International Successions in Spain: The Impact of a New EU Regulation

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CONTENT

I. INTERNATIONAL SUCCESSIONS IN A GLOBALIZED WORLD

Nowadays, the world is definitely interconnected. People move from one country to another, in many occasions in order to undertake future life projects in other places. Some times this decision is taken to merely reach a more comfortable life, but others it is frequently aimed at finding a job to sustain migrants' families, which often remain very far away. In any case, the decision of moving to a

country different than the state of origin affects the regulation of people's private lives and the arrangement of their inheritance in particular.

According to figures provided by United Nations, 213.943.812 international migrants were counted in the world in 2010 and 69.819.282 in Europe.[1] In global terms, there are 214 millions estimated international migrants in the world today, i.e. 3,1% of the population. In the own words of the International Organization for Migration, the number of migrants worldwide would constitute the fifth most populous country in the world.[2]

Spain, and in a broader geographical scope, Europe (as figures above show), have not escaped to this universal phenomenon. In fact, they can be considered as main characters of the plot, for reasons of different nature but mainly connected in both cases with their consideration as attractive destinations where to thrive. As shown by the said figures, Europe is facing at the present time the challenges of having become a multinational and multicultural region. According to the data provided by the European Commission in several documents on migrations, 493 millions of people live in the European Union (EU hereinafter) and, among those, 18.5 millions of people come from third countries, i.e. around 3,8% of the total population.[3] The largest group comes from Turkey (2.3 million), followed by Morocco (1.7 million), Albania (0.8 million) and Algeria (0.6 million). On the other hand, 5.367.000 EU citizens reside in a different Member State than the one of their nationality[4] and some believe that "all data suggest that the proportion of cross-border successions is likely to increase in the future, partly because of the increasing significance of non-nationals among the elderly population of Member States, partly because of the increasing proportion of the population who owns property abroad".[5]

These facts have grounded during the last years the necessity of elaborating European instruments to govern international private relationships in a multinational territory, in order to achieve a desirable harmonization of legal solutions and thus removing obstacles to the free movement of persons within the Union. In achieving this aim, the European legislator cannot create *ex novo* rules blindly. We firmly believe that he should bear in mind the needs and expectations of people living

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1 United Nations, Department of Economic and Social Affairs, Population Division (2009). *Trends in International Migrant Stock: The 2008 Revision* (United Nations database, POP/DB/MIG/Stock/Rev.2008).

2 http://www.iom.int/jahia/Jahia/about-migration/facts-and-figures/lang/en.

3 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Towards a common immigration policy. COM(2007) 780 final, p. 3; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A Common Immigration Policy for Europe: principles, actions and tools. COM(2008) 359 final, p. 2.

4 Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions. Third Annual Report on Migration and Integration. COM(2007) 512 final, p. 3.

5 HAUSMANN, R.: "Community Instrument on International Successions and Wills" in BARUFFI, M.C. and PANICO, R.C.: *Le nuove competenze comunitarie. Obbligazione alimentary e successioni*, Cedam, 2009, p. 150.

in Europe irrespective of their nationality, because both EU and non-EU citizens can be involved in cross-border relationships. As regards the expectations of non-EU citizens, many of them have been living in Europe since years ago -even decades- and feel much linked to the European societies and legislations. Others, by contrast, are much more rooted to their countries of origin and this feeling should be respected to some extent.

Accordingly, among other problems, successions connected with more than one country also need to be solved in this heterogeneous framework, taking into consideration that the European Commission has calculated that at least 50.000 successions concerning European citizens could raise every year[6] and no figures exist as to non European citizens,[7] which would certainly increase the latter statistic. Moreover, other data closely linked to estate planning after death also deserve to be highlighted: more than 3 millions of immovable properties owned by EU citizens are located in a different Member State than the owners' habitual residence. For instance, it is estimated that between 800.000 and 1.000.000 of German citizens possess immovable assets in Spain, Italy and France.[8]

Therefore, the ingredients of problematical successions are evidenced by those demographical data and others related with the current diversity of legislations will be highlighted subsequently in the following epigraph.

II. THE REGULATION OF INTERNATIONAL SUCCESSIONS TODAY: A BRIEF OVERVIEW

Succession *mortis causa* has traditionally been a very rooted topic within domestic laws very much linked to social reality and history, so that deep differences among legal systems can easily be appreciated from one country to another. However, the same significant disparities permit at the same time to distinguish groups of countries taking into account several criteria.

Firstly, some legislators have adopted two different key decisions as regards the regulation of inheritances. Basically, those primarily based on a personal approach of this legal institution *versus* others having stamped a property approach instead.

Secondly, several ways of transfer of property coexist, such as testamentary successions, agreements as to successions, intestate successions and testamentary or statutory trusts upon death. These different means of inheritance planning are not endorsed in the same extent all over Europe. Whereas testamentary and *ab intestato* successions are fully accepted (although differences among States' regulations are also

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[6] Annex to the Green Paper on Successions and Wills. SEC (2005) 270. Brussels 1.3.2005, pp. 4–5.

[7] IGLESIAS BUHIGUES, J.L.: "Desarrollo del espacio europeo de justicia: hacia el Nuevo D.I. Privado de sucesiones en la UE", in *Cursos de Derecho Internacional y Relaciones Internacionales de Vitoria-Gasteiz 2008*, Servicio Editorial de la Universidad del País Vasco, Bilbao, 2009, pp. 347–348.

[8] *Ibidem*, p. 347.

appreciated; validity of joint wills, specific persons having the right to inherit…), agreements as to successions and trusts do not enjoy the same support.[9]

Thirdly, another chief element of inheritance planning diverges depending on the substantive law: in some countries, some relevant heirs are entitled a reserved portion of the estate (the so-called forced heirship, *ad ex* in Spain),[10] whereas others provide for a freedom of disposal on death (principally UK, although subject to maintenance claims).[11]

Identical feeling of diversity and heterogeneity of solutions affects conflicts rules on successions, an area of law where a complex system exists nowadays, which includes regulations coming from two sources: international conventions and national parliaments. Until now, successions have been excluded from the agenda of the European legislator.

As regards international conventions, both bilateral and multilateral agreements can be mentioned in this area of law, currently in force in different geographical areas. Focusing on multilateral agreements, they have had a very limited success, taking into consideration two criteria: the small number of ratifications and/or their narrow scope of application. In the first sense, the most ambitious project on this topic undertaken so far by The Hague Conference on Private International Law was The Hague Convention on the Law Applicable to Succession to the Estate of Deceased Persons of 1989, which never entered into force. Only The Netherlands has incorporated its provisions within its legislation. In the second sense, four other multilateral conventions stand out: The Hague Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions of 1961 (currently in force in 39 States),[12] the Basel Convention on the Establishment of a Scheme of Registration of Wills of 1972 (currently in force in 11 States),[13] The Hague Convention Concerning the International Administration of the Estates of Deceased Persons of 1973 (currently in force in 3 States)[14] and the Washington Convention providing a Uniform Law on the Form of an International Will of 1973 (currently in force in 19 States).[15]

As to domestic solutions, they largely differ as regards principally choice-of-law rules, but, once again, some groups can be outlined as to the profile of connecting factors chosen by domestic legislators. One of the main issues relies on the acceptance of party autonomy in this field. Freedom of choice has had unequal recognition in family and succession matters, where it was firstly accepted in the

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[9] We will not focus on substantive issues, due to the international character of this article. For a deeper comparison of domestic laws on successions, see HAYTON, D.: *European Succession Laws*, Jordan Publishing Ltd, Bristol, 2002 or AZCÁRRAGA MONZONÍS, C.: *Sucesiones internacionales. Determinación de la norma aplicable,* Tirant Lo Blanch, Valencia, 2008.

[10] Articles 806 ff of Spanish Civil Code (CC hereinafter).

[11] Inheritance Act of 1975, Section 1.

[12] Status details at www.hcch.net.

[13] Status details at www.coe.int.

[14] Status details at www.hcch.net.

[15] Status details at www.unidroit.org.

XIX Century in Latin America and later on in some European countries.[16] Its acceptance has traditionally and strictly been reduced in Spain, where the parties can choose the law applicable to their private relationships in very few occasions, and certainly not in succession matters.[17] In other countries, nevertheless, freedom of choice has been accepted in a broader or narrower manner, like provided (in a non exhaustive list) by the Italian Private International Law Act of 1995,[18] the Belgian Private International Law Code of 2004[19] or the German Civil Code as amended in 1986.[20]

In case of lack of choice by the parties, different objective connecting factors are envisaged by domestic legislations, either personal or territorial. The starting point in this regard is the alternative towards unity or scission of the treatment of international successions. In some words, whereas the unity system expects the whole succession to be governed by one sole law (*ad ex* Spain, Germany, Italy), the scission model distinguishes between movable and immovable properties, which will be governed by the law of the deceased's last domicile and of the *lex situs* respectively (*ad ex* France, Belgium, UK), leading to the succession to be governed by more than one law in case immovable properties and the last domicile of the deceased are located in different countries.[21]

Definitely, these divergences as to the law applicable make difficult to predict the outcome of cross-border successions.

III. THE FORESEEN EU INSTRUMENT ON SUCCESSIONS: A NEW PROPOSAL FOR A REGULATION

1. Background

As previously mentioned, successions have been traditionally excluded from Community rules of Private International Law adopted so far. On the one hand, successions are expressly excluded in instruments dealing with international jurisdiction and recognition and enforcement of foreign decisions, as stated in Article 1.2

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[16] DE CESARI, P.: *Autonomia della volontà e legge regolatrice delle successioni*, Cedam, Padova, 2001, pp. 65–66.

[17] There is a reduced possibility of freedom of choice as regards marital regime in Article 9.2 CC but it is not permitted in Article 9.8 CC for inheritance matters.

[18] Article 46.2 of the Italian PIL Act of 1995 states that the law of the state of residence can be chosen in a testamentary disposition to govern the whole estate, provided that the person still lived there at the time of the death.

[19] Article 79 of the Belgian PIL Code of 2004 establishes that the law of the state of the habitual residence or of the nationality at the time of the election or of the death can be chosen in a testamentary disposition to govern the whole estate.

[20] Article 25 of the Law of 1986 amending the Civil Code states that foreigners can choose the German law in a testamentary disposition to govern their properties located in Germany.

[21] See for further information on unity and scission systems CASTELLANOS RUIZ, E.: *Unidad vs pluralidad legal de la sucesión internacional*, Comares, 2001.

a) of Council Regulation (EC) Nº 44/2001, of 22 December 2000, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters[22] and Article 1.3 f) of Council Regulation (EC) Nº 2201/2003, of 27 November 2003, concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) Nº 1347/2000.[23] On the other hand, other instruments on applicable law also exclude successions from their material scope of application, as stated in Article 1.2 c) of Regulation (EC) Nº 593/2008 of the European Parliament and of the Council, of 17 June 2008, on the law applicable to contractual obligations (Rome I)[24] and Article 1.2 b) of Regulation (EC) Nº 864/2007 of the European Parliament and of the Council, of 11 July 2007, on the law applicable to non-contractual obligations (Rome II).[25]

Now, the manifest difficulties raised in this area have definitely encouraged the EU to undertake the proper legislative process to adopt a new instrument on international successions, a decision that we congratulate. Starting with a brief historical view, the new proposal for a Regulation finds its origin in 1998, as one of the priorities of the so-called Vienna Action Plan.[26] Later on, the Programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters adopted by the Council and the Commission at the end of 2000 provides for an instrument to be drafted.[27] More recently, the Hague Programme of 2004, when dealing with judicial cooperation in civil matters, called on the Commission to present a Green Paper and suggested to cover the whole range of issues involved in transnational relationships, i.e. international jurisdiction, applicable law, and recognition, as well as administrative measures such as certificates of inheritance or registration of wills.[28]

The Green Paper on Successions and Wills was adopted in March 2005.[29] We consider that the analysis of its content is extremely interesting, because it clearly shows the basis of the discussion and the preliminary preferences of the European legislator. Firstly, it definitely confirmed the convenience of elaborating a comprehensive instrument. Concerning international jurisdiction, the Green Paper tries to cover as many situations as possible, starting from the general ground

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[22] OJ L 12, 16.01.2001.
[23] OJ L 338, 23.12.2003.
[24] OJ L 177, 4.7.2008.
[25] OJ L 199, 31.7.2007.
[26] OJ C 19, 23.1.1999.
[27] OJ C 12, 15.1.2001.
[28] http://ec.europa.eu/justice_home/doc_centre/doc/hague_programme_en.pdf.
[29] COM(2005) 65 final. See also BENDITO CAÑIZARES, M.T.: "Quelques réflexions à propos du Livre vert sur les successions et testaments et ses réponses", *L'Observateur de Bruxelles*, nº 67, 2007, pp. 23–25; FONT SEGURA, A.: "Valoración de las respuestas al Libro verde sobre sucesiones y testamentos relativas a la competencia judicial", in VIÑAS, R. and GARRIGA, G. (cords.): *Perspectivas del Derecho sucesorio en Europa*, Barcelona, 2009, pp. 59–81; MIQUEL SALA, R.: "El libro verde sobre sucesiones y testamentos: primeros pasos hacia el Reglamento de 'Bruselas IV'", AEDIP, vol. 7 (2007), pp. 695–718.

of jurisdiction of the deceased's last domicile. Besides that criterion, it already insinuates the convenience of adopting other criteria taking into consideration the location of properties.

As regards choice-of-law rules, in second place, the main decision was whether to grant the possibility of selecting the law to be applied despite the fact that most of Member States do not contemplate it. When reading the relevant part of the Green Paper in this regard, it seems like a positive decision was almost already taken at that time… "Although most Member States of the European Union do not allow the future deceased or his heirs to choose the law applicable to his succession, the question remains worth considering. Whatever connecting factor is selected, the possibility remains that in certain situations it will fail to match the legitimate expectations of the people involved in a succession. A degree of flexibility might therefore be provided".[30]

When it comes to recognition and enforcement of foreign decisions, thirdly, the Green Paper clearly assumed that "the future Community legislation must simplify matters for heirs by allowing the recognition and enforcement of documents needed for the recognition of their rights – court judgments, deeds, wills, documents certifying the status as heir, powers conferred on persons acting as executors, etc.".

Finally, it emphasized on the fact that Community legislation in matters of succession must also set out to remove administrative and practical barriers and, to this aim, it takes for granted that the establishment of a European certificate of inheritance should be envisaged.

This Green Paper on successions and wills elicited around 60 replies from ministries, regional and local authorities, scholars, practitioners, associations of legal professions, etc, and was followed by a public hearing on November 30, 2006. Moreover, the Commission set up on March 1, 2006 a group of experts known as "PRM III/IV", which met on seven occasions between 2006 and 2008 and it organized a meeting of national experts on June 30, 2008. The Proposal on Successions was finally adopted on October 14, 2009, with clear objectives in mind. Among them, "To allow citizens to efficiently plan and to organise their succession in advance in a cross border context".[31] This is precisely what Sahid, a Moroccan citizen who has lived in Spain for thirty years, would like to ascertain.

2. Analysis of the main solutions from a practical point of view: a foreigner plans his inheritance in Spain

November 11, 2010. Sahid, a Moroccan citizen, has an appointment at a Valencian Advocates Bureau called "Solutions after Death" because he has some concerns about the future arrangement of his inheritance. Sahid has lived in Valencia for the last thirty years and owns assets in this city as well as in Casablanca, his home town. He is now very ill and his daughter, Sonna, and his son, Mohammed,

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[30] Green Paper, p. 6.

[31] Working document of the Commission accompanying the Proposal. Summary of the Impact Assessment, p. 5. SEC(2009) 411 final.

are taking care of him. However, a third son, Ahmed, is also ready to claim his inheritance rights. Sahid wants to exclude him from his succession in his last will, so he assumes that he will sue Mohammed and Sonna after his death to claim his inheritance rights. If that is the case, his succession will need to be solved before a court.

This being the situation, Sahid asks the following questions to the Spanish lawyer, Fernando:

1. In first place, he needs to know whether the controversy could be solved before Spanish courts. Both sons and his daughter live in Valencia with their families and to litigate there would be more convenient for all of them.

2. In second place, to know the law applicable to the succession was also vital. Sahid would like the Moroccan law to be applied because he is still much linked to his culture of origin despite having lived in Spain for thirty years.

3. In third place, he wants to know whether a decision adopted in Morocco as to this same succession – in case they will finally litigate in that country – will be recognized in Spain.

Fernando took note of all Sahid's concerns and told him to come back in a few days, so that he can find accurate answers to his questions. He suddenly remembered that there is a new EU Regulation on international successions on the way. He then decided to solve the questions taking into consideration the legislation currently in force as well as the foreseen instrument, always assuming that he will die in Spain, where he had his last habitual residence. He checked the rule on the application of the Proposal for a Regulation on Successions.[32] His client must be aware that under Article 50 PRS, "*This regulation shall apply to the successions of persons deceased after its date of application*". This is a key rule due to the primacy of the European instrument.

a) International jurisdiction

As regards the jurisdiction of Spanish courts to hear a controversy on a succession with foreign elements, the current rule is stated in Article 22 of the *Ley Orgánica del Poder Judicial* 6/1985[33] (Law of the Judiciary of 1985), taking into account that neither EU rules nor international conventions regulate this issue nowadays.[34] Article 22 LOPJ confirms the possibility of Spanish courts to hear this case, according to several grounds of jurisdiction: the parties can agree to litigate before Spanish courts (Art. 22.2 LOPJ); moreover, the defendant is also domiciled in Spain, so he/she can be sued before Spanish courts (Art. 22.2 LOPJ); and furthermore, the

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[32] PRS hereinafter.

[33] LOPJ hereinafter.

[34] International jurisdiction has not been dealt with in international instruments so far, so that the proposal of the new EU instrument on successions in this regard is a significant novelty. FORNER DELAYGUA, J.: "Consideraciones acerca de la regulación de la competencia internacional de autoridades en un futuro Reglamento comunitario de DIPr relativo a las sucesiones por causa de muerte", in R. VIÑAS and G. GARRIGA (cords.), *Perspectivas del Derecho sucesorio en Europa*, Barcelona, 2009, pp. 86–87.

last domicile of the deceased was in Spain and he also had immovable properties there (Art. 22.3 LOPJ).

Once the European Regulation will be in force (and in case the solutions remain as they are currently contemplated in the Proposal of October 2009), the general ground of jurisdiction will be based on the habitual residence of the deceased at the time of the death (obviously, that residence must be in a Member State), under Article 4 PRS. Hence, Spanish courts will also be competent to hear the case under the EU instrument if Sahid dies in Spain habitually residing there.

Also regarding international jurisdiction, it is of an outstanding importance to note that the Regulation not only envisages "courts" as such, but also non-judicial authorities. This point, despite not being a novelty in European instruments,[35] is also very significant in succession matters, where many issues are solved in non-contentious proceedings. As stated in Article 2 when dealing with some relevant definitions for the purposes of the Regulation, "court" means "*any judicial authority or any competent authority in the Member States which carries out a judicial function in matters of succession. Other authorities which carry out by delegation of public power the functions falling within the jurisdiction of the courts as provided for in this Regulation shall be deemed to be courts*". Thus, the European legislator has properly decided to also deal with this non judicial reality. However, we would dare to say that a general definition, despite being appropriate in order to stress that these authorities are covered by the Regulation, is too broad. Perhaps citizens should be provided with a list of authorities per countries, appointed by the Member States according to their respective legislations and contemplated in one of the Annexes of the Regulation.

Finally in this regard, we would like to attract the attention on two points:

Firstly, it is interesting to note that the Regulation does not provide the possibility of *prorrogatio fori* as such (however, we would support it to be granted). Under the current wording, the parties cannot agree on the court having international jurisdiction in succession matters, whereas they can do it in other civil matters covered by Articles 23 and 24 of Council Regulation (EC) Nº 44/2001. Moreover, in this same field they can currently select Spanish courts to be competent under the rules on international successions now in force in Spain (Article 22.2 LOPJ). In the Proposal, by contrast, there is only a similar provision in Article 5 PRS, which leads to a sort of *forum conveniens* when stating the possibility to refer the case to a court better place to hear it. This rule needs to be interpreted together with Article 17 PRS, which grants the chance to select the law of the nationality

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[35] See Article 2 of Council Regulation (EC) Nº 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) Nº (EC) Nº 1347/2000: "*For the purposes of this Regulation: 1. the term "court" shall cover all the authorities in the Member States with jurisdiction in the matters falling within the scope of this Regulation pursuant to Article 1; 2. the term "judge" shall mean the judge or an official having powers equivalent to those of a judge in the matters falling within the scope of the Regulation;* (…)".

as the law applicable to the own succession (see further details in the following epigraph): 2. "*Where the law of a Member State was chosen by the deceased to govern their succession in accordance with Article 17, the court seized in accordance with Article 4 may, at the request of one of the parties and if it considers that the courts of the Member State whose law has been chosen are better placed to rule on the succession, stay proceedings and invite the parties to seize the courts in that Member State with the application*".

Secondly, more concerns arise as regards the grounds of jurisdiction stated in Articles 6 ("Residual jurisdiction" of courts of location of property – when some other requirements are fulfilled –)[36] and 9 PRS ("Competence of courts in the place in which the property is located" to take measures concerning that property under substantive law).[37] These grant more possibilities to litigate in Europe on the basis of property located in Member States. However, the Proposal just says "property"…Shall we then understand any kind of property, or just immovable property? We would support this last view but the answer is unclear, provided that no clarification exists in this point. Is any kind of property located within the EU enough linked with the Union to justify a ground of jurisdiction?

On the other hand, must we understand that the conferred jurisdiction is also universal, i.e. for all the elements referring to the succession? It seems that this question is to be answered in the negative for Article 9 PRS, given that it states the intervention of courts when it is so required "*to take measures under substantive law relating to the transmission of the property, its recording or transfer in the public register*". However, we would dare to affirm that Article 6 PRS can be interpreted as granting universal competence to hear the case (*vid*. footnote 35). At least its wording does not deny it. If this is the case, this decision should be carefully studied to avoid problems of future recognition of decisions in third countries.

b) Applicable law

The current choice-of-law rule on successions in Spain is stated in Article 9.8 CC, which is based on the principle of unity. This rule contemplates the "nationality" as the sole connecting factor, in order to determine the law that shall govern the

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[36] Article 6 PRS: "*Where the habitual residence of the deceased at the time of death is not located in a Member State, the courts of a Member State shall nevertheless be competent on the basis of the fact that succession property is located in that Member State and that: (a) the deceased had their previous habitual residence in that Member State, provided that such residence did not come to an end more than five years before the court was deemed to be seised; or, failing that, (b) the deceased had the nationality of that Member State at the time of their death; or, failing that, (c) an heir or legatee has their habitual residence in the Member State; or, failing that, (d) the application relates solely to this property*".

[37] Article 9 PRS: "*Where the law of the Member State of the place in which property is located requires the involvement of its courts in order to take measures under substantive law relating to the transmission of the property, its recording or transfer in the public register, the courts of the Member State shall be competent to take such measures*".

whole succession. As we already mentioned, this provision does not allow the possibility of choosing the applicable law. It clearly states that intestate successions shall be governed by the law of the nationality of the deceased at the time of the death; and testamentary successions and successions based on an agreement shall be governed by the law of the nationality of the deceased at the time of the adoption of that will or agreement. Hence, under the current provision, the applicable law would certainly be the Moroccan law, as Sahid wished, provided that it will be properly proved as required under Article 281.2 *Ley de Enjuiciamiento Civil* 1/2000 (Civil Procedure Law of 2000).

As regards the European instrument, the general rule – subject to the lack of choice by the deceased, as we will see later on – is stated in Article 16 PRS, under which "*…the law applicable to the succession as a whole shall be that of the State in which the deceased had their habitual residence at the time of their death*", regardless of their nationality. The choice of "habitual residence" as the connecting factor in succession matters has deemed to be the most suitable for the purposes of the common market, besides being the place where the largest portion of the deceased's estate is usually located. In the opposite side, "nationality" has weakened as a connecting factor in European conflicts since a while ago. Both criteria present positive and negative aspects to take into consideration by the European legislator, who is in charge of finding the fairest results for as many cases as possible. Nationality, on the one hand, provides predictability and the possibility for citizens to keep in touch with their cultures of origin. Habitual residence, on the other hand, guarantees an equal treatment of people living in the same territory, a deeper opportunity of integration in the European society and facilitates the task of legal operators, who apply *lex fori* to the case at stake. The latter features have been considered in Article 16 PRS, but, as we will see, the positive elements featuring "nationality" have also been measured in the Proposal.

But going on with the general rule, we would like to insist on the decision of making the choice-of-law rule and the general ground of jurisdiction share the same factual circumstances, i.e. the habitual residence at the time of death. Two issues should be outlined in this regard. Firstly, the Regulation has avoided providing any definition of "habitual residence", so we understand that this factual criterion must be determined on a case-by-case basis by the competent authority hearing the controversy. Secondly, this leads consequently to the unification of *forum* and *ius*, which has been generally supported (we adhere to this opinion as well) in the light of the advantages referred to *supra*: it avoids the problems associated to the application of foreign laws; essentially, the need of proving their content and the possible conflict between the applicable substantive rules of the relevant foreign law and the core values of the *lex fori*. This last issue becomes really significant for a territory like Europe, where a set of successions concerning people residing in the EU will be governed by European laws instead of by certain foreign laws that can cause problems of public policy. In the present topic, discriminatory provisions in succession matters based on religious or gender reasons will not be applied in Europe simply because the law of the habitual residence of the deceased at the time of death will be applied – unless otherwise provided by the deceased – and European laws do not contain this kind of discriminations.

Furthermore, another significant idea must be emphasized as regards the law to be applied. The European legislator has supported the principle of unity of the succession, present in 17 out of 27 of Member States.[38] In other words, the applicable law shall govern the succession "as a whole". In this regard, the European legislator has followed the same general rule already stated in The Hague Convention of 1989,[39] rejecting the scission of the treatment of international successions. This decision is grounded on the ascertained disadvantages of the latter system, where many problems raise when applying different laws to the same inheritance. Above all, procedure and substantive difficulties, higher costs, court delays and the possible application of divergent or even opposite rules from different legislations could be mentioned.[40]

Consequently, the above general rule will lead to apply Spanish law to Sahid's succession, because we previously assumed that he will die habitually residing in this country. But in this case, we must be aware that he owns an immovable property in Casablanca, because Article 21 PRS stipulates the applicability of the law of the *situs* for further formalities possibly required.[41] The aim of this provision

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[38] ÁLVAREZ TORNÉ, M.: "Jornadas sobre "Derecho de sucesiones y testamentos en el contexto europeo", Praga, 20 y 21 de abril de 2009", *Revista Española de Derecho Internacional*, 2009–1, p. 334.

[39] Article 7.1 Hague Convention on the Law Applicable to Succession: "*Subject to Article 6, the applicable law under Articles 3 and 5, paragraph 1, governs the whole of the estate of the deceased wherever the assets are located*". For further information concerning the process of adoption of this Convention, see HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW: *Proceedings of the Sixteenth Session*, Tome II, SDU Publishers, 1990.

[40] AZCÁRRAGA MONZONÍS, C.: *Sucesiones internacionales…, op. cit.*, pp. 363–364.

[41] Article 21 PRS. Application of the law of the State in the place in which the property is located. "1. *The law applicable to the succession shall be no obstacle to the application of the law of the State in which the property is located where, for the purposes of acceptance or waiver of the succession or a legacy, it stipulates formalities subsequent to those laid down in the law applicable to the succession*. 2. *The law applicable to the succession shall be no obstacle to the application of the law of the Member State in which the property is located where it:* (a) *subjects the administration and liquidation of the succession to the appointment of an administrator or executor of the will via an authority located in this Member State. The law applicable to the succession shall govern the determination of the persons, such as the heirs, legatees, executors or administrators of the will, who are likely to be appointed to administer and liquidate the succession*; (b) *subjects the final transfer of the inheritance to the beneficiaries to the prior payment of taxes relating to the succession*". We would suggest eliminating the reference to the law of "Member" States in paragraph 2 in order to preserve the universal nature of the instrument. If this is not the case, the said term should be inserted in paragraph 1 as well, in order to protect the coherence of the rules and avoid misunderstandings. The Max-Planck Institute for Comparative and International Private Law suggests to delete the reference to "Member" States in "Comments on the European Commission's Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession", version of 26 March 2010, p. 90. Available at http://www.mpipriv.de/shared/data/pdf/mpi_comments_succession_proposa_upd.pdf. This point definitely needs to be clarified in the final text.

is the coordination with domestic mandatory procedures that may exist in some States for the implementation of the succession.

However, the general rule of Article 16 PRS only applies in case of lack of choice, because the European legislator has followed the view of some European countries (we already listed some of them in epigraph II) and, once again, of The Hague Convention of 1989,[42] when establishing the freedom of choice in succession matters.[43] The current Article 17 PRS is quite restrictive in this regard, because it only envisages the possibility of selecting the law of the nationality, which, on the other hand, shall govern the whole succession. It literally states that "*a person may choose as the law to govern the succession as a whole the law of the State whose nationality they possess*". But…"Nationality" is a mutable connecting factor and in order to avoid future problems in the process of determination of the applicable law, we would suggest clarifying the accurate moment that the said nationality should be taken into account. From our point of view, it would be desirable to add "(nationality they possess) at the time of the declaration" and in case the nationality will vary, we understand that the former declaration should be void and this new situation would require making a new election, if the person is interested in doing so.

Another key idea concerning the possibility of choosing the law applicable to the succession lies on the nature of the instrument: in this regard, it is of an outstanding importance to highlight its universal nature, as already assumed by the Green Paper of 2005[44] and subsequently clarified in Article 25 PRS, so that "*Any law specified by this Regulation shall apply even if it is not the law of a Member State*". Thus, third states' legislations can also be chosen to govern successions provided that the election complies with the relevant requirements.

Hence, provided that Sahid selects one sole law to govern the whole succession and does it "*expressly… in a declaration in the form of a disposition of property upon death*" (Article 17.2 PRS; implicit choice is not envisaged in the Proposal), he will be granted the possibility of choosing the Moroccan law to govern his inheritance, taking into consideration, furthermore, that Article 50.2 PRS, when dealing with "Transitional provisions", would allow him to select it now, even before the application of the instrument. In this sense, the European legislator has decided to respect his decision once the instrument will be in force, when stating that "*Where the deceased had determined the law applicable to their succession prior to the*

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[42] Article 5 of The Hague Convention on the Law Applicable to Succession: "*(1) A person may designate the law of a particular State to govern the succession to the whole of his estate. The designation will be effective only if at the time of the designation or of his death such person was a national of that State or had his habitual residence there*".

[43] See a worldwide analysis of this possibility in succession matters in FONTANELLAS MORELL, J.M.: *La* professio iuris *sucesoria*, Marcial Pons, 2010, pp. 137 ff.

[44] "The universal nature of the future rules should not be in dispute: confining the application of the harmonised conflict rules to strictly "intra-Community" international situations and excluding those in which there is a third-country element would make life more difficult for individuals and the legal professions.", Green Paper, p. 4.

date of application of this Regulation, this determination shall be considered to be valid provided that it meets the conditions listed in Article 17".

Nevertheless, there is an added problem in this point, which we already mentioned *supra*. Fernando remembered from a former case they dealt with at the Bureau months ago that Moroccan rules on succession, which are contemplated in the Personal Status Code as amended in 2004 (the so-called *Moudawana*), discriminate women when distributing inheritance rights.[45] In that case, no discrimination was appreciated because no women were called to inherit together with men so no incompatibility with the public policy of the *forum* had been appreciated; however, this possibility had to be studied in a deeper manner in this case because of the presence of Sahid's daughter: if she is discriminated as a consequence of the application of Moroccan law on successions, the court should not apply it.[46] It definitely is a consequence of the multiculturalism now present in Spain (and in Europe): people from other countries live here and their private lives are sometimes governed by their laws of origin (by means of an express election in this case), which may differ from the law of the *forum* and can even protect values that crash with ours.

The European legislator has foreseen this possibility in Article 27 PRS, which contemplates a specific provision for public policy: "*The application of a rule of the law determined by this Regulation may not be considered if such application is incompatible with the public policy of the forum*". This provision (which follows Articles 21 and 27 of Regulations Rome I and Rome II), is significant from the Spanish perspective because the relevant provision of our model (Article 12.3 CC) contains a very general public policy rule and despite having been narrowed through jurisprudence and scholars interpretations, we support the explicit clarification made by Article 27 PRS in the sake of clarity and material justice.

Two issues must be highlighted in this regard. Firstly, according to the drafting of this provision, we understand that one specific discriminatory rule must be unapplied in Europe but not the foreign law as a whole. In other words, what the court should do is to remove the problematic provision and go on applying the rest of the foreign law. From our perspective, this option has an obvious positive side: it permits to respect the solutions of the Regulation's conflicts rules; however, the negative side implies that it destroys the coherence and foundations of the foreign law. Secondly, we congratulate the reference to the incompatibility with the public policy of the *forum* of the "application" of the particular foreign law, because no reference to that application *in casu* exists in the said Spanish provision but it has traditionally been deemed necessary.[47]

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[45] Articles 341 ff *Moudawana*.

[46] RODRÍGUEZ BENOT, A.: "La mujer marroquí en España y el Derecho de sucesiones", in RUIZ SUTIL, C. and RUEDA VALDIVIA, R.: *La situación jurídico-familiar de la mujer marroquí en España*, Instituto Andaluz de la Mujer, 2008, p. 352.

[47] AGUILAR BENÍTEZ DE LUGO, M y AGUILAR GRIEDER, H.: "Orden público y sucesiones (II)", *Boletín de Información del Ministerio de Justicia*, nº 1985, 2005, p. 1141.

Going on with Article 27 PRS, it provides further guidelines for the use of public policy against the application of foreign laws in a second epigraph: "*…the application of a rule of the law determined by this Regulation may not be considered to be contrary to the public policy of the forum on the sole ground that its clauses regarding the reserved portion of an estate differ from those in force in the forum*". In other words, differences between laws relating to the protection of certain relatives who are entitled with forced shares must not be alleged to justify the use of public policy. It is important to note from the Spanish perspective that this view confirms the case law of the Spanish Supreme Court in this regard. However, other countries will see their solutions seriously affected by this result, because some European States do protect the legitimate interests of their citizens under their domestic laws in international cases.[48]

c) Recognition and enforcement

The question concerning the possible recognition in Spain of a Moroccan decision on this succession can only be answered applying domestic law, because the recognition and enforcement of foreign decisions European instruments have dealt with so far only concern those decisions adopted in Member States willing to produce effects in other Member States. In other words, the new instrument on successions, as others, solely envisages circulation of decisions *ad intra*. Winds of a common system of recognition towards third countries' decisions seems to come from Brussels since the amendment of Council Regulation (EC) Nº 44/2001 is on the agenda, but there is still a long and uncertain way to travel in this regard.[49]

Focusing on the Proposal, under Article 29 PRS: "*A decision given pursuant to this Regulation shall be recognised in the other Member States without any special procedure being required*". The same provision goes on stating that recognition can be applied "*in accordance with the procedures provided for under Articles 38 to 56 of Regulation (EC) Nº 44/2001*", so that we can confirm that *exequatur*, despite having been sped up within the EU frontiers, will still exist in many matters like successions. Perhaps in a near future the amendment of Regulation Nº 44/2001 will be approved, so that this improvement will lead to the subsequent amendment of other Regulations referring to it. Article 30 PRS, to its turn,

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[48] For instance, Article 46.2 of the Italian Private International Law Act of 1995 allows the possibility of selecting the law of the residence (instead of the national law as the objective connection) but in case that person is an Italian citizen, that selection cannot affect the rights Italian Civil Law grants to the legitimate heirs who live in Italy at the moment of the death. Further details in AZCÁRRAGA MONZONÍS, C.: "El tratamiento de las legítimas en el Derecho comparado. Su protección en el plano material y de Derecho internacional privado", *Revista Jurídica de Castilla-La Mancha*, nº 43, 2007, p. 66.

[49] Green Paper on the review of Council Regulation (EC) Nº 44/2001, Question 2 c) *Under which conditions should third State judgments be recognised and enforced in the Community, particularly in situations where mandatory Community law is involved or exclusive jurisdiction lays with the courts of the Member States?* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0175:FIN:EN:PDF.

contemplates the grounds of non-recognition, also based on the said Regulation, but "*Under no circumstances may a foreign decision be reviewed as to its substance*" (Article 31 PRS).

Thus, there is no doubt that this regime moves back the illusion of the abolition of *exequatur* in Europe, which started a few years ago with certain matters covered by Council Regulation (EC) Nº 2201/2003 (Articles 41 and 42 as to decisions of rights of access and return of the child),[50] went on with Regulation (EC) Nº 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European enforcement order for uncontested claims[51] and reached a significant support after the adoption of Council Regulation (EC) Nº 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations[52] (Article 17, Abolition of *exequatur*).

This being the situation now for the recognition of decisions on successions in Europe, as well as in the near future, the recognition of decisions adopted in non Member States (as Morocco) depends on the requirements established by international conventions or, in their absence, domestic legislations. In our case, no bilateral nor multilateral conventions cover within their scope of application decisions on successions adopted in Morocco, so this leads to the application of the Spanish domestic regulation on the recognition of foreign decisions, that is Articles 952 ff *Ley de Enjuiciamiento Civil* of 1881[53] (Civil Procedure Act of 1881, which remains in force as to this issue despite the fact that a new Civil Procedure Law was enacted in 2000).

In accordance with this regulation, positive or negative reciprocity of the treatment of Spanish decisions in the country of origin should be accredited first, in order to ascertain whether Moroccan decisions will be granted effects in Spain. However, this system has fallen into disuse due to the difficulties of proving this extent (mainly because the burden of proof lies on the parties) and our Supreme Court has even endorsed the primary use of a second system based on the verification of several conditions (Article 954 LEC 1881). In this regard, Fernando will also aware his client of the same difficulties highlighted above concerning

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[50] For more detailed information in this regard, see ESPINOSA CALABUIG, R.: "Las obligaciones alimenticias hacia el menor y su relación con la responsabilidad parental: los Reglamentos 4/2009 y 2201/2003", in BARUFFI, M.C. and PANICO, R.C.: *Le nuove competenze comunitarie.… op. cit.*, pp. 97 ff.

[51] OJ 143, 30.04.2004.

[52] OJ L 7/1, 10.1.2009. The application of the new EC regime on maintenance has been made partially dependent upon the application in the Community of the 2007 Hague Protocol on the Law Applicable to Maintenance Obligations of 2007, which the EC signed on April 8, 2010, during the Council on General Affairs of the Hague Conference. Article 76: "(…) *Articles 2(2), 47(3), 71, 72 and 73 shall apply from 18 September 2010. Except for the provisions referred to in the second paragraph, this Regulation shall apply from 18 June 2011, subject to the 2007 Hague Protocol being applicable in the Community by that date. Failing that, this Regulation shall apply from the date of application of that Protocol in the Community*".

[53] LEC 1881 hereinafter.

the discrimination of women in Moroccan law on succession, given that one of the said conditions requires the decision to respect Spanish public policy and the discriminatory rule directly crashes against the principle of equality (gender equality in this case) stated in Article 14 of our Constitution.

3. Some other changes from the Spanish perspective

Together with the main solutions stated in the Proposal, which may already entail significant changes in the Spanish solutions on international successions, some other rules may also lead to important changes, mainly concerning the sphere of the applicable law. We will approach three of them: the legal capacity of natural persons, inheritance rights of the surviving spouse and solutions embodied for *renvoi* and States with more than one legal system.

a) Legal capacity of natural persons

Capacity of natural persons in Spanish Private International Law is granted an autonomous treatment as to any matter it may be involved, such as contracts, marriage or inheritance.[54] Under Article 9.1 CC, "*The personal law of natural persons is determined by their nationality. The said law shall govern their capacity and marital status, family rights and duties and succession upon death*". Thus, the current rule to determine the law applicable to capacity of natural persons has been built on the "nationality" of the concerned person as the only connecting factor (like Article 9.8 CC concerning successions), regardless of the matter within which it shall be considered.

In principle, this rule should not be affected by the Proposal because Article 1.3 PRS, which deals with the scope of application of the new EU instrument, states that "*The following shall be excluded from the scope of this Regulation:* (…) *b) the legal capacity of natural persons, notwithstanding Article 19(2)(c) and (d)*;…". Hence, legal capacity of natural persons apparently falls outside its scope of application. However, the reference to Article 19.2 PRS, which regulates the scope of the applicable law, leads us to two exceptions. It includes two aspects to be governed by that law: the capacity to inherit (19.2(c) PRS) and the particular causes of the incapacity to dispose or receive (19.2(d) PRS). Consequently therewith, these two issues related with capacity in succession matters will certainly fall within the scope of the relevant applicable law and this will lead to a significant change from the Spanish perspective.

b) Inheritance rights of the surviving spouse

In accordance with Article 9.8 *in fine* CC, "*Intestate rights of the surviving spouse shall be governed by the same law governing the effects of marriage,* (…)". This

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[54] ESPLUGUES MOTA, C. & IGLESIAS BUHIGUES, J.L.: *Derecho internacional privado*, Tirant Lo Blanch, 4th ed., Valencia, 2010, pp. 253 ff.

means that inheritance rights of the surviving spouse fall outside the scope of the law governing the succession; they shall be governed by the same law governing the effects of marriage, i.e. the one pointed out by Articles 9.2 or 9.3 CC (depending on the adoption of a marriage settlement). This provision was added in 1990, through the amendment of the Civil Code operated by Law 11/1990, of 15 October, against discrimination on gender reasons.[55]

By contrast, Article 19.2(b) PRS, when regulating the scope of the law applicable to the inheritance, states that the said law shall govern in particular "(…) *the inheritance rights of the surviving spouse* (…)". Hence, there is a contradiction between the Spanish rule and the Proposal's, which will impact on our legislation once in force. Our rule keeps this issue outside the law governing the inheritance, whereas the European legislator plans to keep it inside its scope of application.

On the other hand, another matter closely related to the above as to the consequences of the death of a married person will not be affected by the EU instrument. Issues regarding the matrimonial property regime remain outside the scope of application of this Proposal (Article 1.3(d)) PRS, so that it will not imply any change in the current rule on this point (the relevant choice-of-law rules in this respect are embodied in the aforementioned Articles 9.2 and 9.3 CC).

c) Renvoi *and States with more than one legal system*

Two other problems related with the law to be applied to international successions are foreseen by the Proposal, which state different solutions than the ones present in the Spanish legislation: *renvoi* and applicable law in case of countries with more than one legal system.

Firstly, Article 26 PRS excludes *renvoi* in succession matters (also following the same decision taken for Rome I and Rome II): "*Where this Regulation provides for the application of the law of a State, it means the rules of law in force in that State other than its rules of private international law*". In other words, the possible referral to another law by the law appointed by the envisaged choice-of-law rules shall not be considered. By doing so, the Proposal eliminates a frequent source of problems currently existing in succession matters in most Member States.

Among them, Spain, where the Supreme Court has provided case law on this issue, but lower courts go on adopting divergent solutions on the basis of Article 12.2 CC.[56] This provision states – using a much improvable wording – that

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[55] ÁLVAREZ GONZÁLEZ, S.: "Dos cuestiones de actualidad en el reciente Derecho Internacional Privado español de sucesiones: los derechos del cónyuge supérstite y el reenvío", en TORRES GARCÍA, T.F. (coord.): *Estudios de Derecho civil: homenaje al Profesor Francisco Javier Serrano García*, Universidad de Valladolid, 2004, pp. 131–158.

[56] See in this regard CALVO-CARAVACA, A.L. & CARRASCOSA GONZÁLEZ, J.: "Sucesión internacional y reenvío", *Estudios de Deusto*, julio-diciembre 2007, pp. 59–121; IRIARTE ÁNGEL, J.L.: "Reenvío y sucesiones en la práctica española", en VIÑAS, R. & GARRIGA, G.: *Perspectivas del Derecho sucesorio en Europa*, Marcial Pons, Madrid, 2009, pp. 111–137; ÁLVAREZ GONZÁLEZ, S.: "Dos cuestiones de actualidad…", *cit.*, pp. 131–158; VIRGÓS SORIANO, M.: "Derecho de sucesiones y reenvío: la respuesta

"*Referral to a foreign law shall be understood as referring to its substantive law, regardless of a possible* renvoi *its choice-of-law rules may do to another law other than the Spanish law*". In other – and clearer – words, *renvoi* at first degree is the only one allowed by Spanish law in succession matters, taking into account, on the other hand, the existing interpretation of the Supreme Court in this regard, as previously emphasized.

Secondly, a solution for States comprising several territorial units with own rules on successions is also envisaged by the European legislator; and once again, this provision differs from the Spanish current solution to this problem. Nowadays and under Article 12.5 CC, "*When a choice-of-law rule refers to the law of a State where different legal systems coexist, the determination of the applicable law among them will be done according to the legislation of the said State*". Hence, the Spanish rule delegates to the relevant foreign law the decision of ascertaining the pertinent regional law to be applied (taking for granted that every country does include such a solution in its legal system, which is not always the case).

By contrast, Article 28.1 PRS states that "*Where a State comprises several territorial units each of which has its own rules of law in respect of succession to the estates of deceased persons, each territorial unit shall be considered as a State for the purpose of identifying the law applicable under this Regulation*". Consequently, there is no delegation at all to the foreign law, but a much more practical solution than the one contemplated in Spain today, that is to consider each territorial unit as a State.

4. The European Certificate of Succession

Nowadays, essential divergences exist among the laws of Member States as to the evidence required, either judicial or non-judicial, to prove the quality of heir or the power of administrators and executors and, furthermore, this evidence is not granted of automatic recognition in the other Member States.[57] In order to avoid the problems caused by this situation, the new Regulation contemplates *ex novo* the so-called "European Certificate of Succession" in Chapter VI (Articles 36 ff PRS), which is aimed at enabling international successions to be settled rapidly. To this end, Article 36 PRS indicates that this certificate shall constitute the "*proof of the capacity of heir or legatee and of the powers of the executors of wills or third-party administrators*", so that applicants can prove the said conditions in the framework of a succession throughout the European Union. However, the establishment of this certificate does not prevent the use of other documents already existing in certain Member States for the same purposes, because the new certificate does

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del sistema español (I)", *Anales de la Academia Matritense del Notariado*, Tomo 42, 2004, pp. 181–210.

[57] More details concerning the current divergence within the European Union in this regard in REQUEJO ISIDRO, M.: "El certificado sucesorio (o de heredero) europeo: propuestas de regulación", La Ley, nº 7185 (29 May 2009), pp. 1–8.

not replace them. On the contrary, a new possibility is added to prove the quality of heir, legatee, executor or administrator in the European Union.

To facilitate the circulation of the certificate within the European borders, two uniform models are provided as Annexes. Annex I contemplates the application form (according to Article 38 PRS, "Content of the application"), whereas Annex II provides a model of certificate (according to Article 41 PRS, "Content of the certificate"). Besides the relevant personal details concerning the deceased and the applicant, some other noteworthy issues shall be included in those forms.

As regards the application form, we would like to highlight the fourth epigraph ("Additional information"), which compels the applicant to include significant information to appropriately solve an inheritance controversy: among others, elements of fact or law justifying the right to the succession (for heirs), elements of fact or law justifying the right to execute and/or administer the succession (for executors or administrators), the existence of dispositions of property upon death made by the deceased, a possible marriage contract stipulated by the deceased, and so on.

Concerning the certificate itself, the main aspect we would like to point out is the obligation of specifying the law applicable to the succession in accordance with the Regulation, as well as the circumstances in fact and in law used to determine that law. Besides this issue, others are also required to be outlined such as the issuing court, information concerning the deceased and the applicant, the heirs and their shares, a list of assets or rights for legatees, and so on.

The competent authority to adopt the certificate is determined according to the same rules dealing with international jurisdiction. In other words and literally taking the clarification from the Explanatory Memorandum of the Proposal of Regulation itself, "*consistency with the rules of substantive jurisdiction requires that the authority should be the same court as has jurisdiction to settle the succession*". To its turn, Article 37 PRS insists on the fact that "*the certificate shall be drawn up by the competent court in the Member States whose courts are competent pursuant to Articles 4, 5 and 6*". This said, it is important to remind that the term "court" covers both judicial and non-judicial authorities. These will vary depending on the countries, so we would like to insist on the convenience of providing a list of competent authorities per State. It may be desirable for the sake of predictability and legal certainty but, above all, to help citizens to facilitate the arrangement of their successions.

The decision of the competent court to adopt or not the certificate shall be challenged, but the Proposal of Regulation refers this issue to the Member States' domestic regulations in Article 44 PRS, as well as the possibilities to rectify, suspend or cancel the certificate. Once adopted, the European Certificate of Succession shall be retained by the issuing court, which shall issue one or more authentic copies to the applicant or to any person having legitimate interest (we could wonder who has legitimate interest in doing so, because no clarification is provided in this regard). The copies will have a limited period of validity of three months. After that deadline, other authentic copy can be requested by the bearers of the certificate or any other interested person (once again, the possible applicants are not specified…) (Article 43 PRS).

As regards its circulation throughout Europe, it shall be recognized automatically in all Member States and its content shall be presumed to be accurate throughout the period of its validity. Furthermore, it will be deemed to have efficacy in public registers, constituting a valid document allowing for the transcription or entry of the inherited acquisition in the public registers of the Member State in which the property is located (Article 42 PRS).

IV. SOME FINAL COMMENTS ON THE PROPOSAL

On March 23, 2007 I had the privilege of defending my Phd Thesis on international successions at the University of Valencia, where I analyzed the regulation in force, which is actually the same nowadays (at least in Spain), and I concluded the research providing a proposal of amendment of the current Spanish choice-of-law rule, solely based on the connecting factor "nationality". At that moment, a new EU instrument on successions and wills was already on the way and it seemed like some decisions had already been taken: unity *vs.* scission, habitual residence as the objective connecting factor *vs.* nationality, allowing a limited freedom of choice… whereas others already needed to be defined.

Today, a new Proposal for a Regulation is on the table. Citizens from worldwide will benefit in the near future of this comprehensive instrument, which will entail the harmonization within the EU borders of the conflicts regulation on cross-borders inheritances, a topic where the current diversity of regulations both in substantive and conflicts levels gives rise to many problems in practice. However, not any kind of solutions will fit the needs of a society having the multicultural profile Europe presents nowadays. Solutions should be focused on providing an adequate equilibrium of the interests at stake. In other words, material justice should be bear in mind for European citizens but also for immigrants, new neighbours who live in Europe and have their own wishes and expectations as to the arrangement of their succession. Some of them, like Sahid, are very much linked with their countries of origin and would prefer their private problems to be arranged under their national laws, and others, by contrast, would prefer to apply European laws to their private relationships.

Taking into account this multinational framework, in the present commentary we have tried to explain from a practical perspective the main foreseen rules concerning international jurisdiction, applicable law and recognition and enforcement of EU decisions, as well as other solutions that will modify our regime and a brief overview of the new European Certificate of Succession the Regulation. Some concerns have been emphasized about certain provisions which still remain unclear from our point of view. However, we would dare to say after a primary overview that the results are rather satisfactory despite the deep impact the foreseen solutions will have on the current Spanish regulation and the existing uncertainties as to some aspects, because we believe that they will improve the existing system. In fact, both positive and negative aspects of the Proposal should be stressed.

As to international jurisdiction grounds, we believe that the choice of habitual residence to grant competence to courts is adequate, together with the necessary

coordination rules for cases having property links in other countries. Furthermore, the provision stating the possibility of staying the process and suggesting the parties to start it in another Member State (the one whose law has been chosen to govern the succession) provides a very interesting rule in the sake of simplicity, looking for the advantageous coincidence of *forum* and *ius*.

As regards choice-of-law rules, the possible impact in the Spanish system of the solutions embodied in the Proposal if they remain as they currently are will be remarkable, because the connecting factors envisaged differ. In first place, we sincerely welcome the acceptance of freedom of choice in succession matters, because it offers incontestable benefits for citizens. We believe that the most suitable person to know the most appropriate law to govern a succession in the future is the person whose inheritance will be concerned. Furthermore, the selection provides predictability and legal certainty, because the law applicable to the succession will be known in advance, avoiding the existing legal uncertainty derived from the divergence of regulations and the current difficulties of *renvoi* in this framework.

Secondly, we also support the decision of considering the habitual residence at the time of the death to determine the law governing the succession in case of lack of choice. This connecting factor provides several benefits, which have already been highlighted, and the law of the nationality, which allows immigrants, at their choice, to keep links with their culture of origin, can also be selected through an express declaration. However, to limit the law available solely to the law of the nationality, besides entailing the problem of mobile conflict previously stressed, might be too restrictive… What about the law of previous residences where the person could have lived for an extensive period of time? What about the law of the heirs' residence? And the law of the state where immovable properties could be located? All those laws belong to countries that can be manifestly linked with certain cases but they have not been envisaged in the Proposal.

When it comes to the recognition and enforcement of foreign decisions, we would like to manifest our disappointment towards the decision of keeping a simplified *exequatur* through the referral to the parameters of Regulation Nº 44/2001, but we understand that this decision is based on the current process of amendment of the said Regulation. Being so, we encourage the European legislator to abolish *exequatur* within the EU borders as soon as possible, as well as to adopt a common system of recognition of third countries' decisions.

Finally, we would like to finish these concluding remarks positively assessing the convenience of creating a new European Certificate of Succession. We believe that every initiative taken within the European Union favouring a faster arrangement of cross-border problems is extremely positive. Facing international litigations is very challenging for authorities, lawyers and citizens, and every sign of harmonization (like the use of standardized forms in many areas; for instance, the ones contemplated in several The Hague Conventions or in other EU Regulations) has always evidenced a substantial decrease of problems. Moreover, preserving other documents already existing in some Member States having the same aim is also positive, because it respects domestic laws and lets citizens decide according to their interests. Therefore, we believe that the mere idea is already worthy and it

is our desire that it will benefit citizens involved in cross-border successions in a near future.

ABSTRACT

The arrangement of cross-border successions is a real challenge nowadays for both citizens and authorities due to the multicultural profile of today's societies together with the current diversity of regulations, both at the substantive and conflicts levels. On 14 October 2009, the European Union adopted a new Proposal for a Regulation on international successions, a comprehensive instrument which will entail the harmonization within the EU of the conflicts regulation of cross-borders inheritances. The text finally adopted will necessarily have to provide an adequate equilibrium of the interests of people living in Europe to be successful. Material justice should not only focus on the European citizens' expectations but also on immigrants' needs, new neighbours who live in Europe and have their own expectations as to the planning of their successions. In the light of the solutions provided by the Proposal, it seems like this aim has been taken into consideration, although some concerns about the current drafting still remain. The present commentary aims at providing an overview of the main solutions of the Proposal, mainly focusing on the needs of multicultural societies like the one existing in Spain, where the regulation in force does not grant to reach the most suitable solutions to every case.

Keywords

Cross-border successions, inheritance, heir, EU Proposal, private international law rules, European certificate of succession.

RESUMEN

La gestión de sucesiones transfronterizas constituye hoy en día un verdadero reto tanto para los ciudadanos como para los operadores jurídicos debido al perfil multicultural de las sociedades actuales, junto con la diversidad jurídica existente, tanto en el plano material como conflictual. El 14 de octubre de 2009, la Unión Europea adoptó una nueva propuesta de Reglamento relativa a sucesiones internacionales, un instrumento omnicomprensivo que conllevará la armonización en la UE de la regulación conflictual de las sucesiones transfronterizas. Para tener éxito, el texto finalmente adoptado tendrá que proporcionar necesariamente un adecuado equilibrio entre los intereses de todas las personas que viven en Europa. La idea de justicia material debería centrarse no sólo en las expectativas de los ciudadanos europeos sino también en las necesidades de los inmigrantes, nuevos vecinos que viven en Europa y que cuentan con sus propias expectativas por lo que respecta a la planificación de su sucesión. A la luz de las soluciones previstas por la propuesta, parece que este objetivo se ha tenido en cuenta, a pesar de que siguen existiendo algunas dudas sobre el texto actual. El presente comentario tiene por objeto proporcionar una visión general de las principales soluciones de la propuesta,

centrándose principalmente en las necesidades de las sociedades multiculturales, como la existente en España, donde la normativa vigente no consigue proporcionar las soluciones más adecuadas a todos los casos planteados.

Palabras clave

Sucesiones internacionales, herencia, heredero, propuesta de la UE, normas de Derecho internacional privado, certificado sucesorio europeo.

RÉSUMÉ

La gestion des successions transfrontalières constitue aujourd'hui un véritable défi tant pour les citoyens que pour les opérateurs juridiques en raison du profil des sociétés multiculturelles, ainsi que de l'existence d'une certaine diversité juridique, tant sur le plan matériel que procédural. Le 14 octobre 2009, l'Union Européenne a adopté une nouvelle proposition de Règlement portant sur les successions internationales, un instrument compréhensif qui vise à l'harmonisation de la réglementation conflictuelle des successions transfrontalières à l'intérieur de l'UE. Pour y parvenir, le texte adopté devra nécessairement prévoir un équilibre approprié entre les intérêts de toutes les personnes résidant en Europe. Le dispositif matériel doit non seulement envisager les intérêts des citoyens européens, mais également ceux des immigrants, de nouveaux résidants en Europe, qui ont leurs propres attentes concernant la planification de leurs héritages. À la lumière des solutions envisagées dans la proposition, il semble que cet objectif a été pris en compte, même si quelques doutes subsistent néanmoins au sujet de certaines solutions incluses dans le texte actuel. Ce commentaire vise principalement à fournir un aperçu des principales solutions proposées qui prennent en compte les besoins des sociétés multiculturelles, telle que l'Espagne, où la législation actuelle ne parvient pas à offrir des solutions appropriées à toutes les affaires.

Mots-clés

Successions transfrontalières, héritage, héritier, proposition de l'UE, règles de droit international privé, certificat successoral européen