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THE BOUNDARIES OF THE LAW APPLICABLE TO SUCCESSION

I. INTRODUCTION

The EU Regulation No. 650/2012 applies to “succession to the estates of deceased persons”, Art. 1 (1). Its choice-of-law rules determine “the law applicable to the succession as a whole”, Art. 21 (1). That law of succession will often parallel other laws, which are applicable to different legal aspects not properly relatable to the law of succession. The most important examples are matrimonial property law and property law in general, but there is a wide range of other areas that may play a role with regard to questions of inheritance, for example company law (here meant to refer to the law of corporations and other companies). In such cases, the different legal issues must be assigned to the respective system of law. This is the well-known problem of characterization in private international law.¹ In this paper, I shall explore the boundaries of the law applicable to succession to such other areas of law, in other words: I shall be dealing with problems of characterization that arise under the new Succession Regulation.

In a purely national context, the problem of characterization is a matter of distinguishing between different choice-of-law rules laid down by the national legislator. Even when characterization is to be done on the basis of national choice-of-law rules, it is now basically accepted that it is not to be done strictly according to the classificatory system of the *lex causae* or that of the *lex fori*, but rather autonomously, in view of the particular objectives of the respective choice-of-law rules that may be applicable to a particular legal issue.² On the level of European choice-of-law rules, that question must be answered autonomously as against the characterization that would govern under national choice-of-law

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1) *Kegel/Schurig*, Internationales Privatrecht, 9th ed. 2004, § 7, p. 327 et seq.

2) See, e.g., *Kegel/Schurig* (n. 1), p. 336 et seq.; *von Hoffmann/Thorn*, Internationales Privatrecht, 9th ed. 2007, § 6 para. 11 et seq.; *von Hein*, in: Münchener Kommentar zum BGB, 6th ed. 2015, Einl. IPR, para. 118.

rules.³ This is simply a specific application of the general principle of autonomous interpretation of European law.⁴

In the private international law of the European Union, these problems most often translate into the delimitation of the scope of different instruments. This is because, in contrast to most national private international law acts, European private international law is divided into different instruments – that is, mostly: different Regulations – on different areas of law (contractual obligations, non-contractual obligations, divorce, succession) which determine matters of characterization in provisions on the scope of the respective Regulations (e.g., for the Succession Regulation, in Art. 1) or on the scope of the law determined by their choice-of-law rules (e.g. Art. 23 of the Succession Regulation). And these provisions, obviously, must be interpreted autonomously, according to European standards.

With regard to the Succession Regulation in particular, however, the most important “bordering” areas of law so far are not governed by European choice-of-law rules. That is true, in particular, for property law or for company law.⁵ With regard to matrimonial property regimes, there currently exists a proposal of March 2016 for a Regulation passed under the system of “enhanced cooperation” (also used for the Rome III Regulation on divorce) on matters of matrimonial property regimes,⁶ but here as well, the determination of the law applicable to matrimonial property regimes still is subject to the national choice-of-law rules of the Member States.⁷ As a consequence, the problem presented by the boundaries of the law applicable to succession, at the current state of private international law in the European Union, is one of the delimitation of the scope of application of the Succession Regulation, to be determined on a European level, from the scope of application of national choice-of-law rules, to be determined on a national level.

3) See, e.g., *von Hein* (n. 2), Einl. IPR, para. 126.

4) *von Hein* (n. 2), Art. 3 EGBGB para. 156.

5) But there is substantial case-law of the ECJ with regard to the impact of EU primary law on the law applicable on corporations.

6) Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, COM(2016) 106 final. Also see the accompanying Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships, COM(2016) 107 final.

7) Conventions on matters of private international law, to which Member States may be a party, shall not be taken into account here.

While the problem of characterization, in substance, will remain the same, whether it is done on the European level or on the national level, the decisions in individual cases may differ. In that respect, two different situations must be distinguished: On the one hand, the European Regulation may consider issues to be governed by the law applicable to the succession under the Regulation, while national private international law may consider such issues to be governed by some other law. In that case, the European choice-of-law rule will trump the national rule, and the respective succession law will apply. This is the situation that may exist with regard to the problem of the “*Vindikationslegat*”.⁸ On the other hand, the European Regulation may consider issues to be outside of its scope, while national private international law may consider them to be properly governed by the law of succession. In such a case, the negative decision on the European level leaves national legislators free to decide on the law properly applicable to the particular issue. More specifically: The familiar provisions on the matters that are excluded from a Regulation (e.g., for the Succession Regulation, Art. 1 (2)), are not binding in a negative sense; they only state that European law does not provide a choice-of-law rule for these issues. As a consequence, national law may still provide that such issues should properly fall under the applicable succession law, as, for example, the German legislator has done in the new Art. 25 (1) EGBGB.⁹ Thus, national private international law may provide, for example, that testamentary trusts, which may be excluded from the scope of the Succession Regulation by Art. 1 (2)(j), will still be governed by the succession law as determined by the Regulation.¹⁰ This, however, is always an autonomous decision taken on the national level.

So what is the positive scope of the law of succession as determined by the Regulation? Art. 1 (1) starts out by providing: “This Regulation shall apply to succession to the estates of deceased persons. It shall not apply to revenue, customs or administrative matters.” Of course, it is necessary to determine more specifically what is meant by “succes-

8) See *infra* VI 2.

9) Art. 25 (1) EGBGB now provides: “Soweit die Rechtsnachfolge von Todes wegen nicht in den Anwendungsbereich der Verordnung (EU) Nr. 650/2012 fällt, gelten die Vorschriften des Kapitels III dieser Verordnung entsprechend.“ English: To the extent that the succession to the estate of a deceased person is not within the scope of Regulation (EU) No. 605/2012, the provisions of Chapter III of that Provision shall apply by analogy.

10) But note that the extent of the exclusion under Art. 1(2)(j) of the Regulation is doubtful; see, in particular, Recital 13. Also see *Frimston*, in: Bergquist et al., EU Regulation on Succession and Wills, 2015, Art. 1 paras. 56 et seq.

sion". Art. 3 (1)(a) provides a definition which, unfortunately, appears somewhat redundant: "'succession' means succession to the estate of a deceased person and covers all forms of transfer of assets, rights and obligations by reason of death, whether by way of a voluntary transfer under a Disposition of Property upon Death or a transfer through intestate succession". At least, it can be inferred that the Regulation tends towards a wide understanding of its scope. This is confirmed by Art. 23, which provides in paragraph 1 that the law determined pursuant to Arts. 21 or 22 of the Regulation shall "govern the succession as a whole" and then gives a (non-exhaustive) list of particular issues to be governed by that law in paragraph 2.¹¹ Recital 42 fills in that "the law determined as the law applicable to the succession should govern the succession from the opening of the succession to the transfer of ownership of the assets forming part of the estate to the beneficiaries as determined by that law".¹²

In sum, the Regulation thus promotes a strong principle of unity of succession. This manifests itself in two distinctive ways: First, the Regulation lays down only one connecting factor for the entire estate in Arts. 21 and 22. As a consequence, the law applicable to the succession governs the entire estate. In particular, there is no distinction between movable and immovable property in that respect.¹³ Second, the law determined under Arts. 21, 22 of the Regulation applies to the entire devolution of the estate, in all its aspects, from the initiation of the succession (typically the death of the decedent) to its end (the distribution

11) Art. 23 (2) thus explicitly decides the principal (and, in most cases: least controversial) questions of characterization.

12) It must be noted that, even within the group of issues that would normally be characterized as matters of succession, there is a further distinction between the "law applicable to the succession as a whole", as determined by Arts. 21, 22 (the scope of which is set out in Art. 23) and the law applicable to the form, admissibility, substantive validity and binding effects (if any) of dispositions of property upon death (including agreements as to succession). Matters of substantive validity and effects are principally referred to the law which, under Arts. 21, 22, would have been applicable to the succession of the testator if he had died on the day on which the disposition was made, see Arts. 24, 25. Thus, a distinction must be made between the scope of the "actual" law of succession (Arts. 21, 22) and the "hypothetical" law of succession at the time of testation (Arts. 24, 25). The scope of both laws is determined by Arts. 23 and 26, respectively. The formal validity of dispositions of property upon death is subject to yet another provision in Art. 27. This diverse system of choice-of-law rules gives rise to further problems of characterization that shall not be dealt with here. Rather, the scope of this paper concerns the "boundaries" of the law of succession as determined by Arts. 21-23 and the range of issues governed by *other* laws.

13) Also see *Solomon*, in: Dutta/Herrler (eds.), *Die Europäische Erbrechtsverordnung*, 2014, 20, para. 2.

of the estate).

The matters excluded from the scope of the Regulation are set out in Art. 1 (2). Some of the exclusions are quite clear: For example, it should be beyond doubt that the substantive law of succession in itself will not govern the existence of family relationships (marriage, parentage) that may be relevant for questions like intestate succession, see Art. 1 (2) lit. a.¹⁴ However, most of the important areas of law that give rise to problems of characterization can also be found here, that is: matrimonial property regimes (lit. d), maintenance obligations (lit. e), property law (lit. g, k), company law (lit. h, i) or trust law (lit. j). It is the boundaries to these areas of law that we shall explore on the following pages.¹⁵ However, we shall not keep strictly to the list contained in Art. 1 (2) but take a more organic approach, considering the different legal contexts in which issues of delimitation may arise.

II. The rationale of the conflicts rule for succession

Before addressing particular problems of the boundaries of the law applicable to succession, it is helpful to first analyze the underlying rationale of the conflicts rule applicable to matters of succession. This is because questions of characterization cannot be decided strictly on the basis of formal considerations of the legal categories existing in the various legal systems, but must take into account the policy considerations underlying the different choice-of-law rules that may be applied to a particular legal issue.¹⁶ Thus, the law applicable to matters of succession shall govern only to the extent that the specific legal issue involves the policy considerations that have given rise to the choice-of-law rules set down in the Regulation. And, correspondingly, different choice-of-law rules (like those for property, matrimonial property regimes, companies, etc.) shall govern to the extent that their policies are involved by the issue to be decided.

As far as the law applicable to succession is concerned, we have seen that one of the most fundamental principles of the Regulation lies in the principle of unity of succession. This is because substantive laws of succession generally provide for the devolution of an entire estate according to a harmonious system that takes into account both the claims

14) Also see *infra* V.

15) It is clear that not all aspects of characterization can be addressed here. In particular, issues involving *trusts* are beyond the scope of this paper.

16) *Kegel/Schurig* (n. 1), p. 346 et seq.

of possible beneficiaries to the assets of the estate and the claims of creditors of the decedent against the estate. This militates strongly in favor of the application of one set of rules and principles on the transfer of both assets and liabilities with regard to the entire estate, in order to obtain consistency of results with regard to a possibly wide range of assets, beneficiaries and creditors that may be located in any number of different legal systems. In contrast, application of different principles with regard to individual assets, beneficiaries or creditors causes considerable danger of inconsistent results.

This becomes very clear with regard to the determination of the beneficiaries and their respective shares in the estate (see Art. 23 (2)(b) of the Regulation): It is clear that these shares cannot be determined according to the personal laws of the individual beneficiaries, as these would only by coincidence amount to a total of 100 % of the estate. A distinction between different parts of the estate (in particular, between movable and immovable property) is possible¹⁷ but has increasingly been felt to be needlessly complex and to result in a differentiation of entitlements between different parts of the estate that is difficult to justify on a policy level. A distinction between movable and immovable property becomes even more problematic with regard to the liability for the debts of the estate (see Art. 23 (2)(g) of the Regulation): It is hard to see why the creditors of the decedent should be free to select a liability regime (together with their specific creditors) by proceeding against either the movable or the immovable estate, where there are diverging rules on the determination of heirs (and thus, the debtors of the estate creditors) and/or diverging rules on the extent of liability on the part of the heirs. Furthermore, where such scission of the law applicable to the succession occurs, it must still be determined whether (and according to which principles) the heirs that have had in fact to answer for debts of the estate under one legal regime can take recourse against those who have inherited under the other. A very close interdependence also exists between the regime of liability for debts of the estate and the administration of the estate (see Art. 23 (2)(f) of the Regulation): Where a national law provides for the immediate devolution of the estate on the heirs, it must also provide for specific rules on the personal or lim-

17) It still is the traditional principle in the Common Law countries; see, e.g., Dicey, Morris & Collins on The Conflict of Laws, 15th ed. 2012, Vol. 2, Rules 149 and 150, paras. 27R–010 et seq.; Hay/Borchers/Symeonides, Conflict of Laws, 5th ed. 2010, §§ 20.2 et seq., p. 1286 et seq.; the principle was also followed in France until the entry into force of the Regulation; see, e.g., *Audit/d'Avout*, Droit international privé, 7th ed. 2013, paras. 973 et seq.

ited liability of those heirs.¹⁸ Where it provides for prior administration under supervision of the court¹⁹ or by a personal representative,²⁰ the regime with regard to the liability for debts will be approached from a quite different perspective. In that respect as well, the interdependence of rules of liability and rules of transmission will make it advisable to apply the same law with respect to both issues.

To the extent that these considerations apply, it therefore will be preferable to apply the (unitary) law of succession, to the extent that the policies underlying other choice-of-law rules prevail, these rules should prevail. It remains to be seen how that distinction may translate into practical application.

III. The composition of the estate

1. General principle

One question that involves the boundaries of the law of succession to other laws concerns the composition of the estate: Which assets are part of the estate? More specifically: is a particular piece of property, a certain plot of land, a specific movable article of value, a given deposit at a bank, part of the estate?

This question is usually not discussed in general terms, as it is rightly accepted as a matter of principle that these matters lie outside of the scope of the law applicable to succession: The composition of the estate usually depends on whether the decedant has, in his lifetime, acquired a particular asset. The answer will turn on the applicable law of property for movable or immovable things, the rules of contract and/or assignment for bank accounts etc. Thus, in this respect, the law applicable to succession is not involved: it takes the estate the way it existed as the entirety of assets owned by the decedent at the time of his death.

18) For example under German law: §§ 1922, 1942 et seq. BGB on devolution and §§ 1967 et seq. BGB on liability for debts; see *Solomon*, in: Zekoll/Reimann (eds.), Introduction to German Law, 2nd ed. 2005, p. 286, 293 et seq.

19) For example under Austrian law: §§ 532, 536, 797 et seq. ABGB on devolution (and the requirement of an “*Einantwortung*”) and §§ 800 et seq. ABGB on liability for debts; see *Solomon*, in: Burandt/Rojahn (eds.), *Erbrecht*, 2nd ed. 2014, Österreich, paras. 143 et seq., 167 et seq. Regarding *Einantwortung* also see *infra* V 1.

20) For example in the Common law: see Parry & Kerridge, *The Law of Succession*, 13th ed. 2016, Chapter 20; *Solomon*, in: Burandt/Rojahn (n. 19), *England und Wales*, paras. 132 et seq. (regarding UK law); *McGovern/Kurtz/English*, *Wills, Trusts and Estates*, 4th ed. 2010, Chapter 13, p. 625 et seq.; *Frank*, in: Burandt/Rojahn (n. 19), *USA*, paras. 118 et seq. (regarding US law).

1. The relationship to matrimonial property law

The question of what makes up the estate is also raised in one of the central issues of delimitation, that is, between the law of succession and the law on matrimonial property. As far as matrimonial property regimes are concerned, they are simply excluded from the scope of the Regulation by Art. 1 (2)(d). Correspondingly, matters of succession law shall be excluded from the scope of the Regulations on matrimonial property regimes and the property consequences of registered partnerships.²¹ This is simply a consequence of the general principle that the composition of the estate is determined by the law applicable under the specific choice-of-law rules regarding the particular assets.

This means that, with regard to property held by spouses,²² it must first be determined, under the law applicable to the matrimonial property regime, which entitlements are allotted to each of the spouses – in particular, whether the spouses continue to hold separate property or whether a system of community property is created. In the latter case, the matrimonial property regime applies to the dissolution of the community property. The share of the decedent thus determined, together with his individual property, will then pass under the applicable succession law.²³

While this distinction may be quite clear and uncontroversial on a formal, categorical level, it may become much more difficult when deciding whether a particular form of entitlement existing under national law is a function of matrimonial property rights or inheritance rights of the surviving spouse. In that respect, again, a functional characterization is necessary:²⁴ That is, we have to determine whether the participation of a spouse is function of the need to distribute the deceased's property because of his death (succession law) or function of the participation in the deceased's property in view of their economic unity during the marriage upon its dissolution (matrimonial property).²⁵

However, even such a functional distinction becomes blurred in

21) See Art. 1 (2)(d) of the respective Proposals, *supra* n. 6.

22) The same is true, of course, for registered partners; for the sake of simplicity, the text shall only refer to married couples.

23) *Dörner*, in: Dutta/Herrler (n. 13), 76 para. 10; *Schmidt*, in: Dutta/Weber (eds.), *Internationales Erbrecht*, 2016, Art. 1 EuErbVO para. 37.

24) *Supra*, text accompanying n. 16. Also see *Weber*, *DNotZ* 2016, 430.

25) Cf. *Dörner*, in: Dutta/Herrler (n. 13), 75 para. 5; *Schmidt*, in: Dutta/Weber (n. 23), Art. 1 EuErbVO paras. 38-40.

practice, as one major (“ideally”, the regular) case of dissolution of a matrimonial property regime is the death of one of the spouses. As a consequence, any legislator will have both regimes (succession and matrimonial property) in mind when determining the rights of the surviving spouse. And at least to some extent, the legal nature of these entitlements may be exchangeable. A notorious example is given by German law, where, under § 1371 (1) BGB, upon the death of one spouse, the statutory property regime of community of gains (“*Zugewinnngemeinschaft*”) results in an additional share of 25 % in the inheritance. Despite this technical implementation of the dissolution of a community of gains in case of death, the German BGH has rightly characterized that provision as pertaining to the law of matrimonial property.²⁶ But it should be clear that the determination of the exact boundary between succession and matrimonial property law may be anything but uncontroversial in specific cases.

2. Survival of rights after the decedent’s death

Another question relating to the composition of the estate is this: Even where an asset had been acquired by the decedent during his lifetime and still belonged to him at the time of his death, has it remained part of the estate after his death? This is an elementary question, because only where the right survived the decedent’s death is it possible for the right to devolve upon his heirs.

This question obviously relates to the fate of life interests.²⁷ For example: A has granted the decedent (D) a life interest in living in a certain house. As a matter of property law, upon D’s death, the life interest is extinguished and reverts to the original owner, A. Thus, the existence of a life interest will normally be analyzed as defining the contents of the right created under the respective legal regime – which, in our example, would be the law of the situs. Where that law determines that the entitlement ends when its owner dies, there is consequently nothing to inherit and the law of succession is not involved. It is only where the entitlement continues to exist that it passes to the decedent’s heirs as determined by the applicable law of succession.

Thus, the delimitation of the law governing the individual asset (in the example: the law governing property rights in an immovable) and

26) BGH, 13.05.2015 – IV ZB 30/14, BGHZ 205, 290 = NJW 2015, 2185 with note by *Lorenz* 2157 = FamRZ 2015, 1180 with note by *Mankowski* = JR 2016, 193 with note by *Looschelders*.

27) See, e.g., *Lawson/Rudden*, *The Law of Property*, 3rd ed. 2002, p. 97 et seq.; *Stoebuck/Whitman*, *The Law of Property*, 3rd ed. 2000, §§ 2.11 et seq., p. 58 et seq.

the law governing succession appears to be clear cut. However, here as well, there are also more doubtful areas: Life interests may also be created successively; in any case, the remainder may be granted to a particular person.²⁸ Thus, where D dies, his interest may fall to E rather than revert to A. And D may have had a say in determining the successor to his life interest. This may appear much closer to the determination of an “heir” and may substitute a transmission by way of inheritance. Or the determination of the successor may be subject to a power of appointment,²⁹ possibly held by the life tenant D. Here as well, it may be doubtful whether the determination of the successor should indeed be held to fall exclusively under the domain of property law, thus avoiding possible limitations and safeguards provided by the applicable succession law (most importantly, provisions on reserved shares or creditors’ rights).³⁰

IV. Exclusion of transfers otherwise than by succession

A related question concerns assets that are considered to be transferred not by way of a “hereditary” transfer but by particular rules outside the scope of succession law. The possibility of such transfer is envisaged by Art. 1 (2)(d) of the Regulation which excludes from the scope of the Regulation “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 [...]”.³¹ The range of such transfers taking place “otherwise than by succession” is very wide, and the impact on the scope of the applicable succession law may accordingly be immense.³² At the same time, the “border area” is still remarkably hazy.

28) See the examples given by *Stoebuck/Whitman* (n. 27), § 3.6, p. 88 et seq.

29) See, e.g., *Williams on Wills*, 10th ed. 2014, Vol. 1, Chapters 39, 40; *Solomon*, in: *Burandt/Rojahn* (n. 19), England und Wales, para. 81; *McGovern/Kurtz/English* (n. 20), § 10.5, p. 474 et seq.; *Stoebuck/Whitman* (n. 27), § 3.14, p. 108 et seq.

30) Also see infra IV 1.

31) The provision is inspired by Art. 1 (2)(d) of the 1989 Hague Convention on the Law Applicable to Succession to the Estates of Deceased Persons which provides: “The Convention does not apply to [...] property rights, interests or assets created or transferred otherwise than by succession, such as in joint ownership with right of survival, pension plans, insurance contracts, or arrangements of a similar nature”.

32) The exclusion of transfers “otherwise than by succession” on the level of private international law is reminiscent of the wide-spread efforts to “avoid probate”, particularly in the USA.

1. The paradigm example: joint tenancy

The most prominent example for transfers taking place “otherwise than by succession” is the Common Law joint tenancy.³³ In the case of a joint tenancy, a certain asset (most importantly: a family home) is owned jointly by several people (in particular: spouses). When one of the owners (spouses) dies, the property will pass to the surviving owner (spouse); this is the so-called “right of survivorship”. It is important to note that under the Common Law, upon the death of a joint tenant, ownership passes automatically by operation of law to the surviving tenant(s), outside probate proceedings. As a consequence, the acquisition of ownership is considered a matter of property law, *not* a matter of succession law.

Technically, this conception is simply another application of the principle that the survival of rights after the decedent’s death is not a matter of succession law, but rather must be determined pursuant to the rules governing that specific right, particularly the law of the situs governing property rights in tangible assets.³⁴ Just as in the example of a life estate,³⁵ the right of a joint tenant is extinguished when he dies. The fact that the right then falls to the surviving tenant, making him the sole owner of the property, is a matter of property law, just like the reversion of the life interest to the holder of the superior right. As far as the deceased tenant is concerned, his interest ceases to exist and consequently cannot pass onto his heirs.

However, the example of the joint tenancy also shows that a merely technical analysis of its functioning is not sufficient to allow for a convincing decision of the choice-of-law problem. The mechanism of the joint tenancy makes it possible for any owner who wants a particular asset to pass immediately and automatically to a specific person, to create a joint tenancy with regard to that asset. Most importantly, by doing so that person will “avoid probate”, that is: he may avoid important aspects of the law of succession, in particular the reach of creditors of the estate or rights of forced heirs or the effect of statutory safeguards regarding family provision. As a consequence, even in jurisdictions

33) See, e.g., *McGovern/Kurtz/English* (n. 20), § 4.8, p. 240 et seq.; *Stoebuck/Whitman* (n. 27), § 5.3, p. 182 et seq.; *Smith*, Property Law, 8th ed. 2014, Chapter 15, p. 300 et seq.; *Solomon*, in: *Burandt/Rojahn* (n. 19), England und Wales, para. 114; *Frank*, ebd., USA paras. 109 et seq.; *Leithold/Wainwright*, IPRax 2015, 374 et seq.

34) *Supra* III 3.

35) *Supra*, text following n. 27.

recognizing joint tenancy, creditors may exceptionally be allowed to satisfy their claims from the portion of ownership previously owned by the deceased. That is, the liabilities of the deceased (or the mandatory rights of spouses or next of kin) may, under certain circumstances, be considered to remain attached to the property.³⁶

Therefore, in substance, regardless of its formal technicalities, a joint tenancy may work as a “will substitute”³⁷ with regard to the joint property and may consequently raise issues that involve policies of succession law. This requires a re-assessment of the problem of classification: Is the Common Law joint tenancy a matter of property law or a matter of succession law?³⁸

At first blush, the Regulation appears to take up an ambiguous stance: Pursuant to Art. 3 (1)(a), the term “succession”, defining the scope of the Regulation under Art. 1 (1), “covers all forms of transfer of assets, rights and obligations by reason of death”³⁹ and would thus extend to a transfer brought about by a “right of survivorship”. However, Art. 1 (2) (g) expressly excludes transfers “by way of [...] joint ownership with a right of survivorship”,⁴⁰ and this exclusion must necessarily trump the more general provision of Art. 1 (1). But this does not necessarily imply that all aspects and implications of a joint tenancy must necessarily be excluded from the law applicable to the succession under the Regulation.⁴¹

Thus, the question remains: what *is* the proper characterization of the joint tenancy? The fact that the joint tenancy will often operate to bring about a transfer of property upon death as well as the concerns regarding the protection of creditors’ rights and of reserved interests of mandatory heirs may argue for the application of the *lex successionis*. However, despite these concerns, it must also be taken into account that the parties, by creating a joint tenancy, have created a particular form of entitlement with certain legal characteristics and consequences.

36) But see, e.g., *McGovern/Kurtz/English* (n. 20), § 13.6, p. 656 et seq.

37) *McGovern/Kurtz/English* (n. 20), § 4.8, p. 244. Also see *infra* IV 2.

38) The characterization of the joint tenancy is a “classic” problem of private international law; see, e.g. *Dutta*, in: *Münchener Kommentar zum BGB*, 6th ed. 2015, Art. 25 EGBGB para. 170.

39) *Supra* I, text following n. 10.

40) *Supra*, text accompanying n. 31.

41) In any case, national law may always operate to subject aspects of the joint tenancy to the applicable law of succession regardless of the exclusion under Art. 1 (2)(g) of the Regulation; cf. *supra*, text accompanying n. 9.

These characteristics of the joint tenancy should also be respected on the level of conflicts law. More specifically: If A acquires the right of a joint tenant, A should be able to determine, at the time of acquisition, whether this is a right which A will be able to dispose of for the time of his death or whether the right is not subject to such disposal. At the same time, A's co-owner B will want to know whether he is the holder of a right of survivorship or whether A's interest will pass to his heirs under the applicable law of succession. This latter aspect is of particular importance, since the law applicable to the succession to the estate of A will, under the Regulation, depend on the last habitual residence of A (Art. 21 (1)), a factor that is beyond the control of B. By changing his habitual residence, A would thus be able to defeat B's right of survivorship. This is hardly a solution that would provide sufficient protection to the interests of joint tenants.

As a consequence, the creation and the consequences of a joint tenancy, including the right of survivorship, should indeed not be governed by the law applicable to succession but exclusively by the respective law of property, usually the law of the situs.⁴² However, this is not yet the entire picture: situs law should only govern to the extent that title passes to the surviving owner. The further consequences of such transfer ("otherwise than by succession") with regard to the rights of creditors of the estate or the beneficiaries of reserved shares remain to be governed by the applicable law of succession.⁴³ Accordingly, the "obligation to restore or account for gifts, advances or legacies when determining the shares of the different beneficiaries", governed by the law of succession according to Art. 23 (2)(i) of the Regulation, is explicitly reserved in Art. 1 (2)(g), and this reservation should be extended to other questions, particularly to possible creditors' rights as against the beneficiary of a right of survivorship. The law applicable to succession will thus determine to what extent the decedent is able to avoid mandatory rights and safeguards of interests existing under the law of succession by providing for a transfer of rights "outside probate" or "otherwise than by succession". This may be difficult to determine in cases where the law applicable to succession does not know a particular form of individual succession like the one based on a right of survivorship. In such cases courts may have to apply existing legal rules by way of analogy or resort to general principles of adaptation.

42) See *Schmidt*, in: Dutta/Weber (n. 23), Art. 30 EuErbVO para. 17.

43) *Dutta* (n. 38), Art. 1 EuErbVO paras. 23, 24.

3. The broader picture: “will substitutes”

As has been seen above, the joint tenancy with a right of survivorship is only one aspect of a transfer that is excluded from the scope of the Regulation by virtue of Art. 1 (2)(d).⁴⁴ In fact, Art. 1 (2)(d) refers to all transactions that may present “will substitutes” under the law of Common Law countries. Since the provision is based on the Hague Succession Convention, it is helpful to quote the *Waters* Report regarding that exclusion:

“In common law jurisdictions there is a number of so-called ‘will substitutes’ or non-testamentary transfers of assets that constitute *inter vivos* dispositions, and they are of ever greater financial significance in all common law developed countries. They are the *inter vivos* trust, joint bank accounts where the survivor takes the balance, life insurance and the designation of a beneficiary to take the benefits of the policy on the death of the insured [...], and pension provision accounts where the designated beneficiary takes the benefit of the account proceeds, by way of a joint lives and survivor annuity, in the event of the prior death of the pensioner. There is a fifth ‘will substitute’ and that is the joint tenancy (typically spousal and concerning the matrimonial home) with right of the survivor to take the whole. None of these devices gives rise to a ‘disposition of property upon death’, and should not be understood to do so. Article 1 (2)(d) is designed to be embracive of these will substitutes, and to underline that the Convention is not concerned with them in any way. Of course, Article 1 (2)(d) having a very broad scope covering all *inter vivos* dispositions including gifts, such gifts may give rise to an obligation to restore or account when determining the shares of beneficiaries under the law applicable under Article 7 (2)(c).⁴⁵ But even so the Convention does not in any way determine the validity of such gifts nor their effect or the extinction of those effects.”⁴⁶

The considerations regarding the joint tenancy thus, as a matter of principle, also apply to other will substitutes: Since the rights and obligations of the parties in these cases are created by *inter vivos* trans-

44) *Supra* n. 31.

45) Art. 7 (2)(c) of the Convention provides: “This law governs [...] any obligation to restore or account for gifts, advancements or legacies when determining the shares of heirs, devisees or legatees”. It corresponds to Art. 23 (2)(i) of the Regulation.

46) *Donovan W.M. Waters*, Explanatory Report on the 1989 Hague Succession Convention, published by the Permanent Bureau of the Hague Conference on private international law, Proceedings of the Sixteenth Session (1988), Tome II, Succession to estates – applicable law; para. 46, available at <https://www.hcch.net/de/publications-and-studies/details4/?pid=2959>.

actions, they must be determinable in a reliable way from the moment the transaction is made. This precludes subordinating their validity and proprietary effects to the law of succession, which will only be determinable at the time of death of a party to the transaction – *and* will depend on that party’s habitual residence at that time. They are therefore governed by their particular legal regimes, which may be the law applicable to contractual obligations (as in the case of joint bank accounts or life insurances) or the law applicable to proprietary rights (as in the case of a joint tenancy). These legal regimes will thus determine the rights available, at the time of the decedent’s death, to pass to the decedent’s heirs under the applicable rules of inheritance. But – as is also made clear by the *Waters* Report – the law of succession will still be applicable with regard to the rights of creditors or beneficiaries of the estate as against *inter vivos* transfers effected by the decedent.

4. Company law: a short glance

These principles also apply with regard to the succession to the membership in a company or shares in a corporation, even though the respective agreements of the members of a company will normally not qualify as “will substitutes”. However, on a policy level, the relevant considerations are the same: Here as well, the applicable company law will often set down a particular regime with regard to succession that may diverge from the general rules regarding inheritance. This is because succession by a possibly large group of heirs to the membership in a partnership may be inappropriate. Rather, there may be a strong interest by the members of a company, particularly a partnership,⁴⁷ to determine specific successors. As a default rule, membership to a company may also terminate when a partner dies and accrue to the surviving partners. In such a case, the situation is functionally comparable to that of a joint tenancy.⁴⁸

Again, these particular interests regarding the succession to membership in a company should also be respected on the level of the conflict of laws. Accordingly, Art. 1 (2)(h) excludes from the scope of the Regulation “questions governed by the law of companies and other

47) In contrast, the interests of shareholders in a corporation may often be more abstract, allowing for a succession to the shares in a corporation under the general rules of inheritance. Even in this case, however, the question whether the shares in a corporation should pass under the rules of inheritance or under a special regime, should be left to be determined first by the law applicable to the corporation. But see *Vassilakakis*, ZfRV 2016, 75 et seq.

48) Cf. supra IV 1, text following n. 33.

bodies, corporate or unincorporated, such as clauses in the memoranda of association and articles of association of companies and other bodies, corporate or unincorporated, which determine what will happen to the shares upon the death of the members⁴⁹; thus opening the door for the application of the choice-of-law rules regarding such companies.⁵⁰

Art. 1 (2)(h) of the Regulation does not really answer the question of characterization, as it simply excludes “questions governed by the law of companies”, thus begging the question which matters are in fact governed by that law. However, the answer can be given by the preceding consideration: The applicable law of companies will govern to the extent that the particular interests of company law are involved. Consequently, the law of companies will decide whether the company continues to exist after the death of a partner and whether the share of the deceased partner will accrue to the other partners (like under a right of survivorship), to a particular successor as determined by the deceased or the articles of the company (like in will substitutes) or to the partner’s heirs in general (like the other assets of the decedent).⁵¹ In the latter case, the rules of company law “release” the decedent’s share, which then passes to his heirs according to the rules of the law applicable to succession.

But even in those cases where the law of companies governs the succession to the decedent’s share possible consequences with regard to the rights of creditors or the beneficiaries of forced shares may remain to be determined under the applicable succession law.⁵²

V. Determination of the beneficiaries and their shares

A clear case for the application of the succession law is the determination of the beneficiaries and their respective shares, see Art. 23 (2)

49) Interestingly, despite this general exclusion, Art. 30 of the Regulation still reserves the applicability of special rules of a State regarding “certain enterprises”. As a consequence, the scope of application remaining for Art. 30 may appear doubtful. This question cannot be pursued in this paper; see, in that respect, *Dutta* (n. 38), Art. 30 EuErbVO para. 2.

50) It must be noted that, in that respect as well, Art. 1 (2)(h) does not in itself operate to provide for the application of the respective company laws, as the Succession Regulation does not provide any choice-of-law rules with regard to company law; the applicability of that law therefore derives from the respective choice-of-law rules, which, at this stage, are still basically national; cf. *supra*, text preceding n. 9

51) *Schmidt*, in: *Dutta/Weber* (n. 23), Art. 1 EuErbVO paras. 97 et seq.; *Hertel*, in: *Dutta/Herrler* (n. 13), 105, paras. 64, 65.

52) *Schmidt*, in: *Dutta/Weber* (n. 23), Art. 1 EuErbVO para. 99; cf. *supra*, text accompanying n. 43.

(b) of the Regulation. That law thus determines the heirs, legatees and persons entitled to a reserved share⁵³ as well as their respective shares or entitlements.⁵⁴ The status of a beneficiary, particularly under rules on intestate succession, typically depends on the existence of a certain family relationship, e.g. that of a spouse or a relative. Whether a person was (still) validly married to the decedent at the time of his death or is legally related to the decedent, is obviously a matter that must be determined according to the law governing the particular relationship, e.g. the law governing marriage, parentage or adoption. As a consequence, Art. 1 (2)(a) excludes the existence of such family relationships from the scope of the Regulation.⁵⁵

While it is clear that the existence of a family relationship relevant for succession must be determined by its proper law (and not by the law applicable to succession), it is still controversial whether the choice-of-law rules regarding such “incidental questions” should be taken from forum law or from the law applicable to the succession. However, since Art. 1 (2)(a) generally excludes family relationships from the scope of the Regulation, it would be inconsistent with that exclusion to grant the Regulation indirect influence on the determination of such relationships by directing courts to take the choice-of-law rules regarding the status of potential beneficiaries from the law governing succession pursuant to the Regulation. Consequently, incidental questions regarding personal status (and others) should always be governed by the law determined under the respective choice-of-law rules of the forum (regardless of whether these rules derive from national, international or European law).⁵⁶

VI. Transmission of the assets (“*Erbgang*”)

1. General principle

There are considerable differences between national laws with regard to the transmission of the assets of the estate to the beneficiaries.⁵⁷ Under some systems, like German law, there is a direct transfer of the entire estate by operation of law, with the requirement of a subsequent

53) With regard to the reserved share, the application of the *lex successionis* also derives from Art. 23 (2)(h).

54) As to the *nature* of their entitlements, also see *infra* VII.

55) Also see *supra*, at n. 14.

56) *Solomon*, in: Bernreuther et al. (eds.), *Festschrift für Ulrich Spellenberg*, 2010, 355; *Lagarde*, in: Bergquist (n. 10), Art. 23 para. 10. *Contra*: *Dutta* (n. 38), vor Art. 20 *EuErbVO* paras. 27 et seq.; *Weber*, in: *Dutta/Weber* (n. 23), *Einl* paras. 98 et seq.

57) Also see *Schmidt*, *ZEV* 2014, 455 et seq.

sharing-out of the estate among the heirs.⁵⁸ Other systems provide for an indirect transfer through administration by a personal representative (with title vesting formally either in the personal representative or in the beneficiaries, but subject to the disposal of the personal representative), who ultimately distributes the assets of the estate to the beneficiaries; this is the solution adopted in the Common Law.⁵⁹ Yet other systems require some formal act by courts or public officers for the transmission of the estate to become effective: Austrian law, for example, requires a formal “*Einantwortung*” by the probate court.⁶⁰ The *Einantwortung* takes place after the payment of the debts of the estate and signifies the formal act of transferring possession of the estate to the heirs.

In this respect, the boundaries of the law applicable to succession must be set as against the domain of procedural law. To the extent that the transmission of the assets of the estate involves the participation of a court, a public officer or a private party appointed as an administrator (and, possibly, supervised) by a court, there is clearly a close relationship to procedural matters. This is even more true where payment of the liabilities and subsequent distribution of the estate are part and parcel of the same procedure. This linkage to procedure would generally argue for application of forum law, at least to the formal aspects of transmission.

However, the mode of transmission adopted by a particular legal system is closely related to matters of substantive law. In particular, it sets the framework for the settlement of the liabilities of the estate, with the requirements regarding acceptance or renunciation of the estate often serving as the crystallization point regarding liability for the debts of the estate. Thus, the institution of a personal representative is a convenient technique to shield the beneficiaries, at least as a matter of principle, against personal liability for the decedent's debts. The liability for the debts of the estate, however, is clearly a substantive matter that is accordingly governed by the law of succession, Art. 23 (2)(g) of the Regulation. Consequently, it seems preferable to apply that law also to the requirements necessary for the transmission of the estate to its beneficiaries. This is also the solution adopted by the Regulation in Art. 23 (2)(e) and (f), which provide that the law of succession shall

58) § 1922 and §§ 2032 et seq. BGB; see *Solomon*, in: Zekoll/Reimann (n. 18), p. 286, 292 et seq.

59) *Supra*, n. 20.

60) *Solomon*, in: Burandt/Rojahn (n. 19), Österreich, paras. 195 et seq.; also see *supra*, n. 19.

also govern “the transfer to the heirs and, as the case may be, to the legatees of the assets, rights and obligations forming part of the estate, including the conditions and effects of the acceptance or waiver of the succession or of a legacy” (lit. e) and “the powers of the heirs, the executors of the wills and other administrators of the estate, in particular as regards the sale of property and the payment of creditors [...]” (lit. f). In that respect, therefore, the principle of unity of succession⁶¹ applies with full force.

However, this requires that courts adopt an open, liberal stance with regard to technical rules of transmission that may deviate more or less from their own rules. Under the former law, for example, German courts used to refuse to decree an Austrian “*Einantwortung*”, arguing that they lacked the requisite procedural rules.⁶² Today, application of the Austrian rules on *Einantwortung* is dictated by the Regulation and it appears that, at least now, German courts will have to give up their hesitation as against unfamiliar rules and adopt a more flexible approach.

Even so, there will always remain a core set of strictly procedural questions regarding the functioning of the courts that will remain governed by the respective *lex fori*. In that respect, problems of classification between substance (*lex successionis*) and procedure (*lex fori*) will stay with us in the context of the administration of estates. But the Regulation leans toward giving the largest possible effect to the requirements of the *lex successionis* in order to promote the substantive unity of succession.⁶³

2. The “*Vindikationslegat*”

One of the most controversial issues regarding the transmission of assets, at least in Germany, relates to the so-called “*Vindikationslegat*”. The problem arises from a fundamental distinction in German law between the status of heirs (*Erben*) and legatees (*Vermächtnisnehmer*). An heir will acquire the estate (or his share in the estate) automatical-

61) See *supra*, text accompanying n. I. and II.

62) See, e.g., BayObLG, 15.02.1971 – BReg. 1 Z 90/70, BayObLGZ 1971, 34 = NJW 1971, 991; BayObLG, 08.05.1967 – BReg. 1 a Z 95/66, BayObLGZ 1967, 197. – As for the way in which the BayObLG still brought about a transmission of the estate despite its unnecessarily restrictive approach, see *Solomon*, in: Burandt/Rojahn (n. 19), Österreich, para. 198.

63) Conversely, Art. 29 of the Regulation allows Member States whose law requires the appointment of an administrator to so appoint an administrator despite the applicability of a foreign law to the succession under Arts. 21 and 22. This provision raises considerable problems of application that are beyond the scope of this paper.

ly, by operation of law, upon the death of the decedent.⁶⁴ In contrast, a legatee will only acquire a personal claim against the heir(s) to be transferred the asset devised to him (called “*Damnationslegat*”).⁶⁵ As a consequence, title to the asset still has to be transferred by way of an *inter vivos* transaction pursuant to the applicable rules of property law. In contrast, under some legal systems, legacies of individual assets operate automatically and title is acquired by the legatee immediately upon the decedent’s death, without the requirement of a further transaction (called “*Vindikationslegat*”).

In 1994, the German BGH had to decide whether a *Vindikationslegat* arising under a foreign law of succession (in that case, under Colombian law) could be given immediate proprietary effect with regard to real property located in Germany. The BGH held that giving effect to a *Vindikationslegat* would be in violation of the *numerus clausus* of the possible *modi* of acquiring property under German property law. Thus, the law applicable to succession was only called upon to determine who is to receive which asset (which, in the case of a regular testamentary legacy, is not really a problem), but not how title in that asset is transferred onto the beneficiary. Rather, according to the BGH, transfer of title is left to German law, the property being situated in Germany.⁶⁶ The decision was hardly convincing to begin with, but shaped the prevailing view in Germany.

Now the question of how to deal with a *Vindikationslegat* has re-presented itself under the reign of the Succession Regulation. At a first glance, the answer appears to be clear: Pursuant to Art. 23 (2)(e), the law applicable to succession shall govern in particular “the transfer to the heirs and, as the case may be, to the legatees of the assets, rights and obligations forming part of the estate”. The acquisition of assets under a legacy seems to fall quite easily under this provision.⁶⁷ This assumption is confirmed by various Recitals.⁶⁸ Accordingly, a *Vindika-*

64) § 1922 BGB; cf. supra, text accompanying ns. 18 and 58.

65) § 2174 BGB; see *Solomon*, in: Zekoll/Reimann (n. 18), p. 288.

66) BGH, 28.09.1994 – IV ZR 95/93, NJW 1995, 58 = IPRax 1996, 39 with note by *Dörner* 26 = ZEV 1995, 298 with note by *Birk* 283. – Accordingly, acquisition of an asset by way of a specific transfer of title (“*Singularsukzession*”) upon the death of the testator was rejected as incompatible with German property law by KG, 29.05.2012 – 1 W 270-271/12, NJW-RR 2013, 79.

67) Cf. *Lagarde*, in: Bergquist (n. 10), Art. 23 para. 19.

68) See Recital 15: “This Regulation should allow for the creation or the transfer by succession of a right in immovable or movable property as provided for in the law applicable

tionslegat arising under a foreign law which is applicable pursuant to Art. 21 or 22 of the Regulation should also be effective with regard to property located in Germany. One would assume that the Regulation has overturned the former practice in Germany.⁶⁹

Rather surprisingly, there is a strong opposition against this reading of the Regulation in Germany, particularly among German notaries. The opposition is mainly based on Art. 1 (2)(1) which excludes from the scope of the Regulation “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”. The argument runs like this: Art. 1 (2)(1) is intended to preserve the reliability of the register. Therefore, to the extent that rights have to be recorded in a register, the law of the country of registration will not only apply to the formal requirements of registration but will also govern the substantive requirements for the creation or transfer of a right that is subject to registration.⁷⁰

However, the reference to Art. 1 (2)(1) is hardly persuasive in view of the clear language of Art. 23 (2)(e), which generally provides for the application of the law of succession with regard to “the transfer to the heirs and [...] to the legatees of the assets [...] forming part of the estate”, and of the respective Recitals to the Regulation. Consequently, Art. 1 (2)(1) must be read to refer only to the procedure of recording rights in the register and the effects of such recording with regard to third parties.⁷¹ In fact, there is little in the corresponding Recitals 18 and 19 that would suggest that Art. 1 (2)(1) was meant to extend beyond such procedural questions to the substantive requirements for the acqui-

to succession. [...]” Recital 42: “The law determined as the law applicable to the succession should govern the succession from the opening of the succession to the transfer of ownership of the assets forming part of the estate to the beneficiaries as determined by that law. [...]”. Recital 47: “The law applicable to the succession should determine who the beneficiaries are in any given succession. Under most laws, the term ‘beneficiaries’ would cover heirs and legatees and persons entitled to a reserved share although, for instance, the legal position of legatees is not the same under all laws. Under some laws, the legatee may receive a direct share in the estate whereas under other laws the legatee may acquire only a claim against the heirs.”

69) Accord: *Dutta* (n. 38), Art. 1 EuErbVO para. 32, Art. 23 EuErbVO para. 20; *Schmidt*, in: *Dutta/Weber* (n. 23), Art. 31 EuErbVO paras. 13 et seq.; *Schmidt*, *RabelsZ* 77 (2013), 1 et seq.; *Mansel*, in: Hilbig-Lugani et al. (eds.), *Zwischenbilanz*, Festschrift für Dagmar Coester-Waltjen zum 70. Geburtstag, 2015, 587 et seq.

70) See, e.g., *Hertel*, in: *Dutta/Herrler* (n. 13), 99, paras. 42 et seq.; *Weber*, in: *Dutta/Weber* (n. 23), Einl. para. 106.

71) *Dutta* (n. 38), Art. 1 EuErbVO paras. 31 et seq.

sition of a right.⁷²

The central argument for the recognition of a *Vindikationslegat* established under the law applicable to succession, however, is a substantive one, and it derives, again, from the principle of unity of succession.⁷³ The question whether a legal system opts for a *Vindikationslegat* oder a *Damnationslegat* is not only, and probably not even primarily, based on purely dogmatic preferences with regard to the technical *modus* in which to bring about the transfer of the asset devised to the legatee. Rather, the construction of the legacy is imbedded into the general system of liability in the context of inheritance. Thus, where the asset automatically leaves the estate upon the death of the testator, it will usually not be available to satisfy claims against the estate; at least, the legatee may be subject to a mere subsidiary liability, with primary liability for the debts of the estate resting on the heirs. Such a system of subsidiary liability may also be effected under a system of *Damnationslegat*, but it will at least take a different form. As a consequence, here again the rules of liability are closely related to the liability regime of a particular law of succession. It would therefore be very unfortunate to dissociate one from the other.⁷⁴

It may be hoped that this question, which has tormented German commentators so much, will soon be finally settled: Only recently, a Polish court requested a preliminary ruling by the European Court of Justice regarding the status of a *Vindikationslegat* under the Succession Regulation.⁷⁵ The decision of the ECJ is keenly awaited.

72) See, in particular, Recital 18: “[...] It should therefore be the law of the Member State in which the register is kept [...] which determines under what legal conditions and how the recording must be carried out and which authorities, such as land registers or notaries, are in charge of checking that all requirements are met and that the documentation presented or established is sufficient or contains the necessary information. [...]” Recital 19: “The effects of the recording of a right in a register should also be excluded from the scope of this Regulation. It should therefore be the law of the Member State in which the register is kept which determines whether the recording is, for instance, declaratory or constitutive in effect. Thus, where, for example, the acquisition of a right in immovable property requires a recording in a register under the law of the Member State in which the register is kept in order to ensure the *erga omnes* effect of registers or to protect legal transactions, the moment of such acquisition should be governed by the law of that Member State.” – Contrast the clear language of the Recitals quoted *supra*, n. 68.

73) *Supra* II.

74) See *Schmidt*, in: Dutta/Weber (n. 23), Art. 23 EuErbVO para. 100, Art. 31 EuErbVO para. 17.

75) Request for a preliminary ruling from the Sąd Okręgowy w Gorzowie Wielkopolskim (Poland), 19.04.2016 – Aleksandra Kubicka, Case C-218/16, O.J. 2016, C 335/30.

VII. Nature of the rights created by the law applicable to succession

As we have seen, the law applicable to succession shall determine not only the beneficiaries and their respective share, but also “other succession rights”, Art. 23 (2)(b) of the Regulation.⁷⁶ Accordingly, the law of succession should also determine whether a certain beneficiary shall automatically acquire a certain asset or right upon the death of the decedent or whether he shall only have a personal claim against the estate to be transferred that right or asset.⁷⁷ However, the law of succession may create rights or entitlements that are unknown to the law applicable to the individual asset, notably the law of the situs regarding property rights. In such cases, problems of adaptation will arise.

The problem is well illustrated by a decision of the BayObLG from 1995:⁷⁸ The court had to decide on the effects of a (mandatory) statutory life interest (*usufruct*) of the surviving spouse, which arose under Belgian succession law, with regard to property located in Germany. This entitlement was upheld by the court only as a simple personal claim against the heirs,⁷⁹ directed at the establishment of a corresponding life interest on the basis of German law. In this context, the court also referred to the 1994 BGH decision denying proprietary effects to a “*Vindikationslegat*” arising under Colombian law.⁸⁰

The decision conflates two distinct aspects: The first concerns the question whether title to a specific asset can be transferred or some other right in such an asset may be created automatically by operation of law upon the death of the owner. This is the problem of the *Vindikationslegat*, and for the reasons developed above,⁸¹ such effects should be recognized, even if they are unknown to the law governing the individual asset, in particular the law of its situs. However, it is quite another matter whether the right so created is, by its contents, compatible with the property law of the situs. This problem did not arise in the BGH case, as the *Vindikationslegat* effected immediate acquisition of absolute ownership by the legatee and such ownership (*Eigentum*) is clearly known to German law.⁸² As a consequence, no problems of adaptation

76) Supra V, text accompanying n. 53.

77) Supra VI 2.

78) BayObLG, 26.10.1995 – 1Z BR 163/94, BayObLGZ 1995, 366.

79) As such, it was not to be included in the (German) certificate of succession.

80) Cf. supra n. 66.

81) Supra VI 2.

82) Cf. *Schmidt*, in: Dutta/Weber (n. 23), Art. 31 EuErbVO para. 15.

arose. However, the situation was different in the case of the BayObLG: There, the *usufruct* arose by operation of Belgian law on property situated in Germany. The “nature of rights *in rem*”, however, is excluded from the scope of the Regulation under Art. 1 (2)(k). It is rather left to the law applicable to questions of property, that is, German law.⁸³

The distinction between the transfer and/or creation of rights and the contents and/or nature of these rights is also supported on a policy level: As has been shown above, the *modus* of creating or transferring a right in the context of succession is closely connected to other substantive matters of succession law, particularly to the liability for debts of the estate.⁸⁴ Therefore, that law should also govern the transmission of the assets, to the exclusion of the *lex rei sitae*. In contrast, the right that has been created by way of succession will persist beyond the termination of the probate proceeding and the distribution of the estate, and it will be subject to legal transactions in the State where the property is located. Thus, with regard to the contents of that right, the interests of third parties (“*Verkehrsinteressen*”) are involved, particularly those of creditors of the beneficiaries or parties acquiring the asset on which the right was created. Furthermore, procedural aspects are involved to the extent that the right created under the applicable succession law has to be asserted in enforcement proceedings – either positively by the beneficiary himself or negatively as a defense against enforcement proceedings brought by third-party creditors. Here, the parties concerned have a legitimate interest not to be surprised by rights of a nature or of contents unknown to the law of the State where the asset is located.

For these reasons, that very “nature” of rights *in rem* (and, notably, not the *modus* of their creation or transmission) is excluded from the Regulation by virtue of Art. 1 (2)(k). This exception is directed at the protection of the *numerus clausus* of property rights that may exist under the law of a Member State.⁸⁵

83) In Germany, the *lex rei sitae*, applies by virtue of Art. 43 (1) EGBGB.

84) *Supra*, text accompanying n. 73.

85) Cf., in particular, Recital 15: “This Regulation should allow for the creation or the transfer by succession of a right in immovable or movable property as provided for in the law applicable to the succession. It should, however, not affect the limited number (*numerus clausus*) of rights *in rem* known in the national law of some Member States. A Member State should not be required to recognise a right *in rem* relating to property located in that Member State if the right *in rem* in question is not known in its law.” Recital 16: “However, in order to allow the beneficiaries to enjoy in another Member State the rights which have been created or transferred to them by succession, this Regulation should provide for the adaptation of an unknown right *in rem* to the closest equivalent right *in rem* under the law of that other Member State. [...]”

As a consequence, the right must be adapted to the requirements of the law applicable to the specific asset over which the right is created, generally the law of its situs. This is the province of the Regulation's adaptation provision in Art. 31, which merits a literal reproduction:

“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.”

The true method of “adaptation” of rights *in rem* created under a foreign law to the requirements of forum or situs law is subject to a very sophisticated, highly technical debate that threatens to transcend the needs of practical jurisprudence.⁸⁶ Against this background, Art. 31 strikes a balance by giving useful (albeit: quite general) guidelines for a practical approach to the problem without getting lost in theoretical battles. This is not the place for a closer analysis of the way adaptation should work in the context of the Succession Regulation. We shall content ourselves with remarking that we are here actually at the precise borderline between two areas of law: the law of succession and the law of property. In fact, the exclusion of the “nature of rights *in rem*” from the scope of the Regulation, as set out in Art. 1 (2)(k), on closer inspection, turns out to be too sweeping: After all, pursuant to Art. 31, courts and lawyers will have to first determine “the right *in rem* in question” – that is, the right as it arises under the law applicable to succession – in order to determine whether that right is “known” to the law of the Member State in which the right is invoked, and to determine what is the closest equivalent right under the law of that State. In the end, therefore, even the right *in rem* is first created, let us say: “virtually”, as provided by the law applicable to the succession, but it is promptly “adapted”, “transposed”, or whatever you want to label the process that is required, in order to meet the categories of rights existing under the law applicable to the specific asset.⁸⁷

86) For an overview of the myriad of “theories” see, e.g., *Wendehorst*, in: *Münchener Kommentar zum BGB*, 6th ed. 2015, Art. 43 EGBGB paras. 147 et seq.: theory of “effet de purge”, theory of “full transposition”, theory of “selective transposition” or “substitution”, theory of “recognition” (*Anerkennungstheorie*), theory of “acceptance” (*Hinnahmetheorie*).

87) *Mansel* (n. 69), p. 592, aptly talks about a “cooperation” of property and succession law.

VIII. Conclusion

We have come to the end of our exploration of the boundaries of the law applicable to succession. It cannot be denied that there still remains unmarked territory. In particular, the “sharing-out of the estate”, which is generally subjected to the law applicable to succession by Art. 23 (2)(j) of the Regulation, probably requires a more differentiated approach.⁸⁸ Intricate questions of characterization may also arise with respect to the exclusion of “maintenance obligations other than those arising by reason of death”, Art. 1 (2)(e).⁸⁹ But we have to leave these for another day.

88) See *Schmidt*, in: Dutta/Weber (n. 23), Art. 23 EuErbVO paras. 131 et seq.

89) See *Schmidt*, in: Dutta/Weber (n. 23), Art. 1 EuErbVO paras. 54 et seq.

ABSTRACT

The EU Regulation No. 650/2012 applies to “succession to the estates of deceased persons”, Art. 1 (1). Its choice-of-law rules determine “the law applicable to the succession as a whole”, Art. 21 (1). That law of succession will often parallel other laws, which are applicable to different legal aspects not properly relatable to the law of succession. The most important examples are matrimonial property law and property law in general, but there is a wide range of other areas that may play a role with regard to questions of inheritance, for example company law (here meant to refer to the law of corporations and other companies). In such cases, the different legal issues must be assigned to the respective system of law. This is the well-known problem of characterization in private international law. In this paper, I shall explore the boundaries of the law applicable to succession to such other areas of law, in other words: I shall be dealing with problems of characterization that arise under the new Succession Regulation.

Keywords: Characterization; EU Succession Regulation; Einantwortung; Vindikationslegat; joint tenancy.

GRANICE MJERODAVNOG PRAVA ZA NASLJEĐIVANJE

SAŽETAK

Uredba EU br. 650/2012 se odnosi na „nasljeđivanja imovine preminulih lica“, čl. 1 (1). Osim ako je drukčije predviđeno ovom Uredbom, pravo mjerodavno za nasljeđivanje u cijelosti je pravo države u kojoj je umrli imao svoje uobičajeno boravište u trenutku smrti., čl. 21 (1). Nasljedni statut će se najčešće primjenjivati istovremeno sa drugim statutima, mjerodavnim za različite pravne aspekte koje nasljedni statut ne može urediti na odgovarajući način. Najznačajniji primjeri su bračno-imovinski režim i stvarno pravo općenito, ali postoji širok spektar drugih područja koja mogu igrati ulogu u odnosu na nasljeđivanje, na primjer statusno poslovno pravo (ovdje se prvenstveno mislina korporativno pravo i pravo privrednih društava). U takvim slučajevima, različita pravna pitanja moraju biti regulisana i podvrgnuta različitim mjerodavnim pravima. Ovo je dobro poznat problem kvalifikacije u međunarodnom privatnom pravu. U ovom radu ćemo istražiti granice prava koje se primjenjuju na nasljeđivanje u odnosu na druga pravna područja, drugim riječima; bavit ćemo se problemima kvalifikacije koji se javljaju s novom Uredbom o nasljeđivanju.

Ključne riječi: Kvalifikacija; Uredba EU o nasljeđivanju; Einantwortung; Vindikationslegat; suvlasništvo s pravom priraštaja u korist nadživjelog.