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AGREEMENTS AS TO SUCCESSION UNDER THE NEW EUROPEAN PRIVATE INTERNATIONAL LAW

Abstract

After a short delineation of the new European Private International Law on Succession codified by the EU Regulation No 650/2012 the following article analyses the conflict-of-law treatment of agreements as to succession under that Regulation. The main focus is set on the special conflict-of-law rule of Article 25 Succession Regulation determining which law has to govern admissibility, substantive validity and binding effects of agreements as to succession.

Keywords: Agreements as to Succession; Dispositions of property upon death; EU Succession Regulation; EU Regulation No 650/2012; European Private International Law on Succession.

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1. Introduction

The EU-Regulation No 650/2012[1] (hereinafter: *Succession Regulation*) is the next, very important step in the establishment of a common European area of justice, unifying not only Private International Law, but also International Civil Procedural Law in matters of succession. In detail, this regulation provides rules on jurisdiction, applicable law, recognition and enforcement of decisions, acceptance and enforcement of authentic instruments in matters of succession as well as rules on the creation of a new European Certificate of Succession, which aim to simplify the settling of successions with cross-border implications within the European Union.[2]

With its 84 Articles and 83 Recitals, the Succession Regulation is one of the most complex legislative acts of the last few years. It entered into force on the 16th of August 2012 in all Member States – with the exception of Denmark, Ireland and the United Kingdom – and is applicable in its substantial parts since the 17th of August 2015. Since that day, the Succession Regulation replaces conflicting national law by means of its priority of application.

2. The new connection system concerning the law applicable to succession

Before we turn to the main subject, please allow for a short delineation of the new Private International Law on Succession, which involves remarkable alterations

[1] 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, *Official Journal of the European Union*, L 201/107.

[2] Books on the Succession Regulation: Gierl/Köhler/Kroiß/Wilsch, *Internationales Erbrecht – EuErbVO, IntErbRVG*, 2015; Müller-Lukoschek, *Die neue EU-Erbrechtsverordnung – Leitfaden mit Erläuterungen für die notarielle Praxis*, 2nd edition, 2015. – Commentaries on the Succession Regulation: Bergquist/Damascelli/Frimston/Lagarde/Odersky/Reinhartz, *EU-Regulation on Succession and Wills: Commentary*, 2015; Bonomi/Wautelet, *Le droit européen des successions – Commentaire du Réglement n°650/2012 du 4 juillet 2012*, 2013; Deixler-Hübner/Schauer (eds.), *EuErbVO – Kommentar zur EU-Erbverordnung*, 2015; Dutta, in: Säcker/Rixecker/Oetker (eds.), *Münchener Kommentar zum BGB*, 6th edition, 2015; Herberger/Martinek/Rüßmann/Weth (eds.), *juris PraxisKommentar BGB* (Band 6), 7th edition, 2014; Köhler, in: Kroiß/Horn/Solomon (eds.), *NomosKommentar Nachfolgerecht*, 2015; Hüßtege/Mansel (eds.), *NomosKommentar BGB – Rom-Verordnungen, EuErbVO, HUP* (Band 6), 2nd edition, 2015; Schmidt, in: Budzikiewicz/Weller/Wurmnest (eds.), *Beck´scher Online-Großkommentar ZivilR, Internationales Privatrecht*; Thorn, in: *Palandt, Bürgerliches Gesetzbuch*, 75th edition, 2015.

for several Member States. Regarding the determination of the law applicable to succession, the Succession Regulation provides *three different conflict-of-law rules.*

The general rule is codified in *Article 21 (1),* according to which the succession as a whole shall be governed by the law of the state in which the deceased had his habitual residence at the time of death. The now chosen primary connection to the habitual residence shall – especially in view of the increasing mobility of citizens within the European Union – ensure a "genuine", furthermore "close and stable" connection between the succession and the Member State exercising the jurisdiction (see Recital 23), but this also encountered criticism,[3] because the habitual residence can easily be changed and – occasionally – not easily be determined.[4] However, such a connecting factor generates parallelism between jurisdiction and applicable law ensuring quicker[5] – and also cheaper – proceedings, so that it is suitable at least for practical reasons.

To compensate for the deficits arising from the general connection to the habitual residence and to ensure a sufficiently close and stable connection in all cases, postulated by implied conflict-of-law interests,[6] *Article 21 (2)* provides an *escape clause* in addition to the general rule. This escape clause has to be applied when the deceased was manifestly more closely connected with a state other than the state of his last habitual residence at the time of his death. According to Recital

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[3] See Sonnentag, Das Europäische Internationale Erbrecht im Spannungsfeld zwischen der Anknüpfung an die Staatsangehörigkeit und den gewöhnlichen Aufenthalt, *EWS 2012*, p. 457 *et seq.*; Bonomi, Choice-of-Law Aspects of the Future EC Regulation in Matters of Succession – A First Glance at the Commission's Proposal, in: Boele-Woelki/Einhorn/Girsberger/Symeonides (eds.), *Convergence and Divergence in Private International Law – Liber Amicorum Kurt Siehr*, 2010, p. 157 (163 *et seq.*). – On the other hand see Kindler, From Nationality to Habitual Residence: Some Brief Remarks on the Future EU Regulation on International Successions and Wills, in: Boele-Woelki/ Einhorn/Girsberger/Symeonides (eds.), *Convergence and Divergence in Private International Law – Liber Amicorum Kurt Siehr*, 2010, p. 251 (255).

[4] For further details see NK-NachfolgeR/Köhler (supra note 2) Art. 21 EuErbVO mn. 4 *et seq.*; Köhler, in: Gierl/Köhler/Kroiß/Wilsch (supra note 2), p. 92 *et seq.* (§ 4 mn. 10 *et seq.*); MüKo/Dutta (supra note 2) Art. 4 EuErbVO mn. 2 *et seq.*; BeckOGK/Schmidt (supra note 2) Art. 4 EuErbVO mn. 18 *et seq.*

[5] Kindler (supra note 3), p. 251 (255).

[6] NK-NachfolgeR/Köhler (supra note 2) Art. 21 EuErbVO mn. 13; similar Dutta, Das neue internationale Erbrecht der Europäischen Union – Eine erste Lektüre der Erbrechtsverordnung, *FamRZ 2013*, p. 4 (8).

25, the escape clause should particularly handle those cases, in which the deceased has established a new, but not yet sufficiently solidified habitual residence just recently before his death. In such constellations, Article 21 (2) enables the application of the law of the state of the next-to-last habitual residence or habitual residences that are dated back even longer, if the deceased was – even more – closely connected to this habitual residence than to his last.[7] In all cases, handling of the escape clause has to be restrained;[8] especially Article 21 (2) must not be misused as a subsidiary connecting factor whenever the determination of the habitual residence proves too complex or too difficult (see Recital 25).

Finally, Article 22 enables the decedent *to choose the law* of the state, whose nationality he possesses at the time of making the choice or at the time of his death. Has he done so, the chosen law governs his succession as a whole. According to Recital 38, the choice of law is limited to the law of the state of his nationality "*in order to ensure a connection between the deceased and the law chosen and especially to avoid a law being chosen with the intention of frustrating the legitimate expectations of persons entitled to a reserved share*". Therefore, Article 22 takes into account the conflict-of-law interests implied by the substantive law of succession, which cannot be suspended only by the decedent's will. Nevertheless, Article 22 is a required addition to Article 21, especially with respect to increasing mobility of citizens,[9] because it enables them to organise their succession in advance[10] irrespective of a future, perhaps currently unknown habitual residence, and hereby ensures the predictability of the *lex successionis* at an early point of time, which cannot be achieved by the primary connection to the habitual residence. Therefore, Article 22 also has a corrective function to the main rule of Article 21.[11]

All mentioned conflict-of-law rules are created as *loi uniforme* (Article 20), referring therefore to the law of a Member State as well as to the law of a third state. In the last case, it should be taken into account that the referral to a third

[7] See NK-NachfolgeR/Köhler (supra note 2) Art. 21 EuErbVO mn. 12.

[8] See NK-NachfolgeR/Köhler (supra note 2) Art. 21 EuErbVO mn. 13.

[9] See Recital 23.

[10] See Recital 38.

[11] Palandt/Thorn (supra note 2) Art. 22 EuErbVO mn.1; NK-NachfolgeR/Köhler (supra note 2) Art. 22 EuErbVO mn. 1 *et seq.*; Köhler, in: Gierl/Köhler/Kroiß/Wilsch (supra note 2), p. 99 (§ 4 mn. 23).

states law ordered by Article 21 (1) includes the rules of Private International Law, if the requirements of Article 34 (1) are fulfilled, so that *renvoi* has to be accepted according to the *lex causae*. In contrast, no *renvoi* shall apply according to Article 34 (2) with respect to the law referred to in Article 21 (2) and Article 22.

3. Agreements as to succession

3.1. General remarks

Naturally, these general conflict-of-law rules are not suitable for all problems concerning succession, especially not for dispositions of property upon death. Would the law determined by Article 21 or Article 22 govern such testamentary dispositions, predictability interests of the testator or of parties to an agreement as to succession might be thwarted due to the simple fact, that the *lex successionis* could change at a later time.[12] In order to ensure legal certainty for citizens wishing to plan their succession in advance (Recital 48), the Succession Regulation provides specific conflict-of-law rules concerning dispositions of property upon death.

The ***formal validity*** of such dispositions is governed by the law mandated by Article 27, which incorporates the *Hague Convention on the Conflicts of Laws relating to the Form of Testamentary Dispositions*.[13] Unlike this Convention, Article 27 is applicable not only to conventional wills and joint wills, but also to (written[14]) agreements as to succession.[15]

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[12] Max Planck Institute for Comparative and International Private Law, 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, *RabelsZ 74 (2010)*, p. 522 (616 *et seq.*); see also MüKo/Dutta (supra note 2) Vor Art. 20 EuErbVO mn. 10.

[13] Available at *http://www.hcch.net/index_en.php?act=conventions.text&cid=40*. – Member States which are Contracting Parties to this convention shall continue to apply the provisions of that convention instead of Article 27 with regard to the formal validity of wills and joint wills, see Article 75 (1) (2). – For further details see Köhler, in: Gierl/Köhler/Kroiß/Wilsch (supra note 2), p. 125 *et seq.* (§ 4 mn. 86 *et seq.*); NK-NachfolgeR/Köhler (supra note 2) Art. 27 EuErbVO mn. 1 *et seq.*

[14] Since questions concerning the "formal validity of dispositions of property upon death made orally" are excluded from the scope of the Succession Regulation (see Article 1 (2) (f)), the formal validity of *oral* agreements as to succession has to be governed by the law determined by the *national* conflict-of-law rules.

In addition, the Succession Regulation provides two special conflict-of-law rules concerning the ***material validity*** of dispositions of property upon death: On the one hand, Article 24 as a general rule concerning common dispositions like wills and, on the other hand, Article 25 as a *special* rule exclusively concerning agreements as to succession. The background of the separate codification of the latter rule is the varying admissibility and acceptance of this type of disposition among the Member States (see Recital 49). Many legal systems (especially Roman-based ones, but also Serbian law) forbid such testamentary dispositions restricting *testamentary liberty* already during lifetime. Therefore, a special conflict-of-law rule determining which law has to govern admissibility, substantive validity and binding effects of such agreements was considered to be necessary "*in order to make it easier for succession rights acquired as a result of such an agreement to be accepted in the Member States*" (Recital 49). The following remarks[16] will focus on that special conflict-of-law rule.

3.2. The term of agreements as to succession

First of all: What kind of testamentary dispositions falls within the scope of Article 25? As always, the term of agreements as to succession has to be interpreted autonomously, irrespective of the national legal concept of any Member State, hence, under consideration of the significant implied conflict-of-law interests.[17] Therefore the legal definition of Article 3 (1) (b) is of substantial assistance. This Article defines an agreement as to succession as "*an agreement, including an agreement resulting from mutual wills, which – with or without consideration – creates, modifies or terminates rights to the future estate or estates of one or more persons party to the agreement*".

Thus, the term used in Article 25 is very wide. From a German point of view, it includes not only contracts of inheritance (§§ 2274 *et seq.* BGB), but also

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[15] For further details see Köhler, in: Gierl/Köhler/Kroiß/Wilsch (supra note 2), p. 125 *et seq.* (§ 4 mn. 86 *et seq.*); MüKo/Dutta (supra note 2) Art. 27 EuErbVO mn. 1, p. 3 *et seq.*; BeckOGK/Schmidt (supra note 2) Art. 27 EuErbVO mn. 8 *et seq.*; NK-BGB/Looschelders (supra note 2) Art. 27 EuErbVO mn. 5.

[16] These remarks are based on NK-NachfolgeR/Köhler Art. 25 EuErbVO.

[17] See NK-NachfolgeR/Köhler (supra note 2) Art. 3 EuErbVO mn. 1, Vor Artikel 20-38 EuErbVO: Einleitung IPR mn. 12. – For general aspects concerning the characterisation see Kegel/Schurig, *Internationales Privatrecht*, 9th edition, 2004, § 7 III 3; *v.* Bar/Mankowski, *Internationales Privatrecht (Band 1)*, 2nd edition, 2003, § 7 mn. 172.

enunciations of inheritance or compulsory share (§§ 2346 *et seq.* BGB),[18] as well as – per specification of the *lex causae* – promises of *donation mortis causa* (§ 2301 BGB).[19] If such an agreement is accompanied by a non-hereditary consideration (money, services *et cetera*), which is – like in German law – subject of a separate contract, this contract has to be assessed separately according to the significant conflict-of-law rules.[20] Frequently, such a contract falls within the scope of the Rome I Regulation,[21] so that – according to Article 3 Rome I Regulation – this contract is primarily governed by the law chosen by the parties, in default of a choice of law by the law determined by Article 4 Rome I Regulation. In this case, the contract shall be governed – according to the escape clause of Article 4 (3) Rome I Regulation – by the *lex successionis* to which such contracts are manifestly more closely connected as to the law determined by Article 4 (1) or (2) Rome I Regulation.[22]

However, the characterisation of ***joint wills*** is difficult due to the possibility of having binding effects in some legal systems, for example in German law (§§ 2265 *et seq.* BGB). Since the legal definition of dispositions of property upon death codified in Article 3 (1) (d) includes wills, joint wills as well as agreements as to succession, a joint will seems to fall *prima facie* in the scope of Article 24[23] including all dispositions of property upon death *other* than agreements as to

[18] NK-BGB/Looschelders (supra note 2) Art. 25 EuErbVO mn. 3; Palandt/Thorn (supra note 2) Art. 25 EuErbVO mn. 2; MüKo/Dutta (supra note 2) Art. 25 EuErbVO mn. 2; NK-NachfolgeR/Köhler (supra note 2) Art. 25 EuErbVO mn. 4.

[19] NK-NachfolgeR/Köhler (supra note 2) Art. 25 EuErbVO mn. 4, Art. 23 EuErbVO mn. 13; MüKo/Dutta (supra note 2) Art. 3 EuErbVO mn. 9; NK-BGB/Looschelders (supra note 2) Art. 25 EuErbVO mn. 3.

[20] NK-NachfolgeR/Köhler (supra note 2) Art. 25 EuErbVO mn. 4; NK-BGB/Looschelders (supra note 2) Art. 25 EuErbVO mn. 4. – Probably different Palandt/Thorn, Art. 25 EuErbVO mn. 2.

[21] 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), *Official Journal of the European Union*, L 177/6.

[22] See NK-NachfolgeR/Köhler (supra note 2) Art. 25 EuErbVO mn. 4; Köhler, in: Gierl/Köhler/Kroiß/Wilsch (supra note 2), p. 120 (§ 4 mn. 74); NK-BGB/Looschelders (supra note 2) Art. 25 EuErbVO mn. 4; Nordmeier, Erbverträge und nachlassbezogene Rechtsgeschäfte in der EuErbVO – eine Begriffsklärung, *ZEV 2013*, p. 117 (119).

[23] For example jurisPK-BGB/Nordmeier (supra note 2) Art. 24 EuErbVO mn. 14 *et seq.*; Nordmeier (supra note 22), *ZEV 2013*, p. 117 (120); Simon/Buschbaum, Die neue EU-Erbrechtsverordnung, *NJW 2012*, p. 2393 (2396).

succession irrespective of having a binding effect or not. As a consequence, the question of a binding effect would be governed by the – convertible – *lex successionis* determined by Article 21 or 22.

Such an outcome is not convincing. The legal definitions of joint wills in Article 3 (1) (c) and of agreements as to succession in Article 3 (1) (b) are not standing in an exclusive relationship, but are overlapping,[24] which is shown especially in German law: To create a joint will in accordance with the formal requirements, it suffices if one of the spouses makes a formal valid will, and the other spouse co-signs the joint declaration in his own hand (§ 2267 BGB). But this is no strict requirement; the spouses could also make a joint will in two separate documents. However, only the usage of a single document fulfills the formal requirements of Article 3 (1) (c). The same holds true with regard to the binding effect of a joint will. In German law, such an effect only occurs under the specific circumstance, that the spouses have made interdependent dispositions, based on the common will of the spouses (§ 2270 BGB). Hence, a joint will established under German law can be regarded as an agreement as to succession within the meaning of Article 3 (1) (b), but again, there is no automatism to do so.

The last example illustrates: For a distinction between Article 24 and Article 25, both of which have *exclusively material aspects* of a testamentary disposition as a subject, the definition pair – agreement as to succession on the one hand, joint will on the other – does not and probably shall not fit. In this context it is pointed out correctly,[25] that the term of a joint will is only used in the context of Article 27,[26] which incorporates, as already mentioned, the *Hague Convention on the Conflicts of Laws relating to the Form of Testamentary Dispositions*. Therefore it can be presumed that the legal term of a joint will codified in Article 3 (1) (c) is simply an *incorporation* of the identical Article 4 Hague Convention, which has no relevance at all for the question of characterisation in the context of Article 24 and

[24] See Lehmann, Die EU-ErbVO: Babylon in Brüssel und Berlin – Ein Beitrag zur Auflösung der geradezu babylonischen Sprachverwirrung um die EU-Erbrechtsverordnung, *ZErb 2013*, p. 25 (26 et seq.); Dutta (supra note 6), *FamRZ 2013*, p. 4 (9 note 50); Palandt/Thorn (supra note 2) Art. 25 EuErbVO mn. 3.

[25] See Palandt/Thorn (supra note 2) Art. 25 EuErbVO mn. 3; Wilke, Das internationale Erbrecht nach der neuen EU-Erbrechtsverordnung, *RIW 2012*, p. 601 (606 note 63).

[26] Namely in Article 75 (1) (2).

25.[27] As a consequence, the characterisation of joint wills has to be performed, as usual, exclusively by the implied conflict-of-law interests: If a joint will has a binding effect, the relevant substantive law implies conflict-of-law interests facilitating a characterisation under Article 25, irrespective of the fact that the testamentary disposition was laid down in one or more documents; if there is a lack of binding effect, the joint will falls within the scope of Article 24.[28]

3.3. Connections

3.3.1. Overview

With regard to the determination of the law applicable to agreements as to succession, Article 25 differentiates between *unilateral* agreements concerning the succession of a single person (paragraph 1) and *multilateral* agreements concerning the succession of several persons (paragraph 2). Both types of agreements are treated differently with respect to their substantial validity and binding effect in the context of paragraph 1 and 2, as shown below. Furthermore, Article 25 (3) grants a restricted choice of law for both types of agreements as to succession. For all connections provided by Article 25, a change of applicable law to a later point in time is excluded, so that this conflict-of-law rule complies to a great extent with the interests of the parties to an agreement as to succession.

3.3.2. General connection

a) Unilateral agreement as to succession (paragraph 1)

According to Article 25 (1), a unilateral agreement concerning the succession of a single person is governed by the *lex successionis* applicable at the time of the

[27] NK-NachfolgeR/Köhler (supra note 2) Art. 25 EuErbVO mn. 5; Köhler, in: Gierl/ Köhler/ Kroiß/ Wilsch (supra note 2), p. 120 *et seq.* (§ 4 mn. 75); Palandt/Thorn (supra note 2) Art. 25 EuErbVO mn. 3.

[28] NK-NachfolgeR/Köhler (supra note 2) Art. 25 EuErbVO mn. 5; Köhler, in: Gierl/Köhler/Kroiß/ Wilsch (supra note 2), p. 121 (§ 4 mn. 75); see also MüKo/Dutta (supra note 2) Art. 3 EuErbVO mn. 9; NK-BGB/Looschelders (supra note 2) Art. 25 EuErbVO mn. 3; Palandt/Thorn (supra note 2) Art. 25 EuErbVO mn. 3; Lechner, Erbverträge und gemeinschaftliche Testamente in der neuen EU-Erbrechtsverordnung, *NJW 2013*, p. 26 (27); Döbereiner, Das internationale Erbrecht nach der EU-Erbrechtsverordnung (Teil 2), *MittBayNot 2013*, p. 437 (439).

conclusion of the agreement *(hypothetical lex successionis)*. Therefore, Article 25 (1) refers to the already mentioned Article 21 or Article 22, so that a unilateral agreement as to succession is primarily governed by the law of the habitual residence (Article 21 (1)), in exceptional cases by the law of the *closest connection* determined by the escape clause of Article 21 (2). Has the person bound by an agreement as to succession finally made a choice of law within the meaning of Article 22, the agreement is ultimately governed by the law of the state of his nationality. In all cases, the *hypothetical lex successionis* governs the admissibility, substantive validity and binding effect of such an agreement.

b) Multilateral agreement as to succession (paragraph 2)

However, if the agreement as to succession concerns the succession of several persons, we have to distinguish: According to Article 25 (2) (1), the admissibility of a multilateral agreement has to be governed by the *hypothetical lex successionis* of each person bound by the multilateral agreement. Consequently, such an agreement is only *valid* if it is admissible under all the laws mandated by subparagraph 1; otherwise the agreement as a whole is *invalid*. This solution aims to protect each person whose succession is affected by the agreement: Nobody should be bound by an agreement as to succession if the *lex successionis* of this person does not allow this.

In contrast, questions of substantive validity and binding effect of an agreement as to succession including conditions for its dissolution are governed – according to Article 25 (2) (2) – by just *one* of the laws determined by the first subparagraph; namely the law, with which the agreement as to succession has the closest connection. As usual, the determination of this closest connection requires the consideration of all the circumstances of the case, first and foremost a *common* habitual residence or a *common* nationality of the parties, otherwise the *place of the conclusion of the agreement*, especially in the presence of certification requirements.[29] In addition, weaker criteria, like the language of the agreement or circumstances resulting from the agreement itself, could also be considered.

[29] Palandt/Thorn (supra note 2) Art. 25 EuErbVO mn. 6; jurisPK-BGB/Nordmeier (supra note 2) Art. 25 EuErbVO mn. 19; Deixler-Hübner/Schauer/Fischer-Czermak (supra note 2) Art. 25 EuErbVO mn. 24; Simon/Buschbaum (supra note 23), *NJW 2012*, p. 2393 (2396); Nordmeier, Erbverträge in der neuen EU-Erbrechtsverordnung: zur Ermittlung des hypothetischen Erbstatuts nach Artikel 25 EuErbVO, *Zerb 2013*, p. 112 (115). – See further NK-NachfolgeR/Köhler (supra note 2) Art. 25 EuErbVO mn. 7.

However, Article 25 (2) (2) does not state, which ***point in time*** is decisive for the determination of the closest connection. In order to protect the legitimate expectations of the parties, the relevant point of time has to be the time of the conclusion of the agreement.

3.3.3. Choice of law (paragraph 3)

Furthermore, Article 25 (3) grants a restricted choice of law under the conditions mentioned in Article 22 irrespective of whether a unilateral or a multilateral agreement as to succession was concluded. Due to the reference to Article 22, the law of nationality of a person whose succession is affected can be chosen exclusively. If there is a multilateral agreement as to succession, the choice of law extends to the law of nationality of any person, whose succession is affected by the testamentary disposition.[30] For persons with multiple nationalities, this can lead to a wide range of choices.

According to its wording, the choice of law within the scope of Article 25 (3) is always a ***joint choice of law***[31] ("the *parties* may choose"), therefore, the law chosen for the assessment of the material validity has to determine, whether a – possibly implied[32] – *joint* choice of law was made. If the choice of law is valid, it always refers to every material aspect of the agreement as to succession mentioned in Article 25, thus to its admissibility, its substantive validity, its binding effect as well as to its requirement of dissolution. Consequently, concerning this matter, a ***partial choice of law*** is excluded.[33]

[30] NK-NachfolgeR/Köhler (supra note 2) Art. 25 EuErbVO mn. 8; BeckOGK/Schmidt (supra note 2) Art. 25 EuErbVO mn. 33.

[31] MüKo/Dutta (supra note 2) Art. 25 EuErbVO mn. 6; Palandt/Thorn (supra note 2) Art. 25 EuErbVO mn. 7; NK-NachfolgeR/Köhler (supra note 2) Art. 25 EuErbVO mn. 9; Nordmeier (supra note 29), *Zerb 2013*, p. 112 (115 *et seq.*).

[32] See also BeckOGK/Schmidt (supra note 2) Art. 25 EuErbVO mn. 38; Nordmeier (supra note 29), *Zerb 2013*, p. 112 (117).

[33] NK-NachfolgeR/Köhler (supra note 2) Art. 25 EuErbVO mn. 9; BeckOGK/Schmidt (supra note 2) Art. 25 EuErbVO mn. 38; NK-BGB/Looschelders (supra note 2) Art. 25 EuErbVO mn. 18; jurisPK-BGB/Nordmeier (supra note 2) Art. 25 EuErbVO mn. 20; Nordmeier (supra note 29), *Zerb 2013*, p. 112 (116 *et seq.*).

However, in contrast to a widely shared view,[34] a modification or revocation of the joint choice of law is not possible.[35] According to its distinct wording, Article 25 (3) only grants a choice of law, but not at the same time a revocation or modification of an already made choice of law. Consequently, Article 25 (3) refers only to Article 22 (1) to (3), not to paragraph 4 of this Article. An interpretation against this wording cannot be taken into consideration, because the admissibility of a subsequent modification of the choice of law cannot only lead to a – subsequent – invalidity of the otherwise validly constructed agreement as to succession, but also to an extinction of the validly developed binding effects. Such an outcome cannot be justified by saying that such a revocation or modification of the parties involved is made mutually:[36] At least one party is restricted in its private autonomy – specifically in its testamentary liberty –, so that a Private International Law implementing values of substantive law[37] cannot thwart this substantive decision by granting party autonomy in this matter.[38]

3.4. The scope of the law applicable to agreements as to succession

As already mentioned, Article 25 includes questions of admissibility, material validity and binding effect of agreements as to succession as well as requirements for its dissolution. Concerning the admissibility of agreements as to succession, it has to be remarked that not every prohibition of agreements as to succession can be characterised under Article 25. Insofar we have to distinguish between two different categories: If such a prohibition is directed exclusively against the formal summary in one document – like in Dutch,[39] probably even in French

[34] Nordmeier (supra note 29), *Zerb 2013*, p. 112 (117 *et seq.*); jurisPK-BGB/Nordmeier (supra note 2) Art. 25 EuErbVO mn. 20; Deixler-Hübner/Schauer/Fischer-Czermak (supra note 2) Art. 25 EuErbVO mn. 28; Leitzen, Die Rechtswahl nach der EuErbVO, *ZEV 2013*, p. 128 (130).

[35] NK-NachfolgeR/Köhler (supra note 2) Art. 25 EuErbVO mn. 10; see also NK-BGB/Looschelders (supra note 2) Art. 25 EuErbVO mn. 21; MüKo/Dutta (supra note 2) Art. 25 EuErbVO mn. 6; BeckOGK/Schmidt (supra note 2) Art. 25 EuErbVO mn. 12.

[36] In this respect see Nordmeier (supra note 29), *Zerb 2013*, p. 112 (117 *et seq.*).

[37] For further details on this aspect see Köhler, *Eingriffsnormen – Der "unfertige Teil" des europäischen IPR*, 2013, p. 68 et seq.

[38] NK-NachfolgeR/Köhler (supra note 2) Art. 25 EuErbVO mn. 10.

[39] Article 4:4 (2) Burgerlijk Wetboek. – See Süß, in: Kroiß/Ann/Mayer (eds.), *NomosKommentar BGB – Erbrecht (Band 5)*, 4th edition, 2014, Länderbericht Niederlande, mn. 46 *et seq.*; NK-NachfolgeR/Köhler (supra note 2) Art. 27 EuErbVO mn. 11.

law[40] –, this legal prohibition has to be characterised as a formal requirement and therefore does not fall within the scope of Article 25, but rather within that of Article 27. Because the latter rule provides multiple connecting factors to facilitate the *favor testamenti*,[41] such a formal requirement is generally insurmountable. This is different, if the legal prohibition – for example like in Italian,[42] but also in Serbian law[43] – is explicitly directed against the binding effect of an agreement as to succession. In this case, the legal prohibition has to be characterised as a *material* requirement for admissibility, which is governed by the law mandated by Article 25.

Furthermore, Article 26 states clearly, which precise legal questions rank among ***material validity***. This rule is not exhaustive[44] and – if necessary – has to be substantiated by means of the implied conflict-of-law interests.[45] According to Article 26, the following elements pertain to substantive validity:[46]

First of all

- the ***capacity of the person*** making the disposition of property upon death to make such a disposition and

[40] Article 968, 1130 Code civil. – See Palandt/Thorn (supra note 2) Art. 25 EGBGB mn. 14; probably similar Schurig, in: Soergel, *Bürgerliches Gesetzbuch mit Einführungsgesetz und Nebengesetzen: Band 10 (Einführungsgesetz)*, 12th edition, 1996, Art. 26 EGBGB mn. 23. – Dissenting (material requirement for admissibility) NK-BGB/Frank (supra note 39), Länderbericht Frankreich, mn. 75 *et seq.*

[41] NK-NachfolgeR/Köhler (supra note 2) Art. 27 EuErbVO mn. 3; Köhler, in: Gierl/Köhler/Kroiß/Wilsch (supra note 2), p. 126 (§ 4 mn. 88); NK-BGB/Looschelders (supra note 2) Art. 27 EuErbVO mn. 5.

[42] Article 458, 589, 635 Codice civile. – See Palandt/Thorn (supra note 2) Art. 25 EGBGB mn. 14; Soergel/Schurig (supra note 40), Art. 26 EGBGB mn. 23; NK-BGB/Frank (supra note 39), Länderbericht Italien, mn. 60.

[43] Article 179 Zakon o nasleđivanju. – See Đorđević, in: Burandt/Rojahn (eds.), *Erbrecht*, 2nd edition, 2014, Länderbericht Serbien mn. 29.

[44] MüKo/Dutta (supra note 2) Art. 26 EuErbVO mn. 2; NK-NachfolgeR/Köhler (supra note 2) Art. 26 EuErbVO mn. 1. – For the contrary view see BeckOGK/Schmidt (supra note 2) Art. 25 EuErbVO mn. 4.

[45] See NK-NachfolgeR/Köhler (supra note 2) Art. 27 EuErbVO mn. 11; Köhler, in: Gierl/Köhler/Kroiß/Wilsch (supra note 2), p. 128 (§ 4 mn. 95).

[46] For further details see NK-NachfolgeR/Köhler (supra note 2) Art. 26 EuErbVO mn. 2 *et seq.*; Köhler, in: Gierl/Köhler/Kroiß/Wilsch (supra note 2), p. 124 (§ 4 mn. 83 *et seq.*).

- ***prohibition norms***, which bar the testator from disposing in favour of certain persons or which bar a person from receiving succession property from the testator.

Furthermore, Article 26 includes

- the ***admissibility of representation*** for the purposes of making a disposition of property upon death,

- the interpretation of the disposition and lastly

- questions of fraud, duress, mistake and any other questions relating to the consent or intention of the person making the disposition.

4. Closing remarks

Even though Article 25 is a complex and fairly difficult provision, due to its sophisticated concept of connection it meets the interests of the parties involved in the agreement as to succession. At the same time, it ensures that a validly constructed agreement as to succession has to be accepted in all European Member States, regardless of a possible prohibition of agreements as to succession by the *lex fori*. Lastly, Article 25 essentially pursues the former legal situation in Germany, so that it hardly astonishes, that this rule generally seems to be well accomplished from a German perspective. Time will tell, whether it turns out to be proven effective in European legal practice.