



Towards the entry into force of the succession regulation:
building future uniformity upon past divergencies



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Jurisdiction, competence and application of the EU Regulation 650/2012

DISPOSITION OF PROPERTY UPON DEATH as per EU Regulation no.650/2012

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CO-BENEFICIARIES



Definition of property upon death

Article 3 of the Regulation

(d) 'disposition of property upon death' means a will, a joint will or an agreement as to succession;

(b) 'agreement as to succession' means an agreement, including an agreement resulting from mutual wills, which, with or without consideration, creates, modifies or terminates rights to the future estate or estates of one or more persons party to the agreement;

(c) 'joint will' means a will drawn up in one instrument by two or more persons;

The law governing the admissibility and substantive validity of the disposition of property upon death (*other than agreements as to succession*)

- Not to be confused with **the law applicable to the succession as a whole (art.21)**
- The Regulation aimed at having a unique law governing the succession as a whole, but at the same time, wanted to grant “legal certainty for persons wishing to plan their succession in advance” (recital 48)
- Planning a succession was meant to be made easier, but in the context of frequent residence change, establishing the law governing the validity of the will is not always an easy task (eg: the will was authenticated on the 01.01.2016, the testator dies on the 10.02.2018 after changing residence at least 2 times in different countries and the will is contested by the heirs as to it's validity in December 2018)

The law governing the admissibility and substantive validity of the disposition of property upon death (*other than agreements as to succession*)

Article 24, paragraph 1 – the solution in default of a choice of law

A disposition of property upon death other than an agreement as to succession shall be governed, as regards its admissibility and substantive validity, by the **law which, under this Regulation, would have been applicable to the succession of the person who made the disposition if he had died on the day on which the disposition was made.**

- such reference should be understood as a reference to either the law of the State of the habitual residence of the person concerned on that day or, if he had made a choice of law under this Regulation, the law of the State of his nationality on that day (recital 51).
- *Practical consideration: before drafting the will, the notary should ask the testator if he previously made a choice of law, because if he did, that chosen law would be applicable to his succession if he were to die on that day, and as a consequence that is the law governing the validity and admissibility of the will.*

The law governing the admissibility and substantive validity of the disposition of property upon death (*other than agreements as to succession*)

Article 24 - paragraph 2

Notwithstanding paragraph 1, a person may choose as the law to govern his disposition of property upon death, as regards its admissibility and substantive validity, the law which that person could have chosen in accordance with Article 22 on the conditions set out therein.

- **The choice of law excludes RENVOI (art 34)**
- Correlation with the choice of law applicable to the succession as a whole, according to art.22:
 - in default of a choice of the law that is to govern the succession as a whole– we may be in the presence of 2 relevant laws (a law chosen to govern the will, and the law of the habitual residence, that governs the succession as a whole)
 - in the presence of such a choice, we will have a unique law governing both the succession as a whole and the validity of the will
 - the moment of choice in connection to the entry in force of the Regulation
 - available choices
 - the form of such a choice

The law governing the admissibility and substantive validity of the disposition of property upon death (*other than agreements as to succession*)

Article 24, paragraph 2 – choosing a law

1. Available choices:

- limited to the law of the state whose nationality the testator has at the time of the choice or at the time of death
- Recital 38 explains the reason behind this limitation: to ensure a real connection and to avoid fraud. Determining the nationality is a preliminary issue, to be resolved according to the national law

2. The form of such a choice

- that of a disposition of property upon death (oral testaments are outside the scope of the Regulation)
- *according to recital no.39, a choice of law could be demonstrated if the disposition contains a reference to a law or has otherwise mentioned that law*

3. The moment of choice in connection to the entry in force of the Regulation:

- Art.83 par.3: A disposition of property upon death made prior to 17 August 2015 shall be admissible and valid if it meets the conditions in Chapter III or if it is admissible and valid according to the rules of private international law which were in force at that time: in the state of the habitual residence or in any of the states whose nationality he possessed or in the Member State of the authority dealing with the succession
- *Art.83 par.4 changes the relation between the law of the will and the law of the succession, in the sense that if a will was drafted according to a law available as a choice, this shall equal a choice of law applicable to the succession as a whole*

The law governing the admissibility and substantive validity of the disposition of property upon death (*other than agreements as to succession*)

Scope of law:

- the capacity of the person making the disposition of property upon death to make such a disposition;
- the particular causes which bar the person making the disposition from disposing in favour of certain persons or which bar a person from receiving succession property from the person making the disposition;
- the admissibility of representation for the purposes of making a disposition of property upon death;
- the interpretation of the disposition;
- fraud, duress, mistake and any other questions relating to the consent or intention of the person making the disposition.
- modification or revocation of a disposition of property upon death other than an agreement as to succession

The law governing the admissibility and substantive validity of the disposition of property upon death (*other than agreements as to succession*)

Outside the scope of such a law:

- The form (art.27)
- the determination of the beneficiaries, of their respective shares and of the obligations which may be imposed on them by the deceased, and the determination of other succession rights, including the succession rights of the surviving spouse or partner (art.23)
- the disposable part of the estate, the reserved shares and other restrictions on the disposal of property upon death (art.23)

(the last 2 aspects belong to the scope of the law governing the succession as a whole)

Formal validity of dispositions of property upon death made in writing (article 27)

For determining whether a given disposition of property upon death is formally valid, the Regulation sets multiple choices of law, in order to preserve and respect, as possible, the last will of the testator:

- (a) law of the State in which the disposition was made or the agreement as to succession concluded;
- (b) law of a State whose nationality the testator or at least one of the persons whose succession is concerned by an agreement as to succession possessed, either at the time when the disposition was made or the agreement concluded, or at the time of death;
- (c) law of a State in which the testator or at least one of the persons whose succession is concerned by an agreement as to succession had his domicile, either at the time when the disposition was made or the agreement concluded, or at the time of death;
- (d) law of the State in which the testator or at least one of the persons whose succession is concerned by an agreement as to succession had his habitual residence, either at the time when the disposition was made or the agreement concluded, or at the time of death;
- (e) in so far as immovable property is concerned, the law of the State in which that property is located.

- *Recital 73 speaks of the international commitments entered into by the member states prior to the Regulation, especially the Hague Convention of 5th of October 1961 regarding conflicts of law relating to the form of the testament*
- *Recital 53: if a personal qualification limits the choices of form, that is an aspect belonging to the formal validity of the testament (eg: in Romania a person who does not know how to read or write can make a disposition of property upon death only in the form of an authenticated testament, in the presence of 2 witnesses) – that is not a limitation of his legal capacity*

The law governing the *admissibility* of the agreements as to succession (article 25)

- **par.1:** the law of succession as anticipated on the conclusion day – if the agreement concerns the succession of one person
- **par.2:** all the laws of succession as anticipated on the conclusion day – if the agreement concerns the succession of several persons
- **par.3:** choice of law – any available for any of the parties, as per article 22

The law governing the *substantive validity and binding effects* of the agreements as to succession (article 26)

- **if the agreement concerns one person:** his anticipated law of succession
- **if the agreement concerns several person:** the anticipated law of succession out of several, with which it has the closest connection
- **chosen law** – *professio juris*

Joint wills

- distinction between the joint wills that contain mutual provisions in favor of the parties, and the joint wills that merely contain in the same instrument the last will of two or several persons
- a mutual joint will is to be governed by the rules set forth in article 26 and 27
- mutual wills that are not joint

Practical issues regarding the agreements as to the succession

- Heterogeneous dispositions in the national laws of the member states
- Autonomous concept defined in art. 3 of the Regulation
- Berliner testament
- Other agreements that are meant to produce effects after the death of one party (insurances, donations with a clause providing the property shall return to the donor if the beneficiary dies before the donor, provisions in the statutes of company regarding the death of an associate)
- Prenuptial agreements – may reserve an advantage for the surviving spouse (recital 12)
- Recital 26: “Nothing in this Regulation should prevent a court from applying mechanisms designed to tackle the evasion of the law, such as fraude à la loi in the context of private international law.”

Instruments of information as to the content of the succession law in European countries



Successions in Europe
Succession law in 22 European countries

EN FR

A site proposed by:
Notaries of Europe
PROMOTING LEGAL COOPERATION

Succession in Romania
18/10/2015

Anticipate Prepare Inherit Taxation

- 1 How do I draw up my will ?
- 2 How can I be sure it will be applied ?
- 3 How can I find a will that has been filed with a notary ?
- 4 Which law can I choose ?
- 5 Can I favour a particular heir ?
- 6 How can I protect my spouse ?
- 7 Can I disinherit someone ?
- 8 Can I make my last will jointly with someone else ?

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Choose a country

Romania

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Directory
Find a notary who
speaks your
language

Finding a will in European countries

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The European Network of Registers of Wills Association

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THE ASSOCIATION



Members and Partners
The network of interconnected registers
Statutes
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The European Network of Registers of Wills Association is an international not-for-profit association governed by Belgian law, created in 2005 by the Belgian, French and Slovenian Notariats.

In compliance with the Basel Convention relating to the establishment of a system for the registration of wills of May 16, 1972, the States which have a register for the recording of wills and which adhere to the ARERT can interconnect these registers, thus enabling all European citizens to discover the wills left by any deceased person regardless of the country in which such will was registered.

EUROPEAN CITIZENS



Registering and searching for wills - Information sheets
How to contact a register of wills in Europe?
New: interconnection of ECS registers

EU citizens will find here:

- ▶ Information sheet on how to register and to find a will in all 28 Member States of the UE. This information is available in French, English and national language of each country concerned
- ▶ Useful information for contacting the registers of wills in most countries of the European Union.
- ▶ information on the new interconnection of registers of European Certificate of Succession (ECS).

LEGAL PRACTITIONERS



Registering and searching for wills in Europe - "Europe Wills" project

- "Europe Wills" seminars
- "Europe Wills" reports: Status and summary of the project
- Final report
- The closing conference

The interconnection of European registers of wills - "IRTE" project

- Presentation of the project
- Final report
- The closing conference

The communication of the information contained in wills - "Cross-Border Wills" project