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GENERAL PRIVATE INTERNATIONAL LAW INSTITUTES IN THE EU SUCCESSION REGULATION – SOME REMARKS

I. INTRODUCTION

Questions concerning the General Part of Private International Law have always had a certain appeal for those working with conflict of laws, because the topic deals with the "abstract roof" of an already abstract legal field. Nevertheless, such questions are not purely academic in nature, but rather due to the attempt for equal treatment of repeatedly occurring legal questions, so that the General Part supports realisation of the legal idea itself. Regarding this background, it might seem disappointing that European PIL has not yet regulated these questions by a special regulation – a so-called "Rome 0-Regulation"[1]. But the European legislator has chosen a different way, namely a step-by-step codification of the several legal fields concerning conflict of laws, in which questions of the General Part are regulated in a context-specific manner. Occasionally, this approach leads to inconsistency within the European PIL[2], but it also facilitates an evolutionary development of the General Part, which is not trapped within a distinct national legal doctrine, but pursues a genuine European understanding.

New "bricks for a European General Part"[3] have now been given by the EU-Regulation No 650/2012[4] (hereinafter: *Succession Regulation*), which also unifies PIL in matters of succession. Because general ques-

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1) For that discussion see Leible/Unberath (eds.), Brauchen wir eine Rom 0-VO?, 2013; Leible (ed.), General Principles of European Private International Law, 2016; also *Sonnenberger*, Randbemerkungen zum Allgemeinen Teil des eines europäischen IPR, in: Baetge/von Hein/von Hinden (eds.), Festschrift Kropholler 2008, 227.

2) See *Wilke*, in: Leible (ed.), General Principles of European Private International Law, 2016, 1 *et seq.*

3) *Heinze*, Bausteine eines Allgemeinen Teils des europäischen Internationalen Privatrechts, in: Festschrift Kropholler (supra note 1), 105.

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

tions are traditionally of great importance in this legal field[5], it does not appear surprising that this regulation deals with several of them. This holds true especially for *renvoi* (Article 34), which has found its way into European PIL for the first time, but foremost also for the *concept of adaptation*, for which this regulation even provides three special rules (Article 31-33). Furthermore, this regulation also contains a *public policy clause* (Article 35) as well as – excluded from this article – an "unfinished" general clause concerning *mandatory rules[6] (Article 30) and provisions concerning referrals to a state with more than one legal system[7] (Article 36, 37). In contrast, the handling of characterisation*, *incidental questions* as well as of *fraus legis* was not explicitly codified, so that these problems have to be solved by recourse to general PIL-principles.

II. Characterisation

However, let us first start our *tour d´horizon* with the **characterisation** or classification, even though it rarely poses problems – at least in theoretical regard. In short words, this problem deals with the question of which substantive provisions fall in the scope of the respective conflict-of-law rule. Nowadays there is unity, that the scope of a conflict-of-law rule can solely be determined **autonomously**, irrespective of the national legal concept of lex fori or lex causae, but under consideration of the significant, implied *conflict-of-law interests[8]. Therefore, the starting point for characterisation is the purpose of the respective substantive provisions, which implies specific conflict-of-law interests for their application. Do they match those conflict-of-law interests, which are accounted for by a codified conflict-of-law rule, the substantive provision falls in the scope of that PIL-rule. In consequence, the respective*

5) See *Looschelders*, Die allgemeinen Lehren des Internationalen Privatrechts im Rahmen der Europäischen Erbrechtsverordnung, in: Hilbig-Lugani/Jakob/Mäsch/Reuß/Schmid (eds.), Festschrift Coester-Waltjen 2015, 531.

6) See *Köhler*, in: Gierl/Köhler/Kroiß/Wilsch, p. 131 *et seq.* (§ 4 mn. 104 *et seq.*). – For general aspects on this issue see *Köhler*, Eingriffsnormen – Der „unfertige Teil" des europäischen IPR, 2013; *Köhler,* Uzimanje u obzir stranih normi neposredne primene u evropskom međunarodnom ugovornom pravu, Nova Pravna Revija – Časopis za domaće, njemačko i evropsko pravo, 2014 (Vol. 8), p. 9-19.

7) See *Eichel*, References to Non-unified Legal Systems, in: Leible (ed.), General Principles of European Private International Law, 2016, p. 275 *et seq*.

8) For further details see *Kegel/Schurig*, Internationales Privatrecht, 9th edition 2004, § 7 III 1 (p. 336); *von Bar/Mankowski*, Internationales Privatrecht I, 2nd edition 2003, § 7 mn. 138; *Köhler*, in: Kroiß/Horn/Solomon (eds.), NomosKommentar Nachfolgerecht, 2015, Vor Artikel 20-38 EuErbVO: Einleitung IPR mn. 6-9, 12.

provision is part of the lex causae and has to be respected. Therefore, the process of characterisation is a multi-level process, where substantive purposes gain major significance[9].

In the scope of the European PIL-regulations, this fact required no explicit codification. Nevertheless, the Succession Regulation simplifies the process of characterisation by providing several auxiliary conflict-of-law rules, which concretise the scope of the most important conflict-of-law rules. A prominent example for such an auxiliary rule is codified in **Article 23**, which substantiates the legal term of succession, used in the scope of the general conflict-of-law rules.

Reference: Article 23 Par. 1 states that the law determined pursuant to Article 21 or Article 22 shall govern the *succession as a whole*. What is meant by this term is firstly determined by Article 3 Par. 1 lit. a, which codifies a respective legal definition. More importantly, Article 23 Par. 2 further provides a detailed but not exhaustive[10] list of legal questions, which should be governed by the lex successionis. Such an enumeration facilitates the determination of lex successionis in the majority of cases and therefore contributes to legal certainty, but it does not solve *all* problems of characterisation[11]. In fact, here is valid as well, that the wording of Article 23 solely forms the starting point for a teleological characterisation – the question, whether a substantive rule is part of the applicable lex successionis or not, can be decided ultimately only by considering the significant, implied conflict-of-law interests[12].

Finally, the question has to be answered, if the problem of characterisation is **subject to review by the European Court of Justice**, which has to decide on questions concerning the interpretation of this regulation. Among these questions is the determination of the scope of conflict-of-law rules originating from European PIL-acts, so that the characterisation is in principle subject to review by the ECJ. Certainly,

9) For further details see *Köhler*, Eingriffsnormen – Der „unfertige Teil" des europäischen IPR, 2013, 70 *et seq*.

10) *Dutta*, in: Säcker/Rixecker/Oetker (eds.), Münchener Kommentar zum BGB, 6th edition 2015, Art. 23 EuErbVO mn. 41; NK-NachfolgeR/*Köhler* (supra note 8), Art. 23 EuErbVO mn. 1; *Köhler*, in: Gierl/Köhler/Kroiß/Wilsch, p. 107 *et seq.* (§ 4 mn. 41).

11) See NK-NachfolgeR/*Köhler* (supra note 8), Art. 23 EuErbVO mn. 10 *et seq.*; *Köhler*, in: Gierl/Köhler/Kroiß/Wilsch, p. 110 *et seq.* (§ 4 mn. 49 *et seq.*).

12) NK-NachfolgeR/*Köhler* (supra note 8), Art. 23 EuErbVO mn. 1 *et seq.*; *Köhler*, in: Gierl/Köhler/Kroiß/Wilsch, p. 107 *et seq.* (§ 4 mn. 41 *et seq.*); see also *Mankowski*, in: Deixler-Hübner/Schauer (eds.), EuErbVO – Kommentar zur EU-Erbverordnung, 2015, Art. 23 EuErbVO mn. 1 *et seq.*

the ECJ can only interpret *European* legal acts, but not at the same time provisions originating from national law, which are only subject to characterisation. Since the last question cannot be decided without considering the special purposes of the substantive law in question, there has to be some kind of **cooperation** between the member state courts and the ECJ: While the national courts have to decide – finally and bindingly – on the purpose of provisions originating from national law, the ECJ has to decide on their application with respect to the purpose determined by the national courts[13].

III. Incidental questions

Another classic problem concerning the General Part is the handling of so-called **incidental or preliminary questions**, which is not explicitly regulated in the Succession Regulation either. Here, it deals with the question of which conflict-of-law rules should govern legal relationships provided in the scope of an applicable substantive rule as a legal requirement. For example, granting a spouse´s right of inheritance requires a valid marriage between the spouse and the deceased. Since the validity of a marriage is not a question of succession, it cannot be answered automatically by lex successionis determined by the conflict-of-law rules of this regulation. Therefore, the question of the law applicable to such an issue has to be asked *anew* without respect to conflict-of-law rules governing the so-called main question, unless the incidental question is subject to a legally binding decision, which has to be recognised in the concerning member state.

If the main question is governed by the lex fori, there is no doubt, that incidental questions arising in this context have to be answered in accordance to the conflict-of-law rules provided by the respective lex fori. However, if *foreign* law is applicable as lex causae, it is disputable in German as well as in European PIL whether the incidental question has to be answered **independently[14] in accordance with the conflict-**

13) For further details see *Köhler*, Eingriffsnormen – Der „unfertige Teil" des europäischen IPR, 2013, 325 *et seq.* (concerning mandatory rules).

14) *Concerning German PIL: Kegel/Schurig* (supra note 8), § 9 II 1, p. 379-381; *von Bar/Mankowski* (supra note 8), § 7 mn. 192-206; *Rauscher*, Internationales Privatrecht, 4th edition 2012, mn. 509. – See also BGH NJW 1981, 1900, 1901. – *Concerning European PIL:* NK-NachfolgeR/*Köhler* (supra note 8), Vor Artikel 20-38 EuErbVO: Einleitung IPR mn. 20 *et seq.*; *Köhler*, in: Gierl/Köhler/Kroiß/Wilsch, p. 150 *et seq.* (§ 4 mn. 145 *et seq.*); *Solomon*, Die Anknüpfung von Vorfragen im Europäischen Internationalen Privatrecht, in: Bernreuther/Freitag/Leible/Sippel/Wanitzek (eds.), Festschrift Spellenberg 2010, p. 355, 369 *et seq.*; *Schurig*, Das internationale Erbrecht wird europäisch – Bemerkungen zur kommenden europäischen Verordnung, in: Festschrift Spellenberg, p. 343, 350 *et seq.*; *Nordmeier*, ZEV 2012, 513, 515; *Döbereiner*, MittBayNot 2013, 358, 361.

of-law rules of the lex fori or dependently[15] by using the respective conflict-of-law rules of the lex causae[16].

Supporters of a dependent handling of incidental questions traditionally argue, that such an approach facilitates *international consistency*, because the main question could be decided in complete accordance with the lex causae[17]. In the scope of European PIL, such an approach would additionally realise *European* consistency due to the fact that each member state has to decide incidental questions on the basis of the same substantive law, even though the respective legal issues have not yet been harmonised among the member states[18]. In consequence, identical decisions as well as identical European Certificates of Succession[19] could be issued in all member states, which would obviously be very desirable from a political point of view.

Nevertheless, a dependent handling of incidental questions has to be dismissed for several reasons. First of all, such an approach *technically* implies, that the respective conflict-of-law rules of the lex causae have to be applied due to a special conflict-of-law rule[20], which neither German nor European PIL explicitly provides for. In consequence, such a conflict-of-law rule would have to be developed *modo legislatoris*. However, such a proceeding fails in the context of the Succession Regulation at least due to the fact that the respective legal issues are regularly excluded from their scope of application[21]. For clarification, let us take for example the spouse´s right of inheritance: As already

15) *Concerning German PIL: von Hoffmann/Thorn*, Internationales Privatrecht, 9th edition 2007, § 6 mn. 71-72. – *Concerning European PIL:* MüKoBGB/*Dutta* (supra note 10), Vor Art. 20 EuErbVO mn. 28; *Dutta*, IPRax 2015, 32, 36; *Thorn*, in: Palandt, Bürgerliches Gesetzbuch, 75th edition 2015, Art. 1 EuErbVO mn. 5; *Dörner*, ZEV 2012, 505, 512 *et seq.*

16) For further details see NK-NachfolgeR/*Köhler* (supra note 8), Vor Artikel 20-38 EuErbVO: Einleitung IPR mn. 20 *et seq.*; *Köhler*, in: Gierl/Köhler/Kroiß/Wilsch, p. 150 *et seq.* (§ 4 mn. 145 *et seq.*). – In general: *Kegel/Schurig* (supra note 8), § 9, p. 373-386; *von Bar/Mankowski* (supra note 8), § 7 mn. 182-213; *Kropholler*, Internationales Privatrecht, 6th edition 2006, § 32, p. 221-230, *von Hoffmann/Thorn* (supra note 15), § 6 mn. 56-72.

17) *von Hoffmann/Thorn* (supra note 15), § 6 mn. 71-72.

18) See MüKoBGB/*Dutta* (supra note 10), Vor Art. 20 EuErbVO mn. 28; *Dutta*, IPRax 2015, 32, 36.

19) See *Dörner*, ZEV 2012, 505, 512 *et seq.*; *Dutta*, FamRZ 2013, 4, 13; Palandt/*Thorn* (supra note 15), Art. 1 EuErbVO mn. 5.

20) For further details see *Kegel/Schurig* (supra note 8), § 9 II 1, p. 379; NK-NachfolgeR/*Köhler* (supra note 8), Vor Artikel 20-38 EuErbVO: Einleitung IPR mn. 20 *et seq.*; *Köhler*, in: Gierl/Köhler/Kroiß/Wilsch, p. 151 *et seq.* (§ 4 mn. 147).

21) See *Solomon*, in: Festschrift Spellenberg (supra note 14), p. 355, 370.

mentioned, Article 21 and Article 22 include only such substantive provisions, which could be characterised as law of succession, but not at the same time conflict-of-law rules of the *lex successionis* concerning the validity of a marriage. Their application therefore requires a special conflict-of-law rule, which *cannot* be provided by the Succession Regulation already due to the fact, that questions concerning family relationships are excluded from the scope of this Regulation (Article 1 Par. 2 lit. b). This exceptional clause also includes incidental questions arising in the scope of the Succession Regulations, as is shown by Article 1 Par. 2 Rom III-Regulation, which mentions incidental questions explicitly and to which references could be made due to a consistent interpretation of the European PIL[22]. Therefore, a dependent handling of incidental questions in the scope of European PIL could only be considered for such legal issues which have already been harmonised among the member states – for all remaining issues, the handling of incidental questions has to be determined by the respective national rules of the respective lex fori[23].

But also in general, a dependent handling of incidental questions has to be declined. Such an approach raises concerns, because there is absolutely no hint, that the codified German as well as the European conflict-of-law rules could only be applied in the context of main questions and not at the same time in the context of incidental questions[24]. Therefore, a dependent handling means *ignoring* codified conflict-of-law rules provided by the lex fori. Such an approach cannot be justified with reference to *international consistency*, especially since this can only be taken into account by violating the consistency of the own legal system. In fact, *if* the incidental question has to be answered in accordance to the conflict-of-law rules of the respective lex causae, *different* conflict-of-law rules always have to be applied – depending on which state is providing the lex causae. This fact could lead to a different assessment of the same legal question[25], depending only on the legal context: For example, if we had to decide on the validity of

22) NK-NachfolgeR/*Köhler* (supra note 8), Vor Artikel 20-38 EuErbVO: Einleitung IPR mn. 23 *et seq.*; *Köhler*, in: Gierl/Köhler/Kroiß/Wilsch, p. 153 *et seq.* (§ 4 mn. 148 *et seq.*).

23) See *Solomon*, in: Festschrift Spellenberg (supra note 14), p. 355, 370.

24) NK-NachfolgeR/*Köhler* (supra note 8), Vor Artikel 20-38 EuErbVO: Einleitung IPR mn. 22; *Köhler*, in: Gierl/Köhler/Kroiß/Wilsch, p. 151 *et seq.* (§ 4 mn. 147).

25) See *Kegel/Schurig* (supra note 8), § 9 II, p. 379-381; NK-NachfolgeR/*Köhler* (supra note 8), Vor Artikel 20-38 EuErbVO: Einleitung IPR mn. 22; *Köhler*, in: Gierl/Köhler/Kroiß/Wilsch, p. 151 *et seq.* (§ 4 mn. 147).

a marriage, the respective German conflict-of-law rule may refer to a law, under which the marriage is valid. If we had to decide on the same question in the context of another legal issue – for example the examination of a spouse´s right of inheritance, a divorce etc. –, the existence of that marriage ought to be denied, if the conflict-of-law rules of the foreign lex causae refers to a law, under which the legal requirements of a valid marriage are not fulfilled. Such an outcome is not convincing. Coherent results can only be achieved, if incidental questions are *always* answered in accordance to the conflict-of-law rules of the lex fori. The fact, that member state courts may handle incidental questions differently in the context of not yet harmonised legal issues, has to be eliminated by the European legislator, namely by enacting further PIL regulations concerning these issues.

IV. Renvoi (Article 34)

Concerning renvoi, the Succession Regulation performs an important change: In contrast to the other European PIL-acts, Article 34 Par. 1 henceforth mandates *third-state conflict-of-law rules* in order to ensure international consistency, so that – at least in particular cases – renvoi to another law has to be accepted according to lex causae. Even though the wording of Article 34 seems to establish the acceptance of renvoi as a principle, this first impression is in fact misleading. If we include the very wide exceptional clause of Par. 2 into our considerations, renvoi has only to be accepted in the scope of **Article 21 Par. 1** as well as in the scope of provisions referring to this rule (Article 24 Par. 1, Par. 3 S. 1, Article 25, Article 28 lit. a). Therefore, the precondition for the acceptance of third-state renvoi is that the **deceased had his last habitual residence in said third state**. Since the international jurisdiction in such cases could solely be based on Article 10 *(subsidiary jurisdiction)* or Article 11 *(forum necessitates)*, the practical relevance of renvoi is quite small – at least in pure cases of succession[26]. However, if we have to apply Article 21 Par. 1 in the context of an incidental question, which could be assessed without respect to the restricted jurisdiction rules of this regulation, Article 34 obtains further importance[27].

According to the wording of Article 34 Par. 1, the acceptance of ren-

26) *Dörner,* ZEV 2012, 505, 511 *et seq.*; *Hausmann*, in: Staudinger, Kommentar zum Bürgerlichen Gesetzbuch: EGBGB/IPR Art. 3-6 EGBGB (IPR – Allgemeiner Teil), 2013, Art. 4 EGBGB mn. 164; Palandt/*Thorn* (supra note 15), Art. 34 EuErbVO mn. 1.

27) NK-NachfolgeR/*Köhler* (supra note 8), Art. 34 EuErbVO mn. 3; *Köhler*, in: Gierl/Köhler/Kroiß/Wilsch, p. 139 (§ 4 mn. 120).

voi firstly requires that the Succession Regulation refers to the law of a **third-state**. Hereunder fall – besides all non-member states – also those member states, which are not participating in this regulation, namely the United Kingdom, Ireland and Denmark[28]. The case in which renvoi refers to the law of *another* member state is not mentioned by Article 34 Par. 1, however there is also no need, because even the recourse on the – among member states harmonised – conflict-of-law rules leads to the application of substantive law of the respective member state[29]. Furthermore, renvoi ordered by Article 34 Par. 1 is subject to the condition that the *third-state conflict-of-law rules* refer to the law of a member state *(lit. a)* or to the law of a *second* non-member state, which would apply its own law *(lit. b)*. If these requirements are not fulfilled, renvoi is excluded, due to the fact that the referral ordered by Article 21 Par. 1 refers only to the substantive law of the respective third state.

To clarify the particular cases covered by Article 34 we take a look at an **example**: Let us presume that German courts have jurisdiction to rule on the succession of a deceased German having his last habitual residence in England. In such a case, the general conflict-of-law rule of Article 21 Par. 1 (in conjunction with Article 36 Par. 2 lit. a) refers to English law including English conflict-of-law rules, which assign *movable property* to the law of habitual residence of the deceased, but *immovable property* to the lex situs. Therefore, the English conflict-of-law rule accepts our referral at least in matters of movable property, which is, as a result, governed by English law of succession. However, this outcome is *not* a consequence of applicable English conflict-of-law rules, but only of European law: Since the requirements of Article 34 Par. 1 are not fulfilled, the referral of Article 21 Par. 1 includes only substantive law, so that English law of succession is *directly* applicable without reference to the English conflict-of-law rules[30]. As a matter of fact this approach chosen by Article 34 Par. 1 seems to be a little bit complicated and inconvenient.

If the inheritance of the deceased further includes a holiday rental in

28) *Schmidt*, in: Budzikiewicz/Weller/Wurmnest (eds.), Beck´scher Online-Großkommentar ZivilR, Internationales Privatrecht, Art. 34 EuErbVO mn. 4; Staudinger/*Hausmann* (supra note 26), Art. 4 EGBGB mn. 163; NK-NachfolgeR/*Köhler* (supra note 8), Art. 34 EuErbVO mn. 4.

29) NK-NachfolgeR/*Köhler* (supra note 8), Art. 34 EuErbVO mn. 4; *Köhler*, in: Gierl/Köhler/Kroiß/Wilsch, p. 139 (§ 4 mn. 121); Deixler-Hübner/Schauer/*Schwartze* (supra note 12), Art. 34 EuErbVO mn. 8.

30) NK-NachfolgeR/*Köhler* (supra note 8), Art. 34 EuErbVO mn. 5; *Köhler*, in: Gierl/Köhler/Kroiß/Wilsch, p. 139 *et seq.* (§ 4 mn. 121).

France, then, concerning this immovable property, English law refers back to situs law, hence to French law. If the English law referred only to the substantive law without accepting renvoi, indisputably French law would govern this case, due to the fact that foreign law has to be applied – according to general principles – in the way, in which it is handled by the respective state. However, English conflict-of-law rules accept renvoi, so that a **circle of renvoi**, a *"circulus inextricabilis"* arises, which has to be cut by a special *termination rule*. Unfortunately, this regulation does not provide such a rule[31], so we have to fill this legal gap *modo legislatoris* by developing such a rule within the scope of this regulation. By what means this should be achieved, is to date unclear and can finally only be decided by the European Court of Justice. Conceivable however, are basically **three approaches**:

(1) an autonomous termination by applying the substantive law of the *member state*[32],

(2) an autonomous termination by applying the substantive law of the *third-state* or

(3) a termination according to the termination rule of the third-state in the sense of the *„foreign-court-theory"*[33].

Since the English conflict-of-law rule itself follows the *foreign-court-theory*, **approach 3** does not reach an outcome, therefore an autonomous solution must be aimed for. Here, we have to consider that the acceptance of renvoi within the Succession Regulation shall not lead to a complete realisation of *international consistency*, but is rather

31) See NK-NachfolgeR/*Köhler* (supra note 8), Art. 34 EuErbVO mn. 6; *Köhler*, in: Gierl/Köhler/Kroiß/Wilsch, p. 140 (§ 4 mn. 122); *Solomon*, Die Renaissance des Renvoi im Europäischen Internationalen Privatrecht, in: Michaels/Solomon (eds.), Liber amicorum Schurig 2012, p. 237, 242; Staudinger/*Hausmann* (supra note 26), Art. 4 EGBGB mn. 165; MüKoBGB/*Dutta* (supra note 10), Art. 34 EuErbVO mn. 3.

32) NK-NachfolgeR/*Köhler* (supra note 8), Art. 34 EuErbVO mn. 7 *et seq.*; *Köhler*, in: Gierl/Köhler/Kroiß/Wilsch, p. 140 *et seq.* (§ 4 mn. 123 *et seq.*); MüKoBGB/*Dutta* (supra note 10), Art. 34 EuErbVO mn. 3; *Looschelders*, in: Hüßtege/Mansel (eds.), NomosKommentar BGB – Rom-Verordnungen, EuErbVO, HUP (Band 6), 2nd edition 2015, Art. 34 EuErbVO mn. 9 *et seq.*; Deixler-Hübner/Schauer/*Schwartze* (supra note 12), Art. 34 EuErbVO mn. 11 *et seq.*; BeckOGK/*Schmidt* (supra note 28), Art. 34 EuErbVO mn. 9. – See also *Solomon*, in: Liber amicorum Schurig (supra note 31), p. 237, 242 *et seq.*, 253; *von Hein*, in: *Leible/Unberath* (eds.), Brauchen wir eine Rom 0-Verordnung?, p. 341, 374.

33) Staudinger/*Hausmann* (supra note 26), Art. 4 EGBGB mn. 165. – For further details on the *foreign-court*-theory see *von Bar/Mankowski* (supra note 8), § 7 mn. 216 *et seq.*; *von Hoffmann/Thorn* (supra note 15), § 6 mn. 89; *Kegel/Schurig* (supra note 8), § 10 III 1 (p. 394).

restricted by practicability interests[34], which are best taken into account when the competent courts can apply their familiar lex fori. **Approach 2** does not meet the requirements of these interests, because an autonomous termination by applying the substantive law of the third-state can neither ensure international consistency with the third-state nor facilitate application of the lex fori, because such an approach *always* leads to the application of foreign law. Therefore, **approach 1** is preferable[35], so that in the present case, French law has to govern the succession concerning the holiday rental.

If the inheritance of the deceased finally includes **immovable property in a second non-member state**, according to Article 34 Par. 1 lit. b the acceptance of renvoi depends on whether the second state would apply its own law or not. If it applies its own law, the succession concerning the immovable property is governed by the law of this state, if it does not, the requirements of lit. b are not fulfilled, so that renvoi ordered by English law is not to be taken into account. In consequence, English substantive law has to be applied.

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Even though the wording of Article 34 Par. 1 lit. b provides no limitations, according to the preferable opinion, **two exceptions** have to be made: If the conflict-of-law rule of the second third-state refers to the law of a *member state*, this is equivalent to the constellation covered in lit. a. Therefore, with regard to a coherent interpretation of this rule, it seems to be necessary to treat these cases equally and hence also accept the renvoi of the second third-state to the law of a *member state* in order to support the application of the lex fori[36]. Furthermore, a restrictive teleological interpretation of lit. b should be performed when the second third-state refers back to the first third-state, which in turn declares the law of the second third-state as applicable. In this case, the considerations restricting international consistency are not affected, because no *additional* legal system has to be considered, so that international consistency can be reached with the first third-state by accepting such a

34) See NK-NachfolgeR/*Köhler* (supra note 8), Art. 34 EuErbVO mn. 1; *Köhler*, in: Gierl/Köhler/Kroiß/Wilsch, p. 138 *et seq.* (§ 4 mn. 119).

35) For further details NK-NachfolgeR/*Köhler* (supra note 8), Art. 34 EuErbVO mn. 7; *Köhler*, in: Gierl/Köhler/Kroiß/Wilsch, p. 140 *et seq.* (§ 4 mn. 123).

36) See NK-NachfolgeR/*Köhler* (supra note 8), Art. 34 EuErbVO mn. 11; *Köhler*, in: Gierl/Köhler/Kroiß/Wilsch, p. 142 *et seq.* (§ 4 mn. 127); Deixler-Hübner/Schauer/*Schwartze* (supra note 12), Art. 34 EuErbVO mn. 15; MüKoBGB/*Dutta* (supra note 10), Art. 34 EuErbVO mn. 5; vgl. auch NK-BGB/*Looschelders* (supra note 32), Art. 34 EuErbVO mn. 12.

renvoi[37]. Application according to the exact wording of Article 34 Par. 1 lit. b would in contrast lead to the application of the substantive law provided by the first third-state without reference to any foreign PIL.

In conclusion, Article 34 is a highly technical and complex rule, which causes some difficulties, but is manageable. However, from a political point of view, it seems to be quite inconsistent to realise the international consistency only in the scope of the general conflict-of-law rule of Article 21 Par. 1 and not within the scope of other rules. With this being said, a clear solution – either complete acceptance or entire abrogation of renvoi – would have been preferable. What remains is a crooked compromise, which at least provides for enthralling legal examination questions.

V. Adaptation

a) General aspects

Another institute of the General Part is adaptation, for which the Succession Regulation provides three different rules. Before I go into further details, I want to give a general outline of that issue. The problem of adaptation has its source in the analytic approach of PIL, according to which an appropriate law has to be determined for every raised legal question[38]. This often means that a cross-border case has to be decided in accordance to several legal systems, leading therefore to a *depeçage*. Since the respective national legal systems are not synchronised with each other, their combined application can lead to inconsistency, more precisely to a result which *none* of the involved legal systems would presume, if they could decide the whole legal dispute on their own. In such cases the inconsistent result has to be adjusted. The respective conflict-of-law instrument for this purpose is the so-called **adaptation,** which can be carried out in two different ways[39]:

37) NK-NachfolgeR/*Köhler* (supra note 8), Art. 34 EuErbVO mn. 11; *Köhler*, in: Gierl/Köhler/Kroiß/Wilsch, p. 142 *et seq.* (§ 4 mn. 127); Deixler-Hübner/Schauer/*Schwartze* (supra note 12), Art. 34 EuErbVO mn. 15. – For the contrary view see MüKoBGB/*Dutta* (supra note 10), Art. 34 EuErbVO mn. 5; NK-BGB/*Looschelders* (supra note 32), Art. 34 EuErbVO mn. 11.

38) For further details see NK-NachfolgeR/*Köhler* (supra note 8), Vor Artikel 20-38 EuErbVO: Einleitung IPR mn. 27 *et seq.*; *Köhler*, in: Gierl/Köhler/Kroiß/Wilsch, p. 154 *et seq.* (§ 4 mn. 149 *et seq.*).

39) For details see *Kegel/Schurig* (supra note 8), § 8, p. 357-371; *von Bar/Mankowski* (supra note 8), § 7 mn. 249-257; *Kropholler* (supra note 16), § 34, p. 234-240, *von Hoffmann/Thorn* (supra note 15), § 6 mn. 31-39; NK-NachfolgeR/*Köhler* (supra note 8), Vor Artikel 20-38 EuErbVO: Einleitung IPR mn. 29 *et seq.*; *Köhler*, in: Gierl/Köhler/Kroiß/Wilsch, p. 154 *et seq.* (§ 4 mn. 150 *et seq.*).

Firstly, the inconsistency could be eliminated by a teleological modification of the codified **conflict-of-law** rules insofar as they mandate only *one* law to govern the whole respective legal relationship as a result. This could be achieved by *revising* the scope of the concerning rules or by *developing* a completely new conflict-of-law rule. In both cases, the *depeçage* as the source of inconsistency would be directly eliminated.

The second possibility of resolving inconsistency caused by conflicting laws is exclusively located on the level of **substantive law** *without* affecting the codified conflict-of-law rules. In this case, the applicable substantive law has to be modified or completely ignored and replaced by new substantive rules, which have to be developed modo legislatoris.

The Succession Regulation does not decide between these possibilities, but refers to all of them in a different context.

b) Adaptation of rights in rem (Article 31)

Let us start with Article 31, which codifies an adaptation rule located exclusively on the level of substantive law. This rule covers the particular constellation, that the ***lex successionis*** **itself** generates a *right in rem* concerning the inheritance, which is unknown to the *lex situs*[40]. *If such a right has been invoked in a member state, Article 31 permits its adaptation to the closest equivalent right in rem of the lex fori, if this is necessary for the preservation of the limited number of rights in rem, the numerus clausus*, of the respective state[41]. In this context, the aims and interests pursued by the specific right *as well as* the effects attached to it should be taken into account.

From a German point of view, Article 31 has to be applied if the applicable lex successionis provides a **trust**[42]**,** which is unknown to German Law. This legal institute originating from Anglo-American Law is excluded from the scope of the Succession Regulation only with regard to the requirements concerning its creation, administration and dissolution (Article 1 Par. 2 lit. j), not at the same time with regards to other

40) For further details NK-NachfolgeR/*Köhler* (supra note 8), Art. 31 EuErbVO mn. 1 *et seq.*; *Köhler*, in: Gierl/Köhler/Kroiß/Wilsch, p. 157 *et seq.* (§ 4 mn. 154 *et seq.*).

41) See recitals 15 and 16.

42) See NK-BGB/*Looschelders* (supra note 32), Art. 31 EuErbVO mn. 15; NK-NachfolgeR/*Köhler* (supra note 8), Art. 31 EuErbVO mn. 8; *Köhler*, in: Gierl/Köhler/Kroiß/Wilsch, p. 159 *et seq.* (§ 4 mn. 159).

legal questions[43]. In consequence, the *lex successionis* determined by the Succession Regulation governs at least the effects originating from trust concerning the succession. If German courts have to deal with such a legal institute, an adaptation will be necessary with regard to estate objects located in Germany, because the particular distribution of the ownership position between beneficiary and trustee arising from a trust[44] violates the *numerus clausus* of German substantive law[45]. This violation has to be eliminated in the scope of Article 31 by *modification* of the foreign substantive law, potentially insofar as the trustee could be treated as an executor in the sense of German law[46], while the beneficiary could be considered as conventional heir acquiring full property rights[47].

Another problem arising in this context is the legal treatment of legacies, which *effect* a direct transfer of ownership to the legatee concerning the bequeathed items. Such *Vindikationslegate* are known especially in the roman based legal systems, for example in Italian and French Law, but not in German Law, which only provides a legacy granting the legatee a *personal claim* against the heir to have the bequeathed item transferred to him (§ 2147 BGB, so-called *"Damnationslegat"*). Therefore, it is assumed that a *Vindikationslegat* provided by the lex successionis has to be adapted to a legacy in the sense of German law[48], if German courts have to decide on it. However, I cannot agree with such an opinion. According to the preferable, admittedly also controversial view, the *modalities* of the transfer to the heirs are completely governed by the *lex successionis*, so that this law has to decide finally on the *effect* of the legacy in question[49]. If this legacy has an *effect in rem* according

43) See NK-NachfolgeR/*Köhler* (supra note 8), Art. 1 EuErbVO mn. 17; *Köhler*, in: Gierl/Köhler/Kroiß/Wilsch, p. 64 *et seq.* (§ 2 mn. 11).

44) For details see Burandt/Rojahn/*Solomon*, Länderbericht Großbritannien, mn. 111-113; *Schurig*, IPRax 2001, 446.

45) See BGH IPRax 1985, 221, 223 *et seq.*; *Ludwig*, in: Herberger/Martinek/Rüßmann/Weth (eds.), juris PraxisKommentar BGB (Band 6), 7th edition 2014, Art. 31 EuErbVO mn. 32. – For the contrary view see Schurig, in: Soergel, Bürgerliches Gesetzbuch mit Einführungsgesetz und Nebengesetzen: Band 10 (Einführungsgesetz), 12th edition 1996, Art. 25 EGBGB mn. 43; *Schurig*, IPRax 2001, 446, 447.

46) LG München I IPRax 2001, 459, 461; NK-BGB/*Looschelders* (supra note 32), Art. 31 EuErbVO mn. 15.

47) NK-BGB/*Looschelders* (supra note 32), Art. 31 EuErbVO mn. 15.

48) *Dörner*, ZEV 2012, 505, 509; jurisPK/*Ludwig* (supra note 45), Art. 31 EuErbVO mn. 27, 29.

49) See NK-NachfolgeR/*Köhler* (supra note 8), Art. 1 EuErbVO mn. 10 *et seq.*, Art. 23

to the lex successionis, the only question being answered in the scope of Article 31 is whether *this effect* is compatible with the German lex situs or not. Since a *Vindikationslegat* gives full ownership to the legatee – a right which is obviously well-known in German Law –, the acceptance of such a right cannot violate the *numerus clausus* of German substantive law. Therefore, a *Vindikationslegat* provided by the lex causae has to be accepted and is not subject to adaptation[50].

c) Commorientes (Article 32)

Article 32 provides another adaptation rule with regard to conflicting provisions concerning presumption of death. Such provisions are required if the legal assessment of succession depends on the chronological order of death of two or more persons, which cannot, however, be cleared up due to special circumstances. In this case, the chronological order has to be determined by legal presumptions. Since such rules vary considerably among the different legal systems, their combined application can lead to inconsistency, which has to be eliminated by Article 32 on the level of substantive law. As a **legal consequence,** Article 32 stipulates that *none* of the deceased has a claim on the inheritance of the other party.

Furthermore, it should be noted that the wording of Article 32 is not precise. Since this rule requires the presence of an inconsistency caused by *conflicting*[51] *presumption rules*, it is, in contrast to the wording, *not* decisive that the *succession* is subject to different laws – solely the presumption of death has to be governed by different laws[52]. However, this question is excluded from the scope of the Succession Regulation (Article 1 Par. 2 lit. c), so that it is subject to national conflict-of-law rules. According to the preferable opinion, this incidental question should be

EuErbVO mn. 16 *et seq.*, Art. 31 EuErbVO mn. 1 *et seq.*; *Köhler*, in: Gierl/Köhler/Kroiß/Wilsch, p. 65 *et seq.* (§ 4 mn. 12 *et seq.*), p. 112 *et seq.* (§ 4 mn. 55 *et seq.*), p. 157 *et seq.* (§ 4 mn. 154 *et seq.*).

50)NK-NachfolgeR/*Köhler* (supra note 8), Art. 31 EuErbVO mn. 10; *Köhler*, in: Gierl/Köhler/Kroiß/Wilsch, p. 160 *et seq.* (§ 4 mn. 161); NK-BGB/*Looschelders* (supra note 32), Art. 31 EuErbVO mn. 14; Palandt/*Thorn* (supra note 15), Art. 1 EuErbVO mn. 15, Art. 31 EuErbVO mn. 2; *Schmidt*, RabelsZ 77 (2013), 1, 19, 21 *et seq.*; *Margonski*, GPR 2013, 106, 108-110; BeckOGK/*Schmidt* (supra note 28), Art. 31 EuErbVO mn. 29.

51) NK-NachfolgeR/*Köhler* (supra note 8), Art. 32 EuErbVO mn. 3; *Köhler*, in: Gierl/Köhler/Kroiß/Wilsch, p. 162 *et seq.* (§ 4 mn. 163); Palandt/*Thorn* (supra note 15), Art. 32 EuErbVO mn. 2. – For the contrary view see *Dutta*, FamRZ 2013, 4, 11.

52) NK-NachfolgeR/*Köhler* (supra note 8), Art. 32 EuErbVO mn. 3; *Köhler*, in: Gierl/Köhler/Kroiß/Wilsch, p. 162 *et seq.* (§ 4 mn. 163); NK-BGB/*Looschelders* (supra note 32), Art. 32 EuErbVO mn. 4 *et seq*.

handled *independently* and therefore in accordance to the respective rules of the lex fori[53].

Example[54]: Father and daughter – he French, she English, both with habitual residence in Germany – die together in a car accident. The precise time of death cannot be determined in both cases. Both declared in the form of a disposition of property upon death the respective other one as sole heir and, in addition, each appointed a substitute heir – the father chose friend A, the daughter friend B.

According to Article 21 Par. 1, the succession of the father as well as the succession of the daughter is governed by German law, according to which only a person who outlives the decedent may inherit (§ 1923 Par. 1 BGB). Because the respective time of death cannot be determined in this case, we have to refer to legal presumptions, which are – as incidental questions being handled independently – subject to the national conflict-of-law rules of the lex fori. Within German Law, the respective conflict-of-law rule is codified in Article 9 EGBGB, which refers to the law of the State of nationality. Therefore, the question relating to presumed death is governed by two different laws, on the one hand – with regard to the father – by French law, which presumes death at the same time (Article 725-1 Cc), and on the other hand – with regard to the daughter – by English law, that presumes survival of the respective younger party and therefore the daughter (Sec. 184 Law of Property Act 1995). Because both in casu applicable presumptions are contradictory (the later deceased daughter cannot have died simultaneously with her father), there is an inconsistency, which has to be eliminated according to Article 32, so that *none* of the deceased parties has a claim on the inheritance of the respective other one. Therefore, the conditions for application of § 2096 BGB come into effect, so that A can become the heir of the father and B the heir of the daughter as substitute heirs.

d) Estate without a claimant (Article 33)

Lastly, Article 33 provides a special adaptation rule concerning estates without a claimant. The background of this rule is the partly very different handling of such cases[55] within the national laws: In part,

53) NK-NachfolgeR/*Köhler* (supra note 8), Art. 32 EuErbVO mn. 3; *Köhler*, in: Gierl/Köhler/Kroiß/Wilsch, p. 162 *et seq.* (§ 4 mn. 163). – For the contrary view see Palandt/*Thorn* (supra note 15), Art. 32 EuErbVO mn. 2

54) Case discussed by *Kegel/Schurig* (supra note 8), § 8 III 3, p. 370 *et seq.*

55) An overview is given by jurisPK/*Ludwig* (supra note 45), Art. 33 EuErbVO mn. 5.

those provide for a **state´s right of succession** (for example German[56] or Spanish[57] law), in part there exists a **state´s right of appropriation** with regard to the estate (for example English[58] or Austrian[59] law). Since the first one is governed by the *lex successionis*, the second one by the *lex situs*, both rights might be applicable at the same time, which leads to inconsistency. In those cases, Article 33 stipulates a primacy of *lex situs* towards *lex successionis[60], with the consequence that the right of appropriation could be asserted, if the respective estate is located in this state and if it is assured that creditor rights are not affected.*

e) Other adaptation cases

These three rules do not include all imaginable constellations of adaptation that could arise in the context of succession. Another, especially from a German point of view important constellation can occur, if a spouse´s right of succession – governed by foreign succession law – has to be *combined* with a claim concerning the equalisation of accrued gains governed by German matrimonial property law, more precisely by Article 1371 Par. 1 BGB. This rule realises the equalisation in a generalised way thereby that the intestate share of the surviving spouse, living under the statutory property regime of community of surplus *(Zugewinngemeinschaft)*, is increased by one quarter of the inheritance. If this increase as a result leads to an intestate share, which both legal systems involved would isolated not presume, there is *inconsistency*, which also has to be adjusted by means of adaptation[61]. Since the Succession Regulation does not regulate this case of adaptation, this legal gap has to be filled modo legislatoris by developing such a rule within the scope of this regulation, which finally is subject to review by the ECJ[62].

How this has to be achieved, has not yet been decided. As mentioned previously, either adaptation on the level of PIL or on the level of sub-

56) § 1936 BGB.

57) Art. 956 Cc.

58) s. 46 (1) (vi) Administration of Estates Act 1925.

59) § 760 ABGB.

60) NK-NachfolgeR/*Köhler* (supra note 8), Art. 33 EuErbVO mn. 1; *Köhler*, in: Gierl/Köhler/Kroiß/Wilsch, p. 163 (§ 4 mn. 165). – For the contrary view Palandt/*Thorn* (supra note 15), Art. 33 EuErbVO mn. 2; MüKoBGB/*Dutta* (supra note 10), Art. 33 EuErbVO mn. 1; *Dutta*, FamRZ 2013, 4, 11.

61) NK-NachfolgeR/*Köhler* (supra note 8), Art. 23 EuErbVO mn. 19 *et seq.*; *Köhler*, in: Gierl/Köhler/Kroiß/Wilsch, p. 113 *et seq.* (§ 4 mn. 58 *et seq.*).

62) *Köhler*, in: Gierl/Köhler/Kroiß/Wilsch, p. 155 (§ 4 mn. 150).

stantive law can be taken into consideration. Because any form of adaptation massively intervenes in the legal regime, the required modification has to be achieved with the – in casu – *smallest* intervention in the legal structures[63]. Regularly, the suitable tool for this is an adaptation located on the level of substantive law, because substantive rules allow more differentiated modifications. Insofar, this results in a priority of substantive-law-adaptation[64], which is also implied by Article 31 and Article 32. For the present case, this means that the intestate share of the surviving spouse has to be adapted to a share within the frame presumed by the involved laws.

VI. Ordre public

Just as all other European regulations concerning conflict of laws, the Succession Regulation also contains a public policy clause codified in Article 35. The wording chosen by this rule matches in its final version the previous public policy clauses of European PIL-acts and therefore provides no novelties. The purpose of any public policy clause is to secure essential principles of the lex fori and, if necessary, to enforce them in a conflict-of-law manner, provided that the applicable foreign law violates them[65].

According to the general view[66], the application of the public policy clause requires two things: On the one hand a **violation of essential substantive principles** of lex fori, on the other hand the presence of a **sufficiently close connection to the respective state**, which is mediated regularly by the nationality or a habitual residence in the respective member state. If these two requirements are fulfilled, the lex causae can be adjusted to that extent, as it is necessary to preserve the violated substantive principles.

Such principles are in particular **fundamental principles of justice**,

63) *Kegel/Schurig* (supra note 8), § 8 III 1, p. 361 *et seq.*; *Kropholler* (supra note 16), § 34 IV 2, p. 238; *Köhler*, in: Gierl/Köhler/Kroiß/Wilsch, p. 155 (§ 4 mn. 151).

64) See also *von Bar/Mankowski* (supra note 8), § 7 mn. 257; *Looschelders*, Die Anpassung im Internationalen Privatrecht, 1995, p. 210 *et seq.* – For the contrary view see *Kropholler* (supra note 16), § 34 IV 2 d, p. 240; *von Hoffmann/Thorn* (supra note 15), § 6 mn. 36 *et seq*.

65) For further details NK-NachfolgeR/*Köhler* (supra note 8), Art. 35 EuErbVO mn. 1 *et seq.*; *Köhler*, in: Gierl/Köhler/Kroiß/Wilsch, p. 166 *et seq.* (§ 4 mn. 171 *et seq.*).

66) See Staudinger/*Voltz* (supra note 26), Art. 6 EGBGB mn. 156 *et seq.*; MüKoBGB/*von Hein* (supra note 10), Art. 6 EGBGB mn. 184 *et seq.*; Palandt/*Thorn* (supra note 15), Art. 6 EGBGB mn. 6; *Kegel/Schurig* (supra note 8), § 16 II, p. 521; *von Bar/Mankowski* (supra note 8), § 7 mn. 263 *et seq.*; *Kropholler* (supra note 16), § 36 II 2, p. 246; *von Hoffmann/Thorn* (supra note 15), § 6 mn. 152.

which do not necessarily, but regularly result from prior-ranking law. In this context, it is irrelevant whether those principles are of national, international or European origin, because – and insofar as – they *are* applicable law of the lex fori. Therefore, German courts have to enforce not only civil law requirements originating from German Basic Law, but also those given by the European Convention on Human Rights and the Fundamental Rights of the European Union.

Examples: In the scope of the Succession Regulation the **principle of non-discrimination**, provided by Article 21 Charter of Fundamental Rights of the European Union, Article 14 European Convention on Human Rights as well as Article 3 German Basic Law is of particular interest. Typical cases, which are continuously occupying German legal practice, in this context often result from the application of Islamic succession law, which for example provides lower inheritances for female heirs than for male heirs[67] *or* does not grant close relatives a right to inherit in case of religious differences between deceased and heirs[68]. Such cases have to be adjusted by German Courts within the scope of Article 35, if they are closely connected to Germany[69]. From a German point of view, another case concerning Article 35 may be given, if the lex successionis does not grant a **reserved portion for close relatives**, especially children of the deceased. In this context, the *German Federal Constitutional Court* (Bundesverfassungsgericht) decided, that the "guarantee of the right of inheritance contained in Article 14.1 sentence 1 in conjunction with Article 6.1 of the Basic Law [guarantees a] minimum economic participation of the testator's children in his or her estate, which is in principle inalienable and non-means-tested"[70]. If we take this decision seriously, the children´s right to a compulsory proportion is an essential principle of German law, which has to be enforced against a conflicting lex causae provided that the case has a close connection to Germany[71].

67) See for example OLG Düsseldorf ZEV 2009, 190; OLG München ZEV 2012, 591; OLG Hamburg, FamRZ 2015, 1232 with a comment by *Köhler*, FamRZ 2015, 1235.

68) See for example OLG Hamm ZEV 2005, 436; OLG Frankfurt ZEV 2011, 135.

69) NK-NachfolgeR/*Köhler* (supra note 8), Art. 35 EuErbVO mn. 8; *Köhler*, in: Gierl/Köhler/Kroiß/Wilsch, p. 169 *et seq.* (§ 4 mn. 176).

70) BVerfG ZEV 2005, 301; see also KG ZEV 2008, 440, 441. – For the contrary view BGH NJW 1993, 1920, 1921. – For details see Staudinger/*Voltz* (supra note 26), Art. 6 EGBGB mn. 190.

71) NK-NachfolgeR/*Köhler* (supra note 8), Art. 35 EuErbVO mn. 8; *Köhler*, in: Gierl/Köhler/Kroiß/Wilsch, p. 169 *et seq.* (§ 4 mn. 176).

One last problem I want to mention in this context, is the as yet unanswered question, to which extent the public policy clause is subject to review by the European Court of Justice[72]. This question is closely linked to the methodical concept of the public policy clause, of which I can only give a short outline here[73]. If we grant Article 35 – according to the prevailing view[74] – the function of an auxiliary conflict-of-law rule, which makes the application of foreign law subject to the (resolving) condition of its compatibility with essential substantive principles of the lex fori, the ECJ is largely prevented from reviewing the recourse to public policy clause. In accordance with the *Krombach*-decision concerning the concept of procedural public policy, the ECJ could in this case solely *"watch over the limits, within which the courts of a [Member] State may have recourse to that concept"*[75].

This may be different, however, if we accept that each enforcement of a substantive principle also requires a special conflict-of-law rule, due to the simple fact that there are different laws in the world[76]. If we presume this theoretical starting point, the public policy clause gets a *positive* task[77] insofar as it has to mandate essential principles of lex fori by special conflict-of-law rules, which have to be developed *modo legislatoris* within the scope of that clause. Concerning the European PIL-acts, these unwritten conflict-of-law rules originate – according to the preferable view[78] – *solely* from European Law, so that they are – as

72) See NK-NachfolgeR/*Köhler* (supra note 8), Art. 35 EuErbVO mn. 11 *et seq*; *Köhler*, in: Gierl/Köhler/Kroiß/Wilsch, p. 172 *et seq.* (§ 4 mn. 179 *et seq.*).

73) For further details NK-NachfolgeR/*Köhler* (supra note 8), Art. 35 EuErbVO mn. 4 *et seq*; *Köhler*, in: Gierl/Köhler/Kroiß/Wilsch, p. 167 *et seq.* (§ 4 mn. 173).

74) For example Staudinger/*Voltz* (supra note 26), Art. 6 EGBGB mn. 21, 204; Palandt/*Thorn* (supra note 15), Art. 6 EGBGB mn. 1, 3, 13; *Kegel*, Internationales Privatrecht, 7th edition 1995 , § 16 XI, p. 385; *Kropholler* (supra note 16), § 36 I, p. 244 *et seq.*; *von Hoffmann/Thorn* (supra note 15), § 6 mn. 154.

75) See EuGH 28.3.2000, C-7/98 (Krombach) mn. 22 *et seq.* – Confirmed by EuGH 11.5.2000, C-38/98 *(Renault SA/Maxicar SpA)* mn. 27 *et seq.*; EuGH 6.9.2012, C-619/10 mn 49.

76) *Kegel/Schurig* (supra note 8), § 16 II, p. 524; *Schurig*, Kollisionsnorm und Sachrecht, 1981, p. 51 *et seq.*; *Köhler*, Der "unfertige Teil" des europäischen IPR, 2013, 6 *et seq.*

77) For further details NK-NachfolgeR/*Köhler* (supra note 8), Art. 35 EuErbVO mn. 4; *Köhler*, in: Gierl/Köhler/Kroiß/Wilsch, p. 172 *et seq.* (§ 4 mn. 179 *et seq.*); *Kegel/Schurig* (supra note 8), § 16 II, p. 524; see *Kahn*, in: *Lenel/Lewald* (eds.): Abhandlungen zum internationalen Privatrecht (Band 1), p. 161, 251.

78) NK-NachfolgeR/*Köhler* (supra note 8), Art. 35 EuErbVO mn. 11 *et seq*; *Köhler*, in: Gierl/Köhler/Kroiß/Wilsch, p. 167 *et seq.* (§ 4 mn. 173). – Concerinig mandatory rules as the positive ordre public see *Köhler*, Der "unfertige Teil" des europäischen IPR, 2013, p. 113 *et seq.*

the "unfinished part of the European PIL"[79] – subject to review by the ECJ.[80] Therefore, this court has to decide especially on the requirements concerning the presence of a sufficiently close connection as the second precondition for applying Article 35[81].

VII. Fraus legis

The last institute of the General Part, which I want to point out briefly, is the ***fraus legis***, which should avoid abuse of law[82]. This legal institute has not been codified in the Succession Regulation, but is however mentioned by recital 26. Nevertheless, it seems to be highly questionable whether there *are* cases in which this instrument could be used. Certainly, the application of *fraus legis* is not possible in cases, in which the legislator itself offers legal leeway to the parties, for example by enabling choice of law or by proving several connection factors to facilitate a particular substantive result, for example the *favor testamenti* in the scope of Article 27[83]. A *fraus legis* is also normally excluded if the deceased changed his nationality[84] or habitual residence in order to influence the lex successionis, because the generally strict requirements for acquiring a nationality as well as the existence of the escape clause provided by Article 21 Par. 2 do not leave room for abusive procedures. However, the famous *Leslie Caron-case*[85] decided by French Courts gives a possible constellation in which the fraus legis might be used. In this case, an American decedent transferred immovable property situated in France to a corporation incorporated under US-law to avoid legal portions of his children. But even this case ought to be solved solely in the scope of the public policy clause without recourse to that instru-

79) Following *Kahn*, in: *Lenel/Lewald* (eds.): Abhandlungen zum internationalen Privatrecht (Band 1), p. 161, 251 *et seq.*

80) For details see NK-NachfolgeR/*Köhler* (supra note 8), Art. 35 EuErbVO mn. 13; *Köhler*, in: Gierl/Köhler/Kroiß/Wilsch, p. 173 (§ 4 mn. 181). – Concerning mandatory rules as the positive ordre public see *Köhler*, Der "unfertige Teil" des europäischen IPR, 2013, p. 321 *et seq.*

81) NK-NachfolgeR/*Köhler* (supra note 8), Art. 35 EuErbVO mn. 5; *Köhler*, in: Gierl/Köhler/Kroiß/Wilsch, p. 168 *et seq.* (§ 4 mn. 174).

82) For details see *Kegel/Schurig* (supra note 8), § 14, p. 475-494; *von Bar/Mankowski* (supra note 8), § 7 mn. 128-137; *Kropholler* (supra note 16), § 23, p. 156-162, *von Hoffmann/Thorn* (supra note 15), § 6 mn. 122-135.

83) *Köhler*, in: Gierl/Köhler/Kroiß/Wilsch, p. 174 (§ 4 mn. 182).

84) Palandt/*Thorn* (supra note 15), Vor Art. 3 EGBGB mn. 26; *Kegel/Schurig* (supra note 8), § 14 IV, p. 485; *von Hoffmann/Thorn* (supra note 15), § 6 mn. 128.

85) Cour de cassation Rev.crit.dr.i.p. 1986, 66. – For details see *Kegel/Schurig* (supra note 8), § 1 I 5, p. 4, § 14 II, p. 480; *von Hoffmann/Thorn* (supra note 15), § 6 mn. 130.

ment[86]. Therefore, the scope of application for *fraus legis* is, at best, very small and in any case *limited* to extreme exceptional circumstances[87]. However, it is at least a possible instrument to avoid abuse of law, as it is explicitly clarified in recital 26. As an intrinsic conflict-of-law instrument based on teleological legal application, the fraus legis falls within the regulatory scope of the European PIL-acts and therefore is subject to review by the ECJ[88].

VIII. Closing Remarks

Concerning the General Part of the PIL, the Succession Regulation provides remarkable innovations, even though important questions still have to be solved by recourse to general PIL-principles. Nonetheless, the development of the European General Part is continuously progressing and its substantial "bricks" are already constituted by the existing European PIL-acts. For that reason it is to be hoped that the European legislator will dare to take the next big step in the not too distant future: The enactment of a consistent and gapless General Part of European PIL.

86) *Köhler*, in: Gierl/Köhler/Kroiß/Wilsch, p. 174 (§ 4 mn. 182).

87) *Köhler*, in: Gierl/Köhler/Kroiß/Wilsch, p. 174 (§ 4 mn. 183).

88) *Köhler*, in: Gierl/Köhler/Kroiß/Wilsch, p. 174 (§ 4 mn. 183).

ABSTRACT

Questions concerning the General Part of Private International Law have always had a certain appeal for those working with conflict of laws, because the topic deals with the "abstract roof" of an already abstract legal field. Nevertheless, such questions are not purely academic in nature, but rather due to the attempt for equal treatment of repeatedly occurring legal questions, so that the General Part supports realisation of the legal idea itself. Regarding this background, it might seem disappointing that European PIL has not yet regulated these questions by a special regulation – a so-called "Rome 0-Regulation". But the European legislator has chosen a different way, namely a step-by-step codification of the several legal fields concerning conflict of laws, in which questions of the General Part are regulated in a context-specific manner. Occasionally, this approach leads to inconsistency within the European PIL, but it also facilitates an evolutionary development of the General Part, which is not trapped within a distinct national legal doctrine, but pursues a genuine European understanding.

Keywords: Rome 0-Regulation; General Part of Private International Law; EU Succession Regulation.

OPĆI INSTITUTI MEĐUNARODNOG PRIVATNOG PRAVA U UREDBI EU O NASLJEĐIVANJU – NEKE NAPOMENE

SAŽETAK

Pitanja u vezi općeg dijela međunarodnog privatnog prava su uvijek bila privlačna za one koji se bave materijom sukoba zakona, jer se tema bavi "apstraktnim krovom" ionako apstraktne pravne oblasti. Ipak, takva pitanja nisu čisto akademska u prirodi, nego, zbog pokušaja za jednak tretman pravnih pitanja koja se javljaju u više navrata, opšti dio podržava realizaciju same pravne ideje. Uvažavajući ovakvu pozadinu, može izgledati razočaravajuće da evropsko međunarodno privatno pravo još uvijek nije regulisalo ova pitanja posebnim propisom - takozvanom "Uredbom Rim 0". Međutim, evropski zakonodavac je odabrao drugi put, tačnije postepenu kodifikaciju nekoliko pravnih oblasti koje se tiču sukoba zakona, u kojima su regulisani opći instituti MPP-a u odnosu na tu konkretnu oblast. Ovaj pristup povremeno vodi nedosljednosti unutar evropskog MPP-a, ali također olakšava evolucijski razvoj općeg dijela, koji nije zatvoren unutar posebnih nacionalnih pravnih doktrina, nego teži istinskom evropskom značenju.

Ključne riječi: Uredba Rim 0; opći dio međunarodnog privatnog prava; Uredba EU o nasljeđivanju.