Choice of Court and Applicable Law Under Regulation (EU) 650/2012

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PERSONALIZED SOLUTION
IN EUROPEAN FAMILY AND
SUCCESSION LAW

GUIDELINES FOR PRACTITIONERS IN CROSS-BORDER FAMILY PROPERTY AND SUCCESSION LAW

(A collection of model acts accompanied by comments and guidelines for their drafting)

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TABLE

CHAPTER 3
CHOICE OF COURT AND APPLICABLE LAW UNDER REGULATION (EU) 650/2012

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I. GUIDELINES ON CHOICE OF COURT

1. Is choice of court allowed under the Succession Regulation?

Yes, Article 5(1) of Regulation (EU) 650/2012[43] allows the parties concerned to agree on a competent court (*professio fori*). However, there is an important **limitation to the freedom of the parties' choice**: the parties may do so only if the deceased has chosen the applicable law under Article 22. If this is the case, the concerned parties may agree that a court or the courts of the same Member State are to have exclusive jurisdiction to rule on any succession matter. Under Article 22 of the Succession Regulation, the person may choose as applicable the law of his or her nationality at the time of making the choice or at the time of death.[44] The logic behind this limitation is that when the parties choose a competent court they may choose only the court of the same Member State as the applicable law because the basic idea of the Succession Regulation is the alignment of the competent court and applicable law.[45]

In addition, Article 5(1) expressly refers to the courts of "the Member State"; therefore, the choice-of-court agreement under the Regulation may not designate the courts of the third State as competent. In addition, the Succession Regulation has a limited territorial scope within the European Union. Namely, Ireland and Denmark do not apply this Regulation. Therefore, for the purposes of the Succession Regulation, these two countries are considered third States.[46]

2. May parties choose only the courts of a Member State in general, or may they also choose the exact court to be competent in the matter?

Under the Succession Regulation, the parties may confer jurisdiction on "a court or the courts of that Member State", as stated in the provision of Article 5(1) of the Succession Regulation. This in fact means

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43 Regulation (EU) 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, OJ L 201, 27.7.2012, p. 107–134.

44 See this part, section III.

45 See Whereas 27 and 28 of the Succession Regulation. See also Marongiu Buonaiuti, Fabrizio, in: Calvo Caravaca, Alfonso-Luis/Davì, Angelo/Mansel, Heinz-Peter (eds.) The EU Succession Regulation: A Commentary, Cambridge University Press, 2016, p. 150.

46 Fuchs, Angelika, The new EU Succession Regulation in a nutshell, ERA Forum, Vol. 16, 2015, p. 122.

that it is possible that the choice-of-court agreement is phrased in **either of two ways**, to designate a named court in a Member State or, generally, the courts of a Member State.

Since the Succession Regulation deals only with international jurisdiction, whereas territorial and subject-matter jurisdiction are determined by the national law of the Member State,[47] there may be pros and cons for choosing one or the other option. The choice would in most cases depend on the circumstances of a case, such as whether there is territorial competence with a single court in a Member State or whether more courts are competent and, in the former case, whether the parties know the exact court competent in the chosen Member State, whether it is likely that such competence might change between the conclusion of the choice-of-court agreement and the succession proceedings, and whether the chosen Member State comprises several territorial units, each of which has its own rules of law with respect to succession.

3. May the parties choose more than one court to have jurisdiction?

The parties may choose **only one court** to have jurisdiction over the succession matter, or they may choose the courts of **only one Member State**, in which case the exact court will depend on the territorial jurisdiction pursuant to the national law of that Member State, as explained above.[48] In either case, the chosen court(s) will have **exclusive jurisdiction**. This entails that whenever the court is chosen as competent, other courts seized with the matter must decline jurisdiction.[49]

4. Does the choice-of-court-agreement have to be concluded in writing?

Yes, Article 5(2) prescribes that the choice-of-court agreement **must be expressed in writing**. Moreover, it must be **dated and signed** by the parties concerned. In line with other European private international law regulations, any communication by electronic means that provides a durable record of the agreement is deemed equivalent to writing.[50] When concluded in the electronic form, the written agreement will normally have the date recorded as part of the electronic communication (in any case, the parties should ensure that it is recorded), while the signature should be an electronic signature or another technical means that identifies the respective person, as per most commentators.[51]

5. May the parties conclude a choice-of-court agreement at any time?

Yes, Article 5(1) of the Succession Regulation does not specify at what point in time the parties concerned may enter into a choice-of-court agreement. However, as previously indicated, the chosen court must coincide with the law chosen by the deceased. The deceased may choose only the law of his or her nationality, and he or she may choose between the nationality he or she has at the time of making the choice or that at the time of death. Therefore, it follows that the parties concerned may agree on a competent court during the deceased's life or upon his or her death. However, if the parties do so during the deceased's life, there is a risk that he or she may become a national of another Member State and thus trigger an according change in the choice of law. A more likely scenario could involve a deceased who possesses two nationalities and, after initially choosing the applicable law of one nationality, decides to change the applicable law to the one corresponding to the other nationality. In these circumstances, the choice-of-court agreement aligned with the previously chosen law becomes invalid.

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47 See in relation to territorial, Poretti, P., Nadležnost, nadležna tijela i postupci prema Uredbi (EU) br. 650/2012 o nasljeđivanju, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, Vol. 37, No. 1, 2016, p. 571.

48 See this section, question 2.

49 See Article 6 of the Succession Regulation.

50 See for instance Art. 25(2) of the Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351, 20.12.2012, p. 1–32.

51 Marongiu Buonaiuti, op. cit., p. 158.

6. Who are the necessary parties to the choice-of-court agreement?

This is an important issue because it might prove to be a difficult task to list in advance all persons with an interest in the succession following the death of a person. Some interested parties appear only after the choice-of-court agreement is concluded. Actually, **all parties interested in succession are necessary parties to the choice-of-court agreement**, but the absence of any of them may be remedied subsequently under the strict condition of submission to the jurisdiction. Article 9 provides that the chosen court will retain competence under the agreement only if parties external to the agreement enter an appearance without contesting the jurisdiction of the court. If, however, the parties external to the choice-of-court agreement contest the jurisdiction, the chosen court must decline jurisdiction.

7. Is the chosen court competent for all or just some of the assets?

In principle, the court designated by the choice-of-court agreement has the **competence to decide on all assets of the deceased**, regardless of their location, pursuant to the general principle of the Regulation on unity of assets (see Article 4). However, under Article 12(1), if the estate of the deceased comprises assets located in a third State, the Member State court seized to rule on the succession may, at the request of one of the parties, decide not to rule on one or more of such assets if it may be expected that its decision about those assets will not be recognized and declared enforceable in the third State. In addition, the parties may agree that any issue of succession may be subject to the limitation of the scope of the proceedings under the law of the Member State of the court seized.

8. In what circumstances is it recommended that the parties conclude a choice-of-court agreement?

The backbone of the Succession Regulation jurisdictional rules is the **deceased's habitual residence**. According to the general rule of jurisdiction prescribed in Article 4, jurisdiction lies with the court in which the deceased has his habitual residence at the time of death, and this is coupled with the applicable law determined by the same connecting factor. If the habitual residence of the deceased at the time of death is not located in a Member State, pursuant to Article 10, the courts of a Member State in which assets of the estate are located are competent to rule on the succession as a whole if the deceased either had the nationality of that Member State at the time of death or previously had his or her habitual residence in that Member State and, at the time the court is seized, a period of not more than five years has elapsed since that habitual residence changed.

It follows that in the absence of the choice-of-court agreement, jurisdiction is linked with the deceased's habitual residence or the location of his or her assets. If the deceased, in the years preceding his or her death, lived in more than one Member State or throughout the year lived periodically in different Member States, it may be questionable whether he or she had established habitual residence in one or more of these Member States.[52] With regard to localization of assets, if the deceased has assets in multiple states, the localization of the assets may prove to be a burdensome and time-consuming task.[53] In such circumstances, the parties concerned may benefit from agreeing on a competent court, provided that the deceased chose the applicable law in accordance with Article 22 of the Succession Regulation, the choice of law being advantageous for the same reasons.

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52 See Whereass 23 and 24 on determining habitual residence of the purposes of the Succession Regulation. See also Knol Radoja, Katarina, Odstupanja od načela jedinstva nasljeđivanja u Uredbi EU-a o nasljeđivanju, Pravni vjesnik, Vol. 35, No. 2, 2019, pp. 54-55.

53 Wautelet, Patrick, Drafting choice of law and choice of court provisions under the EU Succession Regulation, Fifteen questions and some answers, available at: https://orbi.uliege.be/bitstream/2268/207471/1/Wautelet%20Succession%20Regulation%20Choice%20of%20court%20choice%20of%20law.pdf (4.5.2020), p. 1.

II. MODEL CLAUSES

CHOICE-OF-COURT AGREEMENT

III. GUIDELINES ON CHOICE OF APPLICABLE LAW

1. Is the choice of applicable law allowed under the Succession Regulation?

Yes, as was already indicated, under Article 22(1), a person may choose applicable law to govern his or her succession (*professio iuris*). The possibility of **choosing applicable law** is considered an advantage of the Succession Regulation in generating legal certainty as to the law applicable to succession,[54] as well as providing the option for the person to organize his or her succession in advance and more efficiently.[55]

2. How is the choice determined?

The choice of applicable law may be **explicit or tacit**. Article 22(2) lays down that the choice can be made expressly in a declaration in the form of a disposition of property upon death. In addition, the deceased's choice of applicable law may be demonstrated by the terms of such a disposition. Whereas 39 explains that a tacit choice of law can be regarded as demonstrated by a disposition of property upon death where, for instance, the deceased had referred in his or her disposition to specific provisions of the law of the State of his or her nationality or where he or she had otherwise mentioned that law. However, if a person wishes the law of his or her nationality to govern his or her succession, it is advisable that he or she make an express choice and not rely on the referral and mention of that law in disposition.

3. May the law of any State be chosen as applicable?

No, **only the law of the State of the deceased's nationality may be chosen**, meaning either his or her nationality at the time of making the choice or his or her nationality at the time of his or her death. If a person possesses multiple nationalities at the time of making the choice or at the time of death, he or she may choose as applicable the law of any of those States. Nationality is chosen as a sole option for the choice of law in order to ensure a connection between the deceased and the law chosen and to avoid a law being chosen with the intention of frustrating the legitimate expectations of persons entitled to a reserved share.[56]

The fact that the person chose the law to govern his or her succession gives the concerned parties possibility of designating the competent court located in the Member State whose law has been chosen.[57] If the parties concerned use this option, the competent court and applicable law will be aligned, as generally occurs in situations where no law and no court are chosen.[58]

4. Is it possible to choose the law of a third State as applicable?

Yes, Article 20 provides for the **universal application** of the Succession Regulation. Thus, any law referred to by the Succession Regulation is applied whether or not it is the law of a Member State.

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54 Rodríguez-Uría Suárez, Isabel, La ley aplicable a las sucesiones *mortis causa* en el Reglamento (UE) 650/2012, InDret, Vol. 2, 2013., p. 11, available at SSRN: https://ssrn.com/abstract=2266493 (5.5.2020).

55 Whereas 38 of the Succession Regulation.

56 Whereas 38 of the Succession Regulation.

57 See section I.

58 Damascelli, Domenico, Diritto internazionale privato delle successioni a causa di morte, Giuffrè, 2013, pp. 59 et seq.

Furthermore, Article 22(1) allows the person to choose "the law of the State", thus not restricting the choice to the law of a Member State. However, if the person has the nationality of a third State, the persons concerned will not be able to agree on a competent court.[59]

5. May multiple laws be chosen?

No, the Succession Regulation does not allow for the choice of multiple laws, either vertically or horizontally, for a single succession.[60] This is because it is founded on the principle of unity of assets (see Articles 4 and 21).

6. May the choice be modified or revoked?

Given that the person has the right to choose the applicable law in relation to his or her anticipated succession, he or she may **modify that choice or revoke it** without choosing another law instead.[61] However, there are issues of validity related to such modification and revocation, which are mentioned below.[62]

Concerns have been raised in relation to this issue of whether a modification or revocation of the act of disposition of property upon death entails the modification and revocation of the choice of law, because it remains unresolved in the Succession Regulation.[63] For this reason, it is important for the person organizing his or her succession by choosing applicable law to always explicitly state the destiny of the choice of law when modifying or revoking previous dispositions containing the choice-of-law clause.

7. Who may choose the applicable law?

Only the person, whose succession is at stake, has the right to choose the applicable law for his or her succession. The Succession Regulation does not allow such a choice to be made by any other person, including heirs, before or after the death of the person or opening of the succession proceedings.[64]

8. Does the choice-of-law clause have to be in writing?

The choice-of-law agreement does not have to be in writing. However, the issue of the formal validity of **dispositions of property upon death made orally is excluded from the scope** of the Succession Regulation. Therefore, whether orally made choice of law is valid is decided subject to the law applicable under the national conflict of laws of the Member State whose court is seized with the matter.

If the disposition is a will, the formal validity of the will and the choice of law contained therein is determined by the 1961 Hague convention on the conflict of laws relating to the form of testamentary dispositions, provided that the Member State of the court seized is a party to that Convention. When the court of the Member State, that is not a party to this Convention, is seized, the formal validity of the will and the choice of law in it are subject to the Succession Regulation, in particular Article 27(1). The

59 See this part, section I.

60 Max Planck Institute for Comparative and International Private Law, Comments on the European Commission's Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession, Rabels Zeitschrift für ausländisches und internationales Privatrecht, Vol. 74, 2010, pp. 609-613.

61 See also Article 22(4) of the Succession Regulation.

62 See this section, question 8.

63 Castelanoz Ruiz, Esperanza, in Calvo Caravaca, Alfonso-Luis/Davì, Angelo/Mansel, Heinz-Peter (eds.) The EU Succession Regulation: A Commentary, Cambridge University Press, 2016, pp. 340 et seq.

64 Damascelli, Domenico, Diritto internazionale privato delle successioni a causa di morte, Giuffrè, 2013, p. 56.

same Article also governs the issue of the formal validity of a choice of law contained in a disposition of property upon death, before the courts of the Member State in which the Succession Regulation applies.[65]

Article 27(1) lays down that a disposition of property upon death made in writing is valid in form if its form complies with at least one of the laws referred to in that paragraph. This provision is designed to favor formal validity and is consistent with the 1961 Hague convention.[66] Hence, despite the above differentiation between wills in the Member States not parties and Member States being parties to the 1961 Hague convention, the outcome should be the same.

When determining whether a given disposition of property upon death is formally valid under this Regulation, the competent authority should disregard the fraudulent creation of an international element to circumvent the rules on formal validity.

If the person wishes to modify or revoke the choice of law, according to Article 22(4), the modifications or revocation must meet the requirements of form for the modification or revocation of a disposition of property upon death.

9. What law governs the substantive validity of the choice of law?

In line with the principle established in private international law, Article 22(3) prescribes that the **substantive validity of the choice of applicable law is governed by the chosen law**, that is, whether the person making the choice may be considered to have understood and consented to what he or she was doing. The same should apply to the act of modifying or revoking a choice of law. The validity of choice of law is not affected by the fact that the chosen law does not allow a choice of law in matters of succession.[67] Furthermore, as *professio iuris* represents an independent act, it is not affected by the invalidity of a will or an agreement regarding succession of which it is part.[68]

10. In what circumstances is it recommended that the person choose the applicable law?

The general rule that applies in the absence of choice in the majority of cases is Article 21, according to which the law of the State in which the deceased has his or her habitual residence at the time of death is applicable. However, in certain circumstances, such as those in which a person divides his or her time between two States during the year or expects to change his or her residence, the habitual residence might be difficult to establish. For the sake of the predictability of the result, it might be beneficial to choose the law applicable to succession. It has been suggested that the option of choosing the applicable law could be particularly useful for persons who have settled abroad but still have strong connections with their State of origin and wish for the law of that State to govern succession.[69]

In contrast, if the person finds the law of his or her nationality unfavorable for estate planning, there is no option to "confirm" the application of the law of the State of his or her habitual residence. This might become important in view of the escape clause in Article 21(2) and, more importantly, the tacit choice of law in Article 22(2) should the circumstances be interpreted to trigger their operation. Therefore, it is recommended that the person "unchooses" the law by a statement indicating that he or she in no way intends for the law of his or her nationality (or any other law, for that matter) to govern the succession, thus removing any potential doubt regarding his or her intentions.[70]

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65 See this part, section I.

66 Whereas 52 of the Succession Regulation.

67 Whereas 40 of the Succession Regulation.

68 Rodríguez-Uría Suárez, op. cit., p. 13.

69 Damascelli, Domenico, I criteri di collegamento impiegati dal regolamento n. 650/2012 per la designazione della legge regolatrice della successione a causa di morte, in: Franzina, Pietro/Leandro, Antonio (eds.), Il diritto internazionale privato Europeo delle successioni *mortis causa*, Giuffrè, 2013, p. 99.

70 Wautelet, op. cit., p. 11.

IV. MODEL CLAUSES

- CHOICE OF APPLICABLE LAW
- DEROGATION OF THE LAW OF NATIONALITY AS APPLICABLE