in a Member State are recognised in the other Member States without it being necessary to apply a special procedure*”, in the case of appeal, as is the case here, the intervention of the courts cannot be avoided, and the rules which have to be taken into consideration are those in art. 45-58 from the Regulation, completed with other potential national dispositions.

The internal territorial jurisdiction of the Romanian court on requests of recognition has to be established following the rules specified in art. 1098 NCPC²⁷⁸. It makes the distinction according to the modality in which the Romanian court is seised regarding the recognition request – directly or indirectly. In the first case, two hierarchical solutions are established: the court in the jurisdiction of which the domicile or headquarters of the party opposing the recognition is located and, if that is not possible, the Bucharest Tribunal. When the request is formulated indirectly in the case of a process having a different object, the competent court will be able to take a decision regarding the recognition of the foreign decision. Because in this case neither of the heirs resides in Romania, the requests are in the competence of the Bucharest Tribunal. If the authorization of enforcement had been jointly requested, the jurisdiction would have been given to the court under whose circumscription the enforcement would have been carried out (art. 45, para. 2 from Regulation 650/2012, art. 1102 NCPC).

Procedure. Regarding the recognition of the German decision, the court’s power to decide is very narrow, art. 48 from the Regulation is expressly against the evaluation of the grounds for the recognition refusal in the first phase of the procedure. Once the documents mentioned in art. 46 of the Regulation are proven to exist – the recognition request, a copy of the decision which meets all the requirements for the validation of its authenticity²⁷⁹, the certificate issued by the court in the state of origin²⁸⁰ and, should the court require them, authorized translations – the court issues the recognition decision, which it immediately communicates to the interested persons (provisions in art. 1099 and 1101 NCPC are not incidental, and as such the requirements instituted there regarding the documents to be attached

²⁷⁷ The phrase “Member State” must be interpreted referring to recitals 82 and 83 from the Regulation: Great Britain and Ireland (as long as they have not exercised their opt-in right regarding especially the Rome Regulation IV) and Denmark respectively, will not be considered Member States, and the recognition of the decisions coming from these states will be made based on common right laws in the destination states.

²⁷⁸ Art. 39§2 in the Regulation goes to art. 45§2, instituting two alternative criteria: the place of domicile of the party against whom enforcement is sought, or to the place of enforcement; when the procedure implies only the recognition, it is possible that neither of them is operational (with the unwanted consequence of limiting the circulation of the decision), some authors have suggested the acceptance of the liberty of the applicant to notify any court in the state where the recognition is to be made (see II. Pretelli, article 39, *op. cit.*, no. 15, p. 579, mentioning the position of French authors H. Gaudemet-Tallon and P. Gothot, D. Holleaux respectively, regarding the dispositions from the Bruxelles Convention and the Rome Regulation I).

²⁷⁹ According to the regime, the authenticity of the decision has to be established according to the laws of the state from which it comes; if all such Regulation indications are missing, the existence of the signature of the members of the forum and of the seal should be verified (see II. Pretelli, *Article 46, cit. op.*, no. 4, p. 619-620).

²⁸⁰ This certificate, written on a standard European form, has the role to facilitate the recognition procedure / the declaration of enforceability. As resulting from art. 47§1 final, the certificate is not mandatory: the court in the destination state can relieve the applicant from presenting it when the elements it has are pertinent enough.

to the request and the proof of summons of the parties must not be necessarily met). The recognition decision can be contested, respecting the term provisioned in art. 50, para. 5 from the Regulation; given that the person against which the recognition is requested does not live in Romania, this term is in this case 60 days and will be calculated from the moment of notification and, respectively, from that of the issuing of the decision which was directly served to the party or sent to the home residence.

Reasons to refuse the recognition. As soon as the recognition is made, the procedure becomes contradictory. The European legislator has exhaustively regulated the grounds to refuse the recognition²⁸¹, which can be considered by the court exclusively at the request of the interested person (their *ex officio* examination is not possible), who also has to bring the evidence that it meets the requirements provisioned in the legal text.

Before the examination of their incidence in this case, it is worth noting that the examination of the competence of the court in the state of origin cannot be found among them, something which is not admitted in the system of the Regulation.²⁸² Besides, this does not pose any problems in this case: seeing as how the deceased was a German citizen and part of his inheritance assets were located in Germany, the German court could found its jurisdiction on art. 10, para. 1. Letter a) in the Regulation in order to decide the integrity of the succession. At the same time, considering the hierarchical priority of the European Regulation before national Regulations, it is obvious that the dispositions of art. 1096 letter e) from the NCPC in conjunction with 1079 paragraph 1 of the NCPC (recognition refusal justified through the lack of exclusive jurisdiction of the Romanian courts in the judging of litigation regarding assets located outside of Romanian territory), they cannot be applied.

Among the reasons for recognition refusal provisioned by art. 40 from Regulation 650/2012, in this case the one provisioned at letter d): irreconcilability between the decision the recognition of which is requested and a foreign decision previously issued (in a Member State or in a third-party state). The conditions provisioned for it in the legal text are severe enough: on the one hand, the irreconcilability must regard decisions coming from procedures between the same parties and having the same object (1), on the other the foreign decision must have been susceptible to recognition in the state in which the recognition is sought (2) and previous to the decision the recognition of which is requested (3).

Regarding the first condition, it is worth noting that it does not pose special problems, the legal consequences of the two decisions cancel each other out: the two heirs have quotas in each of the inheritance procedures started in Germany and Turkey, their procedural position being irrelevant (subjective identity); also, the two litigations regarding the division of the inheritance in Germany and the recognition of the lack of rights respectively, in Turkey, can be considered as having the same object – in this case, the establishing of the heirs and of the inheritance rights due to each of them (the objective identity is based not on purely formal criteria, but by considering the “nucleus of the litigation²⁸³”).

Regarding the second condition – that the foreign decision is to be susceptible to recognition in the state of the forum²⁸⁴ –, it is worth noting that the European legislator does not

²⁸¹ The solution is justified through the absolute/exceptional/derogatory character of the measures in order to refuse the recognition, real violations of the mutual recognition principle (art. 67 TFUE), the base of the liberty, security and justice base, the following of which must be assured as much as possible.

²⁸² As opposed to the Brussels I and II bis Regulations, Regulation 650/2012 does not expressly mention that courts in the destination state cannot control the jurisdiction of the court from the origin state, but the solution is not implicit – see J. Foyer, *cit. op.*, p. 155. Its justification resides, on the one hand, in the absence in the Regulation of exclusive jurisdiction or protection criteria, the following of which must be assured through a potential refusal to recognize the decision breaking them, and on the other hand in the mutual trust in the interpretation and correct application of uniform jurisdiction criteria instituted.

²⁸³ See A. Bonomi, *Article 17, cit. op.*, no. 19 and following, p. 263.

²⁸⁴ The European legislator does not impose that the previous foreign decision be recognized in the state in which the recognition is sought.

distinguish in terms of its origin from a Member State or a third-party state; nevertheless, its possibility to be recognized is estimated in the first case according to rules in the Regulation (art. 39-40), while in the second case the domestic law of the requested state apply (art. 1095 and following from NCPC) or potential international conventions ratified by it. In this case, the origin state of the second decision is Turkey and the Romanian courts will consider the provisions of the Agreement between Romania and the Republic of Turkey regarding the legal assistance in civil matters, signed at Ankara on 28 September 2005 and ratified by the law 214/2006. As such, in support of his recognition request, Y will have to provide, according to art. 1099 in the NCPC, a legalized copy of the Turkish decision, the proof of its final and enforceable character, proof of service the citation and the document which instituted the proceeding, communicated to X in due time, certified translations. The court will have to ascertain (a) the final and enforceable character of the decision according to Turkish law (to be verified *in concreto*), (b) the jurisdiction of the Turkish court in judging the litigation (valid, as being the court from the last home residence of the deceased) and the absence of an exclusive competence criteria in favor of the Romanian courts (yes, in this case no criteria provisioned in art. 1078-1079 of the NCPC is applicable), (c) the reciprocity between Romania and Turkey regarding the recognition of legal decisions (yes, see art. 16-17 Law 214/2006 mentioned above), (d) the notification in due time of the defendant, who has lost, about the procedure started against him in Turkey, so he can defend himself adequately (to be verified *in concreto*), (e) the non-breaching, through the foreign decision, of the public order PIL in Romania (not the case), (f) the non-breaching of the Romanian law (not the case, the Romanian law is not applicable in this case), (g) the following of the defendant's right to defend himself (to be verified *in concreto*), (h) the lack of reconcilability with a decision issued in Romania or the inexistence of a process having the same object in Romania (not the case). Should the requirements mentioned be met, the definitive criterion to solve the "conflict" between the two decisions, found in art. 40 letter d) of the Regulation, is one of temporal nature: in the requested state, the decision with the issue date prior to the other one has recognition priority (*prior in tempore potior in iure*). If Y's allegations regarding the precedence of the Turkish decision are found to be correct based on the evidence submitted, the court will refuse the recognition of the German decision.

Practical case 2 (for courts). Exequatur. Final decision. Missing certificate. Staying of the proceedings X, Romanian citizen with last known home residence in Spain, dies leaving behind assets on Romanian and Spanish territory. Since he had started an action denying the paternity of A, his son from a previous marriage, he wrote, shortly before his death, a will in which he left his entire fortune to B, a nephew who was taking care of him. A litigation has appeared between A and B regarding the validity and efficiency of the will and the rights of inheritance respectively. This has been solved in Spain through a court decision; A requests its recognition and enforcement in Romania. B opposes, showing, on the one hand, that the Spanish decision is not final and, on the other, that A has not submitted the certificate mentioned in art. 46. How should you proceed?

Recognition and enforcement of the Spanish decision. If according to art. 39, paragraph 1 from Regulation 650/2012 the decisions issued in a Member State are fully recognized in the other Member States, without the necessity of a special procedure regarding the exequatur, art. 43 forces the interested persons to obtain a declaration of enforceability in the state of destination.

The jurisdiction of the Romanian courts. The international jurisdiction of the Romanian courts will have to be established according to art. 45 from the Regulation: the request, along

with the necessary documents²⁸⁵, will have to be submitted to the court²⁸⁶ in the jurisdiction of which the enforcement will be carried out or where the home residence of the party against which the enforcement is requested is located; the Regulation does not allow autonomy of will for the conclusion of potential choice of law (which will be ineffective). Furthermore, in this first phase, the procedure is not contradictory and the party against which the exequatur is requested does not have to be summoned.

According to art. 48, along with the verification of the documents submitted by the applicant, the court must in theory issued the exequatur; the reasons for which at this stage it can refuse to do so are very limitative: the decision the recognition of which is requested does not exist or does not enter the sphere of the Regulation applicability²⁸⁷, or the certain seised court does not consider itself competent.

If the decision regarding the request for granting the exequatur must be communicated to the applicant, be it positive or not, the other party on the other hand (the party against which the enforcement is requested) is informed only about the decision of granting the exequatur (art. 49). In both cases, the methods of communication are those provisioned in the law of the forum (in Romania, art. 427, art. 163 and following from the NCPC).

Once communicated, the decision to grant *exequatur* can be appealed against (as in this case), according to art. 50 from the Regulation²⁸⁸, and on this occasion the court will be able to decide regarding the existence of potential grounds to refuse de recognition/enforcement. These cannot be analyzed ex officio by the courts, but only on request of the claimant²⁸⁹, who will

²⁸⁵ Art. 46, para. 3: “*The application shall be accompanied by the following documents: (a) a copy of the decision which satisfies the conditions necessary to establish its authenticity; (b) the attestation issued by the court or competent authority of the Member State of origin using the form established in accordance with the advisory procedure referred to in Article 81(2), without prejudice to Article 47*”. If the copy of the decision is mandatory, the certificate is not; according to art. 47, the competent court or authority *can set a term for its presentation or can accept an equivalent document* or, should it consider that it has enough information, *can skip the presentation of this document*. Also, considering art. 47 para. 2, the court can request a translation of the documents, done by an authorized person.

²⁸⁶ According to art. 45, para. 1 of the Regulation, the court to be specifically take into consideration is that communicated to the Commission by each of the member states, according to art. 78 par. 1 letter a) (until November 14th, 2014); considering art. 1102 of the NCPC, as well as the exequatur of the court decisions in civil and commercial matters (in the context of Regulation 44/2001), as well as the exequatur in divorce decisions, marriage annulment or parental responsibility (in the context of Regulation 2201/2003), Romanian authorities have communicated that the “court” as a competent institution (see also Law 191/2007 for the approval of O.U.G. no. 119/2006 regarding some necessary measures for the application of some community Regulations from the date of Romania’s accession to the European Union, Official Gazette no. 1036 from 28.12.2006), it is to be assumed to be unitarily processed, so that in regards to the decisions in inheritance matters, the exequatur institution will be the court as well.

²⁸⁷ II. Pretelli, *Article 48, op. cit.*, no. 2, p. 625.

²⁸⁸ The legal text mentions the terms for these: in theory, 30 days from the notification or issuing, or 60 days respectively, if the party against which the execution is requested does not have home residency in the state of the forum.

²⁸⁹ In order not to justifiably limit the circulation of decisions in the European space, the European legislator limits the sphere of persons who can contest the decision: the party requesting the recognition/execution and the party against which the execution/recognition is requested, respectively. Interested third parties cannot make such an appeal, even in the form of derivative action (CJEU, April 23rd, 2009, C-167/08, *Draka*, para. 29); as such, in its jurisdiction according to the Brussels Convention/Regulation I, the Court of Justice has reached the conclusion that the national rules which could prevent other persons than those taking part in the litigation from the origin country are incompatible with the system of the Brussels convention (CJEU, April 21st, 1993, C-172/91, *Sonntag*, para. 33-34: „33. ...la convention a créé une procédure d' exequatur qui constitue un système autonome et complet, y compris dans le domaine des voies de recours, et qu' il en résulte que l' article 36 de la convention exclut les recours que le droit interne ouvre aux tiers intéressés à l' encontre d' une décision d' exequatur. 34 Ce principe doit également être appliqué au recours introduit ultérieurement, conformément à l' article 37, deuxième alinéa, de la convention. Le fait d' interdire à un tiers intéressé de former un recours au titre de l' article 36, tout en lui permettant d' intervenir au stade ultérieur de la procédure, en formant un recours au titre de l' article 37, irait, en effet, à l' encontre du système susmentionné ainsi que de l' un des objectifs principaux de la convention, qui est de

have to accurately mention them. Because the enumeration of the grounds for the refusal of recognition/enforcement under art. 40 in the Regulation is a restrictive one – the violation of public order, the lack of notification of the defendant, irreconcilable decisions – the seised court will be forced to limit itself to the verification of the meeting or not of their requirements (according to art. 52²⁹⁰); in the Western jurisdiction related to the Brussels Convention, it has been decided, however, that even from this phase an appeal from the interested party against the jurisdiction of the *exequatur* institution must be possible.²⁹¹

The applicability of the non-definitive character of the decision. The fact that the decision, the recognition/enforcement of which is requested, is not final has a relatively low applicability in this procedure of giving *exequatur* (and under no circumstances can it be seen as a reason to reject the request). The starting point is represented by the art. 43, mentioning that the enforceable decisions can be recognized in the state of origin. The enforceable character, the only requirement mentioned in the legal text, is governed by the law of the origin Member State; it is attested by the authority that issues the certificate attached to the decision, provisioned in art. 46 and, according to the position of the ECJ, targets exclusively the intrinsic character of the decision, not the conditions in which the decision could be executed in the country of origin²⁹²; also, the fact that in the country of origin, due to particular circumstances, the enforcement *per-se* would not be possible must be irrelevant.²⁹³ The legal text does not impose the condition of the final character as well; as such, it is possible to obtain *exequatur* for enforcement decisions which are not final.

Staying of the proceedings. Still, in order to protect persons interested against the potential damage generated by the *exequatur* of foreign decisions susceptible to modification, the European legislator has provisioned in art. 53 of the Regulation the possibility for the *exequatur* institution to stay the proceedings (or for the one lodged with an appeal against the decision to grant *exequatur*, under art. 51).

Its conditions can be easily seen after reading the legal text. The first one requires the existence of an appeal, from the interested person, against the procedures in the destination state.²⁹⁴ The second implies the exercise of a challenge in the origin state, so as to involve, as mentioned by the ECJ in the interpretation of the Brussels Convention, the annulment or the modification of the decision²⁹⁵; the part in which it requests the suspension, it has to prove the notification of the court. Finally, the third condition regards the suspension of the enforceable character of the decision in the state of origin, following the exercise of the challenge (suspension established according to the law of the origin state)²⁹⁶. If the requirements

simplifier la procedure dans l' État d' exécution”). Because the execution *per-se* is still governed by the law in the state of the execution, nothing can oppose, however, their exercise of their rights by appealing against the execution – CJEU, July 2nd, 1985, C-148/84, *Deutsche Genossenschaftsbank*, §18: „la convention se bornant a regler la procedure d' exequatur des titres executoires etrangers et ne touchant pas a l' execution proprement dite qui reste soumise au droit national du juge saisi, les tiers interesses pourront intenter contre les mesures d' execution forcee les recours qui leur sont ouverts par le droit de l'etat ou l'execution forcee a lieu »...

²⁹⁰ Art. 52 from the Regulation: “The court with which an appeal is lodged under Article 50 or Article 51 shall refuse or revoke a declaration of enforceability only on one of the grounds specified in Article 40. It shall give its decision without delay”.

²⁹¹ See CAP Luxembourg, November 15th, 2001, *Dahlem c. Wagner*, *apud* II. Pretelli, *Article 50, op. cit.*, no.6, p. 631, considering that the same solution could be retained regarding the *exequatur* of the decisions in the system of Regulation 650/2012.

²⁹² CJEU, April 29th, 1999, C-267/97, *Coursier*, § 32-33.

²⁹³ CJEU, April 28th, 2009, C-420/07, *Apostolides*, § 69 and following.

²⁹⁴ A difference must be noted between this and the case in which the discussion was about the recognition of the contested decision alone in the origin state: the literal interpretation of art. 42 allows for the court to consider, in this case, the suspension *ex officio*, while for the *exequatur* procedure art. 53 conditions the suspension, among others, on its express request from the interested party.

²⁹⁵ CJEU, November 22nd, 1977, C-43/77, *Industrial Diamond Supplies*.

²⁹⁶ In this context, the faulty Romanian translation of art. 53 of the Regulation has to be shown: while in this version it is provisioned that “the court [...] stays the proceedings [...], if the enforceability of the decision is

(provisioned cumulatively) are met, the court suspends the *exequatur* procedure, its margin of appreciation being extremely low²⁹⁷; the decision through which suspension is granted (or a previous suspension is canceled) cannot be appealed against.²⁹⁸ In this case, where the suspension was not requested by the interested person (first condition), the court will not need to decide *ex officio* on the matter.

Non-production of the attestation. According to art. 47 from the Regulation, not providing the attestation on the applicant's side as provisioned in art. 46 cannot represent *per se* a ground to refuse a recognition or *exequatur* request; in the interpretation of requirements in Regulation 44/2001, the ECJ has mentioned that this document only has the purpose of “*to facilitate, in the first stage of the procedure, the adoption of the declaration of the enforceability of the judgement given in that Member State of origin, making its delivery almost automatic.*”²⁹⁹ Both when the certificate is missing, and (even) when it is submitted, the court has indisputable jurisdiction to examine the meeting of the requirements (in this case, the existence of a decision in inheritance matters, enforcement in the state of origin, issued between the litigating parties...); also, it is not definitively linked to the precise mentions in the attestation; the correspondence between these and the effective evidence issued by the applicant needs to be verified.³⁰⁰

In the hypothesis in which the applicant has not submitted the attestation provisioned by the Regulation, the seised court has two alternatives. If the first one is setting a term in which the applicant must submit the attestation, it is not compulsory. The second alternative is, in fact, that of declining this obligation, when based on the documents already submitted, (potentially) knowing the language and being sufficiently familiar with the legal system of the state of origin of the decision, the court in the destination state considers itself clarified regarding the content of the foreign decision. According to the objective situation, the court can opt; when it has decided the granting of an additional term, considering the attestation absolutely compulsory for the clarification, and the applicant does not submit it, it can refuse *exequatur*.³⁰¹ However, in the

suspended in the state of origin by reason of an appeal”, its French, Italian or English versions talk only about the suspension of the enforcement character of the decision: *La juridiction [...] sursoit à statuer, [...] si la force exécutoire de la décision est suspendue dans l'État membre d'origine, du fait de l'exercice d'un recours*” (French); „L'organo giurisdizionale [...], sospende il procedimento se l'esecutività della decisione è sospesa nello Stato membro d'origine per la presentazione di un ricorso...” (Italian); „The court [...] shall [...] stay the proceedings if the enforceability of the decision is suspended in the Member State of origin by reason of an appeal” (English).

²⁹⁷ As opposed to art. 42, in the cases of “admission”, the court *can stay* the proceedings, art. 53 states that in the case of *exequatur*, the court *suspends* the procedure (if the legal requirements for it are met); also, in its jurisdiction regarding the dispositions from the Brussels Convention, the CJEU has stated that these must be interpreted restrictively, so as not to damage the useful effect of the dispositions regarding the granting of *exequatur* and not to compromise their objective (the free circulation of decisions); see CJEU, 4 October 1991, C-183/90, *Van Dalfsen*: “...l'article 38, premier alinéa, de la convention doit être interprété de façon stricte, sous peine de porter atteinte à l'effet utile de l'article 31 de cette convention et de compromettre l'objectif poursuivi par celle-ci, qui est d'assurer la libre circulation des jugements en permettant que les décisions exécutoires rendues dans un État contractant puissent être mises à exécution dans un autre État contractant ».

²⁹⁸ See regarding the dispositions of the Brussels Convention / Regulation 44/2001, the CJEU decision, 11 August 1995, C-432/92, *SISRO*.

²⁹⁹ ECH, 6 September 2012, C-619/10, *Seramico* para. 41. See also the conclusions of general attorney Kokott, in the same case: “The substance of the certificate therefore essentially reflects the scope of review afforded to the court of the State of enforcement at the first stage of the *exequatur* procedure. The information contained in it enables the conditions for a declaration of enforceability to be quickly examined. It is therefore easy to check from the certificate whether the parties to the main proceedings are identical to those under the *exequatur* procedure and whether, on the formal side, there is any decision that comes within the scope of application of the regulation. The certificate under Article 54 therefore serves in the first place the procedural simplification of the first stage of the *exequatur* procedure. (§ 40).”

³⁰⁰ See CJEU, September 6, 2012, C-619/10, *Seramico*, § 46.

³⁰¹ See for example Tribunal da Relação de Lisboa, 18 October 2007, *Empresa-A*, apud II. Pretelli, *Article 47, cit. op.*, no. 3, p. 624.

Regulation system, favoring the circulation of decisions, the measure needs to be a truly exceptional one.

Practical case 3 (for courts). Protective measures. *In the previous case, A requests, besides the recognition and enforcement of the Spanish decision, protective measures regarding inheritance goods. How should you proceed?*

According to art. 54 in the Regulation, should the recognition of a foreign decision be requested, the interested person (the applicant) can request the application of provisional measures, including protective, as provisioned by the law of the enforcement member state.

The way to determine the competent court in the member state of enforcement is not established in the Regulation; for this, it is necessary to take into consideration the rules of internal law: those regarding, for example, the one regarding the presidential ordinance (art. 996 and following in the NCPC), the way in which this type of measures are requested the most frequently, order the request to be submitted to the competent court in order to take a decision regarding the matter on trial (art. 997 in the NCPC)³⁰² – in this case, that competent to issue the *exequatur*.

The law in the state of enforcement – the Romanian Law – will have to be consulted both regarding the variety of available measures (inventory, sealing, custody of goods) and the conditions in which they will be issued³⁰³ (for example, art. 996 NCPC), but also regarding the solving procedure of the request (art. 998 NCPC) and the actual application of the measure respectively.³⁰⁴

The issuing of these measures is not conditioned by the previous obtaining of the *exequatur* (art. 54 paragraph 1 final), nor by the verification, by the court, of the meeting of the requirements for the recognition of that decision; also, the obtaining of protective measures is possible including when the decision to grant *exequatur* would be the object of an appeal (art. 54 para. 3 final). In this case, the court will respond positively to A's request.

Practical case 4 (for courts). Foreign legal decision. Legal assistance. *X, Romanian citizen, dies. His last known home residence is in Spain. Between his heirs (his wife, Spanish citizen, and his parents, Romanian citizens), a litigation has appeared, which was solved in Spain by a final legal decision, the *exequatur* of which is requested in Romania. Wanting to make an appeal against the decision to grant *exequatur*, X's parents request legal assistance. How should you proceed?*

The right to legal assistance, a component of the effective jurisdictional protection principle, is a general principle of the EU Law, guaranteed by and including art. 47 from the Charter of the Fundamental Rights of the European Union.³⁰⁵ For their actual protection in the cases with foreign elements, the courts must distinguish between the two categories of situations, depending on whether the applicant has or has not benefitted from legal aid including during the procedure in the country of origin

³⁰² A similar solution is noted when the claimant request a distraint or a garnishment (art. 953 NCPC, art. 970 NCPC).

³⁰³ If they are too severe, they could be declared incompatible with the rules provisioned in the uniform European Law and remain inapplicable – see CJEU, 3 October 1985, C-119/84, *Capelloni*.

³⁰⁴ See II. Pretelli, *Article 54, cit. op.*, no. 4 and following, p. 644-654.

³⁰⁵ *JO C 303, 14.12.2007 (Article 47. The right to an effective remedy and to a fair trial: “(1) Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. (2) Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. (3) Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.”*

Article 56 from Regulation 560/212. In the first hypothesis, the applicant can use the dispositions in art. 56 from the Regulation³⁰⁶, provisioned exactly in the idea that it guarantees the access to justice and respects the right to defense: it allows the interested party that has benefitted from legal aid in the state of origin (reliefs, reductions, delays, rescheduling of the payment of legal taxes, free defense or assistance through a lawyer named by the bar) to obtain similar advantages in the *exequatur* procedure in the state of destination as well.³⁰⁷

Its request will not make the object of a new examination: the principle of recognition applies not only regarding the foreign decision, but also regarding the right to legal aid, so that the court in the state of destination will not be able to (re)verify the financial conditions or the reasons (i.e. minority, handicap, another special status) retained by the court in the state of origin in order to grant it.³⁰⁸ The doctrine, however, claims that, in the light of the effective legal protection principle, the court in the state of destination could still make a *summary verification of the persistence need for aid*, with the consequence that, when it is not maintained, the benefit of legal aid might be refused.³⁰⁹

Because there are significant differences between the legislations and the practices in the member states regarding legal aid, art. 56 does not force the granting of the exact same rights and services as in the state of origin; the applicant will enjoy “the most favorable aid” provisioned by the internal law of the state of destination (which is not forced to create new services or modify their quantum).

Finally, under art. 56 from the Regulation, the right to legal aid regards the *exequatur procedure*; however, taking into consideration the jurisprudence of the ECJ afferent to the corresponding decision in Regulation 44/2001, it is not excluded that its sphere of application be larger, in order to be invoked regarding recognition applications or those contesting the *exequatur* decisions as well (cf. art. 50 and 51 in the Regulation).³¹⁰

Art. 47 para. 3 from the Charter of the Fundamental Rights of the European Union.

The fact that the applicant has not benefitted from legal aid in the state of origin does not have to represent an obstacle in his obtaining of legal aid in the state of destination.

According to the position of the ECJ regarding the interpretation of the dispositions in Regulation 44/2001, even if the European Regulations of PIL aim to ensure the circulation of legal decisions in the member states by simplifying the procedures and formalities with the purpose of their fast recognition and enforcement, this must not be achieved by violating the interested person’s right to defense³¹¹, which includes the possibility to formulate an appeal, examined after a contradictory procedure, against the declaration of enforceability of such a decision. In itself, the right to defense is one of the aspects of the principle of effective legal protection of the European Union, the third paragraph of which expressly states that “*Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.*” In this case, the access to justice is the possibility to formulate, according to art. 50, an appeal against the declaration of enforceability for the

³⁰⁶ Similar dispositions are found in the other European international private law instruments: Regulation 44/2001, Regulation 2201/2003, Regulation 4/2009, Regulation 1206/2001, Regulation 1393/2007.

³⁰⁷ The conditions for the exercise of this right are today the object of a Regulation harmonized in the EU through directive 2003/8/EC of the Council from January 27th, 2003, *improving the access to justice in cross-border litigations by establishing minimal common norms regarding legal aid granted in such litigations* (JO L 365, 10.12.2004).

³⁰⁸ The solution does not apply, of course, when the claimant has not requested this aid in the state of origin but does so, with a character of novelty, in the state of destination; in this case, he must follow the Regulations in this latter state.

³⁰⁹ II. Pretelli, *Article 56, cit. op.*, p. 652, no. 5.

³¹⁰ CJEU, June 13th, 2012, C-156/12, *GREP*, par. 37 (“*le principe de protection juridictionnelle effective, et notamment le droit à l’aide juridictionnelle, doit pouvoir être invoqué afin d’introduire un recours tel que celui prévu à l’article 43 du règlement n° 44/2001*”).

³¹¹ CJEU, December 14th, 2006, *AMSL*, par. 23, 24.

Spanish decision, so that the right to legal aid (allowing for this appeal) will be able to be invoked, even in the absence of a special provision in this sense in Regulation 650/2012.

The granting requirements of such aid will be those provisioned by the internal law of the requested state.³¹² Still, when these prove to be much too restrictive, the problem of their compatibility with the European law could come up³¹³; as mentioned by the ECJ, they must not constitute “*a limitation of the right to access courts that touch this right in its very substance*”, they must have a legitimate purpose and must respect the proportion between the means used and the purpose (GREP decision, para. 45); in their effective evaluation, courts can consider “*the object of the litigation, the petitioner’s chances of success, how grave the stakes are, the complexity of the legislation and procedures that must be followed, as well as the petitioner’s ability to effectively defend his cause. For the evaluation of the proportion, the national court can also consider the importance of necessary legal expenses and the insurmountable (or not) nature of the obstacles this can potentially generate in the access to justice*” (GREP decision, para. 46).

Practical case 5 (for trial courts). Exequatur in part. *Following A’s death, Romanian national with last residence in Italy, a dispute arises between the two sons, whereat the Italian courts are seised. They pronounce a decision by which the litigious immovable properties located one in Italy and the other in Romania are divided between the two; for Y, the owner of the Italian immovable property, the Court shall set a payment obligation whose precise amount was to be fixed with A’s precise value of the immovable properties and debts to the amount payable by each of them. Wishing to dispose of the Romanian immovable property as soon as possible, X asks for the declaration of the enforceability of the Italian decision, but Y opposed, pointing out that this does not finally and fully resolves their rights situation in the succession. Please state your opinion on the solution.*

In accordance with the provisions of the Regulation 650/2012 (art. 55), the exequatur of the foreign decisions may be not only total, but also including partially. In the latter case, it will look only certain parts of the decision, detachable from each other (partially selective exequatur). Not to be confused with the situation that the Court would perform a partially reluctant exequatur (such as decreasing the amount of duties determined by the foreign decision); in the context of art. 41 of the Regulation³¹⁴, which expressly prohibits to review the substance of the decision in the state of destination, it is not admissible, even if the court found an error in the interpretation and application of rules of jurisdictional competence or conflict introduced by the Regulation or the substantial law applied by the court from the state of origin.

The partial exequatur (selective) can be requested by the applicant (article 55 section 2 of the Regulation), for example, wishing to avoid an opposition on the part of the person against whom enforcement is sought; in this practical case, X did not make any indication about the limitation of his application (which is to be imposed to the judges, pursuant to rule *ne ultra petita*). Independently of the applicant position, the exequatur may be partial, but pronounced *ex officio* by the courts (article 55 § 1), specific assumptions possible being quite different. For example, when a foreign decision concerning several matters, and the exequatur cannot be given (automatically) for all of them because some cannot be declared enforceable³¹⁵ or reveal a matter which is outside the Regulation 650/2012 scope of application for which additional

³¹² For Romania, see OUG no. 51/2008 regarding public legal aid in civil matters

³¹³ CJEU, June 13th, 2012, C-156/12, GREP.

³¹⁴ See, *mutatis mutandis*, CJEU, 11 May 2000, C-38/98 *Renault c. Maxicar*.

³¹⁵ For example, a foreign decision finding succession disqualification of one of the heirs and deciding the partition between the others cannot be always declared entirely enforceable; normally sufficient recognition is sufficient for finding succession disqualification; the same, when by the foreign decision the executor quality of a person is found.

exams will be required³¹⁶, such a partial exequatur cannot be avoided. Also, when the decision of which exequatur is required is itself partially enforceable in the state of origin³¹⁷, the power of the courts of the state of destination will also be limited. Because in this case the Italian decision regarding the allocation of immovable properties is enforceable (which will be verified by means of attestation referred to in Art. 46 or based on documentary evidence submitted by the applicant), the Romanian court may grant its exequatur; in any case it cannot be denied that the decision does not definitively establish the amount of the balancing payment (an issue separable from the one of the assignment of assets).³¹⁸

Practical case 6 (for notaries). Authentic instrument. Effectiveness. *X, German citizen ordinarily resident in Romania, draws up a will in establishing the Y legatee and chooses German law as lex successionis. Subsequently, in view of this law, he concludes an agreement to succession in Germany with the two children, authentically, whereby they agree to give up reserves. After the death of X, universal legatee addresses a Romanian notary. How to proceed about this pact?*

Agreement to succession in this case being an authentic document, two issues will be examined by a notary in determining its effects.

Probative effectiveness. As authentic, the German document may receive, based on Art. 59 of the Regulation, the same evidentiary effects as the State of origin; it will take the closest procedural effect (in this case we might speak about the same effects) similar to the documents in the destination country - Romania. The presence of the certificate referred to in art. 59, para. 1.2 describing the evidentiary effects of the authentic instrument (according to German law) is optional, but its importance cannot be neglected.

The evidentiary effects will, of course, regard the findings of the issuing notary (personal presence of the parties or their attorneys, the possible presence of attorney, mental ability of persons, date and place of authentication, signature), the formalities carried out by the notary, and the parties' statements found in the document³¹⁹. Contours and limits are set by the law of

³¹⁶ For example, the foreign decision pronounces not only on the partition, but also on the family relationship between the deceased and one of the heirs; if the latter part of the decision, the recognition will be made in accordance with the rules of art. 1094 et seq. NCPC. Also, the same is the case of a foreign decision where the court was asked to rule on the matrimonial regime liquidation while a person's succession; part of the decision relating to property left express to the wife by will, husband's assets acquired prior to marriage can be recognized / declared enforceable smoothly in the regulation system; but, in terms of the decision regarding the liquidation of the matrimonial property regime is to go through the procedure laid down in Art. 1094 et seq. NCPC. See otherwise and CJEU, 27 February 1997, C-220/95 *Van den Boogaard*, § 21 și 22: „21. *En raison du fait que, dans le cadre d'un divorce, un juge anglais peut précisément, par une même décision, régler tant les rapports matrimoniaux que les obligations alimentaires, le juge requis est tenu de distinguer entre les aspects de la décision portant sur les régimes matrimoniaux et ceux portant sur des obligations alimentaires en ayant égard, dans chaque cas d'espèce, à l'objectif spécifique de la décision rendue.* 22 *Cet objectif devrait pouvoir être déduit de la motivation de la décision en question. S'il en ressort qu'une prestation est destinée à assurer l'entretien d'un époux dans le besoin ou si les besoins et les ressources de chacun des époux sont pris en considération pour déterminer son montant, la décision a traité à une obligation alimentaire. En revanche, lorsque la prestation vise uniquement à la répartition des biens entre les époux, la décision concerne les régimes matrimoniaux et ne peut donc être exécutée en application de la convention de Bruxelles. Une décision qui combine les deux fonctions peut être, conformément à l'article 42 de la convention de Bruxelles, partiellement exécutée, dès lors qu'elle fait clairement apparaître les objectifs auxquels correspondent respectivement les différentes parties de la prestation ordonnée ».*

³¹⁷ It may be the case, for example, for generic convictions, the enforceability of the decision is limited to the principle of responsibility (*andebatur*), while setting / liquidation of the precise amounts due is left to be done in a later time - II. Pretelli, *Article 55*, cit. op., no. 4, p. 650.

³¹⁸ The exhaustive nature of the enumeration of grounds for refusal of recognition/enforceability of art. 40 argues, moreover, the same solution.

³¹⁹ As in the Romanian law operates as a presumption on the completeness and correctness of the declarations of the parties contained in an authentic document, similarly, in the German law there is the same presumption of completeness and correctness (*Vermutung und der Vollständigkeit richtigkeit*). See CNUE, *"Etude sur les actes comparative authentiques. Dispositions nationales de droit privé.*

the State of origin: according to art. 415 ZPO (*Zivilprozessordnung* - Code of Civil Procedure), the authentic instruments "shall have, to the extent that it relates to a statement made to the authority or public officer who has the right to carry them out, the full and complete evidentiary effects on the recorded document; all German law shall be that which should be consulted to see whether evidence is admissible the proof of the inaccuracy of the mentions comprised in the authentic document (in German law regarding authentic documents containing official documents - statements by the issuing authority, operates a presumption of veracity, which obliges the one who wants to challenge the document to provide evidence of enrollment in false - §437 ZPO, however, as regards authentic instruments that include statements or finding of facts, it is possible to prove to the contrary – *Gegenbeweis*; art. § 415.2, §418.2 ZPO³²⁰).

According to art. 59, para. 1, recognition of the evidentiary effects of the authentic document may be refused where it would manifest effect contrary to public policy of the State of destination. Beyond the precautions that normally accompany the use of this exceptional technique (restrictive interpretation, caution, retaining only absolutely unacceptable breaches), an additional aspect should be noted: in the context of art. 59, which should be considered for evaluation are the consequences of accepting the evidentiary force of the document stranger and not the effects of *negotium*; the latter (related to the substantial validity of the document, for which a separate approach should be followed, as we will show below) is not a condition for granting the evidentiary effects of the authentic instrument³²¹.

The validity of the legal document. Substantial validity of the transaction formalized in the authentic is a matter distinct from that of its effectiveness evidence: if the authentic instrument can sample based on art. 59, the existence of the parties' declarations, but the effects of these statements must be assessed in the light of the law normally competent. By targeting only the probative efficacy, art. 59§1 may not represent "vehicle" whereby the substantial effectiveness of the authentic instrument will operate in the European space³²²; moreover, art. 59§3 expressly states that the acts or legal relationships³²³ recorded in an authentic contents can be challenged before the competent courts (in accordance with the rules set out in Chapter II), which will determine the law applicable under the rules of conflict of Chapter III.

In this case, the substantive issues will appeal to the rule of conflict of art. 25, para. 1, which refers to the *lex successionis* - national law of the testator, his choice - §2348 BGB (§2352 BGB and *Zuwendungsverzicht*). Although according to Romanian law mandatory rules prohibit the pacts on future inheritance (as is the case here), the prohibition should not be regarded as embodying a fundamental principle of Romanian law that would deserve to be protected through international public policy exception. The effectiveness of Regulation (that expressly provided texts on inheritance pacts) and its spirit preclude contrary solutions³²⁴. For matters of form, will be considered the conflict rule of art. 27 (which allows access to several

Circulation, Reconnaissance mutuelle et exécution. Éventuelle législative initiative européenne de l'Union (Royaume-Uni, France, Allemagne, Pologne, Roumanie, Suède)", available at http://www.europarl.europa.eu/meetdocs/004_2009/documents/dv/juri_oj_2008_1202_forum_pe408329_/JURI_OJ_2008_1202_forum_pe408329_fr.pdf (p. 60).

³²⁰ Ibid, p. 66, no. 8.1.1.

³²¹ See P. Wautelet, *Article 59, cit. op.*, p. 672, no. 30-31.

³²² P. Wautelet, *Article 59, cit. op.*, p. 678, no. 49.

³²³ According to recital no. 63 of the Regulation: " *The term 'the legal acts or legal relationships recorded in an authentic instrument' should be interpreted as referring to the contents as to substance recorded in the authentic instrument. The legal acts recorded in an authentic instrument could be, for instance, the agreement between the parties on the sharing-out or the distribution of the estate, or a will or an agreement as to succession, or another declaration of intent. The legal relationships could be, for instance, the determination of the heirs and other beneficiaries as established under the law applicable to the succession, their respective shares and the existence of a reserved share, or any other element established under the law applicable to the succession.* "

³²⁴ A. Bonomi, *Article 35, cit. op.*, p. 549, no. 42. This position can also be found in France, Italy, Spain - see references cited by A. Bonomi, *ibid*, footnote 61

laws – including a German one, the state where the document was drafted and whose nationality was late).

Practical case 7 (for notaries and courts). Authentic foreign testament. Challenging Authenticity. Challenging the substantial validity. X, French, ordinarily resident in Romania, draws up a legatee through which he institutes Y, one of the daughters of a universal legatee. A Romanian notary is seised about the succession, but Z, the other daughter, challenges before the Romanian authorities contesting the will, on the one hand, its authenticity and on the other hand, its total disinheritance. How should they proceed?

Elements of settlement. In accordance with Art. 59, a distinction must be made between questions concerning the authenticity of the document and those concerning the merits of the case.

Challenging Authenticity. With regard to challenging the authenticity of the document, it should be considered art. 59, para. 2, which states: *"Any challenge to the authenticity of an authentic document is to be made before the courts of the Member State of origin and shall be settled under the law of that state. The authentic challenged document doesn't produce any evidentiary effect in another Member State as long as the action is pending appeal to the competent court"*.

Based on this text, the complaint related to Romanian courts will decline jurisdiction in favor of the French courts exclusive jurisdiction to deal with any action relating to enrollment forgery (art. 303 CPC fr.); trial (in France) will be based on substantive law of France, which shall specify in particular the reasons for which the instrument could be abolished, following the French also procedural rules.

If disputed the authenticity of the will in France (and in this respect will be made by the interested party evidence) application to challenge the contents of the will shall be rejected, because according to art. 59§2.2, in proceedings in the State of origin evidentiary effects of an authentic document will be suspended in the other Member States.

If not submitted any evidence of false registration procedure initiated in France, the likely effect of the document must be accepted in accordance with art. 59§1, as it is defined by French law; or because the State of origin, the authentic full proof (*pleine foi*) on legal document described³²⁵, the same legal power must be accepted in Romania.

Challenging the will content. Accepting the likely effect of the authentic document does not mean accepting substantial *negotium's* effectiveness for which it is included. In accordance with art. 59, para. 3 *"Any challenge to the legal acts or legal relationships recorded in an authentic instrument shall be made before the courts having jurisdiction under this Regulation and shall be settled under the law applicable under Chapter III. The authentic instrument challenged shall not produce any evidentiary effect in a Member State other than the Member State of origin as regards the matter being challenged as long as the action is pending appeal to the competent court."*³²⁶

Because the deceased had his last habitual residence in Romania, Romanian courts will be declared competent based on art. 4; if the deceased has not expressed in accordance with art. 22 or 24, the option for French law as the law of inheritance, the courts will resolve the matter on the basis of Romanian law³²⁷ (the law of the state where the deceased had his last habitual residence - art. 24§1 in conjunction with Art. 21 of the Regulation).

³²⁵ Art. 1319 of the Civil Code fr. "(1) *L'acte authentique fait pleine foi de la convention qu'il renferme entre les parties contractantes et leurs héritiers ou ayants cause*" - see CNUE, "Etude comparative ...", cit. op., p. 59, no. 7.2.1.

³²⁶ See the final recital 63: *"... A party wishing to challenge the legal acts or legal relationships recorded in an authentic instrument should do so before the courts having jurisdiction under this Regulation, which should decide on the challenge in accordance with the law applicable to the succession."*

³²⁷ Art. 1086 et seq. NCC, especially art. NCC 1088 setting out the extent of the estate.

Practical case 8 (for instance). Foreign authentic instrument. Enforceability. *X, a German citizen residing in Romania dies. His heirs make a voluntary partition, found by an authentic document concluded in Germany. One of the heirs refuses to pay any compensation promised so that the other is forced to seek declaration of enforceability in Romania for the German document. How to be protected?*

Elements of settlement. Text that should be considered is art. 60 of the Regulation: to obtain the exequatur of the authentic foreign document, it establishes a prerequisite - the document in question must be enforceable in the Member State of origin in accordance with the requirements laid down by the law of that state. In Germany, ZPO § 794.5 includes authentic instruments in the category of enforceable instruments imposing requirements³²⁸ not found in the Romanian law: according to it, these are enforceable "*documents, certified by a court or a German notary in his official powers in the prescribed form provided that they contain a claim subject to a transaction, other than a lease, and the debtor to have submitted/accepted the immediate enforcement of the claim in question.*"³²⁹ This clause of submission to enforcement stipulates the enforceability of the document; if it is missing, the application will be rejected.

Practical case 9 (for courts). Foreign authentic instrument. Enforceability. *How should it be protected in the event of the previous practical case, if the authentic partition document was made in France?*

The condition of enforceability (in the state of origin) of the authentic instrument whose exequatur is required is performed: in France, as well as in Romania, the authentic instruments are enforceable³³⁰. This character will automatically circulate in all Member States³³¹, a person must undergo the procedure generally established on the exequatur decisions.

In a first phase, the procedure will be administrative and non-contradictory - it will regard verifying the documents submitted (request for exequatur, copy of the concerned document that meets the conditions for guaranteeing the authenticity certificate referred to in art. 60§2, on the uniform European form, any translation; unnecessary legalization apostils); with this verification, the court shall declare the instrument enforceable. The declaration can be challenged (in accordance with art. 50 or art. 51), during which the court will check whether any effects of the document are likely to violate international public order (art. 60§3). The exequatur having been conferred, the authentic foreign document will be declared enforceable in Romania, as well.

Practical case 10 (for the courts and notaries). Foreign decisions. Public order. *A, Belgian citizen of Romanian origin married in Belgium in 2010 with a coworker (same-sex marriage), B, Belgian citizen. The couple lived in Brussels uninterruptedly until 2016, when A was killed by a ruthless disease. The estate comprises two immovable properties, one located in Romania and one in Belgium, and a substantial bank account. Parents of the deceased, X and Y, Romanian citizens, have unsuccessfully challenged the decision in Belgium. In order to register his right in the land registry, B seeks recognition of the Belgian decision. X and Y are opposed, arguing that it is contrary to public policy in Romania; in parallel, otherwise they address a Romanian notary for the opening of the succession. How should we proceed?*

³²⁸ A situation similar to German law is found in Polish law -see CNUE, "Etude comparative ..." cit. op., pp. 63-64.

³²⁹ § 794 ZPO Weitere Vollstreckungstitel: (1) *Die Zwangsvollstreckung findet ferner statt: [...] 5. aus Urkunden, die von einem deutschen Gericht oder von einem deutschen Notar innerhalb der Grenzen seiner Amtsbefugnisse in der vorgeschriebenen Form aufgenommen sind, sofern die Urkunde über einen Anspruch errichtet ist, der einer vergleichswisehen Regelung zugänglich, nicht auf Abgabe einer Willenserklärung gerichtet ist und nicht den Bestand eines Mietverhältnisses über Wohnraum betrifft, und der Schuldner sich in der Urkunde wegen des zu bezeichnenden Anspruchs der sofortigen Zwangsvollstreckung unterworfen hat*".

³³⁰ See CNUE, "Etude comparative ...", cit. op., p. 62, no. 7.3.1.

³³¹ The situation is different from that established for the European enforcement of art. 25§2 of the European Regulation 805/2004.

In principle, in accordance with art. 39, para. 1 of the Regulation, foreign decisions (occurring in succession) shall be recognised in all other Member States without any special procedure: recognition is automatic, it occurs by operation of law and therefore, in the absence of a challenge, foreign decision control should be excluded³³².

In case of challenge, as in this case, the court may determine whether there is a ground for refusal of recognition. Any contrariety of the foreign decision and international public policy of the forum will be so considered, indicating that the maintenance of international harmony of solutions and ensuring continuity across borders legal situations sometimes justify withdrawal / attenuation of the reaction mechanism. Refusal of recognition is rather an exception³³³, and given that, to facilitate the achievement of the objectives of the Regulation - uniformity of solutions and facilitation of the movement of decisions between Member States - Article 40 requires indisputably restrictive interpretation and application³³⁴.

Exceptional and restrictive grounds for refusal of recognition translate into a series of concrete rules, compliance with which cannot be avoided. Thus, in general, it is not checked if the decision itself is contrary to public policy or if it could be delivered locally, but the effects would be absolutely unacceptable recognizing the legal order of the court (with special attention regarding avoid discrimination³³⁵). It also needs to breach the fundamental principle of the forum to be a manifest and particularly serious³³⁶ it must be evaluated and based on the legal situation and for links (appreciation *in concreto*, depending on the circumstances of the case). Finally, monitoring compliance with public policy as grounds for recognition must be made in light of the prohibition of review of the merits of the foreign decision (art. 41): therefore non-recognition may not be possible simply because the requested court interpreted and applied other provisions of the Regulation would apply another law or had taken a different solution from that of the court of origin.

Turning to the actual case files, it should be noted that what the mind is not so much the main effect of the decision (to confer rights on a man's inheritance in succession another man), but the nature of the legal relationship between the two (homosexual marriage), subsidiary alternative, but undeniable. However, regarding this type of marriage, recent developments in ECHR case law on the protection of family life require however, if not a reconfiguration of the

³³² See II. Pretelli, Article 40, cit. op., p. 585, no. 4. Solution can be deduced indirectly, by linking art. 39§2 and 48 of the Regulation: normally, the recognition procedure involves two phases and art. 48 expressly prohibits courts for the first of these, any initiative in controlling the grounds for refusal of recognition.

³³³ As it has been noted already in a comprehensive study in 2002, drawn on several national reports (DeutschesNotarinstitut, H. Dorner, P. Lagarde, *Étude de droit comparé sur les règles de conflits de juridictions et de conflits de lois relatives aux testaments et successions dans les États membres de l'Union Européenne*" available on the following website: http://ec.europa.eu/civiljustice/publications/docs/testaments_successions_fr.pdf), the reserve of public order should not in generally play a very important in terms of recognition of decisions from other Member States, it is most often limited to sanction discriminatory decisions (p. 30). See E. Pataut, „L'exception d'ordre public et la proposition de règlement relatif à la compétence, la loi applicable, la reconnaissance et l'exécution des décisions et des actes authentiques en matière de successions et à la création d'un certificat successoral européen", 2010:<http://www.europarl.europa.eu/document/activities/cont/201012/20101210ATT08870/20101210ATT08870FR.pdf>, sp. p. 13.

³³⁴ II. Pretelli, Article 40, cit. op., no. 3 et seq., p. 584-595; see, A. Oprea, "international public policy exception provided DIP and inheritance" SUBB, 4/2013, p. 165 et seq. no. 18.

³³⁵ See recital 58 in the preamble that, trying to fit using this mechanism, expressly states that "... the courts or other competent authorities should be able to apply the public policy exception [...] to refuse to recognize - or, as the case may be, accept or enforce a decision, an authentic instrument or a court settlement from another Member State when doing so would be contrary to the Charter of Fundamental Rights of the European Union, and in particular Article 21 thereof, which prohibits all forms of discrimination."

³³⁶ See also European Court of Justice regarding the possibility of invoking "public order" as justification of national restrictive measures, stating constant requirement as a "real threat, present and sufficiently serious threat affecting one of the fundamental interests of society" and the need for proportionality between the threat concerned and measures to counter them - see for example, CJEU, 27 October 1977, af. 30/77 *Bouchereau*; CJEU, July 10th, 2008 C-33/07 *Jipa*.

fundamental values so legally married same-sex couples can benefit from *de plano* recognition of their status in European countries, at least one modular public policy³³⁷ intervention, because the least disruptive effects thereof (such as patrimonial) can be produced³³⁸. In this context, given the strict rules of interpretation and application mentioned above, and including the fact that the degree of the matrimonial relation has however in this case only one "second-class" scope, we consider that the requirements for triggering the public policy exception are not met³³⁹ and non-recognition is not justified.

With the recognition (by operation of law or established by court), the foreign decision will become *res judicata* in the forum state. It corresponds, on the one hand, a positive event: the decision will enjoy substantial effectiveness - issues that it decides on the validity of the will, the probate law applied to rights of heirs ... will be considered as definitively established. *Res judicata* has a negative dimension: once sliced dispute is prevented the resumption of proceedings (*non bis in idem*). The seised notary will dismiss the application of X and Y.

Practical case. 11. Authentic Document. (Not) – Breaching the public order (for the courts and notaries). *X, Senegal, polygamist, dies in a road accident in France. A French notary of the habitual residence of the deceased produced a genuine document of partition, whereby each of the two wives of X inheritance rights are recognized as "widow". At one time football player in Romania, X held here an immovable property and shares in a LLC so that widows require acceptance of the authentic French document to be able to make changes related to the land registry and trade register. How to proceed?*

In accordance with art. 59, the evidentiary effects of foreign authentic instruments will be automatically accepted: according to possible differences between the Member State of origin and that of destination, foreign documents will have exactly the same evidentiary effects as those native or, accordingly, will produce the most comparable effects. Because in this case it is about states following Latin notary system³⁴⁰, it is considered that the documents have authentic full evidentiary effects with respect to the legal document or transaction included, acceptance will not raise in this case the effects of adjustment problems; circulation should be automatic.

Acceptance of foreign authentic instruments is still likely to be refused where it would be contrary to the public policy of the State of destination (art. 59 of para. 1 shall end). Being a restrictive effect measure, it requires restraint and caution from the authorities concerned:

³³⁷ A. Oprea, "On the recognition of marital status acquired abroad and European protection of the right to family life" SUBB, 4/2012, p. 149-169, no. 16 et seq., sp. no. 27 and 28.

³³⁸ See the Supreme Court of Cassation in Italy, no. 4184/2012 of March 15th, 2012: „I componenti della coppia omosessuale, conviventi in stabile relazione di fatto, se - secondo la legislazione italiana - non possono far valere nè il diritto a contrarre matrimonio nè il diritto alla trascrizione del matrimonio contratto all'estero, tuttavia - a prescindere dall'intervento del legislatore in materia - quali titolari del diritto alla "vita familiare" e nell'esercizio del diritto inviolabile di vivere liberamente una condizione di coppia e del diritto alla tutela giurisdizionale di specifiche situazioni, segnatamente alla tutela di altri diritti fondamentali, possono adire i giudici comuni per far valere, in presenza appunto di "specifiche situazioni", il diritto ad un trattamento omogeneo a quello assicurato dalla legge alla coppia coniugata e, in tale sede, eventualmente sollevare le conferenti eccezioni di illegittimità costituzionale delle disposizioni delle leggi vigenti, applicabili nelle singole fattispecie, in quanto ovvero nella parte in cui non assicurino detto trattamento, per assunta violazione delle pertinenti norme costituzionali e/o del principio di ragionevolezza" (cited in A. Oprea, *cit. op. supra*, no. 16). See also in France (before the adoption of the law as regards "marriage for all", May 2013), D. Bureau, H. Muir-Watt, *Droit international privé*, PUF, 2007, t. 2, p. 122, no. 726: „la distance de l'union maritale homosexuelle par rapport à la conception du for [...] ne semble pas justifier non plus de faire jouer l'exception d'ordre public au niveau de la reconnaissance de l'union homosexuelle célébrée à l'étranger entre époux tous deux de statut personnel permisisif”.

³³⁹ See for a similar position with regard to Italy, II. Pretelli, Article 40, *cit. op.*, no. 17, p. 592.

³⁴⁰ The notary gives authenticity of legal documents contained in the drafted documents, he advises the parties and shall ensure compliance with the law; authenticity of the signature, content, document date. Notarial acts enjoys a presumption of legality and the accuracy of the content, and can be challenged in extremely difficult conditions. For differences and similarities between several European countries (Great Britain, France, Germany, Poland, Romania, Sweden), see CNUE, "Etude comparative ...", *cit. op.*, p. 5 et seq., p. 166.

breach of public order in question should be "manifestly" (obviously) and what should count are the actual effects of acceptance of evidentiary force of the foreign authentic instrument. Because essentially what is accepted in accordance with art. 59, para. 1 are the evidentiary implications of the document on a number of factors (such as involvement of a notary who has found a true testament to the composition of the estate, the number and quality of heirs, and that set quotas or goods due to the heirs, any statements by the parties, signatures, date of the document ...), the public policy exception should not have, perhaps, a genuine field of application³⁴¹

However, because along with this evidentiary effects also *negotium* circulates, (indirectly) here comes the question of whether to assess a possible breach of the public policy of the forum by foreign authentic instrument could be considered substantial implications of the document. Western doctrine is divided: for example, while J. Foyer is favorable yes³⁴², P. Wautelet believes that accepting the weight of foreign document should not be conditional on its content (content validity should otherwise be determined on the basis of *lex successionis*, the competent authorities in accordance with Chapter II of the Regulation - see art. 59§3)³⁴³ (position that we share it). Given the possibility of this conflicting interpretation, a question relevant to the European Court of Justice to clarify the situation is not excluded in the future.

Even they shall opt for a broader range of intervention of the public policy exception (on not only the evidentiary effects of the document, but including its substantive content), this does not mean that in the present case given foreign authentic instrument any effects will be refused. The general rules regarding the use of this mechanism - restrictive interpretation and *in concreto*, caution, the idea of achieving the right balance between the protection of private interests of the state concerned and the objectives of integration and freedom of movement within the European³⁴⁴ area - must receive the application.

Of course, according to the Romanian law, the principle of marriage monogamy is fundamental, and its protection through public policy exception is, in principle, possible. But in this case, it is not the original creation, in Romania, of a situation (polygamy) that directly, obviously, manifestly affects this principle and justifies the intervention exception due to its implications for local law. It is not any actual recognition of the family relationship in question, which also could be sometimes considered, depending on the case relationships with legal local order, contrary to public policy³⁴⁵. Because the authentic document in the present practical case doesn't regard the essential and primary the family relationship in question, but a division of property between several individuals, taking into account, it is true, a certain family relationship, we believe that recognition brings a too remote touch to a Romanian law fundamental principle so that the public policy exception might be invoked.

³⁴¹ See P. Wautelet, Article 59, cit. op., p. 671-672, no. 30.

³⁴² J. Foyer, "Reconnaissance, acceptation, et exécution des jugements étrangers, des actes authentiques et des transactions judiciaires", cit. op., p. 141, sp. 163, no. 402: The author believes that on authentic instruments should do the same decisions, and provides a concrete example of sharing authentic document, made abroad and refusing inheritance rights of a child born out of marriage, whose acceptance in order French legal should be refused.

³⁴³ P. Wautelet, Article 59, cit. op., p. 672, no. 31.

³⁴⁴ See *mutatis mutandis*, A. Oprea, "International public policy exception provided in DIP and inheritance" SUBB, 4/2013, p. 165 et seq., sp. no. 18. Also on the restriction of the scope of intervention of this exceptional mechanism, with sharing a number of increasingly large shared values, see by the same author, "European Convention on Human Rights and enforcement of foreign in private international law", *Romanian Rev. of private international law*, no. 1/2006, p. 341.

³⁴⁵ In the French law case, taking into account the theory attenuated effect of the public policy exception, the courts position on the recognition of valid polygamous marriages celebrated abroad knows nuances: if recognition of personal effects (e.g. the obligation of cohabitation) of such unions is refused, it is not the same way things are in terms of economic effects (e.g. food rights, rights of inheritance) – See Cass., 1st civ, 3rd of January 1980 *Bendeddouche, RCDIP*, 1980, p. 331, H. Batiffol note; *JDI*, 1980, p. 327, note M. Simon - Depitre.

Chapter IV. Practical cases regarding the European Certificate of Succession

Practical case 1 (for notaries). European certificate of succession. Competence for issue. Applicants. *X, Romanian national appointed executor of Y, requires a Romanian notary in Cluj, city of last habitual residence of the deceased, the issuance of a European certificate of succession; he gives reasons for his request showing that he needs it to be able to gather information on any property which the deceased would have had in Cyprus, a state where he lived for 15 years. Bank Y, which the deceased owed a sum of money, also filed an application for the same purpose. How to proceed?*

In accordance with art. 64 of the Regulation, in determining jurisdiction to issue the European certificate of succession should be considered the same rules as those laid down on contentious situations (Chapter II Jurisdiction - Art. 4, 7, 10 and 11). Given the location of the habitual residence of the deceased (the first criterion in the hierarchy retained by these texts) and being indisputable that notaries fall within the authorities sphere that can issue such a certificate (art. 64 b), the notary in Cluj may be declared competent.

Persons entitled to obtain a European certificate of succession. Despite the name of the document in question - European certificate of succession – this can be obtained by persons other than heirs. From the correlation of art. 65, para. 1 and art. 63, para. 1 results without a trace of doubt that the executors fall into the category of persons concerned. Instead, the creditors of succession or creditors of heirs are excluded: on one hand, it is doubtful the benefit that these people would have once they are given the European certificate of succession (as unlikely as an heir/owner of a property agrees to pay a debt or remit a good simply on presentation of the certificate); on the other hand, the objective of establishing a European certificate of succession is to be primarily an instrument of proof of the heirs' rights in a succession, not a way of implementing the claims of creditors. Finally, although art. 70 states that certified copies may be issued to any person (other than the applicant) demonstrating a legitimate interest, it is not clear whether the third parties (the bank in this case) are concerned. One answer could be argued from recital 72 in the preamble, which seems to allow such communication to the states, under their laws concerning public access to documents³⁴⁶.

To obtain a certificate, it is sufficient that the applicant may wish to prove a certain quality in relation to third parties. His entitlement to obtain the certificate must be proved to the seized authority; for example, the executor should submit a copy of the will which is given as such.

Although, explaining European certificate of succession content, art. 68 of the Regulation sets out a broad list of information, they are not always all binding; legal text expressly states that the information will appear on the certificate concerned only to the extent of necessary for the purpose it is released - in this case, to prove the quality of executor and specifying powers incumbent in this position.

Practical case 2 (for courts). European certificate of succession. Effects. *X, a German national, appears before a Romanian bank and, invoking a European certificate of succession issued in Germany, seeks access to the accounts of Y, Romanian national, who died. Pointing out that the legal nature of this document is not clear, the bank refuses the request and it is sued. How to proceed?*

³⁴⁶ Recital 72 in the preamble: "...The original of the Certificate should remain with the issuing authority, which should issue one or more certified copies of the Certificate to the applicant and to any other person demonstrating a legitimate interest. This should not preclude a Member State, in accordance with its national rules on public access to documents, from allowing copies of the Certificate to be disclosed to members of the public."...

According to art. 69 of the Regulation, the European certificate of succession should be accepted automatically, by operation of law, in all Member States without further formalities. Its effects are not subject to any proceedings for recognition or enforcement, but immediately propagates in all Member States in which the Regulation applies. Its content cannot be controlled or blocked in the destination³⁴⁷, and any beneficiary claiming succession property rights will be able to rely on them.

Effects of the certificate, based on art. 69 of the Regulation, are essentially ones of evidence order (see recital no. 71 in the preamble). Its probative force will look all elements determined in accordance with the law jurisdiction, and mentioned therein: among these, there are people who were expressly given the quality of Succession and entitlements of each - *"It is alleged that the certificate proves exactly the requirements set by law applicable to the succession or under any other law applicable to specific elements. It is assumed that the person mentioned in the certificate as the heir, legatee [...] is mentioned in the certificate status and/or to hold the rights or powers set out in the certificate, without any conditions and/or restrictions attached to those rights or powers than those stated in the Certificate"* (art. 69, para. 2).

One consequence is clear: on one hand, the person or persons mentioned in the certificate as the heir or legatee can make use of this capacity in dealing with various public authorities or third parties; on the other hand, the latter cannot request further evidence³⁴⁸ or documents than the certificate (actually certified copies).

Even though art. 69, para. 2 speaks only of the existence of a presumption about the veracity of the information contained, it must be understood in the context of the possibilities for contesting the certificate: after following the procedure for modification or withdrawal (art. 71) and by exercising an appeal (art. 72), its effects can be undoubtedly changed. Rebut the presumption could also be done with the presentation of any decision obtained in an action on the merits, establishing a reality different from that expressed in the contents of the certificate. In this case there is no information about any of the latter two alternatives, so that the bank should have to, immediately, based on that certificate, in accordance with art 69, allow the heir access to the accounts. Because he did this, the seised court will only find a breach of Regulation (legal document which has direct effects not only mandatory for public authorities, but also for private persons and entities).

Practical case 3 (for instance). European certificate of succession. Effects. *Acting on a European certificate of succession issued by the French authorities, bank X allowed Y, a person designated therein as executor, access to the bank account opened on behalf of Z (deceased). A year later, relying on another European certificate of succession, also issued in France on the same sequence of Z, A addresses the bank with a request for access to the account. Pointing out that it was closed by Y, the bank rejects the request; it is sued by A, which seeks recovery of damages suffered...*

Element of settlement: Art. 69, para. 3: *"It is considered that any person acting on information certified in a certificate, makes payments or passes on property to a person mentioned in the certificate as authorized to accept payment or property transactions concluded with a person authorized to accept payment or property, unless that person knows that those contained in the certificate are not accurate or is unaware of this because of gross negligence."*

To protect third parties acting on a European certificate of succession, art. 69, para. 3 establishes a specific substantive rule, under which payment shall be considered valid by this person (heir, legatee, executor) acting on such a certificate, which has an appearance of conformity.

³⁴⁷ Its challenging it is still possible in the state of origin in accordance with art. 71 or 72

³⁴⁸ For example, it will not be required nor birth certificates or marriage and even death certificate - see P. Wautelet, *Article 69, cit. op.*, p. 789, no. 28, p. 790, no. 32

It does not distinguish between goods situating place, their nature (property, tangible or intangible), or how to transfer (as particular or universal, for consideration or free of charge). Privacy third party (a bank) will be provided with two conditions:

A. The third party in question must have acted on the information contained in the certificate, which should detail the rights due/powers of the persons concerned; if only approves the European certificate of succession was to collect data on the extent of the estate, thus limiting the powers of the heir or executor and third party ignored these limitations, the protection will not work. In this case, such a restriction does not exist.

B. The third party must have been in good faith. When he knew that the information contained in the certificate does not correspond to reality (being informed that the certificate had been amended, withdrawn or canceled), or ignored it due to gross negligence, the protection will not work. These issues will be proven by the one who wants to bind to *solvens*, and in this case there is no indication in this regard. The simple presentation of a new certificate consequent to that on which payment was made is not sufficient to force the bank to pay a second time so that the court should dismiss the action. The possibility that the heirs moves against the executor should be reserved.

Practical case 4 (for notaries). European certificate of succession. Effects. *X, an Italian citizen ordinarily resident in Romania dies in a car accident. From his succession belong an immovable property located in Italy and Romania. Y's wife, Romanian citizen, obtains a European certificate of succession from a Romanian notary, in which she appears as the sole heir. Wanting to sell one of the properties located in Italy, Y faces opposition of Z who manages that property, which claims to be the son of X. Y requests the recognition of the European certificate of succession from the Italian notary that she had asked to conclude the contract of sale. How to proceed?*

The European certificate of succession, one of the most important innovations made in international successions by Regulation 650/2012, is a document with an undeniable role in facilitating the practical position stakeholders - heirs (including his wife), legatees, executors³⁴⁹.

Its effectiveness is a very wide one: in accordance with art. 69, the effects of the European certificate of succession will occur in all Member States without the need for any procedure (recognition or enforcement) without prior and possible control of the country of destination³⁵⁰, for example in terms of competence of the issuing authority, the vexation of its contents with the international public order or other grounds for refusal of recognition/enforcement (in accordance with art. 40).

Persons appointed as heirs within the will will be able to rely on the content of the certificate in terms of their quality and their due rights without this advantage to be able to be limited or restricted in the destination state by any additional requirements: according to art. 69, it is deemed to certify accurately the existence of the information mentioned therein. Even if there are people who challenge the content of the European certificate of succession, the authorities of the country of destination cannot do anything in principle, as long as the State of origin has not been given at least one order suspending its effects until the settlement of the opposition (art. 73) and should proceed to concluding the contract. In the event that a third party wishing to purchase goods from the person referred to by European certificate of succession was informed - directly by the person who denies the certificate or by the notary from the country of destination - with regard to the existence of possible inconsistencies between the contents of that certificate and reality, and yet decided to contract, he risks losing its protection which is

³⁴⁹ It does not enjoy, instead, the same advantages that others can rely indirectly related to succession rights as second-class beneficiaries of some trustee substitutions or creditors of a succession or inheritance - see P. Wautelet, *Article 63, cit. op.*, and no. 7-11, p. 722.

³⁵⁰ This should increase the precautions taken by authorities required for its issuance and increase the role of prior checks made.

normally afforded by art. 69§4 of the Regulation, to the extent that the legal text states that the third party is considered "*to become party to a transaction with a person authorized to dispose of the property concerned, unless that person knows that those contained in the certificate does not match reality or not aware of this because of gross negligence.*"

The case 5 (for courts and notaries). Challenging the European certificate of succession. *In this case above, advised by a lawyer, Z attacks the certificate of inheritance in Romania. How to proceed?*

Under the terms of the Regulation, challenging European certificate of succession is possible only in the Member State of origin. The European legislator has organized two possible "remedies" against it - before issuing authority (art. 71) or before a judicial authority of the State issuing authority (art. 72). A distinction must be made depending on the denial method chosen by Z chosen, both being possible in this case.

Challenging the European certificate of succession to the issuing authority. Watching a solution likely to facilitate fast resolution of the complaint, art. 71 gives the power to revoke or modify a European certificate of succession exclusively to the issuing authority. According to the legal text, the procedure may be initiated by any interested person demonstrating a legitimate interest³⁵¹; to the extent that the applicant claims to be the heir of the deceased and could have asked himself such a certificate, the legitimate interest to the request must be considered there.

When the appeal regards, as if in the concrete hypothesis into question, the existence of a discrepancy between reality and content of the certificate, the seised authority (the issuing notary) must choose between modification or withdrawal of the certificate; the circumstances that can be considered in this respect, but they are necessarily related to the magnitude of discrepancies or changes that should be made. In this case, the new element of fact - the presence of an additional heir - means that in light of the law of inheritance, the content certificate (on the number of heirs, their shares and property ideal due specifically assigned) to be wrong, so the very withdrawn of it is justified. If the information and documents submitted to the issuing authority indisputably confirm the applicant's claims and do not raise discussion about their veracity (e.g. an original birth certificate where the deceased is mentioned as the father of the applicant, an acknowledgment of paternity or adoption decision)³⁵², it can not only withdraw the inadequate certificate, but, on request inclusively issue a new one.

During the needed period to resolve the complaint, the licensing authority may, under Article 73, suspend the effects of the certificate; suspension will not be automatic but will only be ordered at the request of the person concerned and only when there is sufficiently serious doubts about its future situation. The measure of suspension will necessarily be temporary, and during its existence, after informing beneficiaries' certificate effects, defined in art. 69 of the Regulation, will be paralyzed.

Withdrawal of the certificate does not automatically affect immediately, and copies of certificates previously issued, which must not be returned to the issuer and continue to move freely vocation, during their term (unless the suspension). In order to limit abuses and save the rights of persons concerned, the authority (notary) who disposes the withdrawal of the certificate is required to promptly inform all persons to whom they were issued such copies (persons in the

³⁵¹ The phrase should receive an autonomous interpretation in all Member States, established on the basis of the regulation and the objectives pursued by the European legislator with the establishment of a European Certificate of Succession - see P. Wautelet, *Article 71, cit. op.*, no. 4, p. 816

³⁵² In our opinion, withdrawal of the certificate is justified including where relevant documents submitted are sufficiently pertinent to raise serious doubt on the correspondence between the real situation and the data contained therein; such as the situation abroad where there is a dispute regarding the paternity of a child, the notary may refuse to issue the certificate until its decision becomes final and it has all the data for the precise determination of heirs (art. 67§1, the final sentence, a), as well when it is informed about the start of such a dispute, the outcome of which could invalidate the elements specified in the certificate, he may order the withdrawal of the certificate.

special held list in accordance with Art. 70 §2)³⁵³. The Regulation does not include details of the modalities of this information, but the means chosen must be reliable and effective in achieving its objective³⁵⁴.

Challenging the European certificate of succession before a judicial authority. In accordance with art. 72, para. 1 of the Regulation, the applicant in this case shall have a second way to challenge the certificate: he can choose the direct exercise of the way of challenge before a judicial authority (court or tribunal, taking into account the rules of substantive jurisdiction), in the member state in which the certificate issuing authority is located (in this case, Romania). The condition required in this legal text - the applicant belongs to the category of persons entitled to request a European certificate of succession - is met. Conditions of the appeal - time for exercise, contradictory, probation - is that set by the procedural law of the forum state.

The seised court will determine, based on the law of succession and taking into account all the facts and law relevant whether the information contained in the certificate. If the applicant's claims are unfounded, the court can decide itself the withdrawal/invalidation of the certificate (in practice, the most common case, the procedure having devolution effect) or to request that from the issuing authority. As in the case of proceedings before a notary, the courts may, upon request, suspend the effects of the certificate during the resolution of the case.

³⁵³ According to this legal text, this information is mandatory only in terms of the extent ordered by the issuing authority in resolving the appeal, and not the existence of appeal (a request for modification or withdrawal of the certificate).

³⁵⁴ Art. 145 of Law 36/1995 refers to the dispositions of the Code of Civil Procedure.



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