Succession

I. Introduction

While limited in the past to rare instances involving few wealthy individuals, the phenomenon of international successions has become popularized over the last decades.

Several sociological and economic factors have contributed to this development. In the second half of the 20th century, economic growth together with the diffusion of the welfare state and of social security systems led to the accumulation of significant wealth, even in middle-class families. While the present crisis has slowed down this evolution, it did not bring it to a halt. At the same time, internationalization has increased dramatically under the combined effect of the free movement and migration of workers, the globalization (→ Globalization and private international law) of the economy as well as the steady growth of several emerging countries. The diffusion of mass tourism and of low-cost flights also played a significant role: the purchase of a holiday flat abroad – once the luxury of some upper-class families – has become in certain countries a new aspect of the consumer society.

In this framework, courts and legal professionals increasingly face the complexities of cross-border succession cases. International estate planning is also becoming more popular, at least in certain countries.

When it tackled the problem, the European Commission estimated that around 450,000 international successions of an estimated value of 123.3 billion Euros are dealt with in Europe each year.

Notwithstanding this evolution, substantive succession law has not changed significantly. Its sources are still mostly domestic. They reflect a rich variety of solutions, shaped by history and local traditions. Thus, important disparities exist among national laws regarding very central succession law issues, such as beneficiary rights in an intestate succession, the existence of forced heirship rights or other restrictions of the testator's freedom, the admissibility of mutual wills and agreements as to successions, as well as the administration of the estate and the heir's liability for debts.

Notwithstanding this diversity, harmonization efforts at the substantive law level have been scant until now. Only two texts deserve to be mentioned: the Council of Europe Convention of 16 May 1972 on the Establishment of a Scheme of Registration of Wills (CETS No 77), in force in 12 European states, and the UNIDROIT Convention of 26 October 1973 Providing a Uniform Law on the Form of an International Will (available at <www.unidroit.org/instruments/succession>), ratified by about 20 states.

That being so, the search for uniform and predictable solutions is entirely left to private international law. However, significant disparities also exist among the national systems

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regarding international jurisdiction and choice-of-law issues.

II. Uniform private international law instruments

Until recently, the efforts of unification of private international law rules in the area of successions were not very successful.

The → Hague Conference on Private international law was very active in this field and elaborated three, increasingly ambitious international conventions. The Hague Testamentary Dispositions Convention (Hague Convention of 5 October 1961 on the conflicts of laws relating to the form of testamentary dispositions, 510 UNTS 175) was ratified by 41 European and non-European states. By contrast, the Hague Estates Administration Convention (Hague Convention of 2 October 1973 concerning the international administration of the estates of deceased persons, 1856 UNTS 5) is in force in only three states (→ Czech Republic, → Portugal and → Slovenia). The most recent Hague Convention of 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons (available at <www.hcch.net>, henceforth Hague Succession Convention), which includes uniform rules on the law applicable to all aspects of an international succession, was ratified by only one state, the → Netherlands, and never entered into force.

In this framework, the adoption of the European Succession Regulation (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, [2012] OJ L 201/107; → Rome IV Regulation) is a very important step towards international uniformity. Even if three EU states (→ Denmark, → Ireland and the → United Kingdom) are not bound by this instrument, the Regulation unifies the rules on conflict of laws and conflict of jurisdictions in 25 Member States of the European Union. This very conspicuous instrument includes more than 80 articles and covers all main issues of private international law that could arise in an international succession case, such as jurisdiction, applicable law, recognition and enforcement of foreign decisions, as well as acceptance and enforcement of foreign authentic instruments. It also institutes and regulates in detail a European Succession Certificate. Many provisions of this Regulation, in particular those relating to jurisdiction and applicable law, enjoy a universal scope of application, ie they apply even to relationships with non-Member States of the EU (art 20 and Recital (30) Succession Regulation); therefore, these rules entirely replace the national private international law rules of the Member States with respect to the issues they cover. By contrast, the provisions of the Regulation on parallel proceedings (*lis pendens* and related actions (→ *Lis alibi pendens*)) as well as those on recognition and enforcement of decisions and authentic instruments are only applicable among the Member States. The Regulation is only applicable from 17 August 2015, to the successions of persons deceased on or after 17 August 2015 (arts 83 and 84).

III. Determining the law applicable to successions: a comparative law perspective

In a global comparative perspective, the national and international rules on the determination of the law applicable to a succession can be classified as part of the unitary system or the dualistic system.

1. The unitary approach

Under the unitary approach, one single law governs all assets belonging to an estate, wherever they are situated. Along the same lines, the applicable law also governs all different aspects of the succession, including the issues relating to the administration of the estate. The unitary approach thus avoids a scission of the succession and the complicated problems related to the simultaneous application of different laws to separate parts and distinct aspects of one single estate.

The systems based on the unitary approach are divided into different subgroups, depending on the connecting factor that is adopted for the determination of the applicable law.

Certain countries submit the succession to the law of the state of the deceased's → nationality at the time of death. This solution was still very common in several EU Member States before the application of the Succession Regulation. It is also adopted in some non-European countries, in particular in → Japan, → South Korea and most Arabic countries. The application of the deceased's national law normally ensures

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foreseeability and stability as to the rules governing the succession. As a matter of fact, the nationality of a person is generally quite easy to determine and does not change very frequently; in particular, under this system the law applicable to the succession is not affected by a change of the deceased's domicile or habitual residence (→ Domicile, habitual residence and establishment) during his lifetime. However, a difficult question arises when the deceased possessed two or more nationalities. In a world of increased mobility, nationality does not always reflect a serious and substantial link between a person and a state; therefore, this → connecting factor can lead to the application of a law with which there is no significant connection, thereby producing surprising results for the parties involved in the succession.

Other systems of private international law prefer the application of the law of the state of the deceased's last domicile or last habitual residence. This solution, which is followed in several Nordic states, has also been adopted by the Succession Regulation; under art 21(1) of the Regulation, the law applicable in the absence of a choice is that of the last habitual residence of the deceased. This approach is also widespread in Latin American countries, where the relevant criterion is generally the last domicile of the deceased. The most obvious advantage to this solution is that it leads to the application of the law of a country with a real and significant connection not only for the deceased but also for most other persons interested in the succession (members of the family, potential heirs, legatees, creditors etc). Moreover, since the administration of the estate normally takes place, at least in part, at the place of the last domicile or of the last habitual residence of the deceased, these connecting factors often lead to the application of the domestic law of the state of the competent authority, thus avoiding or reducing the instances in which a foreign law is applicable. However, this approach also has its downsides. The most evident drawback relates to the mutability of the applicable law in the case of a change of domicile or habitual residence by the deceased during his lifetime: to avoid this, these connecting factors are sometimes 'corrected' by special choice-of-law rules in order to grant the foreseeability needed for estate planning purposes (in particular with respect to the enforceability of dispositions upon death, see *infra* V.2.). Another shortcoming of this approach results from the practical difficulties linked to the determination of the last domicile or habitual residence where the deceased, during his lifetime, simultaneously lived in different countries.

2. The dualistic or scissionist approach

Dualistic (or scissionist) systems are based on the idea that the succession of → immovable property should be governed by the law of the country where the property is located (*lex rei sitae*, *lex situs*). This reflects the traditional and almost universally accepted application of the *lex situs* to property rights over immovables: in dualistic countries, the → connecting factor of the *situs rei* also covers the issues relating to succession over immovable property. As a consequence, immovable assets situated in different countries are not dealt with as part of one single, unitary estate, but as part of separate estates, each of them being governed by its own law.

Since the application of the *lex situs* to movable property would make the system even more complicated, it has been replaced in the course of history by a unitary connection of movables. Thus, in most scissionist countries the succession of movable property is governed by the law of the state of the deceased's last domicile or last habitual residence. This was the case in → Belgium, → France and → Luxembourg before the application of the Succession Regulation. The same solution is also adopted in most common law jurisdictions as well as in → China, Russia (→ Russian Federation) and several African countries. However, behind this apparent uniformity the concrete solutions may be very different, in particular because of the distinct understanding of the notion of domicile in civil and common law jurisdictions.

A few dualistic countries submit movable property to the law of the nationality of the deceased (eg Monaco and → Turkey) or to the *lex rei sitae* (eg the state of Massachusetts in the → USA and → Uruguay).

The scission of the deceased's estate which results from the application of the *lex situs* and from the dualistic approach raises difficult problems and is often perceived as the most serious drawback of the scissionist approach. The shortcomings of a scission of the succession are particularly evident when the substantive rules on succession under the governing laws

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are based on the consideration of the estate as a whole. This is for instance the case when one of the applicable laws provides for forced heirship rights, the calculation of which requires an assessment of the value of the entire estate and all financial provisions made by the deceased in favour of his/her close relatives. A unitary approach is also desirable when the issue at stake is the validity of a will or another *mortis causa* disposition by which the testator intended to dispose of the whole of the estate or assets situated in several countries. In such instances, the application of different laws to the individual assets belonging to the deceased's estate may lead to improper results and even cause injustice. To avoid this, some dualistic systems use correction mechanisms to overcome the undesirable effects of a scission.

IV. The corrections of the main connecting factor

In many jurisdictions, irrespective whether they are based on a unitary or dualistic approach, the → connecting factors adopted for the determination of the law applicable to the succession are subject to several exceptions. These have different goals; sometimes they are used to correct the improper results of a scission.

1. *The doctrine of* renvoi

Many private international law systems recognize, to some extent, the doctrine of → *renvoi*. It is worth mentioning that the *renvoi* doctrine was first developed both by French and English courts in succession cases.

Some jurisdictions accept *renvoi* very broadly and do so also in the area of successions: this is for instance the case in → France, → Germany, → Italy and in several common law jurisdictions. In other jurisdictions, which are more reticent to accept *renvoi*, this doctrine is sometimes specifically followed in the area of successions: an example is Swiss law (see art 91(2) Swiss Private international law Act (Bundesgesetz über das Internationale Privatrecht of 18 December 1987, RS 291, henceforth Swiss PILA)). This is due to the fact that *renvoi* is supposed to promote international uniformity of solutions, a goal which is often regarded as paramount in the area of international successions.

It is therefore not surprising that – contrary to all other existing European regulations in the field of conflict of laws – the Succession Regulation adopts the *renvoi* doctrine. Under art 34(1) of the Regulation, *renvoi* is first relevant when it leads to the application of the law of the forum or the law of another Member State (letter a); it must also be followed when it leads to the law of a third state, provided that this state considers its own law as applicable to the case at hand (letter b). As compared to some national systems, which limit the application of *renvoi* to cases where this leads to the application of the → *lex fori* ('reference back'; eg → Spain), the solution in the Regulation is very '*renvoi*-friendly'. According to Recital (57), the underlying purpose is 'to ensure international consistency'.

A difficult problem arises when all states concerned by the succession are prepared to apply *renvoi*. To put an end to the resulting vicious circle, the courts can either accept the 'reference back' resulting from the foreign *lex causae* and thus apply the substantive rules of their domestic law ('simple *renvoi*'), or they can follow the solution, which would be adopted by the courts of the other state concerned ('double *renvoi*' or 'foreign court theory'). The first solution is more frequently adopted in civil law jurisdictions, whereas the second one – more consistent with the goal of promoting international uniformity – is typical of common law jurisdictions. The Succession Regulation is silent in this respect.

The *renvoi* doctrine can also lead to a result, which alters the fundamental choices of a unitary or dualistic system. Thus, in a unitary system, *renvoi* can lead to a scission of the succession ('imported scission'), whereas in a dualistic system it can favour a unitary solution. In some national systems, the *renvoi* doctrine is followed in the field of successions only when it preserves (or re-creates) the unity of the succession. This ingenious solution was adopted by the Spanish and French courts (Tribunal supremo, 15 November 1996, *Lowenthal*; 21 May 1999, *Denney*; 23 September 2002, *François Marie James W*; Cass, 11 February 2009, *Riley* [2009] Rev.crit.DIP 512), as well as by the Belgian legislator (art 78(2) of the Belgian Private international law Act (Wet houdende het Wetboek von international privaatrecht/Code de droit international privé of 16 July 2004, BS 27 July 2004, pp 57344, 57366)). The Succession Regulation has not endorsed this particular use of *renvoi*; it seems, therefore, that the latter can lead to a scission of the succession, and this in contradiction

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with the unitary approach followed by the European legislator.

2. The escape clause

In most national private international law systems, the choice-of-law rules relating to successions are 'hard-and-fast rules', based on the application of the 'rigid' connecting factors mentioned above (domicile, habitual residence (→ Domicile, habitual residence and establishment), nationality, *situs rei*). Even in those common law jurisdictions in which the determination of the applicable law is normally based on rules involving a certain measure of court discretion (such as the USA), a 'flexible' approach is only rarely used in the area of successions. Similarly, in civil law jurisdictions, like → Switzerland, where all choice-of-law rules are subject to a general → 'escape clause' (see art 15 Swiss PILA), this mechanism has not been used so far to derogate from the normal connecting factors adopted for succession.

The main reason, which is often advanced in favour of such a rigid approach, is that predictability is particularly important in successions law. In particular, it is argued that efficient estate planning is only possible when the would-be deceased is capable of anticipating the law that will govern his/her estate.

This is certainly true. However, even the traditional connecting factors used in this area of law do not always grant predictability, the main reason being that they can change during the lifetime of the would-be deceased. Legal certainty is particularly threatened when the relevant connecting factor is the last domicile or the last habitual residence of the deceased, since these factors can easily be modified before death. That being so, a limited degree of judicial discretion in the determination of the applicable law is not necessarily incompatible with the specific needs of international successions.

It is therefore not surprising that escape clauses have been included in the most important uniform law instruments elaborated in this area, ie the Hague Succession Convention (see art 3) and the Succession Regulation. In particular, art 21(2) of the Regulation allows the competent authority to derogate from the application of the law of the state of the last habitual residence of the deceased when 'it is clear from all the circumstances of the case that, at the time of death, the deceased was manifestly most closely connected' with a different state. This provision should, however, be used only 'in exceptional cases', eg 'where . . . the deceased had moved to the State of his habitual residence fairly recently before his death and all the circumstances of the case indicate that he was manifestly more closely connected with another State' (see Recital (25)).

V. Party autonomy

→ Party autonomy is traditionally accepted in several fields of private international law, such as contracts and → matrimonial property regimes. Its application to the area of successions is the result of a much more recent development.

With some notable exceptions (eg Switzerland: see arts 87 and 90 Swiss PILA), most countries previously rejected the idea that the would-be deceased could choose the law applicable to the succession, considering that such a choice could be abused for the purpose of evading mandatory rules, in particular forced heirship rights. In recent times, however, awareness has grown regarding the benefits of a limited recognition of party autonomy. In particular, when the deceased had designated the law governing his succession, the chosen law remains applicable notwithstanding a subsequent change of domicile, habitual residence or nationality, thus granting the stability and predictability required for efficient estate planning.

That being so, the Hague Succession Convention of 1989 and certain national private international law legislations recognized in the course of the last decades a limited right to select the applicable law. Contrary to the extensive freedom of choice recognized for contracts or → trusts, the available options generally only include the laws of countries having a close connection to the deceased and/or the estate, such as the countries of the deceased's → nationality or his/her habitual residence or, less frequently, the country where the estate's assets are located. Moreover, certain private international law systems (such as those of Belgium, Italy and Quebec) limit the testator's freedom, providing that the choice of law cannot derogate from mandatory forced heirship rules of the otherwise applicable law.

The Succession Regulation also allows for the choice of the applicable law (art 22) in order to 'enable citizens to organize their succession in advance' (Recital (38)). The only available choice is that of the law of the would-be deceased's national state (or states, in the case

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of multiple nationalities). However, no specific limitation is provided with the purpose of protecting forced heirship rights: only public policy can be invoked to that effect, if and when the exclusion of the deceased's close relatives from the estate amounts to a violation of a fundamental principle of the forum.

In jurisdictions where → choice of law is allowed, it must be made in the form required for a valid disposition upon death. In general the choice is included in a will or in an agreement as to succession ('*pacte successoral*'). In some systems, a tacit choice is also possible provided that it is demonstrated by the terms of a *mortis causa* disposition (see art 22(3) of the Succession Regulation, and the decision of the Swiss Federal Court, ATF 125 III 35). If this is the case, the reference to specific rules, legal notions or institutions of a certain system of law can be construed as a tacit choice of that law (eg the constitution of a testamentary trust can in some circumstances be interpreted as an indication of the intention to submit the estate to the law of a common law jurisdiction).

In systems based on a unitary approach, the law designated by the deceased is normally applicable to the whole of the estate: this is in principle the case under art 22(1) of the Succession Regulation. However, certain national systems allow a voluntary scission, whereby the law applicable to only a part of the estate or different laws for separate parts of the estate are selected. Under Swiss law, for example, a Swiss citizen domiciled abroad can submit, to Swiss law, the whole of the estate or only the part that is situated in Switzerland (art 87(2) Swiss PILA). Such a *depeçage* brings about all the complexities of a scission. Following the model of the Hague Succession Convention (see art 11), arts 24(2) and 25(3) of the Succession Regulation allow for a partial choice of law, the effects of which are limited to issues of admissibility and substantive validity of a disposition upon death; in this case, all other issues remain subject to the law designated by the objective conflict rules.

The → choice of law may sometimes have an impact on jurisdiction. Under Swiss law, for instance, Swiss courts automatically have jurisdiction when a Swiss citizen domiciled abroad chooses Swiss law (art 87(2) Swiss PILA). The Succession Regulation provides for a much more complex mechanism, the purpose of which is 'to ensure that the authority dealing with the succession will . . . be applying its own law': under art 5, the 'parties concerned' (ie the heirs, legatees etc) can confer jurisdiction to the court(s) of the state whose law was designated by the would-be deceased as applicable to the succession. This means that the choice of law by the would-be deceased can be combined with a choice-of-court agreement entered into by the parties to the proceedings.

VI. The scope of the law applicable to the succession

1. Succession and administration of the estate

Significant differences exist with respect to the scope of the law applicable to the succession. In common law jurisdictions, a clear-cut difference is made between the succession and the administration of the estate. The law applicable to the succession (ie the *lex situs* for immovables and the *lex domicilii* for movables) only governs the issues relating to the determination of heirs, legatees and other beneficiaries of the estate: this includes *inter alia* the rules on intestate succession, all issues relating to the validity and effects of dispositions upon death, as well as the right of family members and dependents to request a proper financial provision. On the other hand, the administration of the estate is always governed by the *lex fori*: this includes all issues concerning the appointment and the powers of a personal representative of the estate, the collection and administration of the assets, the payment of the creditors and the distribution of the property to the heirs. The application of internal law to these issues is justified by the fact that they are dealt with in the framework of the probate procedure, which takes place under the close supervision of the courts.

By contrast, unitary systems tend to submit all issues relating both to the devolution and the administration of the estate to one single law. This approach is typical of civil law jurisdictions, which generally do not provide for an 'organized', court-driven procedure for the administration of the estate, but confer administration rights and liabilities to the heirs ('*saisine*' system). The Succession Regulation exemplifies this well. According to its art 23, the law designated by the choice-of-law rules of the Regulation (ie the law of the last habitual residence, the law which is most closely connected or the law chosen by the would-be deceased) governs the succession as a whole; it does not

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only determine the rights of heirs, legatees and other beneficiaries, but also governs all issues relating to the transfer and the administration of the properties, the liability for debts under the succession and the division of the estate. This solution successfully avoids *dépeçage*, but the court may still have to adapt the measures provided by a foreign succession law to the procedural framework of the *lex fori*, a task which can be quite challenging.

Other unitary systems are less draconian and provide that certain specific issues relating to the administration of the estate are subject to a law other than that which is applicable to the succession. In particular, it is quite common that specific procedural measures relating to the appointment of an administrator or liquidator of the estate, or relating to the inventory of the assets, are entirely governed by the law of the forum (this is for instance the case in Swiss law under art 92(2) Swiss PILA). In certain systems, questions relating to the transfer of property to the heirs (Germany) or the functioning of the community of heirs (France) may be subject to the law of the location of the property.

2. *Dispositions upon death*

In many legal systems, dispositions upon death are governed by the law applicable to the succession determined at the moment of death. This means that the validity and effects of a disposition, which was presumably established in conformity with the law that would have been applicable to the succession at the time of the disposition (eg the law of the would-be deceased's habitual residence at the time of the disposition), might be submitted after death to a different law (eg the law of the deceased's habitual residence at the time of death). Such a discrepancy can lead to unexpected results and represents a serious obstacle to efficient estate planning.

To avoid this, several private international law systems provide for special choice-of-law rules aimed at ensuring the validity of dispositions upon death. These special provisions typically provide for the submission of *mortis causa* dispositions to the law that would have governed the succession if the person who made the disposition had died on the day when the disposition was made (this is the so-called 'hypothetical' succession law; in German, '*Errichtungsstatut*').

Sometimes, such specific rules only apply to agreements as to succession, as is the case under the Hague Succession Convention (see art 9(1)) and under Swiss law (art 95(1) Swiss PILA). More frequently, they also cover wills and other dispositions upon death, as is the case under the Succession Regulation (art 24(1) and 25(1) and (2)).

This prevents a change of the applicable law after the establishment of a disposition upon death and thus preserves the latter's validity. Normally, it only applies to the admissibility and substantive validity of *mortis causa* dispositions and to some specific effects thereof, such as their binding character. By contrast, all other issues relating to the succession are still governed by the law determined at the time of death (in particular, this is the case of forced heirship rights): this *depeçage*, which could raise complicated classification and adaptation issues, is the main downside of this solution.

Several systems also allow for a limited choice of the law governing dispositions upon death. This is a partial choice, which only concerns the admissibility or substantive validity of the *mortis causa* disposition without affecting the law applicable to the other issues under the succession (see art 11 of the Hague Succession Convention, arts 24(2) and 25(3) Succession Regulation and art 95(2) Swiss PILA). Therefore, it must be distinguished from a choice of the law applicable to the succession as a whole.

Specific rules sometimes regulate the admissibility of bilateral succession agreements and mutual wills. These particular dispositions upon death relate to the estate of two or more persons and these may be governed by different laws; in particular, this is the case when these persons have their domicile or habitual residence in different countries, or the nationality of different states. It is possible therefore that the disposition at hand is valid under one of these laws but void under the other. The most common solution is then to submit the admissibility of such dispositions to the cumulative application of the law governing the succession of all persons concerned, subject to a choice of law by the parties (see art 10 of the Hague Succession Convention; art 25(2) of the Succession Regulation; art 95(3) Swiss PILA).

With respect to the formal validity of dispositions upon death, the Hague Testamentary Dispositions Convention provides for alternative → connecting factors, with the consequence

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that a will is valid when it complies with the formal requirements (→ Formal requirements and validity) of at least one of several laws (the *lex loci actus*; the laws of the nationality, of the domicile and of the habitual residence of the testator at the time of the disposition or at the time of death; the law of the location of immovable property). Under some national systems, this solution aimed at favouring the formal validity of the disposition has been extended to succession agreements and other dispositions upon death (see art 26(4) of the Introductory Act to the German Civil Code (Einführungsgesetz zum Bürgerlichen Gesetzbuche of 21 September 1994, BGBl. I 2494, as amended) and art 93(2) Swiss PILA). The same solution has also been adopted by art 27 of the Succession Regulation.

3. Other specific rules

Specific rules are sometimes needed to tackle particular issues relating to a succession for which the applicable law cannot provide a satisfactory answer.

This is for instance the case of *commorientes*, ie 'where two or more persons whose successions are governed by different laws die in circumstances in which it is uncertain in what order their deaths occurred, and where those laws provide differently for that situation or make no provision for it at all' (art 32 Succession Regulation). Failing a solution based on the law(s) applicable to the succession, the Succession Regulation provides for a material rule pursuant to which 'none of the deceased persons shall have any rights to the succession of the other or others'.

A specific rule is provided in some private international law systems to determine the rights on *bona vacantia* when, under the law applicable to the succession, there is no heir and no other person is entitled to the estate properties. In certain legal systems, the state or another public law entity is entitled to the assets as a sort of 'necessary' heir in the absence of a will and of other relatives of the deceased. By contrast, in other jurisdictions the state has the right to appropriate the *bona vacantia* situated on its territory, even if the succession is governed by a foreign law. In case of conflict between competing claims of different states based on such rules, priority is most frequently given to the state where the properties are located (see art 33 Succession Regulation; on the relationship between the law applicable to the succession and the law governing real property rights → Immovable property).

4. Issues outside the scope of the law applicable to the succession

The law applicable to the succession only governs issues which can be characterized as pertaining to succession law. By contrast, it does not regulate questions pertaining to other areas of law, although these may also arise in the framework of a succession or be closely related to it.

Thus, the law applicable to the succession does not govern the status of a natural person nor the family relationships between the deceased and his/her relatives (see art 1(2)(a) Succession Regulation), although the existence and the validity of such status and relationships can become relevant as incidental questions for the purpose of determining the beneficiaries of inheritance rights (→ Incidental (preliminary) question).

The law applicable to the succession does not necessarily govern the matrimonial property regime (art 1(2)(d) Succession Regulation), even though the substantive rules in these two areas of law are often closely interrelated. Thus, the financial provisions included in a marriage contract in favour of the surviving spouse are generally regarded as pertaining to the law applicable to the matrimonial property regime; however, the possible claims of the beneficiary of forced heirship rights against the surviving spouse depend on the law governing the succession.

A simultaneous application of different laws to related issues is also provided for in many jurisdictions with respect to 'claw-back' claims, which can be directed toward the beneficiaries of gifts or other *inter vivos* property dispositions in case of violation of forced heirship rights. Such claims are governed by the law applicable to the succession, even though a different law governs the validity and effects of the *inter vivos* disposition (see art 1(2)(g) Succession Regulation and its Recital (14); see also art 15(c) of the Hague Trust Convention (Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition, 1664 UNTS 311)).

VII. Jurisdictional issues

In most private international law systems, the jurisdiction of courts and other authorities

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in succession matters is largely influenced by the solutions adopted for the → choice of law issues.

Thus, the choice for a unitary or dualist approach generally affects the extension of the court's jurisdiction: in a unitary system, the competent court's jurisdiction will normally cover the entire estate, including assets situated abroad, while in a dualistic system the extension of jurisdiction will vary depending on the nature and location of the assets. In particular, in most common law jurisdictions, the mandatory application of the *lex situs* to the succession over immovables is made effective through the allocation of exclusive jurisdiction to the courts of the *situs*. Conversely, the courts of these countries are often deprived of jurisdiction over foreign immovables because these are governed by a foreign law. The same approach is followed in some dualistic civil law systems (such as French law before the application of the Succession Regulation).

However, a comparative law overview (→ Comparative law and private international law) reveals that the jurisdictional grounds for succession matters do not always entirely coincide with, and are generally broader than, the connecting factors used for the determination of the applicable law. Therefore, in many systems, courts may have jurisdiction on an international succession case even though the choice-of-law rules lead to the application of a foreign law.

The German and Italian systems were illustrative: in these countries (before the application of the Succession Regulation), the deceased's national law was, in principle, applicable to the succession. However, the jurisdiction of local courts in an international succession case could be based not only on the deceased's → nationality but also – *inter alia* – on his/her last domicile and on the location of a part of the assets. When a German or Italian court had jurisdiction based on one of these grounds, it would have to apply a foreign law to the succession.

This is also true in some common law jurisdictions. In these systems, the succession over movable property is governed by the law of the deceased's last domicile. However, in England and other common law countries, a probate procedure is normally started when there is local property (including movable property) to be administered, even if the deceased's domicile was abroad. In such a case, the beneficiaries of inheritance rights will have to be determined in accordance with the foreign *lex domicilii*.

Under the Succession Regulation, jurisdiction is also quite broad. The jurisdiction of a Member State's courts can be based not only on the deceased's last habitual residence, but also, when the last habitual residence was not in a Member State, on the location of estate assets (both movables and immovables). In this case, the court's jurisdiction covers the entire succession (including assets situated abroad) when the deceased had the nationality of that Member State or, failing that, had in that State a previous habitual residence in the five years preceding the moment when the court is seized (art 10(1) Succession Regulation). Failing that, the court's jurisdiction is restricted to local assets (art 10(2) Succession Regulation).

In order to limit the jurisdictional reach of the courts, common law jurisdictions can make use of *forum non conveniens*. In civil law systems, specific rules may be used by the courts to decline jurisdiction over foreign immovables when these are subject to the exclusive jurisdiction of a foreign court (see art 86(2) Swiss PILA) or, more generally, over assets located abroad when it can be expected that the local decision will not be recognized in the foreign country (see art 12 Succession Regulation). Apart from these rules, the general mechanisms of international *lis pendens* and related actions are available in certain jurisdictions to avoid parallel proceedings (see arts 17 and 18 Succession Regulation, which are, however, only applicable among Member States).

Recognition and enforcement of foreign decisions relating to succession matters are normally subject to the general rules. The rules provided to this effect in the Succession Regulation (ch IV) are similar to those applicable under the Brussels I Regulation (Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, [2001] OJ L 12/1; → Brussels I (Convention and Regulation)).

From a practical point of view, authentic instruments (such as notarial acts) and succession certificates are very important in the area of successions. These documents are used in many jurisdictions for several purposes (dispositions upon death, acceptance or waiver of the inheritance, establishment of an inventory,

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non-contentious sharing of the estate, proof of an heir's status, proof of an executor's or administrator's powers). Their circulation is not always granted because of the existing disparities with respect to the modalities of their establishment. Only few national systems have specific rules relating to recognition of such documents (for an example, see art 96 Swiss PILA). The Succession Regulation grants among the Member States the 'acceptance' of the evidentiary effects of authentic acts (art 59 Succession Regulation) and regulates in detail the issuing and effects of the European Certificate of Succession (ch VI).

ANDREA BONOMI

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