

Drafting choice of law and choice of court provisions under the EU Succession Regulation
Fifteen questions and some answers
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As is well known, the EU Succession Regulation ¹ provides estate planners and all those with an interest in cross-border succession matters with a potentially powerful tool : under Article 22 of the Regulation, a person indeed has the possibility to select the law applicable to his estate. This possibility has already spawned a vast literature. Practitioners have also issued guidelines and model choice of law provisions illustrating the possibilities offered by the Regulation². In many countries, there is, however, only scant practice regarding choice of law provisions in succession matters. In the following paragraphs, further guidance will be offered to practitioners in order to ensure they are in a position to offer solid advice to clients in cross-borders situations. The emphasis will be the possibilities offered by the Regulation to determine the competent court and the applicable law.

§ 1. Choice of court under the Regulation?

The Succession Regulation includes detailed rules allocating jurisdiction to the courts of Member States in case of dispute. These rules are primarily built on the habitual residence of the deceased : Article 4 grants jurisdiction to the courts of the Member State where the deceased habitually resided before passing away. When the last habitual residence is located in a State (Member State or not) not bound by the Regulation, Article 10 makes it possible to bring disputes before the court of the Member States where the deceased left some assets. When the deceased possessed the nationality of that State, the courts may take jurisdiction over the whole succession. The same applies if the deceased habitually resided in that Member State in a not too distant past. Failing such connection, the jurisdiction of the courts of the State where the assets are located is limited to those assets.

While these rules may in most cases quite easily be applied, they do not make it possible to predict with certainty in each case where disputes will be settled. The habitual residence of the deceased may indeed move or even be difficult to identify. The localisation of the relevant assets may also require extensive investigation. Further, when advice is sought years before the client passes away, it may be impossible to predict where the client's last habitual residence will be located. This uncertainty is to a certain extent reduced given that whatever court is finally entitled to rule on the dispute, all courts of Member States will apply the Regulation and, hence, come up with the same solution. The uniformity achieved thanks to the Regulation is, however, not perfect. A number of mechanisms included in the Regulation leave a certain discretion to courts. This is the case for the escape clause (Article 21, paragraph 2). Further, the Regulation does not prevent the application of bilateral conflict-of-laws rules in force between a Member State and a third State.

In view of this, one may wonder whether it is possible to lock up the benefit of one court by granting jurisdiction to that court for all disputes arising in relation with the succession. In many fields of law, there is a long standing practice of concluding choice of court agreements. These agreements ensure that parties may easily predict which court will take up a dispute.

1 Regulation (EU) 650/2012 of the European Parliament and of the Council of July 4, 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, 2012, *O.J. L* 201/107 (hereinafter the 'Regulation').

2 See e.g. R. FRIMSTON, "Wills : drafting choice of law under EU Succession Regulation : checklist", Practical Law Private Client.

The Regulation does not, however, leave much room for such choice of court agreement. It is not incumbent on a future deceased to select the courts which will hear potential disputes in relation to his succession. The Regulation opens a number of possibilities for parties to decide which court will hear their disputes, but none of these options are available to the testator.

Article 5 indeed makes it possible for the “parties concerned” to grant jurisdiction by agreement to the court of the Member State whose law has been chosen by the deceased. This possibility is, however, only open for those called to benefit from the succession. It may not be directly applied or imposed by the testator. It further requires that the testator has validly chosen the law applicable to his succession under Article 22. Article 5 therefore only provides an additional ground of jurisdiction which may be used by parties called to the succession. It raises intriguing questions, such as the definition of the parties who may benefit from Article 5. In the literature, it has been discussed whether creditors may be considered to be “parties” within the meaning of Article 5. In any case, Article 5 cannot serve as legal basis for a choice of court by the testator. In practice, one may attempt to reach the same result with indirect means. Such substitutes will not, however, allow the testator to benefit from the certainty afforded by a choice of court.

§ 2. The Succession Regulation and arbitration

The Succession Regulation is silent on the possibility to refer succession disputes to arbitration. The Regulation does not exclude arbitration out of its scope, as does the Brussels *Ibis* Regulation. This cannot be taken to mean that the drafters of the Regulation intended in any way to restrict the possibility to submit disputes to arbitration. Rather, the Regulation’s silence must be understood as a gesture of good neighborliness towards arbitration as dispute resolution method.

Whether or not litigants may validly refer a dispute to arbitration, depends indeed not on the Regulation, but on the attitude adopted in various States towards arbitration. The threshold for arbitration may be expressed by reference to the commercial nature of the interests at stake or the fact that parties may freely dispose of the rights involved. Whatever the test used, it seems that there is no obstacle of principle which would limit or prohibit recourse to arbitration in succession matters.

The use of arbitration may however, be limited by other considerations. It may be in the first place difficult to obtain the consent of all parties concerned that disputes be exclusively referred to arbitration. A will drafted by a testator is by essence a unilateral document. It does not record and is not made to record the consent of the beneficiaries. Save in countries such as Germany and Austria, where the legislator has given a legal basis for arbitration decided unilaterally by a testator, the mere fact that a testator has indicated in its will his desire that disputes be arbitrated, will prove insufficient to bind his heirs and other legatees.

Another issue which could prevent or limit the use of arbitration is the question whether arbitrators have the jurisdiction to rule on some crucial succession questions such as that of reserved portion. It may be that in some jurisdictions, the existence of mandatory rules relating to this question prevent the use of arbitration in succession matters³.

³ See further on arbitration and succession, P. MANKOWSKI, “Erbrechtliche Schiedsgerichte in Fällen mit Auslandsbezug und die EuErbVO”, *ZEV* 2014, 395-400; W. JAHNEL, D. SYKORA & N. GLATTHARD, “Arbitration in matters of succession with special consideration of the Regulation (EU) N° 650/2012”, *b-Arbitra*, 2015/1, 41-66 & P. WAUTELET, “Le recours à l’arbitrage en matière de succession internationale”, *JCP*, ed. Not., 2016/51-52, étude 1350, 42-47.

The Regulation may further have an impact on the conduct of the arbitration proceedings : if the dispute relates to a cross-border succession, the arbitrators could find inspiration in the conflict of laws rules of the Regulation to determine the law applicable to the dispute. While formally not bound by these provisions, an arbitral tribunal could indeed usefully apply those rules as they represent a modern codification of international succession law.

§ 3. Choice of law in general

Article 22 is without any doubt one of the most interesting provisions of the Succession Regulation. By making it possible for a person to select the law applicable to his succession, Article 22 builds on the conflict of laws tradition of a number of countries, where such possibility already existed. For many other Member States, the autonomy recognized to the testator is, however, a strong departure from accepted principles.

The autonomy granted by Article 22 raises a number of questions. In the following paragraphs, an attempt will be made to address some of these issues.

It is well known that the possibility to choose the law offered by Article 22 of the Regulation is not limited to EU nationals. Citizens of third States may also make use of this possibility – *e.g.* a US citizen living in England with a holiday home in France. Likewise, the possibility to choose the law is not limited to those persons having some form of connection with a Member State at death. This would exclude deceased who have lived a significant part of their lives in a third Member State, even though they may possess the nationality of a Member State or own assets located in such as State.

In a similar vein, the Regulation does not limit the possibility to choose the law by requiring that the choice be made in favor of the law of a Member State bound by the Regulation. Article 20 of the Regulation makes it clear that the Regulation applies even if it leads to the application of the law of a third State. Nothing prevents therefore a testator to submit his succession to the law of a State not bound by the Regulation.

Whether or not a choice of law is valid must in the first place be determined taking into account the requirements of the law chosen by the testator. This follows from Article 22, paragraph 3, which states that “The substantive validity of the act whereby the choice of law was made shall be governed by the chosen law”.

The Preamble makes it clear that what is intended with this rule is that it is for the law chosen to determine whether the person making the choice “may be considered to have understood and consented to what he was doing” (Recital 40). Issues of consent (and lack of consent or possible defects of consent) should therefore be addressed under the law chosen.

§ 4. What needs to be included in a choice of law?

An individual seeking to avail himself of the ability to select the law of his nationality should do so “in a declaration in the form of a disposition of property upon death...” (art. 22). A declaration included in the last will is sufficient.

It is sometimes advised to mention that the law chosen applies not only to the disposition of property and administration of the estate, but also to the substantive validity and admissibility of the last will and testament. Article 24 indeed provides that “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”.

It is, however, not necessary to indicate that the law chosen also governs the validity of the will. This follows automatically from Article 24, without there being any need to include language to that effect. Adding a specific provision to that effect may even lead to some confusion. One may indeed wonder why a specific reference is made to the issue of validity, leaving aside other important issues such as that the transfer of the assets to the beneficiaries or the sharing out of the estate.

Article 22 makes it possible to submit one’s succession to the law of one’s nationality. Even though the nationality of the testator plays a central role, it is not necessary to recall or explain in the will why and how the testator acquired this nationality. Any justification of this kind would be strictly superfluous. It might even be dangerous to offer explanations on this issue. The law of nationality is indeed not always easy to navigate. One may therefore include explanations which appear, on a more detailed examination, to be erroneous.

A reference to the nationalities of the person making the choice would, on the other hand, be relevant if the person making a choice possesses more than one nationalities. Such a reference would indeed show that the testator was aware of the choice possibilities offered to him under Article 22. This may be done using the following drafting:

“I am a national of France and Germany. I choose the law of France to govern my succession”.

In practice, one often sees in choice of law provision language making reference to Article 22 of the Regulation, as in the following.

“I am a national of France. I choose the law of France to govern my succession, as allowed by Article 22 of the European Regulation on Successions”.

There is nothing erroneous about this reference. It may help clarify that the testator indeed was aware of the legal consequences of his choice. A choice of law remains, however fully valid and enforceable without any reference to the legal basis making it possible to choose the law governing the succession.

Likewise, it does not seem necessary to include in a choice of law some indication pertaining to the habitual residence or domicile of the testator. It is sometimes suggested to add language to that effect, as in the following provision:

"I choose the law of [Country A] to govern succession to my assets, rights and obligations as a whole, including any not disposed of by this will. I am a national of [Country A] and reside habitually in [country B] since at least ten years”.

The reference to the testator’s habitual residence is by no means necessary in order for the choice of law to be valid. It does not add much to the choice of law. It could be marginally relevant, in order to show that the testator was duly aware of the fact that the choice made would lead to the application of another law than the law of the country where he resides.

§ 5. Choice of law and testators with multiple nationalities

How does the autonomy recognized by Article 22 play out if the testator possesses more than one nationalities. This question had already been raised in some Member States, which recognized the *professio iuris* even before the Regulation came into force. Under Belgian private international law, it was unclear how the the provision making it possible for a party to opt for the law of his nationality, should be applied when a person possessed more than one nationality. In particular, it was unclear whether application should be made of the general rules dealing with situations of multiple nationalities. Under these rules, whenever a person possesses another nationality next to Belgian nationality, the latter must prevail. If those rules were applied in a situation in which a person has made a choice of law, this could endanger the choice of law each time the law chosen does not correspond with the law of the prevailing nationality.

Fortunately, the Succession Regulation has taken a clear position on this issue : Article 22 makes it clear that individuals with multiple citizenships can choose the law of any of the countries of which they are nationals. It does not matter that the law chosen is that of a nationality which was acquired only recently or of a nationality which would not prevail under the rules dealing with multiple nationalities. There is no need to justify why a given nationality is chosen. The choice may not be questioned by an heir or anybody else on account of the fact that the nationality chosen by the testator was not or less effective than another one.

One should also note that the Regulation makes it possible to choose the nationality possessed at the time of death and not only at the time of making the choice. This possibility is, however, to be used with caution. It may indeed not always be easy to predict with accuracy which nationality one will possess when passing away.

§ 6. Choice of law and jurisdictions with multiple succession laws

Article 22 provides that one may choose to govern his succession the law “of the State whose nationality he possesses”. The application of this rule raises a specific concern when the country whose law is selected does not have a unique set of rules governing succession matters. In some countries such as the US, Canada and Spain, different rules apply to succession depending on the state, province or unit concerned. The laws of Florida are not identical to those of New York.

The Regulation includes a detailed rule dealing with States with multiple succession rules. The main principle laid out in Article 36 is that application should be made of the domestic conflict-of-laws rules of the relevant State to determine which rules govern a succession. In the absence of such conflict-of-laws rules, Article 36 provides a number of principles which should help identify the relevant territorial unit.

The application of Article 36 may raise difficult questions when the deceased was a national of a State which not only does not have national succession rules, but also lacks national conflict-of-laws rules governing succession matters. Although this is still open to debate, it appears to be the case in the United States, which does not have national conflict of laws rules. This would mean that application must be made of the law of the territorial unit which has the “closest connection” with the deceased (Article 36, paragraph 2, b). This may lead to some uncertainty, in particular when the testator has not lived or resided in the country of his nationality for a long time or has kept a

connection with several territorial units of the country of which he is a national⁴. It has been suggested to include in the choice of law language indicating with which territorial unit the testator is most closely connected, as in the following draft :

“I am a citizen of the United Kingdom, habitually resident and domiciled in and most closely connected with England and in accordance with the provisions of Article 22 and all other Articles of the European Union Succession Regulation (EU) No 650/2012 or any subsequent or amended Regulation I choose the internal law of England to govern all of my dispositions of property upon death and the whole of my succession”⁵.

Although an indication of this kind may influence the court, no certainty can be given that it will be duly taken into account by the court.

§ 7. Choice of law and multi-jurisdiction estates

The Succession Regulation is built on the principle that a given succession should be governed by one, unique law. This principle applies when the deceased has not chosen the applicable law : his succession will be governed by the law of the State in which he last habitually resided. The Regulation has also been drafted to ensure as far as possible that the courts of one State have jurisdiction to hear disputes relating to a succession. Ideally, those court will apply their own law.

Many individuals possess assets in various States. In a very common scenario, a person living in State A will also own real estate in State B. In another scenario, the person residing in State A will hold a bank account or a securities account in State B. In exceptional cases, the assets of one person will be scattered among a great number of jurisdictions.

Since the Regulation grants parties the possibility to choose the law, one may wonder whether this choice may be adapted to meet the fact that a person’s assets are split among various countries. In some private international law instruments, a possibility is recognized to adapt the choice of law in order to take into account this fact. Under Article 6 of the Hague Convention of 14 March 1978 on the law applicable to matrimonial property regimes, spouses may designate the law of the place where immovables are located in order to govern these immovables. Such a partial choice may prove useful for examples when spouses have adopted specific arrangements with regard to such foreign immovables.

The Succession Regulation does not allow such a partial choice of law. Whenever a choice of law is made by virtue of Article 22, it covers the individual’s worldwide assets. For planning purposes, it is therefore not possible to pick and choose. This may be seen as a lack of flexibility. It is, however, the price to be paid in order for the choice of law mechanism to be accepted by the Member States.

It is therefore unnecessary in a choice of law provision to include language indicating that the law chosen covers the whole estate of the testator, as is sometimes suggested. It may, however, be useful to add language showing that the testator was aware of the fact that the choice of law is not limited to those assets specifically disposed of by the will. This may be done by using the following language :

4 See further A. BONOMI, “Article 36”, *Le droit européen des successions. Commentaire du Règlement (UE) n° 650/2012 du 4 juillet 2012*, A. BONOMI & P. WAUTELET (ed.), 2nd ed., Bruylant, 2016, 612-613, § 14-16.

5 This draft is taken from Richard Frimston, “The Succession Regulation and existing and future Private International Law issues”, March 2016, New York State Bar Association.

"I choose the law of [State A] to govern succession to my assets, rights and obligations as a whole, including any not disposed of by this will."

While this is strictly speaking not necessary to ensure that the law chosen will govern the whole estate, it may be a useful addition as it shows that the testator was aware of the breadth of his choice of law.

§ 8. Succession Regulation and 'old' choices of law

The *professio iuris* was not invented by the Succession Regulation. In some Member States it had become customary long before August 2015 to include a choice of law in wills and other dispositions of property upon death. In other Member States, clients were advised to avail themselves of the possibility to choose the law to their succession before the Regulation became fully effective.

The Succession Regulation became fully applicable on August 17th, 2015. According to Article 83, paragraph 1, it only applies if the death took place on or after August 17th, 2015.

If a testator had, prior to August 2015, selected the law applicable in the event of his death, this choice of law provision may remain effective if it complies with certain requirements. Article 83, paragraph 2 of the Regulation indeed provides that a choice of law made prior to 17 August 2015 remains valid if it meets either the requirements of Article 22 or if it was valid in application of the conflict of laws rules of the State in which the deceased habitually resided or whose nationality he possessed. This rule is important : it guarantees that old choices of law will continue to be upheld⁶.

It is therefore not necessary to renew or alter choices of law which were made before the Regulation came into application. Care should, however, be taken to verify whether these older choices of law should not be kept if the testator modifies his will after 17 August 2015. Say a Greek national living in Belgium has drafted a will in 2006, with the assistance of a Belgian notary. In accordance with Article 79 of the Code of Private International Law, in force in Belgium since 2004, this person has included a choice for Belgian law in his will. Such a choice was perfectly valid, as Article 79 of the Code allowed a choice to be made for the law of the testator's habitual residence. The choice remains effective after August 2015, as it was valid under the conflict of laws rules of the State where the testator habitually resided. If the testator intends to modify its will, care should however, be taken to ensure that the old choice of law is preserved. Under the Regulation, this person may indeed no longer choose to have his succession governed by the laws of Belgium. The only available choice is a choice for the law of his nationality. If changes are brought to the will, this could bring about the demise of the choice of law made earlier. Language may be included in the new will or in the codicil to make clear that the testator did not intend to come back on the choice of law made earlier⁷.

6 It is therefore striking, and regrettable, that the twin Regulations adopted in 2016 to deal with the patrimonial relationships between spouses and partners (Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships and Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes) do not include a similar provision protecting choices of law made before the Regulations come into force (which is due in January 2019).

7 See the drafting suggested by S. BERTE & V. DE BACKER, 'De dood kent geen grenzen. De Europese Erfrechtverordening in 19 casussen', *Notarieel & Fiscaal Maandblad*, 2016, (186), 195-196.

§ 9. Choice of law and renvoi

In commercial practice, it is very common to include a specific provision in the choice of law agreement, to the effect that the rules of private international law are excluded. A typical example will read as follows:

“The present agreement is governed exclusively by the laws of the Netherlands, excluding its conflict of laws provisions”.

This language is only relevant provided the private international law rules of the law chosen include another conflict of laws rule, which would potentially subject the contract to another law than the law chosen, thanks to the mechanism of *renvoi*.

Against this background, it is easy to understand why the exclusion of private international law rules in succession matters is only marginally relevant. Under Article 34, paragraph 2 of the Regulation, no *renvoi* is indeed accepted when application is made of Article 22. In other words, the fact that a law has been chosen by the deceased excludes the application of the mechanism of *renvoi*. Whether the law chosen is that of a Member State bound by the Regulation or of another State is not relevant : the exclusion of *renvoi* applies in all cases.

The exclusion of *renvoi* could have some significance if a dispute regarding the succession is referred to a court of a State not bound by the Regulation. Such a court is indeed not bound by Article 22. It will apply its own rules of private international law. In this case, however, the relevant question is not so much whether the State whose courts are seized will apply *renvoi*, but rather whether it will give effect to the choice of law.

§ 10. Choice of law and third countries

The possibility to choose the law applicable to succession matters is not universally recognized. In many countries outside the EU, this possibility is viewed with skepticism, or even considered anathema. This is currently the case in Scotland, whose private international law rules do not recognize the possibility of a *professio iuris*. The same applied in Croatia, before the Regulation came into force⁸.

While the Regulation remains silent on this issue, Recital 40 of the Preamble indicates that the choice of law “should be valid even if the chosen law does not provide for a choice of law in matters of succession”. This clarification is welcome. However, it only binds Member States. This means that there is no guarantee that a choice for the law of a country whose conflict of laws rules do not allow party autonomy in succession matters, will be recognized in other countries than those bound by the Regulation.

The EU Succession Regulation is indeed only in force in 25 Member States. It has no direct effect in third countries, nor in the three Member States not bound by the Regulation (Denmark, Ireland and the United Kingdom).

⁸ P. SARCEVIC, “Croatie”, in *Régimes matrimoniaux, successions et libéralités dans les relations internationales et internes*, M. VERWILGHEN (dir.), 3rd ed., 2007, Bruylant, 963, § 43.

An intriguing question therefore arises in relation to the enforceability of a choice of law validly made under Article 22 of the Regulation if the question is put to a court not bound by the Regulation.

The answer to this question depends in the first place on the conflict of laws rules in force in the country whose courts are seized. It is not excluded that the mechanism of renvoi has a role to play in this respect. If the conflict of laws rules of the third State indeed in principle do not recognize the possibility for individuals to choose the law applicable to the succession, a choice of law made in accordance with Article 22 could nonetheless be recognized if the third state's conflict of laws rules lead to the application of the law of a Member State and this would lead the court to apply the provisions of the Succession Regulation⁹.

§ 11. Choice of law and multiple wills

In some jurisdictions, it has become common practice to draft multiple wills. Very often, multiple wills are drafted in order to reduce the tax bill which will arise as a consequence of the death¹⁰. Multiple wills have also been used when a person has assets in different countries, whose succession laws are very different. Technically, one could distinguish between drafting a local will, which covers exclusively assets located in one country (so-called 'separate situs will'), next to a more general will ('principal will') from the drafting of a multi-jurisdictions will. One famous case where multiple wills were drafted concerned the estate of the late Luciano Pavarotti, who is reported to have drafted one will dividing his Italian assets and another will concerning his US assets.

Whenever multiple wills are used, care should be taken to ensure a smooth coordination between the wills. There is indeed a risk that provisions of one will could be difficult to reconcile with the provisions of the other. Meticulous drafting should ensure that the two wills are mirror documents. The more complex the documents become, the more opportunity there is for contradiction or incoherence. The risk of accidental revocation of a will on the creation of a subsequent will is one of the most common risks associated with multiple wills.

As far as the choice of law is concerned, it is important to keep the prohibition of partial choice of law in mind when faced with a situation where multiple wills are drafted. When drafting such multiple wills, one should keep in mind that if the deceased has chosen the law applicable to his succession, the two wills will be governed by a single law. As soon as the deceased makes a choice of law, the law chosen applies to the entire estate. It is therefore not possible to make different choices in the two wills, even if the testator possesses more than one nationality.

As a matter of practice, it may be advisable to make a choice of law in one of the wills, and make reference to it in the other will. A German national having assets in England may include a choice for German law in his main will, and refer to it in the secondary will dealing only with the assets located in England. The choice of law in the main will could read as follows:

9 For more details from a UK perspective, see E. B. CRAWFORD & J. M. CARRUTHERS, "Speculation on the Operation of Succession Regulation 650/2012: Tales of the Unexpected", *Eur. Rev. Private Law*, 2014/6, 847-878. From the perspective of the law of New York, see M. W. GALLIGAN, "U.S. Expatriate Persons and Property Owners, the European Union Succession Regulation and the Choice of New York Law", *New York State Bar Association*, March 2016, 1-25, in particular at pp. 10-24.

10 See for instance the practice in Ontario to draft two wills to reduce the estate administration taxes which must be paid – e.g. *McLaughlin v McLaughlin et al.* 2014 ONSC 3162 (Ontario Superior Court of Justice, 8 July 2014).

“Choice of Law I am a citizen of Germany, habitually resident in France and in accordance with the provisions of Article 22 of the European Union Succession Regulation (EU) No 650/2012 I choose the laws of Germany to govern all of my dispositions of property upon death and the whole of my succession, including those assets dealt with under a separate will”.

Is it necessary to repeat the choice of law in the secondary will? This may cause uncertainty as to the precise intentions of parties. The better alternative is to include a recital in the second will, referring to the election made in the parallel will. It may be added that nothing in the second will may be taken to mean that the choice of law included in the first will becomes inoperative.

§ 12. Implicit choice of law

Choosing the law applicable to a succession is not a habit which has gained universal acceptance. In some jurisdictions, the choice of law may be resisted because it is not part of the national tradition. In other jurisdictions, choice of law agreements will not easily be included in wills because this would, under the applicable costs scale, increase the cost of drafting the will. In many cases therefore, a will or other disposition of property upon death will not include a choice of law.

This does not, however, exclude the possibility that Article 22 is applied. Under this provision, a choice may indeed be made “expressly” or “be demonstrated by the terms” of a disposition of property upon death. The Succession Regulation makes it possible to infer from the terms of a will that the deceased intended that his succession be governed by his national law.

As with all other instances of implicit or presumed choice of law, the idea that one can find in the terms of a will sufficient evidence that a person intended to choose a law without saying so expressly is a recipe for endless interrogations. This is especially the case since the Regulation does not include many explanations regarding the minimum threshold which must be met before one may deduce an implicit choice of law. The only clarification may be found in Recital 39 of the Preamble, according to which “[a] choice of law could be regarded as demonstrated by a disposition of property upon death where, for instance, the deceased had referred in his disposition to specific provisions of the law of the State of his nationality or where he had otherwise mentioned that law”.

The Rome I Regulation, which provides uniform conflict-of-laws rules for contracts is more specific. It states that a choice must be “clearly demonstrated” by the terms of the contract. On the other hand, the same provision also makes it possible to take into account the “circumstances of the case”. This reference has not been included in the Succession Regulation. It may therefore be concluded that the search for the implicit intention of the testator must be strictly confined to those provisions appearing in the will.

In practice, opinions may differ when examining a will. The various elements included in the will may point in the direction of a given national law. Whether this is sufficient to conclude that the person truly intended that his will be governed by that national law, is a matter for interpretation. Imagine that a Dutch national who as been living in Belgium for twenty years, dies in that country. In his will, which has been drawn up with the assistance of a Dutch notary, he expressed the wish that his wife’s daughter should be entitled, in his inheritance, to benefit from the same regime as his own children. This is permitted under Dutch law, which expressly provides that a testator may include a so-called ‘clause of equality’ benefiting the spouse’s children¹¹. It remains to be assessed

11 Art. 4:27 Dutch Civil Code.

whether this person, by calling upon the assistance of a professional in the Netherlands and making a reference to a mechanism peculiar to Dutch law, intended to submit his last will to Dutch law.

The uncertainty surrounding the deemed choice of law is an additional incentive to include an express choice of law, whenever this is possible.

§ 13. The ‘unchoice’ of law

Article 22 makes it possible to select the law applicable to one’s succession. As already stressed, such a choice may only be made in favor of one’s national law. A choice for the law of one’s habitual residence is of no value under the Regulation.

In some circumstances, a choice for one’s national law may seem undesirable. This will be the case if the person concerned is a national of a country whose law does not leave much room for estate planning or prohibits certain arrangements which the testator would like to adopt.

In that case, it may be useful to make it clear that the person concerned has no intention to make a choice of law. The strategy is therefore not so much to actively choose the applicable law in one’s will, but to make sure that the succession will be governed by the law of the person’s habitual residence. This may be achieved using the following drafting:

“I have no intention to avail myself of the possibility offered by Article 22 of the EU Succession Regulation to make a choice of law. I understand that in the absence of a choice of law, my succession will be governed by the law of my last habitual residence.”

The same strategy could be applied to avoid the uncertainty surrounding the implicit choice of law. As already underlined, Article 22 makes it possible for a court or a notary to determine that a testator has implicitly chosen a law to govern his succession. This opens the door for an examination which could unravel the provisions of a will. In order to avoid the uncertainty which is inevitably linked with such an inquiry, it is strongly advisable to repudiate the possibility of an implicit choice of law.

“Nothing in the present will may be understood as giving rise to an implicit or deemed choice of law under Article 22 of the EU Succession Regulation.”

This will help make it clear that no choice is being made and that it is the testator’s intention that the default law of the habitual residence at the time of death is to apply.

§ 14. Choice of law and non succession matters

When a person dies, dealing with the succession is only one of the questions which arise. If the deceased was married, one also needs to take into account the matrimonial property relations between the spouses. Various other instruments may also have been used, such as joint ownership structures and usufructs. The deceased could also have taken out a large life insurance. Many important issues are intertwined with succession law. All these matters will need to be sorted out.

When choosing a law, a testator may be under the impression that the law chosen will govern all these aspects. This would, however, give too much importance to the choice of law. The Regulation

does not address all issues linked with the death of an individual. Most notably, the Regulation excludes matrimonial property schemes from its scope. The Regulation also limits itself to transfer of property by succession, excluding life insurance, pension plans, joint ownership and other forms of planning vehicles based on contracts or property rights. Trusts are also excluded from the scope of the Regulation, at least the creation, administration and dissolution of trusts.

As a consequence, all these issues are not governed by the law designated by the Regulation. A choice of law based on Article 22 of the Regulation does not have any influence on these matters.

This should certainly be made clear to the person making the choice. This person should be aware of the fact that the law chosen will only govern those issues which are deemed to be related to the succession. Is it necessary to include a reference in the will to the fact that the testator has been duly informed? This has been suggested¹². Much will depend, however, on the limits of the liability of the professional advising the testator and the practice.

§ 15. Choice of law and liability of estate planners

Notaries are subject to strict professional duties. In many jurisdictions, their liability is a very stringent one. They are required to provide independent advice to their clients and ensure that their clients can make a fully informed decision.

How much information should notaries provide when advising their clients in relation to a choice of law under the Regulation? The standard and benchmark could obviously differ depending on the jurisdiction and the relevant professional rules.

At the very least, a professional advising clients in relation to the Regulation should always point out to the possibility offered by Article 22. The client should be made aware of the fact that he may opt out of the law of his habitual residence, if that law does not coincide with the law of his nationality.

Going further, one may wonder how much information a professional should provide when a client wishes to submit his succession to a foreign law. Say a French notary is advising a German client residing in France, who wants to opt for German law. It will not be difficult for the notary to offer explanations regarding the validity and the enforceability of the choice of law, as these issues are fully governed by the Succession Regulation. It may be more difficult to assist the client in understanding the practical impact of the law chosen on the division of his estate. This is even more the case when one brings in the tax dimension, as the succession may be subject to taxation in the country where the client resides. It appears safer to work together with a professional versed and trained in the law chosen to ensure that the advice meets the quality standards.

A specific situation arises when the law chosen by the client includes provisions which may raise difficulties from a public policy perspective. This situation could arise if the client chooses the law of a country where the assets of the deceased are primarily allocated to his male heirs. In other countries, the succession rules could make it impossible for an heir to benefit from the succession because he/she is not of the same religion as the deceased. In this case, the notary has a duty to warn

¹² See S. BERGE & V. DE BACKER, *op. cit.* (note 7), 196. These authors suggest adding the following language to a will : “Ik verklaar dat de notaris mij benadrukt heeft dat deze rechtskeuze geen invloed heeft op de materies gespecificeerd in artikel 1 Erfrechtverordening nr. 650/2012, waaronder de fiscale gevolgen” and “Ik verklaar dat de notaris mij er op heeft gewezen dat deze rechtskeuze enkel betrekking heeft op mijn erfopvolging en niet op de vereffening en verdeling van mijn huwelijksvermogen”.

the client that the choice of law may be disregarded, at least in part. In exceptional cases, where it is clear that the law chosen will be put aside, the notary should strongly advise the client to reconsider his choice.

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