



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



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Towards the entry into force of the succession Regulation:  
Building Future Uniformity Upon Past Divergences

## DISPOSITIONS MORTIS CAUSA

- practical cases -  
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THE PROJECT IS IMPLEMENTED BY COORDINATOR



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## LEGAL FRAMEWORK

**Art.24** Dispositions of property upon death other than agreements as to succession

- Contains dispositions regarding the **admissibility** and **substantive validity** of **WILLS** and the modification/revocation thereof

**Art.25** Agreements as to succession

- Contains dispositions regarding the **admissibility** and **substantive validity** of **AGREEMENTS AS TO SUCCESSION** and the modification/revocation thereof

**Art.26** Substantive validity of dispositions of property upon death

- Outlines the **scope of articles 24 and 25**, by listing the elements that pertain to the **substantive validity** of a disposition of property upon death

**Art.27** Formal validity of dispositions of property upon death made in writing

- Outlines the **rules of conflict of law** in matters pertaining to **formal validity** of dispositions of property upon death

# TERMINOLOGY

What are the “dispositions of property upon death” identified by Regulation no. 650/2012?

## Dispositions of property upon death

### Wills

Testamento (It.)  
Testament (De.)  
Testamento (Es.)

### Joint wills

Testamento  
coniuntivo (It.)  
Gemeinschaftliche  
s Testament (De.)  
Testamento  
mancomunado  
(Es.)

### Mutual wills

Testameto  
reciproco (It.)  
Gegenseitiges  
Testament (De.)  
Testamento  
reciproco (Es.)

### Agreements as to (future)\* succession

Patto successorio (It.)  
Erbvertrag (De.)  
Pacto sucesorio (Es.)

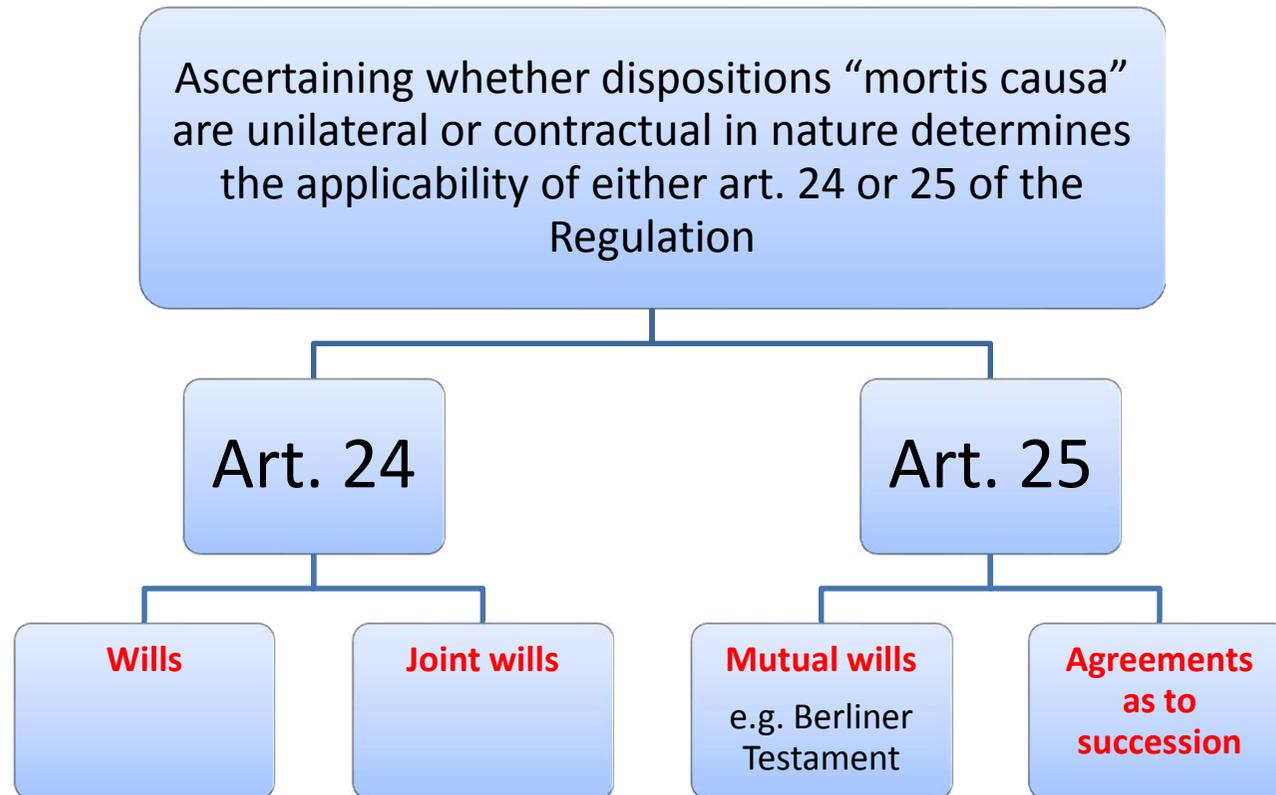
With or without  
consideration

Concerning the  
succession of one  
person/ Concerning the  
succession of several  
persons

\* Please note that: **(1)** according to the Regulation, an agreement as to succession is an agreement that „creates, modifies or terminates rights to *the future estate or estates of one or more persons party to the agreement*” (article 3 para.1 letter b) - this disposition is construed as referring only to **agreements where the person whose succession is concerned is also part** . For a discussion on whether agreements, where the person whose succession is concerned is not part, could still be qualified as agreements as to succession, see „Le droit européen des successions, Commentaire du Règlement n° 650/2012 du 4 juillet 2012”, Andrea Bonomi, Patrick Wautelet avec la collaboration de: Ilaria Pretelli, Azadi Öztürk, Ed.Bruylant, loc.2676, no.20 ; **(2)** the Regulation does not validate agreements as to succession that are deemed invalid by the applicable law.

## TERMINOLOGY (II)

What is the importance of this distinction?



**Joint wills** represent two or more independent wills drafted by two or more persons using the same document (instrumentum); **mutual wills** can be drafted in one document (instrumentum) or in different documents, but contain an agreement between two/more persons regarding their respective successions. Conclusion: Wills and Joint wills are **unilateral deeds**, whereas Mutual wills are **bilateral deeds** and constitute agreements as to succession.

## EXAMPLES

Which article of the Regulation, if any, will be applicable to the admissibility and substantive validity of the dispositions “mortis causa” below?

The spouses A and B are Italian citizens residing in Germany. They decide to draft a will by which they designate each other as sole heir, and determine that, upon the death of the last surviving spouse, the whole of their estate will be transmitted to their son, C.

- This is a mutual will. Article 25 will be applicable.

A and B are brothers. Their father, C, a Romanian resident, dies on the 15<sup>th</sup> of December 2015. On the 1st of January 2016, the brothers enter an agreement under which they decide how to divide C's estate between them.

- This is not an agreement as to a „future” succession, as C was already dead at the time the agreement was concluded. This agreement refers to the „sharing out of the estate” (article 23 para.2 letter j).

**Article 24**  
**Dispositions of property upon death other than agreements as to succession**  
**(wills)**

- **1.** 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.**
- **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.
- **3.** Paragraph 1 shall apply, as appropriate, to the **modification or revocation** of a disposition of property upon death other than an agreement as to succession. In the event of a choice of law in accordance with paragraph 2, the modification or revocation shall be governed by the chosen law.

# Admissibility and substantive validity of wills

## LAW APPLICABLE TO THE DISPOSITION OF PROPERTY UPON DEATH:

The disposition shall be governed by the law which would have been applicable to the succession of the person making the disposition if he had died the day when the disposition was made, i.e.:

- The law of the **HABITUAL RESIDENCE** on the day the disposition was made (art.21 para.1)
- The law of the state **MANIFESTLY MORE CLOSELY CONNECTED\*** to the Deceased on the day the disposition was made (art.21 para.2)
- The law of the **NATIONALITY** (either of the nationalities) of the deceased, in case of **choice of the law** applicable to the disposition (partial choice of law – art.24 para.2) – but only where the deceased was a national of that state on the day the will was made
- *Note: The law applicable to the wills is not restricted to the law of a Member State. Even in the case of choice of law, the person can choose the law of any state, provided he is a national of that state at the time of making the choice.*

## LAW APPLICABLE TO THE MODIFICATION OR REVOCATION OF SUCH DISPOSITION:

- The **ADMISSIBILITY AND SUBSTANTIVE VALIDITY** of the disposition of modification or revocation
- Governed by the law applicable to the succession of the person making the modification/revocation on the day of such modification/revocation (see Recital 51 for clarification)

As per recital 51, references in the Regulation to „the law which would have been applicable to the succession of the person making a disposition of property upon death if he had died on the day on which the disposition was [...]made, [...] 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”. However, article 24 does not preclude the applicability of the law manifestly more closely connected to the person making the disposition, as per article 21 para.2. It would be illogical, for instance, to subject the succession as a whole to the law manifestly more closely connected to the Deceased, but not to be able to subject his will to that same law. In any circumstance, the application of the law manifestly more closely connected to the Deceased shall be deemed as exceptional.

# Examples

A is an Italian citizen residing and working in Morocco. While in Morocco, he makes a disposition of property upon death (a will). Several years later, he retires and moves to Spain, where he subsequently dies. What will be the law applicable to the admissibility/substantial validity of the will?

- Law of the habitual residence at the time of making the disposition - the Moroccan law.

A is a German citizen residing in Italy. While on holiday in Germany, he has a civil law notary draft a will that contains dispositions specific to the German law. The will also contains a choice of law applicable to the succession - A chooses the application of the German law. What law will govern the admissibility/substantial validity of the will?

- Implicit choice of law applicable to the will. Also, Germany may be the state to which A is manifestly more closely connected.

## Article 25

### Agreements as to succession (including mutual wills)

- 1. An agreement as to succession regarding the succession of one person shall be governed, as regards its **admissibility**, its **substantive validity** and its **binding effects** between the parties, including the **conditions for its dissolution**, by the law which, under this Regulation, **would have been applicable to the succession of that person if he had died on the day on which the agreement was concluded**.
- 2. An agreement as to succession regarding the succession of several persons shall be **admissible** only if it is admissible under all the laws which, under this Regulation, would have governed the succession of all the persons involved if they had died on the day on which the agreement was concluded.
- An agreement as to succession which is admissible pursuant to the first subparagraph shall be governed, as regards its **substantive validity and its binding effects** between the parties, including the conditions for its dissolution, by the law, from among those referred to in the first subparagraph, **with which it has the closest connection**.
- 3. Notwithstanding paragraphs 1 and 2, **the parties may choose as the law** to govern their agreement as to succession, as regards its admissibility, its substantive validity and its binding effects between the parties, including the conditions for its dissolution, **the law which the person or one of the persons whose estate is involved could have chosen** in accordance with Article 22 on the conditions set out therein.

## Admissibility and substantive validity of agreements as to succession

**ADMISSIBILITY, SUBSTANTIVE VALIDITY and BINDING EFFECTS** (including conditions of dissolution) of an agreement regarding the succession of one person

- Law applicable to the succession of that person if he had died on the day on which the agreement was concluded (art.25 para.1):
  - **(1) habitual residence** – art.21 para.1;
  - **(2) law of the state manifestly more closely connected\*** with that person – art.21 para.2;
  - **(3) Nationality** (in case of partial choice of law) – art.22.

**ADMISSIBILITY** of an agreement regarding the succession of several persons

- It shall be admissible only if it is admissible(art.25 para.2):
  - **(1) under all the laws**
  - **(2) which would have governed the succession of all the persons involved** if they had died on the day on which the agreement was concluded

**SUBSTANTIVE VALIDITY and BINDING EFFECTS** (including conditions of dissolution) regarding the succession of several persons

- Shall be governed by the law of the state with which it has the **closest connection**, (art.25 para.2), i.e.:
  - **(1) habitual residence** of either of the persons whose successions are concerned, or
  - **(2) law of the state manifestly more closely connected\*** with either of those persons – art.21 para.2;

**CHOICE OF LAW** for agreements as to the successions of several persons

- The chosen law shall govern **admissibility, substantive validity and binding effects of the agreement;**
- The parties may choose the law of **either/any of the states of their nationalities** (art.25 para.3).

# Examples

A, a German citizen and B, a Romanian citizen, are married and reside together in Italy. While on holiday in Germany, the spouses draft an agreement as to their respective successions. They choose the German law as applicable to the agreement. Will this agreement be valid? Can they also choose the German law as the law applicable to their respective successions?

- The choice of law (applicable to the validity of the agreement) is effective, as the parties may opt for the law of either of their nationalities, i.e. German or Romanian. The agreement as to succession will be valid, as it is recognized by the German law. The Romanian citizen cannot choose the German law as applicable to their succession as a whole, unless they acquire the German nationality by the time of their death (art.22 para.1).

The spouses A and B are Italian citizens. While residing in Germany, they both sign a mutual will, assigning each other as sole heirs, with the last surviving spouse bequeathing the whole of the estate to their mutual children. Upon the death of her husband A, B returns to Italy. While residing in Italy, she contacts an Italian notary in order to have the will concluded in Germany revoked. What is the solution?

- The mutual will is valid under German law. The German law is applicable to the admissibility/substantive validity of the will, as it is the state of the habitual residence at the time of the making of the disposition. The binding effects of the mutual will are also governed by the German law, and as such the will become irrevocable after the death of the first spouse and cannot be set aside by the surviving spouse.

# Admissibility and substantive validity

## **ADMISSIBILITY:**

- **Ammissibilità (It.), Zulässigkeit (De.), Admisibilidad (Es.);**
- Is a particular aspect of “Substantive validity”, designating whether a disposition of property upon death is accepted by the applicable law;
- If such disposition is deemed “inadmissible”, the disposition will be invalid and as such it shall not generate any effects.

## **SUBSTANTIVE VALIDITY:**

- **Validità sostanziale (It.), Materielle Wirksamkeit (De.), Validez material (Es.);**
- The Regulation does not offer a definition. However, it indicates the sanction: where a disposition does not comply with the requirements for substantive validity, that disposition is without legal existence (Recital 48).

## **Elements pertaining to substantive validity (art.26):**

- 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.

## Provisions generally found in wills/ agreements as to succession

These provisions generally found in wills/agreements as to successions are governed, as to their admissibility/substantive validity /binding effects by the law applicable to the disposition of property upon death (art.24, 25, 26). However, the effects of these provisions will be, at least partly, regulated by the law applicable to the succession - lex successionis:

**Designation of beneficiaries**

**Obligations imposed on beneficiaries by the deceased**

**Disinheritance**

**Designation of executors of the wills**

**Fideicommissary substitutions**

**Agreement as to succession**

**Choice of law:** Applicable to the succession as a whole (art.22)/ Applicable to the disposition (art.24 para.2; art.25 para.3)

**Indication by the person making the disposition of the state of their habitual residence/ state to which they feel more closely connected** (such indication cannot be construed as a choice of law and is not mandatory, but it may provide an additional element in determining the law applicable to the disposition of property/succession)

**Other provisions included in wills/agreements as to succession fall outside the scope of the Regulation, e.g.:**

**Recognition of illegitimate children**

**Establishing (setting up) a foundation**

**Other last will dispositions** (e.g., dispositions regarding burial and commemoration rites)

## Choice of law (“professio juris”)

Law applicable to the succession as a whole  
 (“lex successionis”)

**Art.22**

Shall govern all aspects relating to a succession, including all elements listed under **art.23**

Is the law of the **nationality of a person at their time of death / at the time of making the choice**

Can determine a **choice of court agreement** by the “parties concerned”(art.5), where the law chosen by the deceased is a law of a Member State

Law applicable to the disposition of property upon death  
 (partial choice of law)

**Art.24 para.2 ; Art.25 para.3**

Shall only govern the admissibility, substantial validity (**art.26**) and binding effect of a disposition of property upon death

Is the law of the **nationality of the person at the time of the choice of law**

Should not determine a choice of court agreement

**Utility of the partial choice of law:** evident where a person does not wish to choose the law applicable to the whole succession, but wants to subject the disposition of property upon death to the law of his nationality.

Law applicable to dispositions of property upon death in matters of admissibility, substantive validity and binding effects (art.24, 25, 26)

Premise:

In light of the Regulation, a disposition of property upon death and the succession of the person making that disposition may be governed by two different laws

Conclusion:

The Regulation “artificially” creates a “**hypothetical lex successiois**”, i.e. the law which would have been applicable to the succession if the person making the disposition had died on the day on which the disposition was made

Effects:

**Crystallization**  
of the law applicable to  
wills/agreements as to succession

**Scission**  
of the “lex successiois”

Possibility for the courts to apply a  
**foreign law**, even where there is  
no choice of law by the deceased

### **Problem:**

Certain aspects relating to dispositions of property upon death are governed by the **law applicable to that disposition** (art.24 and 25), but the succession as a whole - including certain effects of the disposition of property are governed by **lex successionis**.

### **Question:**

Where certain aspects in the disposition of property (e.g.: **fideicommissary substitution, agreement as to succession**) are valid under the law applicable to the disposition, but not under the law applicable to the succession, what will the solution be ?

### **Practical case:**

A is an Italian citizen residing in Germany. In September 2015, he makes a disposition of property upon death in front of a German civil law notary containing a fideicommissary substitution. Accordingly, he leaves his estate to his wife, B, under obligation that she preserve and transfer it, upon her death, to A's nephew, C. The substitution is not valid under Italian law (C is not a descendent of A, he is not incapable, etc.), but it is valid under German law. If A's last habitual residence at the time of death will be in Germany, the law applicable to his succession will be the German law and the substitution will be valid under *lex successionis*. However, if he returns to Italy before his death, the *lex successionis* will be the Italian law, that does not allow the substitution. What will be the solution in this case?

## Formal validity of dispositions of property upon death made in writing (art.27 para.1)

- A disposition of property upon death shall be valid as to form if it complies with one the following laws:
  - (a) of **the State in which the disposition was made** or the agreement as to succession concluded;
  - (b) of a State whose **nationality** the testator or at least one of the persons whose succession is concerned by an agreement as to succession possessed, either at the time when the disposition was made or the agreement concluded, or at the time of death;
  - (c) of a State in which the testator or at least one of the persons whose succession is concerned by an agreement as to succession had his **domicile**, either at the time when the disposition was made or the agreement concluded, or at the time of death;
  - (d) of the State in which the testator or at least one of the persons whose succession is concerned by an agreement as to succession had his **habitual residence**, either at the time when the disposition was made or the agreement concluded, or at the time of death; or
  - (e) in so far as **immovable property** is concerned, of the State in which that property is located.

## Elements pertaining to formal validity (art.27 para.3)

- Any **limitations of the permitted forms** of disposition of property upon death, where such limitations refer to:
  - (a) **age**,
  - (b) **nationality**, or
  - (c) other **personal conditions** of the testator or of the persons whose succession is concerned by an agreement as to succession
- **Question:** Certain law systems do not deem mutual wills as valid. Where there is a legal disposition forbidding mutual wills, does this disposition refer to FORMAL or SUBSTANTIVE validity?

## Formal validity for the modification/revocation of dispositions of property upon death (art.27 para.2)

- **Cumulation** of connecting factors. The modification will be valid if it complies with:
  - Either of the laws set in art.27 para.1, applicable to the modification/revocation
  - Any of the laws set in art.27 para.1, that were applicable to the original disposition of property upon death, even if they would not be otherwise applicable to the modification/revocation

## OTHER ASPECTS RELATED TO FORMAL VALIDITY

### **International element**

- The provisions of the Regulation as to formal validity should only be applied where there is an “international element”
- The competent authority should disregard the **fraudulent creation of an international element** to circumvent the rules on formal validity (recital 52)

### **Renvoi**

- Where the law applicable to formal validity makes a “renvoi” to the law of another state, that disposition shall be deemed inadmissible (art.34 para.2)

**Hague Convention** of 5 of October 1961 on the conflicts of laws relating to the form of testamentary dispositions

- The Convention is valid and continues to apply between the states that ratified it (including Germany and Spain, but also Denmark, Ireland and the U.K.)

## PUBLIC POLICY

(Ordre public)

Certain dispositions of property upon death are **forbidden** in several member states, as they are contrary to the basic legal principles of those states in matters of wills and successions, i.e.:

**Revocability of dispositions of property upon death**

**Prohibition of agreements as to future successions**

(based on the principle of the revocability of dispositions of property upon death, but also on the dangers of “votum mortis”)

In light of the Regulation, these principles should not be considered **public policy in the private international law** of the member states (recital no.58)

## Dispositions “mortis causa” in a European context

Ascertaining the **content of legal provisions** in matters of succession in Member States

- <http://www.successions-europe.eu/>
- Contains information referring to the following questions in matters of succession:
  - Competent authority in matters of succession
  - Applicable law. Choice of law
  - Successions “ab intestat”
  - Reserved portion
  - Drawing up and registering a will/agreement as to succession
  - Procedures required in order to inherit
  - Taxation

**Searching for disposition “mortis causa”** in successions with an international element

- <http://www.arert.eu/>
- Contains information referring to:
  - Registration of dispositions “mortis causa” in all states of the E.U;
  - Means of ascertaining whether the Deceased disposed of his estate through wills/agreements as to succession.

*Thank you!*

*Grazie!*

*Danke schön!*

*¡Gracias!*