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The European Regulations on Succession of July 2012: A Path Towards the End of the Succession Conflicts of Law in Europe, or Not?

ANGELIQUE DEVAUX*

Abstract

*The European regulation 650/2012 adopted last July 4, 2012,¹ has been primarily geared to avoid conflicts of law of succession. It retains the principle of one law applicable to succession and it also admits the *professio juris* rule. In this paper, I examine some of the potential problems with the new European legislation, such as the theoretical and practical aspects of the rule of habitual residence. One likely consequence is that legal practitioners, who are mostly notaries, will have to receive training about the relevant foreign laws. Until now, the question of how they will have access to this training and be ready to apply it to actual cases has not been adequately addressed. Because European countries will have two years to reform their national laws, the time is ripe to discuss the challenges that lay ahead with respect to the succession laws.*

I. Introduction

“Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a *de facto* solidarity.”²

In recent years, the free movement of people within the European Union (EU) has created many cross-border situations. Europeans, as well as foreigners, have different nationalities and own estates in different countries. Professional studies have showed that each year there are 450,000 international successions for an estimated value of 123 billion

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1. Commission Regulation 650/2012, 2012 O.J. (L 201) 107 (EU).

2. Robert Schuman, Foreign Minister of Fr., Declaration of 9 May 1950 (transcript available at <http://europa.eu/about-eu/basic-information/symbols/europe-day/schuman-declaration/>).

euros.³ This ownership triggers the application of multiple inheritance laws and creates conflicts of law.

When Europe is in crisis, it is somewhat ironic that one of the major advances of European construction took place recently concerning family law, a safe refuge. Currently in Europe, there are two types of inheritance law, the principle of scission (known in France, the UK, and Belgium, but also outside Europe, as in the United States) and the law of the Unity Estate (currently applied in Germany, Spain, Italy, and Portugal).⁴

Previous attempts to unify the rules of succession in Europe have been unsuccessful. Nevertheless, since 2005, the European Union has focused on succession.⁵ The European Parliament and the Council of the European Union adopted last July 4, 2012,⁶ a European regulation 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 Certification of Succession. Except for the United Kingdom, Denmark, and Ireland, this text is primarily geared to avoid conflicts of law of succession with a universal character.⁷ This means, for example, that an American citizen who is the owner of a property in Europe, could use these provisions.

From now on, the European countries will have two years to reform their national laws to conform to the European regulations, which retain the principle of one law applicable to the succession by determining the deceased's habitual residence.⁸ It also admits the *professio juris* rule, holding that any citizen can decide the law applicable to his estates.⁹ This regulation denies all actual references to the rule of scission but it may create many conflicts of interpretation. But this idea to solve the conflict of laws in Europe seems to be a difficult task, as many safeguards exist to carry on domestic laws (Title III). The uniform act also created a new instrument, a European Certification of Succession, which becomes a real innovative European tool with difficulties to manage; but this will of harmonization may not be complete if the practitioners, who are mostly notaries in the European continental law countries, are not ready to know about the relevant foreign law (Title IV).

II. Applicable Law To Succession

Harmonization often gives rhythm to wealth and capitalism, but behind the global market there are women and men that cannot control the evolutions of a world economy and that suffer daily from globalization's impact on their private and family lives. They travel, marry, have children, purchase property, divorce, and finally die with cross-border situa-

3. Press Release, Notaries of Eur. & Consiglio Nazionale del Notariato, Notaries and the European Commission for a Simplification of Procedures Regarding 450,000 Transactional Estates Each Year (October 15, 2010).

4. Pamela Cross, Presentation to Ontario Bar Association: Dealing with Multijurisdictional Trusts & Estates (Apr. 1, 2011) (transcript available at http://www.cambridgeforums.com/www.admin/materials/etf/6_Dealing_with_Multijurisdictional_Trusts_and_Estates.pdf).

5. See *Commission Green Paper on Succession and Wills*, COM (2005) 65 final (Jan. 3, 2005), available at http://eurlex.europa.eu/LexUriServ/site/en/com/2005/com2005_0065en01.pdf.

6. Commission Regulation 650/2012, *supra* note 1, at 107.

7. "Any law specified by this Regulation shall be applied whether or not it is the law of a Member State." *Id.* art. 20.

8. *Id.* art. 83.

9. See *infra* II(B).

tions. The life's steps carry on a legal imbroglio named conflict of laws. The European tendency is inclined to the harmonization of these rules as a "natural consequence" of globalization.¹⁰ Succession law is one of these harmonized rules. The field is at the cross-roads of family law, estate law, and contracts, which does not facilitate the tasks of the European legislator.¹¹ Thus, the lawmakers reduced the scope of the regulation to succession law only and excluded certain areas to prevent any confusion.¹² First, tax or administrative matters are not concerned by the text,¹³ although international estate planning matches with tax planning, and national inheritance tax are continuing to be applied with hypothetical double taxation cases in the absence of international tax conventions.¹⁴ Trust law is not affected as well, and we consider the exclusion unfortunate in view of its use in common law systems that may have an impact in Europe.¹⁵ Consequently, matrimonial property regimes have been rejected by the European legislator¹⁶ by reason of involving another type of conflict of laws.¹⁷ The European Parliament and the Council of the European Union have decided to opt for only one landscape theme, the unity of the succession as "a whole."¹⁸ Regulated in this way, is the choice idyllic? This paper shows that the

10. "As full harmonization of the rules of substantive law in the Member States is conceivable, action will have to focus on the conflict of rules. The Commission concludes that there can be no progress in the Community without the question of the applicable law being settled as a matter of priority." CHRISTIAN VON BAR ET AL., *TOWARDS A EUROPEAN CIVIL CODE* 481 (Arthur Hartkamp et al. eds., 4th ed. 2011).

11. "It has been argued that the unification of laws should not be realized by the unification of substantive law but rather by the unification of the principles of private international law. The law to be applied to a transnational conflict is designated according to the national rules on conflict of laws (private international law) of the country of the judge or authority deciding the case. However, also on the level of conflict of law rules, unification of conflict rules regarding family and succession law is not so simple, given the wide variety of conflict rules in that field." *Id.* at 483.

12. Commission Regulation 650/2012, *supra* note 1, Recital 11.

13. *Id.* Recital 10.

14. The European Commission Recommendation has suggested how Member States could improve their national double inheritance tax relief provisions, and measures have been proposed to resolve tax discrimination in the EU. There are no current votes on this topic and the task will be very difficult, but the Commission invited the Council, the European Parliament, and European Economic and Social Committee to consider this communication and related documents and to give their support to this initiative. Press Release, European Comm'n, Commission Proposes Measures to Tackle Cross-Border Inheritance Tax Problems (Dec. 15, 2011) (*available at* http://europa.eu/rapid/press-release_IP-11-1551_en.htm).

15. Commission Regulation 650/2012, *supra* note 1, Recital 13.

16. *Id.* Recital 13.

17. Matrimonial property regimes and succession law are reputed close fields, indeed mixed. From one national law's interpretation to another, a same disposition may belong to dispositions of property upon death or dispositions of matrimonial property regime. For instance, the French *clause d'attribution intégrale*, which ensures an automatic transfer of the whole estates to the surviving spouse, is governed by the matrimonial property law under French law, while it is qualified as a disposition of property upon death under German law. This omission may bring confusion in practice, until courts solve the issue or the regulation is modified. To decrease a potential new conflict of laws due to matrimonial property regimes, the European Commission has proposed a council regulation on jurisdiction, applicable law, and the recognition and enforcement of decisions in matters of matrimonial property regimes not currently voted; that will not create a twenty ninth type of regime but let the spouses chose with freedom the law governing the matrimonial property regime, and we could also hope, a unified definition of these dispositions. See, *Proposal for a Regulation on Jurisdiction, Applicable Law and the Recognition and Enforcement of Decisions in Matters of Matrimonial Property Regimes*, COM (2011) 126 final (Mar. 16, 2011).

18. Commission Regulation 650/2012, *supra* note 1, Recital 37.

unified rule chosen is unstable and practitioners should double vigilance to avoid potential issues.

A. THE GENERAL RULE OF THE DECEASED HABITUAL RESIDENCE—AN UNSTABLE PRINCIPLE

Once the regulation had rejected the concept of scission of laws between movable and immovable,¹⁹ it was time to determine the type of law applicable to succession, meeting the requirements of both security (easy to determine) and proximity (must reconcile with the presumed location of the main interests of the deceased). After several discussions, the European legislature opted for the laws of habitual residence instead of domicile (*lex domicilii*) and nationality (*lex patriae*) on the ground that it is the most appropriate connection between movable and immovable estates that raises less litigation.²⁰

That is the theory, but there is still a gap between theory and practice. Practitioners will rapidly be concerned with questions and difficulties, as the scope of the habitual residence is not perfectly described. What is habitual residence? What are the elements of habitual residence? In the case of several residences, how does one decide whether one residence is the habitual one that governs the succession? Courts have defined habitual residence as “where the person has established, with the desire give it a stable character, the permanent or habitual center of his interests.”²¹ The Preamble of the regulation exposes that “the authority dealing with the succession should make an overall assessment of the circumstances of the life of the deceased during the years preceding his death and at the time of his death, taking account of all relevant factual elements, in particular the duration and regularity of the deceased’s presence in the State concerned and the conditions and reasons for that presence.”²² According to the text, it seems that the legislature relies on practitioners, who become new detectives, to determine the habitual residence of

19. Currently known in France and Belgium. CODE CIVIL [C. CIV.] art. 3 (Fr.); Loi du 16 juillet 2004 portant le Code de droit international privé [Law of 16 July 2004 Holding the Code of Private International Law] of July 16, 2004, MONITEUR BELGE [M.B.] [Official Gazette of Belgium], July 27, 2004, 1st ed., art. 78 § 2.

20. “The d[eceased]’s habitual residence, however, seems to me to be much more natural and appropriate connecting factor.” David Hayton, *Determination of the Objectively Applicable Law Governing Succession to Deceaseds’ Estates*, in LES SUCCESSIONS INTERNATIONALES DANS L’UE [CONFLICT OF LAW OF SUCCESSION IN THE EUR. UNION] 363 (2004). The habitual residence of the deceased is the most appropriate factor for deciding the application succession law. “First it is the place where the deceased and his family were living. Second, normally it also indicates the centre of the deceased’s economic interests.” Tomasz Pajor, *Rapport sur le Rattachement Objectif en Droit Successoral* [Objectively Applicable Law in Successions], in LES SUCCESSIONS INTERNATIONALES DANS L’UE [CONFLICT OF LAW OF SUCCESSION IN THE EUR. UNION] 376 (2004). Mariel Revillard (Centre de Recherches d’Information et de Documentation Notariales) declared herself in favor of the connection of the law applicable to succession to the habitual residence, as a uniform connection for immovable as well, which has been proposed by the study. In her experience the determination of the domicile (or the habitual residence) in the case of succession had hardly ever posed a problem. See Mariel Revillard, *L’Introduction d’un Certificat International d’Héritier et la Pratique du Droit International Privé des Successions* [The Introduction of an International Certificate of Heir and Practice of Private International Law of Succession], in LES SUCCESSIONS INTERNATIONALES DANS L’UE [CONFLICT OF LAW OF SUCCESSION IN THE EUR. UNION] 381 (2004).

21. Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Dec. 14, 2005 (Fr.); see also Cour d’appel [Court of Appeal], June 6, 2007, F. K. c/ U. S., no 31642 (Lux.).

22. Commission Regulation 650/2012, *supra* note 1, Recital 23.

the deceased, an individual that the lawyers probably never met. There is no doubt that the authority dealing with the succession is neutral as excluded from the family, except that the elements are entrusted by the heirs themselves, who are by definition partisans in the succession. This is obviously a lack of clarification in the text, and an adaptation will be necessary to each particular case. The general rule is therefore "inevitably arbitrary"²³ and the result might incur professional civil liability even tensions between heirs.²⁴ It is suggested that practitioners double their vigilance and organize cross-reference information from all parts of successions' files. After all, the security guard is turned away from its primary goal in favor of an unstable and subjective rule, which is regrettable when one knows that most successions are never planned.²⁵

It is thus unfortunate that the regulation on successions would have not ruled in favor of the *lex patriae* mainly known in European States. Nationality would have been an objective standard resulting from the State's immigration law or international conventions and, in all likelihood, it would have been a stable factor considering that we identify with fewer nationalities than residences.²⁶ The determination of nationality does not suffer from a random access, and, moreover, individuals are attached to their culture more than the place they have their residence, whether habitual or not. Thankfully, the law of nationality has not been completely rejected, and the rule is underlined by the admittance of *professio juris*.

B. PROFESSIO JURIS—A FRAMED AND USEFUL TOOL TO THE CHOICE OF LAW

The will refers to the ability to exercise a free choice governed by reason, and *professio juris*²⁷ displays the expression of the party autonomy adapted to the law of succession. A long time prohibited in several European States,²⁸ perhaps largely motivated by the interest of domestic law's conservatism, free autonomy today represents a pillar of the European international private law in construction,²⁹ and the insertion of the legal technique

23. Hayton, *supra* note 20, at 363

24. Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., May 13, 2003, Bull. civ. II, No. 99-20021 (Fr.).

25. "In spite of many advantages of a will, roughly half the population dies interstate. Why? One reason is that the unpleasantness of confronting mortality invite procrastination [. . .] As Freud wrote: "Our own death is indeed unimaginable, and whenever we make the attempt to imagine it we can perceive that we really survive as spectators. Hence . . . At bottom no one believes in his own death, or to put the same thing in another way, in the unconscious every one of us is convinced of his own immortality." JESSE DUKEMINIER, WILLS, TRUSTS, AND ESTATES 59-60 (Robert H. Sitkoff et al. eds., 7th ed. 2009).

26. "[N]ationality appears to be a more satisfactory personal connecting factor because clear and easily ascertainable." Hayton, *supra* note 20, at 362.

27. Latin idiom: "A recognition of the right of a contracting party to stipulate the law that will govern the contract." BLACK'S LAW DICTIONARY 1235 (9th ed. 2009).

28. Unknown in Belgium, Denmark, United Kingdom, France, Greece, Ireland, Luxembourg, Austria, Portugal, Sweden, and Spain. Known in Germany, Finland, Netherlands, and Italy with restrictions for applicable law choice.

29. "Party autonomy, in a controlled form, has been widely promoted in the European family law program[,], though the concept itself, while deserving scrutiny, has been superficially assessed." Janeen Caruthers, *Party Autonomy in the Legal Regulation of Adult Relationships: What Place for Party Choice in Private International Law?*, 61 INT'L & COMP. L.Q. 881, 888 (2012).

was expected in the regulation on successions. Its introduction was elected by an overwhelming majority of lawyers,³⁰ academics,³¹ and Europeans institutions.³²

Professio juris demonstrates a secured devolution of property.³³ Any doubts are avoided from non-unequivocal connecting factors, in particular when the standard is subject to regular modifications, such as the habitual residence. The tool is qualified as useful *par excellence* for the estate planning, a legal technique currently increasingly used in Europe,³⁴ consisting of an individual anticipating and arranging the disposal of his estates. The EU regulation on successions expresses clearly the goal and encourages professionals to use the method to avoid succession contests or interpretations.³⁵

Professio juris incites the free movement of people until the connecting factors do not lead to mobile conflicts. The choice of law is therefore not broad for the testator due to the drafters' hostile attitude for forum shopping; there is no alternative to the law of the deceased's nationality at "the time of making the choice or at the time of death."³⁶ For consistency with secured estate planning, I suggest for the key time the nationality at the time of the choice only; it is a serious and an objective standard. To rule in favor of an unknown or unexpected sign (i.e., the law at the time of death) may obviously shepherd opposite consequences from the ones expected.

Despite all protections considered, there is still a backdoor to forum shopping in the particular (but not exceptional) case of dual citizenship. What law will govern the succession of a testator with dual citizenship? The Regulation does not answer this through a civil rule, and the text defers to the State's immigration law regulations. The decision was probably a way out for the drafters, who are more knowledgeable in civil law than admin-

30. "The recognition of the *professio juris* seems appropriate since the determinant of the living law applicable to the succession, the deceased can develop a strategy global sustainable in time and space." *Livre Vert sur les Successions* [Green Paper on Succession], PATRIMOINE ET ENTERPRISE (Groupe Monassier, Paris), Sept. 2005, at 14 (Fr.).

31. "Granting the power to choose the applicable law, will make the transition easier, as the majority of EU member states still apply their national law in successions." Angelo Davi, *L'Autonomie de la Volonté en Droit International Privé de Successions dans la Perspective d'une Future Réglementation Européenne* [European Private International Law], in LES SUCCESSIONS INTERNATIONALES DANS L'UE [CONFLICT OF LAW OF SUCCESSION IN THE EUR. UNION] 412 (2004).

32. Resolution with Recommendation to the Commission on Succession and Wills, EUR. PARL. DOC. P6_TA(2006)0496, 1, (2006), available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-2006-0496+0+DOC+XML+V0/EN#BKMD-6>.

33. "Party autonomy has now also secured a foothold in the field if successions, where the *professio juris* is now increasingly recognized as relevant for purposes of choice has expanded." H. Patrick Glenn, *Comparative Law and Legal Practice: On Removing the Borders*, 75 TUL. L. REV. 977, 1001 (2001).

34. In 2010, a French notary dedicated his own thesis; see GUILLAUME SOUDEY, YVES LEQUETE, BERTRAND SAVOURE, *L'ESTATE PLANNING* (Paris LexisNexis 3rd ed. 2011).

35. "Since the Objectives of this Regulation, namely the free movement of persons, the organization in advance by citizens of their succession in a Union context and the protection of the rights of heirs and legatees and of persons close to the deceased, as well as of the creditors of the succession." Commission Regulation 650/2012, *supra* note 1, Recital 80.

36. "Forum shopping, both domestic and international, remains a controversial subject The prevailing view seems to be that forum shopping is necessarily 'bad' and should thus be avoided or prohibited. For instance, several authors deplore that uniform law conventions have been unable to 'eliminate' forum shopping opportunities, implying that such practice is undesirable. A number of other writers implicitly condemn forum shopping through their approval of the doctrine of forum non convenient, allegedly the principal tool to combat forum shopping". Markus Petsche, *What's Wrong with Forum Shopping? An Attempt to Identify and Assess the Real Issues of A Controversial Practice*, 45 INT'L LAW. 1005, 1006-07 (2011).

istrative law, but the reference does not solve the problem because some States acknowledge dual citizenship without providing remedies.³⁷ Therefore, until a court raises the issue, the practice should supplement the lack of clarity. We propose to refer to the State with which the testator was “manifestly more closely connected,” keeping in mind the meaning of the EU regulation to avoid any conflict of laws, and respect the “proper functioning of the internal market (that) should be facilitated by removing the obstacles to the free movement of persons who currently face difficulties in asserting their rights in the context of a succession having cross-border implications.”³⁸ More precisely, it is up to the lawyers to promote the tool and to advise their clients for drawing up dispositions with the most accurate precision;³⁹ otherwise, professionals would be subject to malpractice.

The framing of *professio juris* does not only stop at the choice of law itself but also includes the surrounded formalities: “[t]he choice shall be made expressly in a declaration in the form of a disposition of property upon death or shall be demonstrated by the terms of such a disposition.”⁴⁰ Inspired by The Hague Convention of October 5th, 1961—relating to the form of testamentary dispositions—the new regulation describes the formalities of the disposition qualified as valid if it complies with the laws cited in Recital 27⁴¹; however, it does not refer to any particular type of disposition. To avoid contests and applications, this paper suggests opting for the testament, which is known in every EU Member State and also foreign legislation. Taking a step further, the notarial will is preferred over the holographic⁴² on the grounds that it brings security and it avoids will contests, especially in the European civil law systems where most lawyers are notaries.⁴³

37. For instance, a man born in the USA (*jus solis*) from French national parents (*jus sanguinis*). He owns the dual nationality—French and American. Both legislations recognized the dual nationality, and except by relinquishment, U.S. law and French law do not require a person to choose one citizenship over the other. See *Dual Nationality*, TRAVEL.STATE.GOV, U.S. DEP’T OF STATE, http://travel.state.gov/travel/cis_pa_tw/cis/cis_1753 (last visited Sept. 27, 2013); see also, *Nationalité Française [The French Nationality]*, FRANCE DIPLOMATIE, http://www.diplomatie.gouv.fr/fr/les-francais-etrananger_1296/vos-droits-demarches_1395/nationalite-francaise_5301/index.html, (last visited Sept. 27, 2013).

38. Commission Regulation 650/2012, *supra* note 1, Recital 7.

39. In practice, I would suggest that the Testator clearly expresses the choice in this way: “*At the time of the disposition upon death, I, Mr. A have a dual citizenship, French and American. The Notaire (or Lawyer/ Attorney) has informed me about the succession consequences of my national choice of law—French law or American law—that I understood and acknowledged. I precisely expressed my choice in favor of the American law regarding my future succession.*”

40. EUR. PARL. DOC. (COD 2009/0157) (2012).

41. Commission Regulation 650/2012, *supra* note 1, Recital 27. (“The rules of this Regulation are devised so as to ensure that the authority dealing with the succession will, in most situations, be applying its own law. This Regulation therefore provides for a series of mechanisms which would come into play where the deceased had chosen as the law to govern his succession the law of a Member State of which he was a national”).

42. VON BAR ET AL., *supra* note 10, at 467. (“The holographic will must be written and signed personally by the testator. This type of will exists in most European countries, although the formal requirements are not strictly applied in all of them. It does not exist in The Netherlands and Portugal, where the intervention of a notary is always required. Such a will is also unknown in Common Law jurisdictions, e.g., England and Ireland Finally, there is the public will (or notarial will), in most countries drafted by a notary but signed personally by the testator. In Austria, a public will can be made by a judge. Under Belgian and French law, the will must be dictated by the testator to the notary. In other countries, like Germany and Austria, delivery of a document confirmed by the testator to be his will, is sufficient. Generally, the presence of witnesses is required”).

43. DUKEMINER, *supra* note 25, at 157. (“Civil law systems provide for the so-called authenticated will, which is executed before a quasi-judicial officer called the notary. This is not the only mean of making a valid

Moreover, the authentic testament enjoys a probative value and a safe travel inside Europe with mutual recognition and enforceability.⁴⁴ The authenticated will becomes a real instrument for practitioners, indeed a kind of renewal in some jurisdictions.⁴⁵ If a jurisdiction is not familiar with a notarial system, this paper encourages lawyers to resort to the international will offered by the Washington Convention of 1973.⁴⁶ Finally, today there is a European wills database that strengthens the suggestion; the European Network of Register of Wills Association ensures to every European citizen and foreigner that a will shall be found regardless of the place it is kept.⁴⁷ Therefore, the authentic will is the best instrument to ensure the testator's last wishes and it maintains the application of the new EU regulation on successions.

Although the retained choice is an unstable rule and *lex patria* would have been preferred to habitual residence as the main connecting factor, the EU regulation on successions tends to unify the rules and avoid a conflict of laws in Europe. But that is without counting on the several added exceptions that lead me to be skeptical about the unification.

III. Exceptions and Conflict of Laws Revival

Harmonization is not the result of happenstance but the result of an excellent compromise among the Member States, and "harmonization should be pursued when the means to do so exist, and there are no obstacles."⁴⁸ Scholars pretend that harmonization can be reached if it complies with an implicit understanding of flexibility (with some exceptions) for the states, leaving to judges a freedom to operate under exceptional circumstances for injustice or fundamental principles reasons.⁴⁹ On this basis, the drafters of the new Euro-

will in European countries and because it is costly it is not widely used. But the notarial procedure does permit a testator who fears a post-mortem contest to generate during his lifetime and have preserved with the will evidence of exceptional quality regarding, *inter alia* his capacity. The notary before whom the testator executes his will is not a judge; he does not adjudicate capacity. But he is a legally qualified and experienced officer of the state who is obliged to satisfy himself of the testator's capacity as a precondition for receiving or transcribing the testament. The authenticated will is, therefore, extremely difficult for contestants to set aside for want of capacity in post-mortem proceedings.").

44. Commission Regulation 650/2012, *supra* note 1, art. 59.

45. Especially in France, due to strong formalities, the authentic will has been used less in recent years in favor of the holographic will. The Annual French Notaries Convention in 2012 proposed to renew this type of testament by improving formalities.

46. UNIDROIT Convention on providing a Uniform Law on the Form of an International Will, Oct. 26, 1973, S. Treaty Doc. No. 99-29 (1986), reprinted in 12 I.L.M. 1298 (1973).

47. The EUR. NETWORK OF REGISTERS OF WILLS ASS'N, <http://www.arert.eu/?lang=en> (last visited Sep. 27, 2013).

48. Simona Grossi, *Rethinking the Harmonization of Jurisdictional Rules*, 86 TUL. L. REV. 623, 696 (2012).

49. *Id.* at 698. ("The new uniform conflict of laws rules would leave to judges the power to depart from them only under exceptional circumstances when it would be unjust or against the fundamental principles and public policy of that system to apply them. The convention could identify such exceptional circumstances, which could call for governmental interest analysis or for the identification of the better law. This would be possible through the application of each country's fundamental principles of policy (or rules of mandatory application) and *ordre public*. In other words, rules of mandatory application and *ordre public* would be the vehicle through which a state would be able to pursue its own governmental interest or to select the better law to apply to the controversy. However, departures from the general rules for reasons of *ordre public* should be the exception, especially considering that transnational litigation on civil and commercial matters should not be the place where public policy.") (emphasis added).

pean regulation have included several exceptions. The first exception, the exception of *renvoi*, could be qualified as a positive exception that is clearly understood as a whole international concept. The second exception, public order (*Ordre Public*), which is defined as a negative exception, is probably largely motivated by the sole interest of Member States and the fear of losing domestic legal traditions. Even employed cautiously, the discussion below shows that the exceptions are met in most of the succession files. Unless jurisdictions adapt their legislations, we face, in practice, a real revival of the conflict of laws in Europe—indeed a general assertion.

A. *RENVOI*: A POSITIVE EXCEPTION IN FAVOR OF THE THIRD STATE

Renvoi means, in French, “a return.”⁵⁰ In private international law, law *renvoi* consists of applying a law other than the one that should govern as a result of the inclusion of the foreign conflict of laws rules.⁵¹ The method of *renvoi* has been justified by diplomatic concerns; failure to respect international conflict of laws is assimilated to a right of interference from the EU by imposing its rules to a situation without any contact with the EU. These political motivations explain the exception of *renvoi* as a positive standard and, therefore, its inclusion in the original regulation draft to ensure “international consistency.”⁵²

Could it not instead be a legal alibi to protect European domestic laws? If the purpose of the regulation is the unity of law, why not welcome the foreign law? According to *renvoi*, the goal of unity is not reached on the grounds that several laws would unavoidably otherwise apply. In fact, *renvoi* promotes the revival of the law’s sharing out in favor of the application of the law of succession and the *lex sitae*. Taking the example of a Belgian person who dies in New York City with properties in both Belgium and the United States, New York law governs his succession and provides the *lex sitae* rule under conflict of laws. According to *renvoi*, American law applies to New York properties and Belgian law to Belgian properties;⁵³ otherwise, American law would have governed all the properties (i.e. the Belgian and American properties.) What progress! Applied in this way, *renvoi* protects for sure “the law of the Member State,” but the protection, as used to achieve its goal, is too broad. It is believed that turning away the foreign laws without determining if there is an unjust cause or a fundamental principle⁵⁴ is, in equity, opposed to the global-

50. English translation of *renvoi*, OXFORDDICTIONARIES.COM, <http://oxforddictionaries.com/us/translate/french-english/renvoi> (last visited Sept. 27, 2013).

51. Ernest G. Lorenzen, *The Renvoi Doctrine in the Conflict of Laws—Meaning of “The Law of A Country”*, 27 YALE L.J. 509, 511 (1918); (“The recognition of *renvoi* theory implies that the rules of the conflict of laws are to be understood as incorporating not only the ordinary or internal law of the foreign state or country, but its rules of the conflict of laws as well. According to this theory “the law of the country” means the whole of its law.”); see also Grossi, *supra* note 48.

52. Paul Lagarde, *La loi Applicable et la Dernière Residence Habituelle du Defunt [The Applicable Law and the Deceased’s Last Habitual Residence]* (Oct.15, 2010), (transcript available at <http://www.notaries-of-europe.eu/files/cnue-events/2010-10-15/Lagarde.pdf>); see Commission Regulation 650/2012 *supra* note 1, Recital 57.

53. The consequences are the same with many other countries, such as Canada, the United Kingdom, most of the Mexican provinces, Brazil, Ivory Coast, Benin, Gabon, China, India, or Australia.

54. Grossi, *supra* note 48, at 712 n.64 (“For instance, as far as legitimacy and legitimation are concerned, *renvoi* must be applied only if it promotes the policy underlying the choice of law rule, that is, if it leads to the application of a law that favors the establishment of the parental link”).

ization's message.⁵⁵ The sole use of public policy would have been sufficient to reassure the States, until a wise use, a judicious use, became available.

B. NEGATIVE EXCEPTIONS: THE RECALL OF DOMESTIC LAW

1. *Public Policy (Ordre Public)*

"The application of a provision of the law of any State specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (*ordre public*) of the forum."⁵⁶

It is not an easy task to give a perfect definition of public policy inasmuch as the notion may vary from one state to another due to the need of translation in different languages (the English version of the EU regulation is followed by the French expression "*Ordre Public*," which means public policy) and because there is a coexistence of different levels of public policy (i.e. domestic law public policy, European public policy, and international public policy).⁵⁷

In a general manner, public policy (*ordre public*) can be defined as a synthesis of rules related to the restrictions of contract's freedom, which therefore constitutes, conversely, the legal basis of this freedom; but internationally speaking, public policy is a legal concept used to rule out a foreign legislation considered in violation of fundamental principles inherent to the forum.⁵⁸ Although inserted in the Rome I Treaty and the Rome II Treaty, the drafters of the EU regulation did not include a particular definition of public policy. They rather have expressed its use "in exceptional circumstances"⁵⁹ and when applying foreign provisions "would be manifestly incompatible with the public policy (*ordre public*) of the Member State concerned"⁶⁰ or when it "would be contrary to the Charter of Fun-

55. Recently, the French Cour de Cassation [supreme court for judicial matters] held that "in matters of inheritance property, the *renvoi* made by the law of location of the property cannot be admitted unless it ensures the unit estate and applying the same law to movable and immovable." Cour de cassation [Cass.][supreme court for judicial matters] 1e civ., Feb. 11, 2009, Bull. Civ. I, No. 126 (Fr.).

56. Commission Regulation 650/2011, *supra* note 1, art. 35.

57. Catherine Kessadjian, *Public Order in European Law*, 1 ERASMUS L. REV. 25, 26 (2007) ("Our starting point is the French expression 'ordre public.' It is translated into English as either 'public policy' or 'public order.' To this date it is unclear to me whether there is a difference in content or method between the concepts in French law and in English law or common law. In order for the reader to be aware of our basic premise, I offer the following clarification: by either of the often used expressions, we mean to cover in substance all mandatory rules, whatever name they take in French (*lois de police*, *lois d'application immédiate*, *règles d'ordre public*): namely, rules from which parties have no freedom to derogate In contrast, the public policy rules intervene after the conflict of laws analysis is conducted and a foreign law is deemed applicable. The person in charge of applying that law must conduct a comparative analysis of the results potentially reached by the application of the foreign law and that of the mandatory rule. If the result is unacceptable, then the portion of the foreign law deemed to be contrary to the mandatory rule is evicted and the mandatory rule is applied.").

58. Th.M. de Boer, *Unwelcome Foreign Law: Public Policy and Other Means to Protect the Fundamental Values and Public Interest of the European Community*, in *THE EXTERNAL DIMENSION OF EC PRIVATE INTERNATIONAL LAW IN FAMILY AND SUCCESSION MATTERS* (Alberto Malatesta et al. eds., 2008) ("Despite its intractable character . . . there is a general agreement that public policy is meant to ward off foreign law if the result of its application would violate fundamental domestic values or public interests. Its function is therefore limited to the displacement or negation of foreign law, and in that respect it has a negative effect.").

59. EUR. PARL. DOC. (COM 0154) (2010).

60. Commission Regulation 650/2012, *supra* note 1, Recital 21.

damental Rights of the European Union, and in particular Recital 21 thereof, which prohibits all forms of discrimination.”⁶¹ By deduction it can be supposed that there are two types of public policy concerned by the EU regulation on successions, the European public policy and the national (domestic) public policy.

The European public policy exists and is understood as a safeguard for the fundamental elements that govern the European construction formed by the treaties, the European Convention of Human Rights, and the Charter of the Fundamental Rights of the European Union. Applied to the succession laws, the EU regulation uses public policy as part of the fight against any discrimination. In the past, the European Court of Human Rights (ECHR) has ruled on public policy to protect heirs against discrimination; for instance, in 2000, the ECHR condemned France for treating children differently based on whether they were legitimate or born out of wedlock.⁶² Thus, by analogy, it can be supposed that a foreign law such as the Filipino law,⁶³ which discriminates between legitimate and illegitimate children, will be avoided in Europe despite the fact the deceased had decided in a will that Filipino law should govern his European assets. In the same way, discrimination between genders offered by the Islamic law rules⁶⁴ or dispositions based on religion⁶⁵ would be ruled out as suited to the needs of international public policy.

There are finally several cases where the foreign law will be avoided in the name of the European fundamental principles because European public policy echoes the European harmonization. It can now dubiously be wondered about the propriety of the domestic public policy, especially its subjective use and its foreseeable wayward trend. Although some scholars⁶⁶ agreed to say that there is no difference between domestic public policy and European public policy, because all European Member States (Member States) are party to the ECHR, there is still a controversial issue related to public policy that is not protected by the ECHR: the forced share.

Having its origins in the Roman law, the forced share is the portion of the deceased's estate reserved for near relatives.⁶⁷ A large majority of Member States recognize the legal concept that does not allow the testator to completely dispose with freedom of his es-

61. *Id.* Recital 58.

62. See *Mazurek v. France*, 2000-II Eur. Ct. H.R.; see also *Fabris v. France*, App. No. 16574/08 (2013) available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-122353>.

63. The Family Code of the Philippines, Exec. Ord. No. 209, Art. 176 (1987), as amended by Rep. Act 6682 (Phil.).

64. Qur'an, Surah An-Nisaa 4:11, An-Nissa Ayah 4:176 (For instance the Islamic law applied in Morocco declared that "to the male twice the share of the female.").

65. French Cassation Court has recently ruled that the conditional legacy of religious conversion, punishable by a disinheritance clause in case of failure, is not in conformity with the European Convention of Human Rights. In this way, the Islamic law rule consisting that a non-Muslim cannot inherit from a Muslim could not be applied in any EU member States under this public policy. Cour de cassation [Cass.][supreme court for judicial matters] 1e civ., Nov. 21, 2012, Bull. Civ. I, No. 1330 (Fr.).

66. "[T]here is no difference between national and European values and interests where human rights and fundamental freedoms are concerned. All member states are parties to the European Convention of Human Rights and subscribe to the Charter of Fundamental Rights of the European Union. If a rule of foreign law does not satisfy the standards laid down in these instruments its application should be denied, even if the case is only slightly connected with the EU." Boer, *supra* note 58, at 15.

67. Vincent Rougeau, *No Bonds But Those Freely Chosen: An Obituary for the Principle of Forced Heirship in American Law*, 1 CIV. L. COMMENT. 1, 7 (2008) (discussing "the concept of forced heirship," referred to in this article as forced shares).

tates.⁶⁸ The detailed rules for the beneficiaries of the forced share—children, a surviving spouse, or ascendants—may vary from one State to another; Germany and the Netherlands perceive the rule as an heir's debt to the succession while France and Italy see it as a portion of the whole estate. Nevertheless, the assumption is the same—to bring a specific protection to the relatives of the deceased, including a protection from himself, by not allowing disinheritance and, if necessary, the possibility to reduce the donations.⁶⁹ Several States extend the issue by characterizing the forced share as a public policy rule,⁷⁰ like Luxembourg or Germany.⁷¹ France is more of a concern; French law has maintained the current forced heirship since the Napoleonic code of 1804.⁷² Although the forced heirship tends to decline heirship in France, French lawmakers continue to support it.⁷³ When questioned about the EU regulation draft on successions, the French Senate had precisely requested, in 2009, that the exception of forced share should be granted in the final document.⁷⁴ Even if we suppose that French lobbying were the reason for the exception of the public policy's insertion, since then, scholars and practitioners hardly defend the concept. Doctrine advocates that forced share has not lost its power because "it is a reflection of the family solidarity, it guarantees a minimum of equality between the children, and it protects the individual liberties of the heirs."⁷⁵ Other scholars argue that the European regulation is a backdoor for French citizens to subvert the French rule by changing their citizenship. Finally, French notaries, at the time of their annual assembly in 2012, expressly called the Minister of Justice to rule in favor of forced share as a matter of international public policy.⁷⁶ As of today, neither the French government nor the par-

68. Some other states do not recognize the forced share and allow its citizen to enjoy absolute testamentary freedom. This is the case in the United Kingdom (except in Scotland) and Ireland. *Forced Heirship*, GLOBAL WILLS, <http://www.globalwills.com/forced-heirship> (last visited Sept. 30, 2013).

69. "Forced heirship is said to promote family bonding, stability, solidarity, harmony, and responsibility . . . [T]he decision to become a parent and accept the attendant joys and responsibilities of the child's dependence is worthy of formal renewal and acknowledgment at the death of the parent." Deborah A. Batts, *I Didn't Ask to Be Born: The American Law of Disinheritance and a Proposal for Change to a System of Protected Inheritance*, 41 HASTINGS L.J. 1197, 1222-1223 (1990).

70. "The reserved portion used to be sacrosanct in most civil law countries, and perhaps it still is in some of them. That is why such countries are likely to qualify their substantive rules on this topic as 'overriding mandatory rules.'" Boer, *supra* note 58, at 12.

71. On April 19, 2005, the Federal Constitutional Court of Germany affirmed that forced share is constitutional and justified to protect the welfare state against claims of impoverished and disinherited heirs. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Apr. 19, 2005, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1651, 2005 (Ger.).

72. CODE CIVIL [C. CIV.] art. 912 (Fr.).

73. As of 2006, French heirs have the ability to renounce all or part of their forced share, provided they do so prior to the benefactor's death and in accordance with French law. CODE CIVIL [C. CIV.] art. 929 (Fr.). Additionally, in 2011 the French Constitutional Council found a law that sought to protect French heirs from the discriminatory effects of foreign inheritance laws unconstitutional. Conseil constitutionnel [CC] [Constitutional Court] decision No. 2011-159QPC, Aug. 6, 2011, J.O. 13478 (Fr.).

74. *Proposition de Résolution Européenne*, No. 126, Sénat, Session Ordinaire (2009-2010) (Fr.).

75. Translated from French: "la réserve est le reflet de la solidarité familiale: le passage obligé des biens aux descendants du au conjoint conforte le lien du lignage ou du ménage. Ensuite, la réserve garantit un minimum d'égalité entre les enfants." Michel Grimaldi, *Breves Réflexions sur L'ordre Public et la Réserve Héritaire*, LA REVUE DU NOTARIAT (Deffrénois, Paris) Aug. 15 - 30, 2012, at 755.

76. See Christiane Taubira, Keeper of the Seals, Fr. Minister of Justice, Speech Before the 108th Congress of Notaries (Sept. 24, 2004) (transcript available at <http://www.presse.justice.gouv.fr/archives-discours-10093/archives-des-discours-de-2012-12364/108eme-congres-des-notaires-25529.html>).

liament have ruled in that way, but recently, Christiane Taubira, France's Minister of Justice, has expressed that the legal device is not subject to any change (considering amount not reduced, nor abolished, nor extended to the international public policy as well).⁷⁷

In light of such fervor, we can wonder if forced share can be governed by international public policy. The concept of international public policy has already been invoked by the French judges to avoid the application of a foreign law resulting in an unacceptable outcome for the values and principles of the forum.⁷⁸ Therefore, the eviction of the foreign law is not automatic, and its suppression due to the unknown notion is a delicate topic that does not match with the current French jurisprudence nor the meaning of the EU regulation. The French Cassation Court never ruled the absence of forced share contrary to the international public policy, and the goal of the EU regulation is the unity of the law applicable to the succession, as demonstrated before. It is not a backdoor for French citizens to avoid the rule when those concerned should have a particular interest, and each sovereign state enacts its own strict immigration rules and application for naturalization.⁷⁹ Furthermore, the forced share knows different levels; some Member States only protect the descendants,⁸⁰ and some others are protecting the surviving spouse and the ascendants.⁸¹ Finally, the substance of the forced share is not harmonized in Europe with respect to the beneficiaries or the amount of the share.⁸² Considering the lack of harmonization, this paper disapproves the forced share ruling as an international public policy. Again, the meaning of the regulation on successions is the harmonization of the conflict of law rules. Ruling differently will repeat, without doubt, the conflict of laws in Europe, for the reason that forced share, and therefore the domestic law, would be invoked in a very large number of cases.

Taking the example of French notaries, why are they defending, with such ardor, the French forced share while they should be satisfied with a helpful regulation that clarifies the practice of cross-border successions? This paper supposes that these arguments are only a conservative way to ensure the application of French law in France because, first, most French practitioners, including the notaries, have a poor knowledge of international private law and foreign law⁸³ and second, for the reason that it maintains or guarantees

77. Réponse Ministérielle à la Question No. 4510 [Ministry Reply to Question No. 4510], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Feb. 2, 2013, p. 1368.

78. "Les dispositions de la loi étrangère normalement compétente qui sont contraires à la conception française de l'ordre public international ne sauraient avoir d'efficacité en France." Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Jan. 23, 1979, Bull. civ. I (Fr.).

79. This is a different matter than avoiding a forced share rule. "Moreover, by limiting the choice to national law, the *professio juris* is such that it reassures those who fear that it will be too easy to overturn the provisions of national law on the reserved portion of an estate" EUR. PARL. DOC. (COM 154) 5 (2010).

80. See e.g., CODE CIVIL [C. CIV.] art. 913 (Fr.); see also CODE CIVIL [C. CIV.] art. 745-46 (Lux.); see also BURGERLIJK WETBOEK [BW] [CIVIL CODE] art. 4.1 (Neth.).

81. See e.g., CODE CIVIL [C. CIV.] art. 720-26 (Belg.); see also BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], Jan. 2, 2002, BUNDESGESETZBLATT [BGBL. I] 738, as amended, §§ 1922-1930 (Ger.); see also CÓDIGO CIVIL [C.C.] art. 808 (Spain).

82. For instance, if a man died leaving three children or more, the forced share in France would be 3/4, while in Italy it would be 2/3. CODE CIV. [C. CIV.] art. 913 (Fr.); CODICE CIVILE [C.C.] art. 536 (Italy).

83. See OLIVIER MORETEAU, LE DEVENIR DU DROIT COMPARÉ EN FRANCE [THE FUTURE OF COMPARATIVE LAW IN FRANCE] 2 (2004), available at <http://www.gdc.cnrs.fr/journee23juin-conclusion.pdf> (discussing, generally, the backwardness of French lawyers regarding international and comparative law).

their monopoly. Even if it is demonstrated that the notaries' demand cannot be heard, their position is quite understandable because their monopoly is often challenged by foreign practitioners⁸⁴ and the European Commission.⁸⁵ Bearing in my mind that notaries are a guarantee of safety and efficiency for their clients,⁸⁶ who would not defend the notaries' position in the same situation? It is like recalling a battle that never stopped between the common law and civil law systems, a fear to see the application of common law tradition on the continent. It is hardly surprising that the French notaries' motto is "[n]otaires, surement et pour longtemps."⁸⁷

2. *Special Rule Imposing Restrictions or Affecting the Succession in Respect to Certain Assets*

Where the law of the State in which certain immovable property, certain enterprises or other special categories of assets are located contains special rules which, for economic, family or social considerations, impose restrictions concerning or affecting the succession in respect of those assets, those special rules shall apply to the succession

84. David Anderson, a Solicitor in London, was quoted in *The Law Society Gazette* as saying, "[t]his is the first time an English solicitor has broken the Notaire's monopoly. The French have been totally protectionist. It is of limited scope, but I believe it is the thin end of the wedge. It means we can get experience of dealing with the French land registry. There are 500,000 British in France, which will mean a large number of divorce transactions, and properties on the Cote d'Azur can sell for [€]10 to 20 million (£8 to £16 million). We want to exploit the top end of the market." Rachel Rothwell, *English Firm Breaks Notaire Monopoly with Right to Conduct Property Transfer in France*, *L. SOC'Y GAZETTE*, May 2, 2008, available at <http://www.lawgazette.co.uk/news/english-firm-breaks-notaire-monopoly-with-right-to-conduct-property-transfer-in-france/46750.article>.

85. In 2006, a Directive promulgated by the European Parliament (known popularly as the "Bolkestein Directive") included a proposition to liberalize the notarial services, but strong lobbying efforts on behalf of the profession had excluded it from the scope of the Directive. See Directive 2006/123/EC, of the European Parliament and of the Council of 12 December 2006 on Services of the Internal Market, 2006 O.J. (L 376/36). Additionally, Europe has denounced the monopoly of the notaries, the condition of access to the profession, and the advertising restrictions that all are uncompetitive. In 2011, after many years of procedure, the Court of Justice of the European Union has finally judged that "[a] Member State whose legislation imposes a nationality requirement for access to the profession of notary fails to fulfill its obligations under Article 43 EC, where the activities entrusted to notaries within the legal order of that Member State are not connected with the exercise of official authority within the meaning of the first paragraph of Article 45 EC." Case C-50/08, *Comm'n v. French Republic* (2011), available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=126201&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=6854651>. The case is going further because it has been reported that the notarial activities are in the field of competition. So now, notaries do not need to hold the nationality of the state in which they want to practice, and a European citizen who meets the degree requirements can become a notary in France. Recently, on May 29, 2013, the European Commission revived the debate and expressly called the French government to "[t]ake action to enhance competition in services; remove unjustified restrictions in the access to and exercise of professional services, notably regarding legal form, shareholding structure, quotas and territorial restrictions; take action to simplify authorisation for the opening of trade outlets and to remove the ban of sales at a loss". *Recommendation for a Council Recommendation on France's 2013 National Reform Programme and Delivering a Council Opinion on France's Stability Programme for 2012-2017*, at 8, COM (2013) 360 final (May 29, 2013).

86. For a comparative approach of the Notary's role, see Margaret Ryznar & Angélique Devaux, *Au Revoir, Will Contests: Comparative Lessons for Preventing Will Contests*, *NEV. L.J.* (forthcoming), available at http://works.bepress.com/cgi/viewcontent.cgi?article=1013&context=margaret_ryznar.

87. Translation: "Notaries, For sure and a long time." *NOTAIRES DE FRANCE*, <http://www.notaires.fr> (last visited Sept. 30, 2013).

in so far as, under the law of that State, they are applicable irrespective of the law applicable to the succession.⁸⁸

This provision is pointed to as an exception to unity, and the foreign law is unwelcome to remain the *lex sitae*. What are the assets concerned by this article? The scope seems to be very wide and accurate, encouraging interpretation and diversion of the foreign law's application. A certain number of assets could be suggested as referred; these assets could include business or art collections, such as a Dali painting collection owned by a Spaniard who lends it to a Spanish museum. He died in Germany where the German law should be applied. What about the Dali painting collection? Could it be considered as an exceptional asset that should follow the Spanish law?

Mandatory rules are those for which "observance is necessary for the protection of the political, social and economic"⁸⁹ and are "binding on all those living on the territory."⁹⁰ Each Member State will determine whether or not one special rule imposes restrictions and is similar to a mandatory rule. Like this, the French Cassation Court⁹¹ recently held that the rules relating to preferential allotment inheritance in France are mandatory rules and that they should be applicable to all farms located in France. From this case, it is understood that when a farm located in France is part of an international succession, the potential foreign law will be avoided in favor of the French one.⁹² The preferential allotment rule does not only concern family, but also economic status, insofar as it seeks to maintain cost structures and limit the fragmentation of holdings. Following this case, other preferential allotment inheritances may be used, such as the French or the Belgian surviving spouse's preferential allotment of the habitual residence.⁹³ For example, a surviving spouse could claim his or her preferential allotment on a French property known as the main deceased's residence despite the fact that law governing the whole succession acknowledges the principle.

This exception imposed by the regulation still deserves domestic legislation on real estate and disobeys the principle of the unity of law so desired by the author. But it is an excellent tool for early succession because it can allow, for example, to privilege the surviving spouse and to guarantee the allocation of the principal residence.

Even if the European regulation on successions tends to avoid conflict of laws in Europe, it is obvious to observe that the text includes many backdoors to revive, in practice, conflicts and issues. It is as if both Member States and lawyers are not ready to apply foreign law. This may be out of fear or ignorance; nonetheless, the exchanges between individuals are more and more numerous, and the practice should adapt.

88. Commission Regulation 650/2012, *supra* note 1, art. 30.

89. Ph. Francescakis, *Y a-t-il du nouveau en matière d'ordre public?*, in TRAVAUX DU COMITE FRANCAIS DE DROIT INTERNATIONAL PRIVE 149 (1966-1969).

90. CODE CIVIL [C. CIV.] art. 3 (Fr.); CODE CIVIL [C. CIV.] art. 6 (Belg.).

91. Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Oct. 10, 2012, Bull. civ. I, No. 194 (Fr.).

92. *Id.*

93. CODE CIVIL [C. CIV.] art. 1832-1 (Fr.); CODE CIVIL [C. CIV.] art. 1446 (Belg.).

IV. The Technical Tools of Harmonization—Thinking Ahead

Developing legal resolutions to avoid conflicts of law in Europe is a first step that is rapidly reduced to an ideological drive if not accompanied by practical aspects of implementation. The EU regulation on successions breaks the mold by creating a European Certificate of Succession used as real proof of the status of heirs or legatees in a foreign country. If it looks innovative and harmonious, however, the Certificate raises other issues, like its practical use and its admission. Moreover, the implementation of harmonization inevitably brings with it the knowledge of the foreign law.

A. THE EUROPEAN CERTIFICATE OF SUCCESSION (ECS)—A TRUE INNOVATION WITH DIFFICULTIES TO MANAGE

The right of inheritance produces effects in the state where it has been performed, but for the purpose of implementation, legatees and heirs need a special document in accordance to the law of the forum.⁹⁴ Currently, there is no full recognition of such acts abroad, which usually brings practitioners to prepare an additional document in the local form. For instance, a German died in Germany leaving his mother, his sister, and his brother. His heirs want to sell his French property. The German court has prepared a certificate called “Erbschein” sent to the French notary in charge of the sale.⁹⁵ The French notary draws up an additional deed called “attestation immobilière” to ensure the land ownership.⁹⁶ The European Certificate of Succession (ECS) is the first European document that reduces the slow settlement of a cross-border succession. The ECS is framed to the status and the right of each heir or legatee, the attribution of specific assets, and the powers of some persons who executed a will or administered the estate,⁹⁷ and then the grounds for non-recognition are very limited.⁹⁸

The European lawmakers did not want to create a superior European act and exacted that “the use of the Certificate shall not be mandatory.”⁹⁹ But that is an illusion for the reason that this new document will become a key in the presence of cross-border succession situations; an ECS avoids the multiplication of documents and the long and expensive process of legalization. The ECS must be issued by a competent authority, which has the merit of not upsetting the already existing internal practice in the Member States. In this way, the succession court (*Amtsgericht–Nachlassgericht*) will continue to be the jurisdiction in Germany, such as the notary in Belgium and the Netherlands. ECS is an authenticated

94. “In order for a succession with cross-border implications within the Union to be settled speedily, smoothly and efficiently, the heirs, legatees, executors of the will or administrators of the estate should be able to demonstrate easily their status and/or rights and powers in another Member State.” See Commission Regulation 650/2012, *supra* note 1, Recital 67.

95. “The probate court must issue to the heir on application a certificate concerning his right of succession, and, if he is entitled only to a share of the inheritance concerning the size of his share (certificate of inheritance).” *BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE]*, Jan. 2, 2002, *BUNDESGESETZBLATT [BGBL. I]* 738, as amended, § 2353 (Ger.).

96. *Loi 55-22 du 4 janvier 1955 portant réforme de la publicité foncière [Law 55-22 of 4 January 1955 on the Reform of Land Registration]*, *JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE (J.O.)* Jan. 7, 1955, p. 352–353.

97. Commission Regulation 650/2012, *supra* note 1, art. 63.

98. *Id.* art. 40 (“Public policy and procedural obstacles.”).

99. *Id.* art. 62(2).

deed that ranks the need of the notaries in first place. The ECS circulates with its own effects¹⁰⁰ on the basis of a standardized¹⁰¹ procedure and with autonomy. For the moment, the European institutions have not yet suggested a standard form, but this paper recommends the possibility of downloading it from a European secured website for practitioners. The document should refer to its contents, such as the deceased's information, the beneficiaries' information, the law applicable to the succession, the share of heirs or legatees, and the power of executors.¹⁰² The ECS shall also contain the

information concerning a marriage contract entered into by the deceased or, if applicable, a contract entered into by the deceased in the context of a relationship deemed by the law applicable to such a relationship to have comparable effects to marriage, and information concerning the matrimonial property regime or equivalent property regime.¹⁰³

This provision was not indicated in the previous draft of 2009, and it is important to raise the point considering that some dispositions upon death may also be concerned by the matrimonial property regimes and not succession law.¹⁰⁴ Therefore, this paper recommends adding the content of the matrimonial property regime on the certificate to avoid any risk of omission of disposition upon death. It is certain that the interpretation will induce difficulties in practice, depending on the foreign law knowledge of the ECS drafter. Similarly, if one provision has been neglected, the practitioner would have to complete the ECS with a domestic certificate.

Another function of this ECS deserves special attention, constituting "a valid document for the recording of succession property in the relevant register of a Member State."¹⁰⁵ Reading the provision faster means that the ECS would also serve as a property deed. So, it could then be imagined that an ECS provided by a Greek notary may constitute a valid document for the record of a French succession property. Would it be correct? This suggestion sounds unbelievable, as notaries in Europe enjoy a national monopoly, especially in real estate. For instance, the French law¹⁰⁶ regulates, with precision, the contents of real estate demised by death, holding that the following information is mandatory: cadastral information, the origin of property, and the value of the property. This information is not included in the ECS, so, for that reason, ECS cannot be accepted, as of now, as a valid document for the French real estate's record. The evolution of the ECS may, however, be an issue. What would happen if the European document improves and contains information required by most of the European land registries? Would it become a superior European document enforceable in every Member State? The issue is controversial, as Europe tends to create harmonization of substantive law, and practitioners do not

100. *Id.* art. 69, 67.

101. *Id.* ¶ 67 ("To enable them to do so, this Regulation should provide for the creation of a uniform certificate.").

102. *Id.* art. 68.

103. *Id.* art. 68(h).

104. This is the case with *clause integrale d'attribution* in French and Belgian law. See *Marriage Contract: Choose their Matrimonial Regime*, NOTAIRES DE FRANCE (July 24, 2013), <http://www.notaires.fr/notaires/en/marriage-contracts> (July 24, 2013).

105. Commission Regulation 650/2012, *supra* note 1, art. 69.

106. Law 55-22 of Jan. 4, 1955, p. 348 (Fr.).

want to lose their power. There is no doubt that it is time for notaries to become European actors of this change.

B. KNOWLEDGE OF THE FOREIGN LAW

Here are the numbers: 12.3 million European citizens are living in a different country than their home, there are 450,000 European successions¹⁰⁷ that happen per year, and approximately sixteen million international couples live in the EU.¹⁰⁸ Indubitably, single European lawyers become international lawyers, and each one of them might be confronted one day with a case involving individuals needing advice related to their expatriation, marital life, or properties. In order to achieve this, lawyers need to gain knowledge of foreign laws. There are approximately 200 jurisdictions in the world, and we do not require lawyers to know all of them. There is no super-lawyer! Jurists need to revise their usual methodologies and they must engage in a real analysis of the legal situation.¹⁰⁹ How do lawyers have access to the foreign legal information, and what are the current tools?

To complement the regulation on successions, the European Commission has, first, financed a website¹¹⁰ powered by notaries of Europe, which gives details about the relevant law of succession in each Member State. This is a useful technology; however, the contents are regrettably poor to effectively solve a foreign law's issue.

A second tool, the "Interconnecting European Registers of Wills" (IERW),¹¹¹ co-funded by the European Union, appears useful. IERW ensures that lawyers will find wills or dispositions of property upon deaths registered in the database. The database's registration is not mandatory, but recommended as it secures wishes of the deceased and it avoids the loss of the will. Currently, there are only nine Member States¹¹² and six observer Members.¹¹³ This paper encourages all the Member States to be part of the database to provide European citizens with full access to and respect of their rights. This paper also suggests that the European Union create a mandatory database related to the declaration of law applicable to successions, enlarged to marital property regime or partnership for those States not connected to IERW.¹¹⁴ The Internet is in place, and we have to ensure that this technology is indeed used wisely.

107. Press Release, Eur. Comm'n, EU Rules to Ease Cross-Border Successions are Now Law (July 26, 2012), available at http://europa.eu/rapid/press-release_IP-12-851_en.htm.

108. Memorandum, Eur. Comm'n, Clearer Property Rights for Europe's 16 Million International Couples—Frequently Asked Questions (Mar. 16, 2011), available at http://europa.eu/rapid/press-release_MEMO-11-175_en.htm.

109. "Il s'agit là d'une contrainte universelle. S'y trouvent confrontés les citoyens, les magistrats qui doivent trancher les litiges et les professionnels du droit dans le cadre de leur mission d'assistance et de conseil" ["It is one universal constraint. Citizens, judges are confronted and they must resolve disputes and legal professionals in their mission to support and advice."]. Jean-Francois Sagaut et al., *Droit International Privé Notarial*, LA SEMAINE JURIDIQUE, JURIS-CLASSEUR PÉRIODIQUE [JPC], Oct. 26, 2012, at 25.

110. SUCCESSIONS IN EUROPE, www.successions-europe.eu/en/home (last updated July 10, 2012).

111. THE EUR. NETWORK OF REGISTERS OF WILLS ASS'N, *supra* note 47.

112. Austria, Belgium, Bulgaria, France, Hungary, Italy, Portugal, Romania, and Slovenia. *Members and Partners*, THE EUROPEAN NETWORK OF REGISTERS OF WILLS ASSOCIATION, <http://www.arert.eu/Members.html?lang=fr> (last visited Sept. 30, 2013).

113. Croatia, Latvia, Luxembourg, the Netherlands, Poland, and Spain. *Id.*

114. Both of these areas of law are currently studied to create a European regulation.

Finally, a European directory of notaries has been created, giving access to potential practitioners to answer questions about their domestic legislation.¹¹⁵ This raises the question of communication. For instance, we cannot find any French notary able to speak Latvian or an Italian notary able to speak Finnish, and therefore, language is a barrier to break down.

The current tools are not sufficient to resolve international successions. It is obvious that practitioners need international training that should start now because we have been delaying this for too long due to the lawyers' egocentrism.¹¹⁶ We should reinforce comparative law¹¹⁷ and private international law courses accompanied by the study of a foreign language, taught by a mix of professors of law and practitioners. For lawyers in place, it is recommended that training in comparative law be mandatory and included in CLE. The Council of the Notariats of the European Union¹¹⁸ (CNUE) has recently received funding from the European Commission for a large-scale training program for EU notaries.¹¹⁹ "The project will consist of 14 seminars in 10 Member States, which will be attended by a total of 2,000 notaries."¹²⁰ This is a preliminary step, but there are more than 40,000 notaries in Europe, in addition to their employees! The European Commission's goal is to "[offer] at least half of the legal professionals in the EU the opportunity to receive training in EU law at local, national or European level by 2020".¹²¹ The Commission suggested that "the target of having all legal professionals receive at least one week of training in EU law at some point in their careers".¹²² The wishes are there, and the only hope is that the funding will not stop the goal and the professionals will seize the opportunities offered to them. To train is to ensure quality.

The planning has to go much further than that, passing, inevitably, by weaving the strengths of each other and the creation of partnerships and networks. Very few of them, such as International Union of Notaries (UNIL),¹²³ Lexunion, or the International Legal and Notarial Strategies,¹²⁴ do exist, although the network contains only one office per State. Globalization, learning, and integration are being followed by strategies of exchange and partnership, and, above all else, a willingness to be open to others.

115. EUR. DIRECTORY OF NOTARIES, <http://www.notaries-directory.eu/> (last visited Sept. 30, 2013).

116. See MORETEAU, *supra* note 83, at 2.

117. "Comparative legal practice is therefore a rapidly expanding field of legal practice. It is a new addition to the discipline of comparative law and implies its generalization and democratization. Comparative lawyers should be less lonely in the future, and comparative methods (not necessarily those of traditional comparative law) should become more mainstream in legal thought. This has important consequences, among other things, for legal education. These developments are also important for our understanding of the relations between the different laws of the world. Comparative legal practice is founded on an underlying idea that the laws of the world are commensurable or comparable, and on an equally fundamental idea that comparison can only continue to take place amidst ongoing diversity." Glenn, *supra* note 33, at 1002.

118. "The Council of the Notariats of the European Union (CNUE) is the official body representing the notarial profession dealings with the European institutions." NOTARIES OF EUR., <http://www.cnue.be/> (last visited Sept. 30, 2013).

119. CNUE Training Program 2013-2014, NOTARIES OF EUR. (Jan. 11, 2013), <http://www.notaries-of-europe.eu/news/latest/2013/2013-01-10-training-programme>.

120. *Id.*

121. *Id.*

122. *Id.*

123. INT'L UNION OF NOTARIES, <http://www.uinl.org/1/home-page> (last visited Sept. 30, 2013).

124. LEXUNION, <http://www.lexunion.com/?la=en> (last visited Sept. 30, 2013).

V. Conclusion

In general, European regulation 650/2012 has been welcomed by all practitioners dealing with international successions. The document has the merit of reducing a maximum of conflicts of laws, while accelerating procedures and providing legal certainty for the clients. Even if the exceptions and issues are numerous, it is up to practitioners to anticipate possible abuses and aberrations and publicize jurisdiction choice of law. Don't be afraid of the regulation's entry into force; practitioners must take ownership now of the helpful solutions offered. The transitional dispositions allow adaptation and time to be more effective with the clients. We need to get prepared rather than suffering the reform.

Obviously, new European practices place the notaries at center stage. Although there is no European notary at the moment, due to the multitude of languages and particularly to the national monopoly, the notarial practice becomes European. The EU regulation represents an opportunity for notaries, with ECS's creation placing the authenticated deed at the heart of an area of justice, freedom, and security aimed at facilitating everyday life of European citizens. This is something new, the birth of the new, European authenticated deed. Notaries have reasons to feel confident about the future, as long as they seize the opportunity, they train, and they adapt their practice.

"Nous devons parvenir à convaincre plutôt que de fustiger parce que c'est ensemble que nous construisons l'Union [E]uropéenne et que plutôt que de percevoir chez nos allies des adversaires ou des ennemis potentiels, faisons l'effort de les convaincre. Et je suis persuadée que travaillant ensemble, nous parviendrons à les convaincre."¹²⁵

125. English translation: "We must be able to convince rather than criticize because together we are building the European Union, and instead of perceiving our allies like adversaries or potential enemies, let's make the effort to convince them. I am confident that if we work together, we will succeed in convincing them." Taubira, *supra* note 76.