Succession and Wills in the Conflict of Laws on the Eve of Europeanisation

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I. The Ambitious Legislative Project

The terms "succession" or "wills" have been used, so far, in European private international law only in a negative sense in order to express that those areas are *not* covered by a certain instrument. Following the 1968

* Literature cited in *abbreviated form*: *Bajons*, Zur Interdependenz von IPR und IZVR bei der Schaffung eines europäischen Justizraums für grenzüberschreitende Nachlassangelegenheiten, in: Successions (this note) 465–484 (cited: Interdependenz); *id.*, Internationale Zuständigkeit und anwendbares Recht in grenzüberschreitenden Erbrechtsfällen innerhalb des europäischen Justizraums, in: FS Andreas Heldrich (2005) 495–509 (cited: Zuständigkeit); *Bauer*, Neues europäisches Kollisions- und Verfahrensrecht auf dem Weg, Stellungnahme des Deutschen Rates für IPR zum internationalen Erb- und Scheidungsrecht: IPRax 2006, 202–

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Brussels Convention[1], most European private international law instruments

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204; *Davì*, L'autonomie de la volonté en droit international privé de successions dans la perspective d'une future réglementation européenne, in: Successions (this note) 387–411; *Dicey/Morris/Collins*, The Conflict of Laws II[14] (2006); *Dörner*, Vorschläge für ein europäisches Internationales Erbrecht, in: Recht als Erbe und Aufgabe, FS Heinz Holzhauer (2005) 474–483; *Dörner/Hertel/Lagarde/Riering*, Auf dem Weg zu einem europäischen Internationalen Erb- und Erbverfahrensrecht: IPRax 2005, 1–8; *Haas*, Der Europäische Justizraum in "Erbsachen", in: Perspektiven (this note) 45–110; *Harris*, The Proposed EU Regulation on Succession and Wills: Prospects and Challenges: Trust Law International 2008, 181–235; *Hayton*, Determination of the Objectively Applicable Law Governing Succession to Deceaseds' Estates, in: Successions (this note) 359–367; *Herweg*, Die Vereinheitlichung des internationalen Erbrechts im europäischen Binnenmarkt (2004); *Jud*, Rechtswahl im Erbrecht, Das Grünbuch der Europäischen Kommission zum Erb- und Testamentsrecht: Zeitschrift für Gemeinschaftsprivatrecht (GPR) 2005, 133–139; *Kühne*, Die Parteiautonomie im internationalen Erbrecht (1973); *Lagarde*, Familienvermögens- und Erbrecht in Europa, in: Perspektiven (this note) 2–20; *Lehmann*, Die Reform des internationalen Erb- und Erbprozessrechts im Rahmen der geplanten Brüssel-IV-Verordnung (2006) (cited: Reform); *id.*, Internationale Reaktionen auf das Grünbuch zum Erb- und Testamentsrecht: IPRax 2006, 204–207 (cited: Reaktionen); *Leipold*, Europa und das Erbrecht, in: Europas universale rechtsordnungspolitische Aufgabe im Recht des dritten Jahrtausends, FS Alfred Söllner (2000) 647–668; *Mansel*, Vereinheitlichung des Internationalen Erbrechts in der Europäischen Gemeinschaft, Kompetenzfragen und Regelungsgrundsätze, in: Tuğrul Ansay'a Armağan (2006) 185–226; *Pajor*, Rapport sur le rattachement objectif en droit successoral in: Successions (this note) 371–375; Perspektiven der justiziellen Zusammenarbeit in Zivilsachen in der Europäischen Union, ed. by *Gottwald* (2004) (cited: Perspektiven); *Rauscher*, Heimatlos in Europa?, Gedanken gegen eine Aufgabe des Staatsangehörigkeitsprinzips im IPR, in: FS Erik Jayme I (2004) 719–745; *Staudinger (-Dörner)*, Kommentar zum BGB, EGBGB/IPR: Art. 25, 26 (2007) (cited: *Staudinger [-Dörner]*); *Stumpf*, Das Erbrecht als Objekt differenzierter Integrationsschritte, in: Differenzierte Integration im Gemeinschaftsprivatrecht, ed. by *Jung/Baldus* (2007) 217–253; Les successions internationales dans l'UE/Conflict of Law of Succession in the European Union/Internationales Erbrecht in der EU, ed. by *Deutsches Notarinstitut* (2004) (cited: Successions).

Materials cited in *abbreviated form*: *Waters*, Explanatory Report, in: Actes et documents de la seizième session, ed. by *Conférence de La Haye de droit international privé*, 3 au 20 octobre 1988 II: Successions – loi applicable (1990) 526–617; Rechtsvergleichende Studie der erbrechtlichen Regelungen des Internationalen Verfahrensrechtes und Internationalen Privatrechts der Mitgliedsstaaten der Europäischen Union, in: Successions (this note) 169–328 (cited: DNotI Study); Green Paper on succession and wills, COM(2005) 65 final of 1. 3. 2005 (cited: Green Paper); the replies to the Green Paper can be obtained from the website of the European Commission at <ec.europa.eu/justice_home/news/consulting_public/successions/news_contributions_successions_en.htm> (cited: … Reply), they have been summarised in a staff document, available at <ec.europa.eu/justice_home/news/consulting_public/successions/contributions/summary_contributions_successions_fr.pdf>; Document de travail des services de la Commission, Annexe au Livre Vert sur les successions et testaments, SEC(2005) 270 of 1. 3. 2005 (cited: Staff Working Paper); Opinion of the European Economic and Social Committee on the Green Paper on succession and wills of 26. 10. 2005, O.J. 2006 C 28/1 (cited: EESC Opinion); Parliament Report with recommendations to the Commission on succession and wills of 16. 10. 2006, A6–0359/2006, whose motion has been adopted by a European Parliament resolution with recommendations to the Commission on succession and wills of 16. 11. 2006, P6_TA (2006) 0496 (cited: Parliament Report); Discussion Paper of the European Commission on successions upon death of 30. 6. 2008, available e.g. at <wko.at/ooe/Branchen/Industrie/Zusendungen/EU-VO_Erbrecht_1.pdf> (cited: Discussion Paper).

expressly exclude succession and wills from their material scope[2]. Nevertheless, since 1998 the rules for international successions are officially on the European agenda. By taking advantage of the Community's competences in the area of freedom, security and justice, the Council and the Commission promised in the Vienna Action Plan to "examine the possibility of drawing up a legal instrument on international jurisdiction, applicable law, recognition and enforcement of judgments [...] relating to succession"[3]. Based on a

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Most of the cited *national legislation* can be found – in German translation – in: *Staudinger (-Dörner)* (this note) Anh. zu Art. 25 f. EGBGB paras. 1 et seq. and Internationales Erbrecht, ed. by *Ferid/Fisching/Dörner/Hausmann* I–X (Looseleaf; 1955 et seq.).

[1] Art. 1(2) No. 1 of the Brussels Convention on jurisdiction and enforcement of judgments in civil and commercial matters of 27. 9. 1968, O.J. 1998 C 27/1.

[2] Art. 1(2)(b) of the Rome Convention on the law applicable to contractual obligations of 19. 6. 1980, O.J. 1998 C 27/34; Art. 1(2)(a) of Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of 22. 12. 2000, O.J. 2001 L 12/1; Art. 2(2)(a) of Regulation (EC) No. 805/2004 of the European Parliament and of the Council of 21. 4. 2004 creating a European Enforcement Order for uncontested claims, O.J. 2004 L 143/15; Art. 2(2)(a) of Regulation (EC) No. 1896/2006 of the European Parliament and of the Council of 12. 12. 2006 creating a European order for payment procedure, O.J. 2006 L 399/1; Art. 2(2)(b) of Regulation (EC) No. 861/2007 of the European Parliament and of the Council of 11. 7. 2007 establishing a European Small Claims Procedure, O.J. 2007 L 199/1; Art. 1(2)(b) of Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11. 7. 2007 on the law applicable to non-contractual obligations (Rome II), O.J. 2007 L 199/40; Art. 1(2)(c) of Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17. 6. 2008 on the law applicable to contractual obligations (Rome I), O.J. 2008 L 177/6. "[T]rusts or succession" are excluded by Art. 1(3)(f) of Council Regulation (EC) No. 2201/2003 of 27. 11. 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, O.J. 2003 L 338/1. "Succession" or "wills" are, however, *not* excluded by Council Regulation (EC) No. 1346/2000 of 29. 5. 2000 on insolvency proceedings, O.J. 2000 L 160/1; Council Regulation (EC) No. 1206/2001 of 28. 5. 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, O.J. 2001 L 174/1; Council Directive 2003/8/EC of 27. 1. 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, O.J. 2003 L 26/41, O.J. 2003 L 32/15; Regulation (EC) No. 1393/2007 of the European Parliament and of the Council of 13. 11. 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), O.J. 2007 L 324/79; Council Regulation No. 4/2009 of 18. 12. 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, O.J. 2009 L 7/1.

[3] Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice of 3. 12. 1998, Text adopted by the Justice and Home Affairs Council, O.J. 1999 C 19/1, para. 41 (cited: Action Plan). This plan was endorsed in later political memoranda, see: Draft programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters, O.J. 2001 C 12/1, p. 3 and 8; Communication from the Commission to the Council and the European Parliament – Area of Freedom, Security and Justice: Assessment of the Tampere programme and future orientations, COM(2004) 401 final of 2. 6. 2004, p. 11; Hague Programme of the Council on strengthening freedom, security and justice in the European Union, O.J. 2005 C 53/1, p. 13 (cited: Hague Programme); Council and Commission

comprehensive comparative study prepared on behalf of the Commission by the German Notary Institute in collaboration with Heinrich Dörner and Paul Lagarde (DNotI Study)[4], the Commission in 2005 published a Green Paper on succession and wills (Green Paper) identifying "a clear need for the adoption of harmonised European rules"[5] – a view which is shared in the positive reactions of the European Economic and Social Committee[6] and the European Parliament[7] as well as in most of the numerous replies to the Green Paper.

The Commission's Green Paper reveals ambitious legislative plans. The issues raised go far beyond the *classic* areas of private international law: choice of law (Questions 1 to 13 of the Green Paper), jurisdiction (Questions 14 to 24 of the Green Paper), and recognition and enforcement of judgments (Questions 25 and 26 of the Green Paper). The Commission is also concerned with the improvement of *cross-border administration* and *winding up* of estates. It raises the question whether there is a need for rules on recognition and enforcement of succession-related deeds and wills as well as the recognition of personal representatives and of trusts created in wills (Question 27 to 32 of the Green Paper). Furthermore, the Commission brings forward the idea of a European certificate of inheritance facilitating the evidence of status as an heir with uniform effects in all Member States (Questions 33 to 35 of the Green Paper). Also the Commission considers a European scheme for the registration of wills (Questions 36 and 37 of the Green Paper) and abolishing legalisation requirements for succession-related public documents (Question 38 of the Green Paper).

Although a formal proposal of the Commission for a comprehensive Regulation covering most of the issues raised in the Green Paper was announced for the beginning of April 2009[8], the publication of the proposal was still awaited when this manuscript was closed. It has been rumoured that due to political considerations the Commission has postponed the publication of the proposal. First indications for the shape of the planned Regulation can, however, be inferred from an informal Discussion Paper on successions upon death (Discussion Paper) which was circulated in 2008 and which contains already quite elaborate provisions.

Action Plan implementing the Hague Programme on strengthening freedom, security and justice in the European Union, O.J. 2005 C 198/1, p. 20.

[4] An English summary of the proposals can be found in: Successions 20–22. Further detailed comparative studies can be found e.g. in *Boulanger,* Droit international des successions (2004); *Li*, Some Recent Developments in the Conflict of Laws of Succession: Rec. des Cours 224 (1990-V) 9–121.

[5] Green Paper 3.

[6] EESC Opinion para. 2.5.

[7] Parliament Report 3.

[8] Press Release AGENDA/09/12 of 27. 3. 2009, p. 14.

Despite the broad scope of the legislative project, this article is restricted to the choice-of-law issues which will be, as highlighted by the Green Paper, "the core aspect of any legislative initiative"[9]. The article does also not elaborate on problems of legislative competence but rather assumes that Art. 61(c) and Art. 65 of the EC Treaty provide a sufficient basis for a European Regulation on cross-border successions[10], all the more so as the new Treaty on the Functioning of the European Union[11] will probably lower competence hurdles in that field[12], especially if one does not characterise succession law as family law[13]. Furthermore, it shall be supposed that with regard to choice of law the instrument will apply universally to both intra-Community and third state cases[14]. After a short glimpse at the need for harmonisation (infra II.) the article will at first focus on a future general conflict rule for successions (infra III., IV. and V.) before a closer look is taken at some issues which might deserve special conflict rules (infra VI.). Finally, the interaction of future choice-of-law rules for successions with neighbouring conflict rules will be outlined (infra VII.).

II. Why Europeanisation at all?

The idea of harmonising the conflict rules for succession and wills in Europe is by far not new. In 1966 Konrad Zweigert had already noted in the Festschrift for Walter Hallstein that divergent conflict rules for successions within the Community would have, in the long term, disintegrative effects[15].

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[9] Green Paper 3.

[10] Parliament Report 4 and 10. For further details see *Haas* 46 et seq.; *Harris* 183 et seq.; *Heggen*, Europäische Vereinheitlichungstendenzen im Bereich des Erb- und Testamentsrechtes: Rheinische Notar-Zeitschrift (RNotZ) 2007, 1–15 (7 et seq.); *Herweg* 182 et seq.; *Lehmann*, Reform 10 et seq.; *Mansel* 191 et seq.; *Navrátilová*, Familienrechtliche Aspekte im europäischen Erbkollisionsrecht: GPR 2008, 144–155; *Pintens*, Die Europäisierung des Erbrechts: ZEuP 2001, 628–648 (646 et seq.); *Siems*, Führen alle Wege aus dem Dschungel nach Rom?: GPR 2004, 66 (68 et seq.); *Stumpf*, EG-Rechtssetzungskompetenzen im Erbrecht: EuropaR 2007, 291–316 (294 et seq.); *id.* 223 et seq.

[11] Cf. Art. 81(2) of the Treaty.

[12] Cf. Opinion of Attorney General (AG) Sharpston delivered on 24. 4. 2008 – Case C-353/06 *(Grunkin-Paul)* para. 5 in n. 2 (not yet in E. C. R.).

[13] Cf. Art. 81(3) of the Treaty.

[14] Green Paper 4; Parliament Report 6 (Recommendation 6, 2nd indent); Dutch Reply 3. See also Art. 2 of Regulation No. 593/2008 and of Regulation No. 864/2007 (both supra n. 2) and (for the European jurisdiction rules) ECJ 1. 3. 2005 – Case C-281/02 *(Owusu)*, E. C. R. 2005, I-1383, para. 34 and ECJ 7. 2. 2006 – Opinion 1/2003 (*Lugano*), E. C. R. 2006, I-1145, para. 134. More restrictive: UK Reply 6.

[15] *Zweigert*, Einige Auswirkungen des Gemeinsamen Marktes auf das Internationale Privatrecht der Mitgliedstaaten, in: Probleme des europäischen Rechts, FS Walter Hallstein (1966) 555–569 (558) (as to the "Personalstatut" in general, including the law applicable to succession and wills).

However, apart from bilateral and regional instruments[16], attempts to harmonise the conflict of laws for succession and wills were not very successful. Despite constant activities of the Hague Conference on Private International Law, choice of law for successions is still widely dominated by national law. The comprehensive 1989 Hague Convention on the law applicable to succession to the estates of deceased persons[17] has – probably due to its complexity[18] – not attracted much acceptance from the international community; only the Netherlands have adopted the Convention unilaterally. It is only in the area of formal validity that the 1961 Hague Convention on the form of testamentary dispositions[19], which is in force for the majority of the Member States[20], provides uniform conflict rules. The 1985 Hague Convention on the law applicable to trusts and on their recognition[21] covering also testamentary trusts[22] has some relevance for choice of law in successions in some Member States[23]. The same applies for a few Member States[24] regarding the 1978 Hague Convention on the law applicable to matrimonial property regimes[25], although that Convention is not applicable to succession rights of surviving spouses[26].

Yet the significance of choice of law in the area of succession and wills cannot be overestimated. Conflict rules in that area are not only crucial from a *quantitative* perspective. It is a commonplace that apart from globalisation also the European integration has increased the number of cross-border successions in Europe[27]. The particular relevance of choice of law in successions has also *qualitative* reasons: The substantive succession laws of the Member States differ considerably. Direct harmonisation of substantive law is almost completely missing, apart from the UNIDROIT Convention providing a uniform law on the form of an international will[28] which offers an additional form of will recognised in some Member States[29]. Moreover, there has been only minimal indirect harmonisation so far. Although the European Court of Human Rights (ECHR) has recognised an impact of the

[16] See e.g. for Denmark, Finland, Iceland, Norway and Sweden the Nordic Convention on inheritance, testamentary dispositions and the administration of estates of 19. 11. 1934.

[17] Of 1. 8. 1989, 28 Int. Leg. Mat. 150.

[18] *Lagarde* 14.

[19] Of 5. 10. 1961, 510 UNTS 175.

[20] Except Bulgaria, Cyprus, the Czech Republic, Hungary, Italy, Latvia, Lithuania, Malta, Portugal, Romania, Slovakia.

[21] Of 1. 7. 1985, 23 Int. Leg. Mat. 1389.

[22] See Art. 2(1) of the Convention.

[23] Italy, Luxembourg, Malta, the Netherlands and the United Kingdom.

[24] France, Luxembourg and the Netherlands.

[25] Of 14. 3. 1978, 16 Int. Leg. Mat. 14.

[26] Art. 1(2) No. 2 of the Convention.

[27] Green Paper 3.

[28] Of 26. 10. 1973, 12 Int. Leg. Mat. 1298.

[29] Belgium, Cyprus, France, Italy, Portugal and Slovenia.

European Human Rights Convention[30] on substantive succession law[31], especially with regard to a discrimination against children born out of wedlock[32], the Court has apart from abolishing those discriminatory rules not triggered any wider convergence of the substantive succession laws. Occasional approximations of the Member States' laws appear rather to be spontaneous[33].

Against this background, the Community's plans are readily comprehensible and one can thus only hope that the Commission will resume its work on the project soon. An international harmony of decision in Europe – one of the main objectives of European private international law[34] – is, due to the differences of the Member States' conflict rules, currently far-off[35]. This lack of harmony affects especially the interests of persons planning their estates in respect of *predictability* and *legal certainty*, which are generally recognised as key concerns of European private international law[36]: As courts in different Member States will apply different laws to the same case of succession, at present, estates have potentially to be planned in accordance with a number of substantive laws, a task which might turn out to be impossible if the substantive laws are irreconcilable. In some cases, it will even not be possible to anticipate which courts will be involved in the succession and, hence, which law will apply. Apart from this absence of predictability and legal certainty, a European harmonisation of the conflict rules for succession and wills would be an indispensable step for *further integration* in the area of cross-border successions[37]. Notably a recognition and enforcement of judgments

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[30] European Convention for the Protection of Human Rights and Fundamental Freedoms 4. 11. 1950, 213 UNTS 222.

[31] See *Pintens*, Das Erbrecht in der Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte, in: Internationale Gemeinschaft und Menschenrechte, FS Georg Ress (2005) 1047–1059.

[32] ECHR 13. 6. 1979 – *Marckx*, Ser. A No. 31; 18. 12. 1986 – *Johnston*, Ser. A No. 112; 29. 10. 1987 – *Inze*, Ser. A No. 126; 29. 11. 1991 – *Vermeire*, Ser. A No. 214-C; 1. 2. 2000 – *Mazurek*, ECHR 2000-II, 23; 3. 10. 2000 – *Camp and Bourimi*, ECHR 2000-X, 119. See, however, as to the interpretation of wills ECHR 13. 7. 2004 – *Puncernau*, ECHR 2004-VIII, 215, or as to the ability to inherit land situated abroad ECHR 27. 3. 2007 – *Apostolidi*, No. 45628/99.

[33] See *Pintens* (supra n. 10) 648; *Terner*, Perspectives of a European Law of Succession: Maastricht Journal of European and Comparative Law 14 (2007) 147–178 (151 et seq.); *Verbeke/Leleu*, Harmonisation of the Law of Succession in Europe, in: Towards a European Civil Code[3], ed. by *Hartkamp et al.* (2004) 335–350 (347 et seq.).

[34] Recital 6 of Regulation No. 593/2008 and of Regulation No. 864/2007 (both supra n. 2).

[35] See e.g. *Herweg* 69 et seq., 84, 97, 105 et seq., 106 et seq.

[36] See e.g. Recital 11 of Regulation No. 44/2001; Recital 6 of Regulation No. 593/2008 and of Regulation No. 864/2007 (all supra n. 2); Proposal for a Council Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, COM(2005) 649 final of 15. 12. 2005, p. 5.

[37] See Green Paper 3.

throughout the Community will only be justified if there is at least some international harmony of decisions[38]. Also instruments such as the planned European certificate of inheritance presuppose uniform conflict rules for successions within Europe[39]; otherwise a person who is not regarded as an heir in all Member States could be accredited by that certificate European-wide.

However, it cannot be denied that the European legislator is facing some reluctance especially from Member States with common-law background[40]. Yet it appears that some of the critical comments are less based on particular choice-of-law arguments but pursue a rather unilateralist view: The Europeanisation of the conflict rules for succession and wills is judged – and criticised – mainly against the background of the own substantive law and its protection instead of analysing the choice-of-law interests of the persons involved. Such a narrow view, though, does not only devaluate private international law by reducing its role to a mere auxiliary function. It can also not guide a European legislator who has to devise multilateral conflict rules.

III. Monist or Dualist Approach?

When drafting conflict rules for succession and wills a legislator must first decide whether, from a choice-of-law perspective, movables and immovables belonging to the estate shall be treated differently[41]. Some Member States[42] and the Hague Succession Convention in its Art. 7(1) follow a monist approach by employing a single connecting factor – be it nationality, last habitual residence or domicile of the deceased – for the succession in the

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[38] The lack of harmonised conflict rules was the reason for the exclusion of succession and wills from the 1968 Brussels Convention (supra n. 1): *Jenard*, Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters: O.J. 1979 C 59/1, p. 10 et seq.

[39] *Haas* 93 et seq.

[40] See e.g. Irish Reply 2; UK Reply 5 et seq.; *Harris* 187 et seq.; *id.*, Understanding the English Response to the Europeanisation of Private International Law: J. Priv. Int. L. 4 (2008) 347–395 (364 et seq.). See also *Stumpf* 225 et seq.

[41] Green Paper 5 (Question 2).

[42] See Sec. 28(1) of the *Austrian* Private International Law Act as interpreted by OGH 19. 11. 1986, IPRax 1988, 246; Sec. 17 of the Czechoslovakian Private International Law Act (*Czech Republic* and *Slovakia*); Sec. 24 of the *Estonian* Private International Law Act; Book 26 Sec. 5 of the *Finnish* Succession Act; Art. 25(1) of the *German* Introductory Act to the Civil Code; Art. 28 of the *Greek* Civil Code; Sec. 36(1) sentence 1 of the *Hungarian* Legislative Decree on Private International Law; Art. 46(1) of the *Italian* Private International Law Act; Art. 34 of the *Polish* Private International Law Act; Art. 62 of the *Portuguese* Civil Code; Art. 32(1) of the *Slovenian* Private International Law Act; Art. 9(8) sentence 1 of the Introductory Title to the *Spanish* Civil Code; Sec. 1 of chapter 1 of the *Swedish* International Successions Act.

whole of the estate wherever it is situated. Other European countries[43] adhere to a dualist conflict rule and differentiate between movables and immovables: The succession in movables is governed by a law which is connected to the deceased, whereas the succession in immovables is subject to the *lex rei sitae*. Hence, for purposes of choice of law the monists regard the estate as a unity, whereas the dualists split the estate in movables and immovables which are regarded as independent estates potentially governed by different laws.

In principle, the European conflict rule for succession and wills should adhere to a monist approach and should perceive the estate as a unity[44], as also Art. 3.6(1) of the Discussion Paper suggests. First of all, the scission of the estate by the dualists – and the potential application of different laws to a single case of succession – increases the *legal costs*, especially of estate planning and the administration of the estate: Under a dualist system, the future deceased has to adjust his arrangements potentially to several legal systems, succession-related legal acts have to be done for each separate part of the estate, and the estate has to be administered under different systems. Furthermore, the *characterisation* of certain property as being movable or immovable, which would be necessary under a dualist system, can be difficult and the lex fori and the lex rei sitae can provide different answers. Additionally, European private international law follows a monist approach in *other areas of law* as well, for example, with regard to cross-border insolvencies: Here the law of the state where the insolvency proceedings are opened applies, at least in principle, to all assets of the debtor wherever they are situated[45].

Most notably, however, the dualist approach entails serious practical problems of *coordinating* the different applicable laws: Nowadays most substantive succession laws will regard the estate as a unity, even if it consists of mova-

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[43] See Art. 78 Sec. 1 and Sec. 2(1) of the *Belgian* Private International Law Act; Art. 89(1) and (2) of the *Bulgarian* Private International Law Code; Art. 1.62(1) of the *Lithuanian* Civil Code; Art. 66 of the *Romanian* Private International Law Act. See for *France*: Art. 3(2) of the Civil Code and Cass. civ. 19. 6. 1939, Rev. crit. d. i. p. 34 (1939) 480; 14. 3. 1961, Rev. crit. d.i.p. 50 (1961) 774. See for *Luxembourg*: Art. 3(2) of the Civil Code and Trib. Lux. 11. 6. 1913, Pas. 9, p. 478. See for *English* law: Rules 141 and 146 of *Dicey/Morris/Collins*.

[44] DNotI Study 260; EESC Opinion para. 2.12; Parliament Report 6 (Recommendation 6, 1st indent) and 11; Dutch Reply 3; Finnish Reply 2; GEDIP Reply 2; German Government Reply 2; Polish Reply 1; Ulrik Huber Institute Reply 3; *Bauer* 203; *Dörner* 477; *Dörner/Hertel/Lagarde/Riering* 4; *Haas* 100; *Harris* 207 et seq.; *Hayton* 361; *Herweg* 79; *Jud* 134; *Lagarde* 15; *Lehmann*, Reform 97 et seq.; *id.*, Reaktionen 205 et seq.; *Leipold* 665; *Mansel* 205 et seq.; *Pajor* 372 et seq.; *Stumpf* 248. For a dualist approach: Czech Reply 3; French Reply 2; Luxembourgian Reply 1; Slovak Reply 2; Annex B to UK Reply 6.

[45] See Arts. 4(1), 3(1) of Regulation No. 1346/2000 (supra n. 2). See, however, also Arts. 5 et seq. which safeguard, notably toward third persons, the application of the lex rei sitae or the lex causae for the consequences of the insolvency proceedings on issues related to property and contractual obligations.

bles and immovables[46]; special regimes for the succession in immovables have been abandoned in most legal systems[47]. Hence, the substantive laws involved will assume their applicability to the whole of the estate. That assumption can cause problems especially with regard to the distribution of the estate and forced heirship if more than one law applies to the same estate. The standard textbook example to illustrate the practical deficiencies of the dualist approach concerns a testator who owns two immovables with the same value each of them situated in different countries, for instance, a villa in Paris and a penthouse in London. If the testator bequeaths the French villa to his daughter and the English penthouse to his son, under a dualist system the son could claim according to French law forced heirship due to his having not been considered in the French estate[48], whereas the daughter could only under certain circumstances ask in England for financial provisions from her father's English estate[49]. A different standard of protection of family members in a single succession case is already, in itself, hardly justifiable. However, even more surprising is the fact that the protection of family members is at issue at all: if applied to the whole of the estate, each of the applicable laws would result in the son and the daughter participating equally in the estate and, hence, a protection would not be in question. The applicable substantive laws might provide solutions to such cases[50]; but a future conflict rule should avoid such difficulties of a "combined effect" of more than one law being applied – problems which were already noticed by Joseph Story in his Commentaries[51] and which have triggered open criticism by courts and commentators in dualist countries[52].

Additionally, there is *no need* for a dualist approach. Undoubtedly, with regard to immovables the dualist system has the advantage of synchronising the applicable succession and property laws. However, frictions between the applicable succession law and the lex rei sitae can easily be avoided without a dualist system by clearly *delineating* the scope of the relevant conflict rules[53].

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[46] See e.g. Art. 724(1) of the *French* Civil Code; Sec. 1922(1) of the *German* Civil Code.

[47] In *England*, for example, since the Administration of Estates Act 1925.

[48] See Arts. 912 et seq. of the *French* Civil Code.

[49] See *UK* Inheritance (Provision for Family and Dependants) Act.

[50] Cf., however, BGH 21. 4. 1993, NJW 1993, 1920.

[51] *Story*, Commentaries on the Conflict of Laws (1834) 406.

[52] See e.g. for the common law: *In Re Collens*, [1986] Ch. 505 (512 et seq.): "I reach the conclusion with some regret. I think there is much force in the trenchant criticism […] as to the illogicality of requiring English immovable assets to be regulated for the purpose of succession by the lex situs rather than by the law of the domicile"; *Hancock*, Equitable Conversion and the Land Taboo in Conflict of Laws: Stanford L. Rev. 17 (1965) 1095–1127 (1115 et seq.); *Weintraub*, An Inquiry into the Utility of "Situs" as a Concept in Conflicts Analysis: Cornell L. Q. 52 (1966) 1–42 (42); *Morris*, Intestate Succession to Land in the Conflict of Laws: L. Q. Rev. 85 (1969) 339–371 (368 et seq.); *Dicey/Morris/Collins* para. 27–016; *Cheshire/North/Fawcett*, Private International Law[14] (2008) 1278.

[53] See Parliament Report 8 (Recommendation 8, 1st indent), 11 and 12.

The applicable succession law should deal with the question of entitlement to the estate; the question whether and how the form of entitlement envisaged by the applicable succession law can be implemented has to be answered by the lex rei sitae as the applicable property law[54]. Furthermore, if the lex rei sitae requires with regard to succession in immovables special formalities or procedures, frictions can be prevented by introducing a special conflict rule for the administration of the estate[55].

However, it should not be overlooked that even a strict monist approach cannot avoid a scission of the estate in every case. First of all, *overriding mandatory provisions* of the situs state regarding the succession in certain property can lead to a scission. In parts of Germany, for example, special legislation, the Höfeordnung, envisages a special regime for the succession in agriculturally used farmland. Such regimes, which can be found in other countries as well, shall ensure that certain objects remain operational under single ownership and are not split up by succession. If the situs state prescribes out of political, social or economic considerations a mandatory succession regime for such property irrespective of the law generally applicable to succession – which is the case for the German Höfeordnung[56] –, the lex rei sitae should be applied for the succession in that property[57]. The application of such special succession regimes is not only explicitly recognised by some Member State laws[58] and Art. 15 of the Hague Succession Convention; the respect of overriding mandatory provisions is also a general principle of private international law and can be found in other Community instruments as well[59]. The recognition of those special regimes could be formulated in accordance with Art. 15 of the Hague Succession Convention, as suggested by Art. 3.5 of the Discussion Paper. Yet for sake of consistency with other Community instruments in the area of private international law, one should adopt the concept of Art. 9(1) of the Rome I Regulation, which is based on the definition of the European Court of Justice (ECJ) for mandatory provisions

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[54] See e.g. for *Germany* BGH 28. 9. 1994, NJW 1995, 58 (59). Cf. also Sec. 32 of the *Austrian* Private International Law Act, which stipulates that the implementation of succession in immovables is governed by the lex rei sitae irrespectively of the applicable succession law. See for the Insolvency Regulation No. 1346/2000 (supra n. 2) the exceptions to the monist approach supra in n. 45.

[55] See infra VI.7.

[56] BGH 14. 7. 1965, MDR 1965, 818; 5. 4. 1968, BGHZ 50, 63.

[57] Parliament Report 8 (Recommendation 8, 2nd indent); Finnish Reply 2; Swedish Reply 3; Ulrik Huber Institute Reply 3; *Dörner/Hertel/Lagarde/Riering* 4 et seq.; *Haas* 102; *Hayton* 361 et seq.

[58] Sec. 19 of the *Estonian* Private International Law Act; Book 26 Sec. 8(1) of the *Finnish* Succession Act; Art. 3(3) of the *German* Introductory Act to the Civil Code; Sec. 2 of chapter 1 of the *Swedish* International Successions Act.

[59] Art. 16 of Regulation No. 864/2007; Art. 9 of Regulation No. 593/2008 (both supra n. 2).

in *Arblade*[60]. Furthermore, the structure of Art. 9 of the Rome I Regulation should be borrowed rather than that of Art. 15 of the Hague Succession Convention because, as will be seen below[61], not only overriding mandatory provisions of the lex rei sitae can have an impact in successions. Hence, Art. 3.5 of the Discussion Paper should rather read:

Art. 3.5 – Overriding mandatory provisions
(1) Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable by virtue of this Regulation.
(2) Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum.
(3) The law applicable by virtue of this Regulation does not affect the application of any overriding mandatory provisions
(a) of a country where certain immovables, enterprises or other special categories of assets of the estate are situated, which institute a special succession regime in respect of such assets, or
(b) of a country to which the deceased was closely connected, which render a testamentary disposition unlawful.

However, not only overriding mandatory provisions can split up the estate. Further scissions of the estate can arise especially[62] with regard to *third states*. Notably, a *partial* renvoi by the law of a dualist third state can cause a scission if, for example, the European monist conflict rule points to the law of a third state whose dualist conflict rule refers to the lex rei sitae for the succession in immovables. It is a *general* question of European private international law whether a renvoi by third states should be accepted[63]. So far, the tendency in the European instruments and legislative discussions has been a reluctancy towards the doctrine of renvoi[64]. But even if the future European instrument shall accept a renvoi by third states[65] – as e.g. Art. 4 of the Hague

[60] ECJ 23. 11. 1999 – joined Cases C-369/96 and C-376/96 *(Arblade)*, E.C.R. 1999, I-8453, para. 30.

[61] See infra VI.3.

[62] A scission can also be caused by a partial choice of law and the succession of the state in heirless estates; both cases will be addressed infra in V. and in VI.5.

[63] Green Paper 7 (Question 12).

[64] See Art. 20 of Regulation No. 593/2008; Art. 24 of Regulation No. 864/2007 (both supra n. 2); Art. 20d of the Proposal for a Council Regulation amending Regulation (EC) No. 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters, COM(2006) 399 final of 17. 7. 2006.

[65] Parliament Report 6 (Recommendation 6, 3rd indent); Dutch Reply 6; Finnish Reply 5; GEDIP Reply 6; German Government Reply 6; German Federal Council Reply 6; Lithuanian Reply 5; Luxembourgian Reply 5; Polish Reply 6; Slovak Reply 4; Annex B to UK Reply 17. Against an acceptance of renvoi: Estonian Reply 4; Swedish Reply 5; Ulrik Huber Institute Reply 9.

Succession Convention and Art. 3.7(2) of the Discussion Paper do to a certain extent[66] – an indirect exception to the monist principle through a *partial* renvoi should be avoided. If at all, only a *total* renvoi by a third state should be allowed[67]. The acceptance of renvoi is aimed at promoting international harmony of decisions at the cost of giving up one's own choice-of-law rule. That price might be reasonable if the connecting factors used by the referring and by the remitting conflict rule differ, especially if there are good reasons for either connecting factor. Yet a European monist position, once taken, would be one of the fundamental principles going beyond the question which connecting factor should be preferred in the conflict laws of successions. The monist principle should not be easily abandoned by a partial renvoi.

Furthermore, a scission of the estate can be caused by a *factual enforcement* of a third state lex rei sitae. If the situs state follows a dualist approach and is able to enforce the lex rei sitae with regard to the succession in immovables situated in its territory, this "harsh jurisdictional reality"[68] cannot be ignored. However, there is no need for a special conflict rule which, for example, stipulates that the lex rei sitae applies if the situs state follows a dualist approach – a rule which can be found in some Member States[69]. European private international law should not waive its monist decision by anticipatory obedience to a third state's lex rei sitae[70]. Only if the lex rei sitae has been *actually* enforced in the third situs state, for example, because the heirs needed the assistance of the courts of the situs state for the devolution of the estate, the lex rei sitae should be considered. Such an actual enforcement of the lex rei sitae against the intention of the European monist conflict rules, however, would happen irrespective of the European rules and, thence, would need no special conflict rule[71]. Rather the factual enforcement of the lex rei sitae should be accommodated by the applicable substantive succession law.

But *how* should the generally applicable substantive law cope with cases where parts of the estate are either legally (overriding mandatory provisions) or factually (enforcement of the lex rei sitae by a third state) governed by a different law? Some legal systems, obviously those which adhere to the dualist approach, have special rules to coordinate the application of different laws

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[66] See also Art. 17 of the Convention.

[67] *Lehmann*, Reform 110. See, however, GEDIP Reply 6; *Bauer* 203; *Mansel* 215.

[68] *Hayton*, The Problems of Diversity, in: European Succession Laws[2], ed. by *id.* (2002) 1–21 (9).

[69] See Art. 3(3) of the *German* Introductory Act to the Civil Code and its interpretation by the German courts, for example, in BGH 7. 7. 2004, NJW 2004, 3558 (3560). Cf. also Art. 2(1) of the *Dutch* International Successions Act; Sec. 19 of the *Estonian* Private International Law Act; Sec. 2 of chapter 1 of the *Swedish* International Successions Act.

[70] Cf. DNotI Study 262 et seq. and 270 et seq.; *Bajons*, Interdependenz 476; *Haas* 102.

[71] See DNotI Study 270 et seq.

to parts of the estate, especially when it comes to the distribution of the estate and the laws involved provide for different shares of the heirs. For example, the *French* statutory droit de prélèvement compensates French heirs who have been, at least from a French perspective, discriminated by a foreign lex rei sitae[72]; those heirs are reimbursed by the property situated in France. Comparable provisions which compensate for a different distribution by a foreign lex rei sitae can be found in the *English* common law[73] and the *Netherlands*[74]. *Swedish* law at least stipulates that payments carried out abroad have to be recognised in domestic procedures[75]. Those substantive or procedural rules which try to balance the scission of the estate could still apply[76]. But even if the generally applicable law does not contain any explicit rules for international cases, there might be provisions for internal cases in which the estate is subject to special succession regimes and the question arises how the special succession in certain property impacts on the general succession. For example, in *Germany* one could revert to the rule that heirs who have not been considered according to the special succession regime for certain shares in private companies are to be compensated by the heirs who receive those shares[77].

IV. Nationality or Residence Principle?

The next decision the European legislator has to take lies at the heart of every choice-of-law rule: the appropriate connecting factor. Which law shall govern successions? Almost all monist systems – and, as far as movables are concerned, the dualist systems as well – refer to a personal criterion of the *deceased*: the law of his nationality, his last habitual residence or his domicile applies. The only exception appears to be *Latvia* which for successions in general points to the lex rei sitae of the property to be inherited[78].

The deceased-centred approach has on the one hand *technical reasons*: the deceased is the only fixed point of departure for a choice-of-law rule in successions; the potential heirs have to be determined by a substantive law first, and the use of the situs of the estate as a connecting factor is not reconcilable with the monist approach just acclaimed. In particular, however, determining the applicable law with reference to a personal criterion of the deceased

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[72] See Art. 2 of the *French* Act of 14. 7. 1819. See also the former Art. 912 of the *Belgian* Civil Code.

[73] See Rule 149 of *Dicey/Morris/Collins*.

[74] See Art. 2(2) of the *Dutch* International Successions Act.

[75] See Sec. 9 of chapter 2 of the *Swedish* International Successions Act.

[76] See Ulrik Huber Institute Reply 4 et seq. See also French Reply 7.

[77] Cf. BGH 10. 2. 1977, BGHZ 68, 225 (238 f.).

[78] See the unilateral conflict rule in Art. 16 of the *Latvian* Civil Code.

complies with his *lifetime interests*. Succession law is traditionally conceived to be more deeply rooted in the legal culture of a country than other areas of law. Even if one does not go as far as Erik Jayme who held in his 2002 Rabel Lecture that nothing reflects the cultural identity of a legal system more clearly than the legal definition of the relation between the individual and the death[79], interrelation between the culture of a country and its succession law cannot be denied. From a sociological perspective, Jens Beckert has shown that the existing differences of the succession laws are to some extent caused by different culturally formed perceptions of the political actors[80]. Hence, a succession law to which the deceased is closely connected will probably be influenced, to a greater or lesser extent, by cultural and social values the deceased might have shared and, thus, will probably reflect his personal beliefs of a fair and just succession. But even more important is the fact that the application of a closely connected law will match with the expectations of the deceased[81]: Even if that law does not comply with the deceased's cultural and social values, the future deceased will, during his lifetime, normally *assume* the applicability of a succession law to whose country he is most closely linked; he will, thus, intentionally or unintentionally gear his behaviour to that law or the perceptions he might have from that law[82]. With regard to succession meeting the expectations as to the governing law is particularly important in order to ensure that the freedom to testate is exercised rightfully, a freedom, which is constitutionally guaranteed on the Community level by the European Charter of Fundamental Rights[83].

Although the central role of the deceased in the choice-of-law process is recognised throughout Europe, there is disagreement on how the law most closely connected to the deceased has to be determined. Again two antagonist approaches face each other: the *nationality* principle and the *residence* principle. Some Member States[84] apply to successions the law of the home

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[79] *Jayme*, Die kulturelle Dimension des Rechts, ihre Bedeutung für das Internationale Privatrecht und die Rechtsvergleichung: RabelsZ 67 (2003) 211–230 (215): "Nichts spiegelt die kulturelle Identität eines Systems so deutlich, wie die rechtliche Ausgestaltung des Verhältnisses des einzelnen zum Tod."

[80] *Beckert*, Unverdientes Vermögen (2004) 323 et seq. = *id.*, Inherited Wealth (2008) 280 et seq.

[81] See Green Paper 4.

[82] See e.g. *G. Fischer*, Gemeinschaftsrecht und kollisionsrechtliches Staatsangehörigkeitsprinzip, in: Europäisches Gemeinschaftsrecht und Internationales Privatrecht, ed. by *von Bar* (1991) 157–182 (164).

[83] Art. 17(1) sentence 1 of the Charter of Fundamental Rights of the European Union of 12. 12. 2007, O.J. 2007 C 303/1: "Everyone has the right to […] bequeath his or her lawfully acquired possessions."

[84] See Sec. 28(1) in connection with Sec. 9(1) sentence 1 of the *Austrian* Private International Law Act; Sec. 17 of the Czechoslovakian Private International Law Act (*Czech Republic* and *Slovakia*); Art. 25(1) of the *German* Introductory Act to the Civil Code; Art. 28 of the

country of the deceased by using nationality as a *legal* connecting factor. Other Member States[85] refer to the last residence of the deceased by using habitual residence or domicile as mainly *factual* connecting factors, although it should not be overlooked that in detail those factors vary considerably, especially due to the legal artificialities of the common-law domicile concept and its stressing of the place of birth. The Hague Succession Convention – mainly followed by *Finland*[86] and the *Netherlands*[87] – tries to strike a balance between the nationality and the residence principle, eventually by adhering to the nationality principle within the first five years of residence in a foreign country and afterwards swapping to the residence principle – both, however, balanced by escape clauses: According to Art. 3(1) of the Convention, the succession law of the last habitual residence of the deceased applies if habitual residence and nationality coincide. If, however, habitual residence and nationality diverge Art. 3(2) privileges the habitual residence if the deceased was resident in the state of his habitual residence at least five years prior to his death and if he was not manifestly more closely connected with the state of his nationality. Otherwise Art. 3(3) refers to the law of the state of nationality unless the deceased was more closely connected with another state.

The European legislator should follow the residence principle and should – as does Art. 3.1 of the Discussion Paper – refer to the succession law of the country in which the deceased at the time of his death was *habitually resident*[88]. The controversy between the nationality and residence principle is

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Greek Civil Code; Sec. 36(1) sentence 1 of the *Hungarian* Legislative Decree on Private International Law; Art. 46(1) of the *Italian* Private International Law Act; Art. 34 of the *Polish* Private International Law Act; Arts. 62, 31(1) of the *Portuguese* Civil Code; Art. 66(a) of the *Romanian* Private International Law Act; Art. 32(1) of the *Slovenian* Private International Law Act; Art. 9(1) and (8) sentence 1 of the Introductory Title to the *Spanish* Civil Code; Sec. 1(1) of chapter 1 of the *Swedish* International Successions Act.

[85] See Art. 78 Sec. 1 of the *Belgian* Private International Law Act; Art. 89(1) of the *Bulgarian* Private International Law Code; Sec. 24 of the *Estonian* Private International Law Act; Art. 1.62(1) sentence 1 of the *Lithuanian* Civil Code. See for *France*: Cass. civ. 19. 6. 1939 (supra n. 43) 480; 22. 12. 1970, Rev. crit. d.i. p. 61 (1972) 467. See for *Luxembourg*: Trib. Lux. 20. 6. 1931, Pas. 13, p. 466. See for *English* law: Rule 140 of *Dicey/Morris/Collins*.

[86] See Book 26 Sec. 5 of the *Finnish* Succession Act.

[87] See Art. 1 of the *Dutch* International Successions Act.

[88] See DNotI Study 261; Parliament Report 5 (Recommendation 2) and 11; Czech Reply 3; Dutch Reply 3; Estonian Reply 1; French Reply 2; GEDIP Reply 2; German Government Reply 2; Lithuanian Reply 2; Luxembourgian Reply 1; Swedish Reply 2; Ulrik Huber Institute Reply 2 et seq.; *Bauer* 202 et seq.; *Davì* 388; *Dörner* 478; *Dörner/Hertel/Lagarde/Riering* 4; *Haas* 99 et seq.; *Hayton* 363; *Henrich*, Abschied vom Staatsangehörigkeitsprinzip, in: FS Hans Stoll (2001) 437–449 (445); *Hohloch*, Kollisionsrecht in der Staatengemeinschaft: ibid. 533–551 (550); *Lagarde* 15 et seq.; *Lehmann*, Reform 95; *Leipold* 663 et seq.; *Mansel* 208 et seq.; *Stumpf* 248 et seq. For the nationality principle: Polish Reply 1; Slovak Reply 2; *Bajons*, Zuständigkeit 501; *Frantzen*, Europäisches internationales Erbrecht, in: FS Erik Jayme I (2004) 187–196 (189 et seq.); *Rauscher* 730 et seq.

one of the classic disputes of private international law. The pros and cons of both connecting factors have been exhaustively discussed for decades and are documented in virtually every pertinent textbook[89]. This paper is not the place for a comprehensive analysis of which connecting factor should be used to determine a law to which a person is most closely connected. The issue has to be decided *generally* for all future European instruments. However, a tendency in favour of the residence principle has already appeared on the international and European horizon. The use of habitual residence as a connecting factor does more than simply follow an international trend, especially set by the Hague Conventions, where nationality has been more and more frequently ousted by habitual residence[90]. More importantly, with regard to choice of law and jurisdiction, habitual residence has become a prominent connecting factor in European private international law in general. References to the habitual residence can be found in the Brussels I Regulation[91], the Brussels IIbis Regulation[92], the Maintenance Regulation[93], the Rome I Regulation[94] and the Rome II Regulation[95]. Also within the other European projects for choice-of-law instruments habitual residence is favoured as a connecting factor over nationality: The proposed conflict rules for matrimonial matters refer, in the first instance, to the common habitual residence of the spouses[96]. The use of habitual residence is also advocated by the majority of replies to the Green Paper on choice-of-law in matrimonial property[97]. Not accidentally, the Commission characterised

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[89] See e.g. *Cheshire/North/Fawcett* (supra n. 52) 179 et seq.; *Briggs*, The Conflict of Laws (2002) 27 et seq.; *von Bar/Mankowski*, Internationales Privatrecht I[2] (2003) 560 et seq.; *Kegel/Schurig*, Internationales Privatrecht[9] (2004) 443 et seq.; *Dicey/Morris/Collins*, The Conflict of Laws I[14] (2006) paras. 6–123 et seq.; *Kropholler*, Internationales Privatrecht[6] (2006) 272 et seq. and 290 et seq. See also Staff Working Paper 11.

[90] See e.g. Arts. 5(1) and 15(1) of the Hague Convention on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children of 19. 10. 1996, O.J. 2003 L 48/3; Arts. 13(1) and 5(1) of the Hague Convention on the international protection of adults of 13. 1. 2000; Art. 3 of the Hague Protocol on the law applicable to maintenance obligations of 23. 11. 2007.

[91] Art. 5(2), Art. 13(3) and Art. 17(3) of Regulation No. 44/2001 (supra n. 2).

[92] Art. 3(1)(a), Art. 8(1), Art. 9, Art. 10 and Art. 12(3)(a) of Regulation No. 2201/2003 (supra n. 2).

[93] Art. 3(a) and (b) and Art. 4(1)(a) and (c)(ii) of Regulation No. 4/2009 (supra n. 2).

[94] Art. 4(1)(a), (b), (d), (e) and (f), Art. 5(1) and (2), Art. 6(1), Art. 7(2) subpara. 2 and Art. 11(2), (3) and (4) of Regulation No. 593/2008 (supra n. 2).

[95] Art. 4(2), Art. 5(1)(a) and (1) subpara. 2, Art. 10(2), Art. 11(2), Art. 12(2)(b) of Regulation No. 864/2007 (supra n. 2).

[96] See Art. 20b of the Proposal for a Regulation on applicable law in matrimonial matters (supra n. 64).

[97] Green Paper on conflict of laws in matters concerning matrimonial property regimes, including the question of jurisdiction and mutual recognition, COM(2006) 400 final of 17. 7. 2006. A summary of the replies by the Commission can be obtained at <ec.europa.eu/civil justice/news/docs/summary_answers_com_2006_400_en.pdf>.

habitual residence in the Green Paper as currently being the "fashionable"[98] connecting factor. Certainly, the proliferation of habitual residence on the international and European level does not turn this connecting factor into the only admissible factor. Yet the use of habitual residence for successions would within Europe further synchronise jurisdiction and applicable law in areas more or less connected to succession. This internal harmony, though, should not hide the fact that with regard to *third state nationals* residing in the Community an adoption of the residence principle could lead to international disharmony. The largest groups of the approximately 18.5 million third-state nationals in the EU come currently from countries such as Turkey (2.3 million), Morocco (1.7 million), Albania (0.8 million) and Algeria (0.6 million)[99] which all adhere to the nationality principle for successions[100]. Hence, their home state courts will apply a different law to their successions than would a European court. Nonetheless, if the Community adopts the residence principle for all its 27 Member States, pressure would be put on third states to rethink their position[101].

The emerging tendency in favour of habitual residence simplifies the decision on the appropriate connecting factor. Where nationality and residence diverge, the question whether the deceased was more closely connected to his home state or to his last residence state is not easily answered. The Green Paper held that "none of the criteria is without its drawbacks"[102]. Notably a decision cannot be based on the *lifetime interests* of the deceased. The dilemma is mainly rooted in the psyche of the deceased. Whether the deceased, who resides outside his home state, was personally more closely connected to his home state or to his residence state, or even to a third state, depends on his internal orientation and especially on the fact whether his interest in *stability* with his home state or his interest in *integration* in his residence state prevailed[103]. On a *general* level, it is impossible to establish whether stability or integration interests dominated[104]. A general decision would necessitate the collection of empirical data, which is, so far, at least for the whole Community apparently lacking[105]. Nor can a choice-of-law rule for successions distinguish in every *individual* case whether the stability or inte-

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[98] Green Paper 3.

[99] Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions – Third Annual Report on Migration and Integration, COM(2007) 512 final of 11. 9. 2007, p. 3.

[100] See Art. 20(1) sentence 1 of the *Turkish* Private International Law Act; Art. 18 of the *Moroccan* Private International Law Act; Art. 14(1) of the *Albanian* Private International Law Act; Art. 16(1) of the *Algerian* Civil Code.

[101] *Henrich* (supra n. 88) 445.

[102] Green Paper 3.

[103] See *Mansel*, Personalstatut, Staatsangehörigkeit und Effektivität (1988) 73 et seq.

[104] *Haas* 97; *Herweg* 56 et seq.; *Lehmann*, Reform 77 et seq.

[105] See, however, for Germany the statistical data cited in *Basedow/Diehl-Leistner*, Das

gration interests of the deceased prevailed. The individual preference for stability or integration can scarcely be inferred from objective facts. The compromise in Art. 3 of the Hague Succession Convention shows the difficulty in drafting a conflict rule which points to the law of nationality for a deceased who had a prevailing stability interest and, alternatively, to the law of habitual residence for a deceased having a prevailing interest in integration[106]. It remains a mere fiction that having a residence in a state over a certain period of time demonstrates a predominant interest in integration; the deceased could still after five years have had an interest in stability. The same is true for the assumption that within the five-year period the stability with the home state prevails; the deceased could have felt himself integrated immediately after taking up his residence abroad. Furthermore, escape clauses such as those used in the Hague Succession Convention only allow considering the real interests of the deceased to a limited extent. An escape clause requires the court to adjudicate an internal orientation of the deceased at a point in time where the court – due to the death of the deceased – can only base its decision on assumptions or, potentially conflicting, information from close dependants, necessitating already on the choice-of-law level comprehensive inquiries[107]. A clear preference of either interest can exclusively be established by a choice of law made by the future deceased but not by an objective connecting factor[108].

However, the emerging international and European trend in favour of the residence principle corresponds with an *integrative policy* of the European Union striving for an integration of persons residing outside their home states[109]. One example where this policy becomes visible is Art. 12 of the EC Treaty, which prohibits discrimination on the grounds of nationality. Article 12 EC does not prescribe the use of nationality as a connecting factor in private international law, as the ECJ recently confirmed in connection with the conflict rules for the determination of surnames[110]: The nationality prin-

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Staatsangehörigkeitsprinzip im Einwanderungsland, in: Nation und Staat im Internationalen Privatrecht, ed. by *Jayme/Mansel* (1990) 13–43.

[106] Also critically towards Art. 3 of the Convention: DNotI Study 261 et seq.; GEDIP Reply 2; *Bauer* 203; *Dörner/Hertel/Lagarde/Riering* 4; *Hayton* 363 et seq.; *Lagarde* 15; *Martiny*, Objectives and Values of (Private) International Law in Family Law, in: International Family Law for the European Union, ed. by *Meeusen et al.* (2007) 69–99 (89) (cited: International Family Law). For the Hague compromise: Finnish Reply 2; *Basedow/Diehl-Leistner* (previous note) 40 et seq.; *Jud* 139; *Pajor* 373 et seq.

[107] In favour of an escape clause, though, *Dörner* 479; *Dörner/Hertel/Lagarde/Riering* 4; *Süß*, Das Erbrecht der Europäischen Union, in: Erbrecht in Europa[2], ed. by *id.* (2008) 285–302 (298 et seq.).

[108] See infra V.

[109] See DNotI Study 261; *Jud* 135; *Kropholler* (supra n. 89) 270, 277 and 291; *Leipold* 664 et seq.; *Mansel* 209 et seq. Cf. also Parliament Report 4.

[110] ECJ 14. 10. 2008 – Case C-353/06 *(Grunkin-Paul)* paras. 19 et seq. (not yet in E. C. R.).

ciple distinguishes between persons with different nationalities but it does not add further differences to the detriment of an EU citizen. However, the prevention of any differentiation between foreign citizens and nationals of the residence state protects the interests of the citizens to be integrated, wherever in the Community they reside in exercising their freedom of movement and residence granted by Art. 18(1) EC[111]. A similar tendency can be observed in the European common immigration policy within a single area of freedom, security and justice. The Recitals of the European instruments, adopted so far with regard to family reunification and rights of long-term residents, give clear evidence that Community law aims to integrate third-state citizens into the societies where they live[112]. An application of the succession law at the place of the last habitual residence could be regarded as a further step toward the legal integration of persons living outside their home countries, especially if one stresses the cultural conditionality of succession law.

Furthermore, following the residence principle safeguards an *autonomous* decision of the European legislator as to the connecting factor. By contrast, the use of nationality would delegate the definition of a connecting factor used in a European choice-of-law rule to the national legislator[113]: For purposes of the conflict of laws, the law of the state whose nationality is in question determines whether a person is its national[114]. The European legislator

[111] See also Directive 2004/38/EC of the European Parliament and of the Council of 29. 4. 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, O.J. L 158/77, Recital 18: "In order to be a genuine vehicle for integration into the society of the host Member State in which the Union citizen resides, the right of permanent residence, once obtained, should not be subject to any conditions." See also Recitals 23 et seq. and Art. 28.

[112] Council Directive 2003/86/EC on the right to family reunification of 22. 9. 2003, O.J. 2003 L 251/12, Recital 3: "[…] the European Union should ensure fair treatment of third country nationals residing lawfully on the territory of the Member States and […] a more vigorous integration policy should aim at granting them rights and obligations comparable to those of citizens of the European Union" and Recital 4: "Family reunification […] helps to create sociocultural stability facilitating the integration of third country nationals in the Member State, which also serves to promote economic and social cohesion, a fundamental Community objective stated in the Treaty"; Council Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents of 25. 11. 2003, O.J. 2004 L 16/44, Recital 4: "The integration of third-country nationals who are longterm residents in the Member States is a key element in promoting economic and social cohesion, a fundamental objective of the Community stated in the Treaty" and Recital 12: "In order to constitute a genuine instrument for the integration of long-term residents into society in which they live, long-term residents should enjoy equality of treatment with citizens of the Member State in a wide range of economic and social matters, under the relevant conditions defined by this Directive." See also Action Plan para. 8; Hague Programme p. 4 (both supra n. 3).

[113] The significance of the Member State nationality laws for European private international law is also stressed by *Dethloff*, Familien- und Erbrecht zwischen nationaler Rechtskultur, Vergemeinschaftung und Internationalität: ZEuP 2007, 992–1005 (996).

[114] See e.g. *Kegel/Schurig* (supra n. 89) 452.

has no competence to harmonise the nationality laws of the Member States[115]. Nationality as a connecting factor might be less problematic in national conflict rules where the national legislator can, at least for the application of its *own* substantive law, define the connecting factor through its nationality law. The situation is different, though, at the European level where the legislator creates transitive conflict rules which do not at the same time define the international scope of the own substantive law but rather delineate other national substantive laws[116]. The delimitation of those national laws should be autonomously drawn by European law. Otherwise European policy decisions would be subject to national policy. If, for example, the European legislator would come to the conclusion that the deceased's interests in stability with the original home state should be protected rather than integration interests, that political decision could even within Europe only partially be implemented by the nationality principle. Depending on the national policy towards integration, the ease with which foreign residents can acquire the citizenship of their residence Member State varies. Recent figures show that in some Member States the number of citizens which were born abroad is even higher than the number of third-country nationals[117]. For those Member States, a reference to nationality would rather support the integration policy pursued by the national naturalisation laws rather than protect stability interests as envisaged by a conflict rule adhering to the nationality principle.

Moreover, a European conflict rule, in particular, for successions should point to the last habitual residence because the state where the deceased habitually resides at the time of his death possesses in most cases *factual links* to the succession as a whole: Regardless of the prevailing stability or integration interests of the deceased, not only the bulk of his estate will be situated in the residence state but also most of his creditors and his potential heirs will reside there[118]. Those factual links, which do not necessarily exist with the state of nationality, have primarily the positive side effect that, under the residence principle, succession-related legal issues are governed by the *same* law: According to the lex rei sitae principle, the law at the habitual residence of the deceased will also apply to most of the property-law issues concerning the assets situated in the residence state. Additionally, under the residence principle family members with different nationalities but common habitual residence would be subject to the same succession law, which can be espe-

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[115] See Art. 61(a) and (b), Art. 62 and Art. 63 EC, which are restricted to measures in the fields of asylum, immigration and safeguarding the rights of nationals of third countries.

[116] See *Basedow*, Conflict of Laws and the Harmonization of Substantive Private Law in the European Union, in: Liber amicorum Guido Alpa, Private Law Beyond the National Systems, ed. by *Andenas et al.* (2007) 168–185 (172 et seq.).

[117] Third Annual Report on Migration and Integration (supra n. 99) 3.

[118] DNotI Study 261.

cially important for the estate planning of bi-national spouses. Moreover, those close links of the residence state will lead often to a synchronisation of forum and ius[119], saving legal costs, especially if the future Regulation – as envisaged in Art. 2.1 of the Discussion Paper – primarily vests jurisdiction in the courts where the deceased habitually resided at his death.

It might, however, finally be seen as a disadvantage of the residence principle that the nationality of a person is in most cases fairly easy to establish by documents whereas the concept of habitual residence entails *uncertainties* and even opens room for manipulation; in that respect the residence principle neglects to some extent the *predictability* and *legal certainty* with regard to the applicable law which is, as already seen[120], one of the fundamental principles of European private international law. However, it must be noted that due to the proliferation of the residence concept in European law[121], even outside private international law[122], there is some ECJ jurisprudence[123] giving first guidance to the national courts when applying the residence principle autonomously, although it has to be kept in mind that the concept of habitual residence may vary in different European instruments[124]. Furthermore, it would be open to the European legislator to provide, as in other instruments[125] and as envisaged in Art. 1.2(j) of the Discussion Paper, a definition of habitual residence[126]. The need for an autonomous interpretation of any connecting factor[127] finally militates against the use of *domicile* instead

[119] See Parliament Report 5 (Recommendation 2) and 11.

[120] Supra II.

[121] See references supra in notes 91 et seq.

[122] See e.g. Art. 3(a)(aa) of Council Directive 83/182/EEC of 28. 3. 1983 on tax exemptions within the Community for certain means of transport temporarily imported into one Member State from another, O.J. 1983 L 105/59; Art. 1(b) and (h) of Council Regulation (EC) No. 118/97 of 2. 12. 1996 amending and updating Regulation (EEC) No. 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community and Regulation (EEC) No. 574/72 laying down the procedure for implementing Regulation (EEC) No. 1408/71, O.J. 1997 L 28/1.

[123] See e.g. ECJ 12. 7. 1973 – Case 13/73 *(Angenieux)*, E.C.R. 1973, 935, paras. 23 et seq.; 17. 2. 1977 – Case 76/76 *(di Paolo)*, E.C.R. 1977, 315, paras. 9 et seq.; 14. 7. 1988 – Case 284/87 *(Schäflein)*, E.C.R. 1988, 4475, paras. 9 et seq.; 22. 9. 1988 – Case 236/87 *(Bergemann)*, E.C.R. 1988, 5125, paras. 18 et seq.; 13. 11. 1990 – Case C-216/89 *(Reibold)*, E.C.R. 1990, I-4163; 23. 4. 1991 – Case C-297/89 *(Ryborg)*, E.C.R. 1991, I-1943, paras. 11 et seq.; 8. 7. 1992 – Case C-102/91 *(Knoch)*, E.C.R. 1992, I-4341, paras. 20 et seq.; 15. 9. 1994 – Case C-452/89 P. *(Fernández)*, E.C.R. 1994, I-4295, para. 22; 25. 2. 1999 – Case C-90/97 *(Swaddling)*, E.C.R. 1999, I-1075, paras. 28 et seq.; 12. 7. 2001 – Case C-262/99 *(Louloudakis)*, E.C.R. 2001, I-5547 paras. 43 et seq.; 2. 4. 2009 – Case C-523/07 *(A)* paras. 37 et seq. (not yet in E.C.R.).

[124] See ECJ 2. 4. 2009 (previous note) para. 36.

[125] See Art. 7 of Council Directive 83/182/EEC (supra n. 122).

[126] For a statutory definition: Annex B to UK Reply 5; Ulrik Huber Institute Reply 3; *Harris* 210 et seq.; *Hayton* 365; *Mansel* 211.

[127] See, in general, for all European instruments based on Art. 61(c) and 65 EC: ECJ 8. 11.

of habitual residence for implementing the residence principle[128]. It is true that the domicile principle has a long tradition in the common law and fairly clear edges. Yet on the European level, domicile is a blank concept. Although domicile plays a major role within the Brussels I Regulation, it is still not a European term: for the definition of domicile, Art. 59 of the Brussels I Regulation refers to the law of the Member State in respect of which the domicile has to be established.

A general conflict rule for successions taking a monist approach (supra III.) and following the residence principle could be formulated as follows:

> *Art. 3.1 – General rule*
> The law of the state in which the deceased was habitually resident at the time of his death shall govern the succession in the whole of the estate wherever it is situated.

V. Freedom of Choice of Law?

However, the question remains whether the decision for the habitual residence as the objective connecting factor should be balanced by some degree of party autonomy[129]. Most conflict laws in Europe do not grant a freedom to determine the governing succession law; rather, in those countries a choice of law by the testator can only have the effects of a substantive-law reference: the foreign law is incorporated as a testamentary disposition within the limits set by internal mandatory provisions of the governing succession law[130]. An increasing number of Member States, however, allows at least a limited choice of law. *Bulgaria*[131] and *Estonia*[132], both following the residence principle, permit a choice of the law of nationality at the time of the choice as the governing succession law. Under *Italian* law[133], which follows the nationality principle, the deceased can stipulate the application of the law of his habitual residence. However, according to *Estonian*[134] and *Italian*[135] law, the choice of law becomes ineffective if the deceased after the choice changes his nationality or, respectively, his habitual residence referred to in

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2005 – Case C-443/03 *(Leffler)*, E.C.R. 2005, I-9611, para. 45. See also Recital 6 of Regulation No. 593/2008 and Recitals 6 and 13 of Regulation No. 864/2007 (both supra n. 2).

[128] See also DNotI Study 262.

[129] Green Paper 6 (Questions 5 to 9).

[130] See the express rule in Art. 68(1) and (2) of the *Romanian* Private International Law Act. See also Art. 6 sentence 2 of the Hague Succession Convention.

[131] Art. 89(3) of the *Bulgarian* Private International Law Code.

[132] Sec. 25 of the *Estonian* Private International Law Act.

[133] Art. 46(2) sentence 1 of the *Italian* Private International Law Act.

[134] Sec. 25 sentence 2 of the *Estonian* Private International Law Act.

[135] Art. 46(2) sentence 2 of the *Italian* Private International Law Act.

his choice. The Hague Succession Convention – followed by *Belgian*[136] and *Dutch* law[137] – allows the deceased in its Art. 5 to choose the law of his habitual residence or nationality at the time of the designation or at the time of his death. *Finnish* law[138] appears at the moment to be the most liberal in Europe; apart from his nationality at the time of the choice or death, a person can choose the law of *any* of the residences the person had and, in case the person is married, the law which governs his matrimonial property. Derogating from its monist approach, *German* law only accepts that the deceased subjects his immovable property situated in Germany to German law[139]. Some party autonomy along the Bulgarian and Estonian lines is also envisaged in the Discussion Paper: Art. 3.2(1) contemplates at least a choice of law in favour of the law of nationality at the time of the choice.

Modern conflict rules for succession should at least accept a limited freedom of choice by the deceased[140]. It would be blasphemous to take any

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[136] Art. 79 of the *Belgian* Private International Law Act.

[137] Art. 1 of the *Dutch* International Successions Act.

[138] Book 26 Sec. 6(2) and (3) of the *Finnish* Succession Act.

[139] Art. 25(2) of the *German* Introductory Act to the Civil Code.

[140] EESC Opinion para. 4.7; Parliament Report 5 (Recommendation 3, 2nd indent) and 11; DNotI Study 265 et seq.; Czech Reply 4; Dutch Reply 3; Estonian Reply 1, 2 et seq.; French Reply 5; Finnish Reply 3; GEDIP Reply 4, 5; German Government Reply 3; German Federal Council Reply 3 et seq.; Lithuanian Reply 3; Polish Reply 1 et seq., 3; Slovak Reply 3; Swedish Reply 2, 4; Annex B to UK Reply 11; Ulrik Huber Institute Reply 6; *Basedow*, Die Neuregelung des Internationalen Privat- und Prozeßrechts: NJW 1986, 2971–2979 (2977); *Bauer* 203; *Brandi*, Das Haager Abkommen von 1989 über das auf die Erbfolge anzuwendende Recht (1996) 290; *Breslauer*, Private International Law of Succession in England, America and Germany (1937) 128 et seq.; *von Daumiller*, Die Rechtswahl im italienischen internationalen Erbrecht (2003) 67; *Dörner* 479 et seq.; *Dörner/Hertel/Lagarde/Riering* 5 et seq.; *Dreher*, Die Rechtswahl im internationalen Erbrecht (1998) 130; *Frantzen* (supra n. 88) 190 et seq. and 195 et seq.; *Geimer*, Die Reform des deutschen Internationalen Privatrechts aus notarieller Sicht: Sonderbeiträge der DNotZ 1985, 102–126 (102 et seq.); *Haas* 103 et seq.; *Harris* 212 et seq.; *Hohloch* (supra n. 88) 550; *Hotz*, Die Rechtswahl im Erbrecht (1969) 116 et seq.; *Jud* 139; *id.*, Die kollisionsrechtliche Anknüpfungsverlegenheit im Erbrecht, in: Winfried-Kralik-Symposium 2006, ed. by *Rechberger* (2007) 19–35 (25 et seq.) (cited: Winfried-Kralik-Symposium); *Kemp*, Grenzen der Rechtswahl im internationalen Ehegüter- und Erbrecht (1999) 147 et seq.; *Kühne* 107; *id.*, Testierfreiheit und Rechtswahl im internationalen Erbrecht: JZ 1973, 403–407 (404 et seq.); *Lagarde* 16 et seq.; *Lehmann*, Reaktionen 206; *Leible*, Parteiautonomie im IPR, Allgemeines Anknüpfungsprinzip oder Verlegenheitslösung?, in: FS Erik Jayme I (2004) 485–503 (501); *Leipold* 665 et seq.; *Li* (supra n. 4) 82 et seq.; *Mansel* 212 et seq.; *Navrátilová* (supra n. 10) 152; *Pirrung*, Die Haager Konferenz für IPR und ihr Übereinkommen vom 1. August 1989 über das auf die Rechtsnachfolge von Todes wegen anzuwendende Recht, in: Mélanges Fritz Sturm II (1999) 1607–1627 (1623 et seq.); *Rauscher* 740; *Sturm*, Parteiautonomie als bestimmender Faktor im internationalen Familien- und Erbrecht, in: Recht und Rechtserkenntnis, FS Ernst Wolf (1985) 637–658 (653 et seq.); *Vassilakakis*, La professio iuris dans les successions internationales, in: Le droit international privé, Mélanges Paul Lagarde (2005) 803–816 (809 et seq.) and the references infra in notes 141 et seq. Critically towards or against party autonomy: Luxembourgian Reply 3; *Bajons*, Zuständigkeit 499 et seq.; *Bruch*, The Hague Convention on the Law Applicable to Succession to the Estates of Deceased Persons: L. Contemp. Probl. 56 (1993)

other position, here and as a member of the Hamburg Max Planck Institute. Not only have both, Ernst Rabel in his comparative treatise on the Conflict of Laws[141] and Hans Dölle in this journal[142], expressed sympathy for a "deceased's autonomy". Also other members of the Institute have advocated a more liberal approach, notably on the occasion of the German private international law reform in 1986[143].

A freedom of choice of law would certainly best serve the *lifetime interests of the deceased*. The discussion on the appropriate objective connecting factor has shown that the decision for the residence principle cannot fully be based on the deceased's interests[144]. A decision for the residence principle has – due to the uncertainties of the habitual-residence concept – not only neglected to some extent the deceased's interest in *predictability* of the applicable law, which would be preserved by a freedom to choose the applicable succession law[145]. The use of the last habitual residence as the objective connecting factor has, more significantly, ignored *stability* interests of the deceased; the residence principle is based on the assumption or political goal that the deceased was most closely connected to his residence state. This assumption is, in particular, flawed if stability interests of the deceased with regard to his home state or another state, for example, a former residence state, prevailed. Stability interests would, however, be protected by a freedom of the deceased to choose the governing succession law because the deceased could then fix the applicable law regardless of a future change of his habitual residence.

It should be noted in this context that Community law does not only protect integration interests[146]; the Community also particularly strives for a protection of *stability interests* in the conflict of laws. The protection of stabil-

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309–326 (321 et seq.); *Ferid*, Die gewillkürte Erbfolge im internationalen Privatrecht, in: Vorschläge und Gutachten zur Reform des deutschen internationalen Erbrechts, ed. by *Lauterbach* (1969) 91–120 (98 et seq.); *Firsching*, Zur Reform des deutschen internationalen Erbrechts, in: Vorschläge und Gutachten zur Reform des deutschen internationalen Personen-, Familien- und Erbrechts, ed. by *Beitzke* (1981) 201–225 (221 et seq.); *Stumpf* 249 et seq.

[141] *Rabel*, The Conflict of Laws IV (1958) 273 et seq.

[142] *Dölle*, Die Rechtswahl im internationalen Erbrecht: RabelsZ 30 (1966) 205–240 (215 et seq.).

[143] See Art. 24(2) of the proposal of Paul Heinrich Neuhaus and Jan Kropholler as well as Principle 16(2) of the proposal of Jürgen Basedow, Peter Dopffel, Ulrich Drobnig, Christa Jessel-Holst, Gerhard Luther, Ulrich Magnus, Dieter Martiny, Frank Münzel, Jürgen Samtleben, Kurt Siehr and Jan-Peter Waehler, both published in: Vorschläge zur Reform des deutschen Internationalen Privatrechts: RabelsZ 44 (1980) 326–366. See also the comments of the Institute on the draft of the German federal government, published in: Kodifikation des deutschen Internationalen Privatrechts: RabelsZ 47 (1983) 595–690 (655 et seq.).

[144] See supra IV.

[145] See also for choice of law in matrimonial matters: Green Paper on applicable law and jurisdiction in divorce matters, COM(2005) 82 final of 14. 3. 2005, p. 4.

[146] Supra IV.

ity interests is especially important for the realisation of the internal market. The basic freedoms can only be ensured, as demanded by Art. 14(2) of the EC Treaty, if the exercise of those freedoms is not connected with the loss of legal positions already acquired. An early example for the protection of stability interests is the country-of-origin principle, which the ECJ has developed from the basic freedoms[147] and which protects stability interests – especially in the conflict of public laws – by subjecting the market participants predominantly to the regulations of their Member State of origin and not to the laws of the marketplace[148]. Moreover, and even more significantly for conflict lawyers, the jurisprudence of the ECJ in *Centros*[149], *Überseering*[150] and *Inspire Art*[151] has shown that, due to the freedom of establishment guaranteed by Arts. 43 and 48 of the EC Treaty, stability interests of a company validly established under the law of a Member State should not be affected by moving to, or acting in, other Member States. Also the recent developments concerning the determination of surnames indicate a tendency of Community law to protect stability interests. Already in *Konstantinidis* the ECJ held that the freedom of establishment is violated if the official transliteration of a surname according to the law of the present residence state distorts the true pronunciation of that name according to the language of the home state[152]. Additionally, the ECJ in *Grunkin-Paul* concluded that it would be incompatible with the freedom of movement and residence granted by Art. 18(1) EC if, due to different choice-of-law rules, a name validly registered under the law of a Member State where the child was born and habitually resident were not recognised in another Member State to which the child has close links[153]. These stability interests in the application of a certain law are not solely endangered by different choice-of-law rules but also, as is relevant here, by using a harmonised connecting factor such as habitual residence which points to a different law when the freedom of movement and residence has been exercised. It is a very intricate question whether, as in *Grunkin-Paul*, even duties of mutual recognition based on the fundamental freedoms can arise with regard to legal positions granted by succession law, for example, with regard to an abstract freedom to testate under a certain law which was applicable to the deceased before a change of

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[147] ECJ 20. 2. 1979 – Case 120/78 *(Cassis de Dijon)*, E. C. R. 1979, 649, para. 14.

[148] See also Art. 3 of the Directive 2000/31/EC of the European Parliament and of the Council on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market of 8. 6. 2000, O. J. 2000 L 178/1.

[149] ECJ 9. 3. 1999 – Case C-212/97 *(Centros)*, E. C. R. 1999, I-1459.

[150] ECJ 5. 11. 2002 – Case C-208/00 *(Überseering)*, E. C. R. 2002, I-9919.

[151] ECJ 30. 9. 2003 – Case C-167/01 *(Inspire Art)*, E. C. R. 2003, I-10155.

[152] ECJ 30. 3. 1993 – Case C-168/91 *(Konstantinidis)*, E. C. R. 1993, I-1191 paras. 15 et seq.

[153] ECJ 14. 10. 2008 (supra n. 110) paras. 21 et seq. See also ECJ 2. 10. 2003 – Case C-148/02 *(Garcia Avello)*, E. C. R. 2003, I-11613, paras. 24 et seq.

the habitual residence. In any case, however, the jurisprudence of the ECJ shows how important the protection of stability interests – and, thus, the grant of party autonomy to the deceased – is for the realisation of the basic freedoms. Hence, Fritz Sturm rightly speaks of the freedom of choice of law in the area of successions as "ein Stück verbriefter Niederlassungsfreiheit"[154].

But the advantages of party autonomy in the area of succession and wills are not limited to the lifetime interests of the deceased and the Community. Rather a freedom of the deceased to choose the applicable succession law would also be part of a *general trend towards liberalisation* in private international law which more and more frequently recognises that it is the individual, not the state, who can best weigh the relevant choice-of-law interests[155]. This trend can also be traced in European private international law where party autonomy is becoming a fundamental principle[156]. Freedom of choice of law is in the meantime a matter of course with regard to contracts[157]. But also in the realm of non-contractual obligations European private international law accepts a choice of law by the parties[158]. The freedom of choice of law has also reached the sensitive areas of family law. Both Commission proposals, for maintenance obligations[159] and for matrimonial matters[160], allow the parties, to some extent, to choose the governing law. Likewise the Green Paper on matrimonial property expresses some sympathy for a freedom of choice[161]. Why should this freedom be denied for suc-

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[154] *Sturm* (supra n. 140) 653.

[155] See e.g. *Basedow*, The Recent Development of the Conflict of Laws, in: Japanese and European Private International Law in Comparative Perspective, ed. by *Basedow/Baum/Nishitani* (2008) 4–18 (14 et seq.).

[156] See e.g. *Carruthers/Crawford*, Variations on a Theme of Rome II – Reflections on Proposed Choice of Law Rules for Non-Contractual Obligations – Part I: Edinburgh L. Rev. 9 (2005) 65–97 (82 et seq.); *Leible*, Der Beitrag der Rom II-Verordnung zu einer Kodifikation der allgemeinen Grundsätze des Europäischen Kollisionsrechts, in: Europäisches Gemeinschaftsrecht und IPR, ed. by *Reichelt* (2007) 31–54 (45); *Pertegás*, Beyond Nationality and Habitual Residence, Other Connecting Factors in European Private International Law in Family Matters, in: International Family Law (supra n. 106) 319–340 (329 et seq.); *Rühl*, Rechtswahlfreiheit im europäischen Kollisionsrecht, in: Die richtige Ordnung, FS Jan Kropholler (2008) 187–210 (209).

[157] See Art. 3 of Regulation No. 593/2008 (supra n. 2).

[158] See Art. 14 of Regulation No. 864/2007 (supra n. 2).

[159] Art. 14 of the Proposal for a Regulation on maintenance obligations (supra n. 36). See now Arts. 7 et seq. of the Hague Maintenance Protocol (supra n. 90), to which Art. 15 of Regulation No. 4/2009 (supra n. 2) refers and which is about to be signed and approved by the Community, see Proposal for a Council Decision on the conclusion by the European Community of the Protocol on the law applicable to maintenance obligations, COM(2009) 81 final of 23. 2. 2009.

[160] Art. 20a of the Proposal for a Regulation on applicable law in matrimonial matters (supra n. 64).

[161] See Green Paper on matrimonial property regimes (supra n. 97) 6.

cession and wills? In contrast to matrimonial matters and maintenance obligations, with regard to successions even the substantive law of most Member States speaks for a liberal approach. The freedom to testate is within Europe widely accepted[162] and, as already mentioned[163], even constitutionally guaranteed. The freedom to testate in substantive law, although it might not doctrinally compel a freedom of choice of law[164], should be continued at the choice-of-law level by a freedom of choice.

However, the freedom to testate does not apply without limits. The freedom of the testator to determine the succession in his estate is under most substantive laws restricted, on the one hand, by private interests of family members which are protected by forced heirship provisions or equivalent institutions and, on the other hand, by state interests, especially in the enforcement of local public policy. Yet those interests are not *specifically* endangered by vesting party autonomy in the deceased. Already the use of a personal criterion of the deceased as the objective connecting factor – *his* residence or *his* nationality – is only to a very limited extent suitable to protect those interests internationally[165]. For *family members* it is a mere coincidence that under the objective conflict rule a protective law applies[166]. The fact that the family members, in the regular case, share the last habitual residence of the deceased[167] is only a reflexive consequence of respecting the choice-of-law interests of the deceased. Even under the objective choice-of-law rules family members cannot avoid that the deceased alters in his lifetime the pertinent personal criterion by changing his habitual residence in order to evade a certain protective law. Thus, if a protection of family members is perceived to be necessary, it should not, as some Member State conflict laws do[168], be accomplished by restricting only the freedom of choice but rather – if at all – by other means which apply generally at the same time to *both* the subjective and objective choice-of-law rule[169]. The need for such a special rule shall be discussed momentarily[170]. Yet apart from the protection of family members also interests of the *residence state*, whose succession law is applicable according to the proposed objective conflict rule, would not be

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[162] The EESC Opinion, para. 2.8.2, speaks even of a "contractualisation" of the law of succession.

[163] See supra IV.

[164] *Kühne* 56 et seq.

[165] The opposite is, however, apparently assumed by Parliament Report 8 (Recommendation 8, 3rd indent).

[166] Cf. *Brandi* (supra n. 140) 278; *Dölle* (supra n. 142) 217; *Flessner*, Interessenjurisprudenz im internationalen Privatrecht (1990) 111 et seq.; *Haas* 104; *Kühne* 77.

[167] Supra IV.

[168] See references infra in notes 216 et seq.

[169] See *Dölle* (supra n. 142) 217; *Kühne* 77 et seq.

[170] See infra VI.1.

unduly endangered by a freedom of choice[171]. This relates, at first, to the *fiscal* interests of the state. Although the residence state will, in some cases, be responsible for the social welfare of family members if the applicable succession law affords no protection, again already the use of a personal criterion of the *deceased* thwarts those interests but not specifically the freedom of the deceased to choose the applicable succession law. Likewise a freedom of choice does not imperil the interest of the residence state protecting its *local public policy*. A state to which the deceased is closely linked might well be interested in having its public policy internationally enforced – a concern which exists in all areas of law where private autonomy is restricted by public policy. However, that state interest does not demand an exclusion of a freedom of choice of law all together. First of all, as under the Rome I and Rome II regimes[172], a true choice of law could be limited to international cases[173], at least if no other mechanisms – e.g. a restriction of the eligible laws – warrant that a choice of a different law than the residence law is only possible if the case has links to more than one country. Furthermore, public policy interests of a state to which the deceased was personally connected can be well accommodated by general means of private international law: the recognition of overriding mandatory provisions[174] and, if the residence state is – as often will be the case[175] – the forum state, by the *ordre public* exception.

But how should the freedom of choice of law in the area of succession and wills be *shaped*? First of all, it should only be the *later deceased* who is able to stipulate the governing succession law[176]. This follows from the fact that the grant of a freedom of choice shall protect the predictability and stability interests of the *deceased*. Additionally, potential bootstrap problems could arise if the heirs were allowed to choose the applicable law after the death of the deceased: The question whether someone is an heir can only be determined by an applicable law. A freedom of choice for the heirs would pose an incidental question on the level of choice of law. Party autonomy of the heirs should, therefore, only be discussed in connection with issues detached from their position as heirs, for example, in connection with the question wheth-

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[171] See, however, *Bajons*, Interdependenz 468 et seq.; *id.*, Zuständigkeit 499 et seq.

[172] See Art. 3(3) of Regulation No. 593/2008 and Art. 14(2) of Regulation No. 864/2007 (both supra n. 2).

[173] DNotI Study 270; *Dörner* 481 et seq. and n. 19; *Haas* 102; *Lagarde* 17. See as to Art. 5 of the Hague Succession Convention *Lagarde*, La nouvelle Convention de La Haye sur la loi applicable aux successions: Rev. crit. d.i. p. 78 (1989) 249–275 (261).

[174] See also supra III. and infra VI.3.

[175] See supra IV.

[176] Czech Reply 4; Estonian Reply 1; GEDIP Reply 5; German Government Reply 3 et seq.; German Federal Council Reply 3; Annex B to UK Reply 11; Ulrik Huber Institute Reply 6; *Mansel* 212; *Stumpf*, Europäisierung des Erbrechts, Das Grünbuch zum Erb- und Testamentsrecht: EuZW 2006, 587–592 (590).

er the administration or the distribution of the estate shall be subject to a special choice-of-law rule[177].

The arguments in favour of a freedom of choice do, in principle, not justify any limits on the freedom of choice as to the *eligible laws*. However, a comparative survey, the reactions to the Commission's plans and the Discussion Paper show that the time for a total freedom of choice of law in successions has not yet arrived. Rather only the choice of a law to which the deceased or the estate is objectively connected appears to be acceptable[178] – a limitation which is a relic from former times and which has been overcome, for example, in the modern conflict of laws of obligations[179], apparently, though, not in international family law[180]. However – and unlike the limited freedom of choice proposed in Art. 3.2(1) of the Discussion Paper – minimal links to the chosen law should suffice. In any case the deceased should be allowed to choose the law of his former, present or future *nationality* or *habitual residence*. A restriction to the law of nationality or residence at the time of the choice or death would not be feasible; as the choice of law will be concluded by the deceased alone, the deceased can, in any event, decide on the date of the choice without any difficulties by dating it accordingly in order to allow the choice of a certain law[181]. If the later deceased has more than one nationality, he should be able to choose either of them[182]; if the state of the deceased's nationality has more than one legal system with regard to successions, as it is the case, for example, in the United Kingdom, the deceased should be able to designate one of those systems. At first sight, the option to choose the law of the *last* habitual residence of the deceased appears to be dispensable, as this law will be applicable already according to the objective choice-of-law rule advocated here. However, the choice of the law of the last habitual residence becomes relevant if the last habitual residence lies outside the Community and the future instrument accepts, as discussed[183], a renvoi of a third state[184]; a renvoi would, at any rate, be excluded in cases of a choice of law[185]. Apart from nationality and habitual

[177] See infra VI.7.

[178] See, notably, the references supra in notes 131–140.

[179] See, e contrario, Art. 3(3) of Regulation No. 593/2008 and Art. 14(2) of Regulation No. 864/2007 (both supra n. 2).

[180] See similar restrictions in Art. 14(1) of the Proposal for a Regulation on maintenance obligations (supra n. 36) and Art. 20a(1) sentence 2 (a) to (d) of the Proposal for a Regulation on applicable law in matrimonial matters (supra n. 64). Also the Green Paper on matrimonial property regimes (supra n. 97) 6 assumes the necessity of such a restriction.

[181] Cf. *Jud* 137 et seq.

[182] See as to Art. 5 of the Hague Succession Convention: *Waters* para. 61.

[183] See supra III.

[184] DNotI Study 268; *Dörner* 482 et seq.

[185] See, in general, e.g. Art. 4(2) of the *German* Introductory Act to the Civil Code and, in particular for successions, Art. 4 of the Hague Succession Convention, which refers only to Art. 3 (objective conflict rule) but not to Art. 5 (freedom of choice).

residence, each spouse should be able to choose for his or her succession the law which governs his or her *matrimonial property* regime in order to avoid coordination problems between succession and matrimonial property[186]. However, as long as the choice-of-law rules for matrimonial property are still in statu nascendi[187], incorporating the freedom to choose that law entails some challenges[188]. For the moment, the law governing matrimonial property regimes depends on the choice-of-law rules of the lex fori. One possibility would be to allow the choice of a law which is applicable to the matrimonial property regime of the spouse according to *any* of the Member States' private international laws. Or one could restrict a spouse to a choice of the matrimonial property law which is applicable under the choice-of-law rules at his or her habitual residence. Hence, it can only be hoped that both instruments, on succession and wills and on matrimonial property, enter into force at the same time and can be adjusted.

Furthermore, it has to be discussed whether the deceased should be able to make a *dualist* choice of law, that is, to choose for parts of the estate a separate law, notably the lex rei sitae of certain immovables[189]. The Hague Succession Convention[190] and some Member States[191] expressly restrict the freedom of choice to the whole of the estate, and so does Art. 3.2(1) of the Discussion Paper. One could indeed argue that a dualist approach should be avoided because otherwise the legislative decision for a monist system[192] would be weakened[193]. However, the monist approach is primarily aimed at protecting the interests of the deceased and his estate planning. If the deceased was not only aware of the fact that different laws apply but even produced this situation voluntarily, there is no reason not to accept that de-

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[186] See DNotI Study 271 et seq.; Czech Reply 5; Finnish Reply 4; Swedish Reply 5; Ulrik Huber Institute Reply 8; *Alvarez Torné*, The Dissolution of the Matrimonial Property Regime and the Succession Rights of the Surviving Spouse in Private International Law, in: European Challenges in Contemporary Family Law, ed. by *Boele-Woelki/Sverdrup* (2008) 395–410 (404 et seq.). Critically towards that option: German Government Reply 5; German Federal Council Reply 5. Cf. Art. 9(8) sentence 3 of the Introductory Title to the *Spanish* Civil Code.

[187] See Green Paper on matrimonial property regimes (supra n. 97).

[188] See *Jacoby*, Die Rechte des überlebenden Ehegatten an unbeweglichem Vermögen und die notarielle Praxis bei deutsch-französischen Verhältnissen, Herausforderungen und Perspektiven: GPR 2008, 91–98 (95); *Mansel* 199 and 213; *Navrátilová* (supra n. 10) 153.

[189] See Ulrik Huber Institute Reply 7; *Siehr* as reported by *Bauer* 203.

[190] See Art. 5(1) sentence 1, Art. 6 and Art. 7(1) of the Convention. See as to the – on first sight – rather puzzling interaction of those provisions: *Waters* para. 60.

[191] See Art. 79(1) sentence 1 of the *Belgian* Private International Law Act; Art. 89(3) of the *Bulgarian* Private International Law Code; Book 26 Sec. 6(1) of the *Finnish* Succession Act; Art. 46(2) sentence 1 of the *Italian* Private International Law Act.

[192] Supra III.

[193] See DNotI Study 268 and 270; GEDIP Reply 5; German Government Reply 3; *Davì* 395; *Dörner* 483; *Haas* 106; *Leipold* 665; *Mansel* 212. Cf. also *Kühne* 125 et seq.

cision, especially as there can be in some cases, e.g. in connection with third states, good reasons for a dualist choice of law in order to facilitate the administration and winding up of the estate. One should, however, assume, as the Hague Succession Convention[194] does, that a choice of law covers the whole of the estate unless a clear intention of the deceased for the opposite can be established.

Finally, the future European instrument must regulate the *existence* and *validity* of the unilateral choice of law. Some issues should be determined *uniformly*. First of all, the European legislator should stipulate that the choice of law is to be declared in the form of a *testamentary disposition* according to the applicable law[195], as Art. 5(2) sentence 1 of the Hague Succession Convention, Art. 3.2(2) of the Discussion Paper and some national laws[196] provide. The same should apply *mutatis mutandis* for the revocation or alteration of the choice[197]. A choice of law, and indeed its alteration or revocation, has comparable consequences as a testamentary disposition and should, therefore, not be subject to lower formal preconditions. The special choice-of-law rules regarding the formal validity, not only of testamentary dispositions in general but also of the deceased's choice of law in particular[198] will be examined in a few moments[199]. Also the European legislator should uniformly stipulate in accordance with the provisions of the Rome I and Rome II Regulation[200] that the choice of law, and its alteration or revocation, can be made *expressly* and *impliedly* if an intention to designate an applicable law can be clearly demonstrated by the terms of the testamentary disposition or the circumstances of the case[201]. The Hague Succession Convention and most national laws remain silent on whether the choice must be declared ex-

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[194] See Art. 5(4) of the Convention.

[195] DNotI Study 270; Parliament Report 5 (Recommendation 3, 2nd indent); French Reply 5; German Government Reply 3; *Davì* 398 et seq.; *Mansel* 212. See already the proposals of the Institute (supra n. 143) 658 et seq. For a notarised form: German Federal Council Reply 5. Against any formal requirements: *Kühne* 112 et seq.

[196] See Art. 79(2) of the *Belgian* Private International Law Act; Art. 89(4) sentence 2 of the *Bulgarian* Private International Law Code; Sec. 25 sentence 1 of the *Estonian* Private International Law Act; Book 26 Sec. 6(1) sentence 2 of the *Finnish* Succession Act; Art. 25(2) of the *German* Introductory Act to the Civil Code; Art. 46(2) sentence 1 of the *Italian* Private International Law Act.

[197] See Art. 5(3) of the Hague Succession Convention; Art. 3.2(4) of the Discussion Paper; Art. 89(4) sentence 2 of the *Bulgarian* Private International Law Code; Book 26 Sec. 6(4) of the *Finnish* Succession Act.

[198] Clarified e.g. in Book 26 Sec. 6(1) sentence 3 of the *Finnish* Succession Act.

[199] See infra VI.2.

[200] Art. 3(1) sentence 2 of Regulation No. 593/2008 and Art. 14(1) subpara. 2 of Regulation No. 864/2007 (both supra n. 2).

[201] See DNotI Study 270; German Government Reply 3; *Kühne* 115. For a restriction to express choices of law: French Reply 5; *Davì* 399; *Hayton* 359; *Mansel* 212.

pressly[202]. The Commission's Discussion Paper allows in Art. 3.2(2) only an express choice of law. The admissibility of an implied choice of law might derogate from the standards of interpretation for testamentary dispositions under some national laws. However, a more liberal approach would give the courts some flexibility and enable them, for example, to assume an implied choice of law if the terms of a testamentary disposition are based on the presumption that a certain law applies or to interpret a revocation of former wills as a revocation of a former choice of law[203] or a new will as an implicit alteration of a former choice of law. Yet in any case the interpretation of an implied choice of law would be limited by the formal requirements for testamentary dispositions under the governing law.

The remaining issues as to the existence and material validity of the choice of law should be decided by the *law governing the choice of law* in general. The unilateral choice of law should not be governed by the lex fori. In order to secure a uniform application, the law designated by the choice of law should apply to its existence and validity[204]. This conflict rule can be found expressly in Art. 5(2) sentence 2 of the Hague Succession Convention, in Art. 3.2(3) of the Discussion Paper and in Bulgarian private international law[205]. As to the choice of law in the area of contractual obligations, it is also the general rule in the Rome I Regulation[206]. Hence, the chosen law governs, for example, the consequences of fraud, duress, undue influence and mistake. Furthermore, the chosen law decides whether the choice of law as a testamentary disposition will be invalidated by certain acts of the deceased such as marriage or divorce insofar as those acts invalidate testamentary dispositions under the chosen law.

In the light of the foregoing considerations a provision on the freedom of choice of law could be formulated as follows:

Art. 3.2 – Freedom of choice

(1) A person may stipulate in the form of a testamentary disposition (will, joint will or succession agreement) that the succession in a part or in the whole of the estate shall be governed by the substantive law

(a) of a country of a nationality possessed by the person at any time before his or her death, or

(b) of the country in which the person was habitually resident at any time before his or her death, or

(c) which governs his or her matrimonial property regime, or

(d) as to immovables, of the country where immovables belonging to the estate are situated.

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[202] See also *Waters* paras. 62 and 65.

[203] See the presumption in Art. 3 of the *Dutch* International Successions Act.

[204] *Davì* 400 et seq. See already *Kühne* 118.

[205] Art. 89(4) sentence 1 of the *Bulgarian* Private International Law Code.

[206] See Art. 3(5) in connection with Art. 10(1) Regulation No. 593/2008 (supra n. 2).

(2) [1]The choice shall be expressed or demonstrated with reasonable certainty by the testamentary disposition or the circumstances of the case. [2]Existence and material validity of the choice are governed by the law designated.
(3) A person may at any time under the conditions of the preceding paragraphs revoke or alter a prior choice of law.

VI. Special Issues

The general conflict rules analysed so far will, in principle, determine the law applicable to all issues of succession and wills. Yet the characterisation whether an issue falls within the scope of the general conflict rules will not always be an easy task. In order to secure the uniform application of the European conflict rules, the concept of "succession and wills" will have to be interpreted autonomously[207]. As in other areas of European private international law the future instrument will have to be interpreted in the light of its wording, its origins, its objectives and its scheme[208] as well as by reference to the general principles which stem from the corpus of the national legal systems[209]. However, the application of the general conflict rules could be eased by adopting a list of issues which will be excluded or covered[210], as can be found in Art. 1(2) and Art. 7(2) of the Hague Succession Convention, in Art. 1.1(2) and Art. 3.6(2) of the Discussion Paper and in some national laws[211].

Some issues covered by the general conflict rules, though, might deserve *special* treatment. The general rule that, failing a choice of law by the deceased, the succession is governed by the law of the last habitual residence of the deceased might not fit for all issues of succession law. Furthermore, the future instrument might address some issues which are located at the outer boundaries of succession law but should nonetheless be specially regulated by the future European conflict rules for successions in order to ensure their uniform application.

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[207] See references supra in n. 127.

[208] See e.g. ECJ 3. 5. 2007 – Case C-386/05 *(Color Drack)*, E. C. R. 2007, I-3699 paras. 17 et seq.

[209] See e.g. ECJ 14. 10. 1976 – Case 29/76 *(Eurocontrol)*, E. C. R. 1976, 1541, para. 3.

[210] See DNotI Study 275; Green Paper 4; *Dörner/Hertel/Lagarde/Riering* 6 et seq.

[211] See e.g. Art. 80 Sec. 1 of the *Belgian* Private International Law Act; Art. 91 of the *Bulgarian* Private International Law Code; Sec. 26 of the *Estonian* Private International Law Act; Book 26 Sec. 7 of the *Finnish* Succession Act; Art. 67 of the *Romanian* Private International Law Act.

1. Protection of family members and clawback

First of all, attention should be drawn to an issue which has already been raised in connection with the freedom of choice of law[212]. As the general conflict rules for succession and wills, so far, only focus on the deceased – *his* habitual residence and *his* choice of law determine the applicable law – the question arises whether there are any third party interests to be protected on the level of choice of law. In particular, family members could deserve protection[213] insofar as the deceased-centred approach distorts their expectations on the applicability of certain provisions on forced heirship and equivalent concepts[214].

Most systems do not award special protection to family members on the choice-of-law level. English statutory law even expressly states that its rules on family provision – as English succession law with regard to movables in general – only apply if the testator died domiciled in England[215]. However, some Member States' private international laws which grant a freedom of choice of law protect family members by limiting the freedom to choose a succession law: According to *Belgian*[216], *Bulgarian*[217] and *Italian*[218] law, the choice of law of the deceased does not affect certain forced heirship provisions under the objectively applicable law[219]. This protection is, however, as already indicated[220], incomplete because equivalent provisions are missing for a change of the nationality or the habitual residence which could also lead to a change of the applicable law to the detriment of family members. An effective protection of family members would rather only be secured if the interests of family members are protected with regard to the objectively applicable law as well by using personal criteria *of the family members* as a connecting factor, for example, *their* habitual residence. More comprehensive appears to be the *Lithuanian* rule[221] which, although Lithuania generally follows the residence principle, stipulates that Lithuanian law shall apply as to movables if the deceased was a Lithuanian national and the heirs are resident in Lithuania and claim their statutory share in the estate. Also *Finnish* law[222] awards certain protection to spouses and children of the deceased irrespec-

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[212] See supra V.

[213] See Green Paper 6 (Question 10).

[214] See Parliament Report 8 (Recommendation 8, 3rd indent).

[215] Sec. 1(1) of the *UK* Inheritance (Provision for Family and Dependants) Act.

[216] Art. 79(1) sentence 3 of the *Belgian* Private International Law Act.

[217] Art. 89(5) of the *Bulgarian* Private International Law Code.

[218] Art. 46(2) sentence 3 of the *Italian* Private International Law Act.

[219] See also the proposals of the Institute (supra n. 143) 659 et seq.; Art. 12(2) of the Hague Succession Convention.

[220] See supra V.

[221] Art. 1.62(2) of the *Lithuanian* Civil Code.

[222] See Book 26 Sec. 12 of the *Finnish* Succession Act.

tive of the applicable succession law. Multilaterally formulated, one could thus think about a special conflict rule which subjects the issue of forced heirship or equivalent concepts to the law of the habitual residence (or nationality) of potential statutory heirs.

Such a special rule for the protection of family members should, however, not be adopted[223]. Firstly, a rule which uses personal criteria of the heirs as a connecting factor would create *technical difficulties*: Which law shall identify the statutory heirs to be protected? How shall a law mix be coordinated if different laws apply to the succession in general and to forced heirship in particular – a mix which can even consist of more than two laws if the potential heirs have different habitual residences or nationalities? Secondly, a special protection of family members is, *in substance*, not justified. Most legal systems protect close family members against an exercise of the testator's freedom to testate. Hence, at least some protection will be awarded under every applicable succession law. Moreover, a tendency in Europe can be observed that – inter alia, due to demographic changes – the protection of family members is decreasing under substantive law[224]. The modernisation of forced heirship, although denoted by the Parliament as a "fundamental principle"[225], will not only be on the political agenda in Germany[226]. Thirdly and finally, a minimum but sufficient protection is awarded to the family members by *other means* of the conflict of laws. If the applicable succession law does not protect family members at all, the public-policy exception could be invoked. However, apparently in court practice, the ordre-public exception is not perceived as being overly relevant with regard to the protection of family members[227] – a fact which again speaks against a need for any special protection.

Although a conflict rule for the protection of family members of the deceased is not necessary, special attention should be paid to the problem of *clawback*[228]. Many succession laws provide that lifetime gifts of the deceased made within a certain period of time before his death can be reclaimed from

[223] DNotI Study 270; Czech Reply 5; Dutch Reply 6; Finnish Reply 5; GEDIP Reply 5; German Federal Council Reply 5 et seq.; Polish Reply 4; Swedish Reply 5; Ulrik Huber Institute Reply 8 et seq.; *Bauer* 203; *Davì* 389 et seq.; *Dörner* 481 et seq.; *Lehmann*, Reaktionen 206; *Kühne* 738 et seq.; *Mansel* 216 et seq. For a special rule: Parliament Report 8 (Recommendation 8, 3rd indent); Slovak Reply 4; *Rauscher* 745. A duty of notification regarding the choice of law towards the statutory heirs is proposed by *Frantzen* (supra n. 88) 196. Undecided: German Government Reply 5.

[224] See *Pintens* (supra n. 10) 638 et seq.; *id.*, Grundgedanken und Perspektiven einer Europäisierung des Familien- und Erbrechts – Teil 2: FamRZ 2003, 417–425 (421 et seq.).

[225] Parliament Report 8 (Recommendation 8, 3rd indent).

[226] See proposal of the German Federal Government for the succession law reform, BT-Drucks. 16/8954, p. 8. See, however, also the constitutional restraints put on the legislator by BVerfG 19. 4 2005, BVerfGE 112, 332.

[227] See DNotI Study 253.

[228] Cf. UK Reply 7; Annex B to UK Reply 15.

donees if the estate does not suffice to satisfy claims of the family members under forced heirship (or equivalent) rules[229]. Clawback has, in general, to be characterised as a matter of succession law[230] and not as a matter of the law governing the gift[231] or of the lex rei sitae[232]: Clawback is part and parcel of the protection of close family members by forced heirship; the deceased shall not be able to devaluate the rights of his family members by diminishing his estate before his death. Clawback provisions cause uncertainty for the donee who, at least during a certain period of time, does not know whether the gift can eventually be reclaimed by family members. Notably English lawyers fear that applying foreign clawback provisions could endanger, for example, lifetime dispositions on trust common under English law[233]. On the choice-of-law level the uncertainties are further increased by the fact that the donee cannot even be assured which law will finally apply to the succession of the donor as the donor, after having made the gift, can change his habitual residence or choose a different law[234]. The donee should, therefore, be protected by a rule stating that the reclaim of a lifetime gift of the deceased is governed by the law which would have hypothetically governed the succession at the time the gift was made[235]. However, if the donor has already chosen a succession law at that time, the chosen law should only apply if the donee knew of the choice. Otherwise the law of the country in which the deceased was habitually resident at the time of the gift should apply. That rule could be formulated as follows:

Art. 3.4bis – Lifetime gifts of the deceased

[1]The reclaim of lifetime gifts is governed by the law which would have governed the succession of the donor at the time of the gift by virtue of this Regulation. [2]However, in case of a choice of law by the donor according to Article 3.2 the chosen law only applies if the donee knew of the choice of law at the time the gift was made.

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[229] See e.g. Secs. 2325, 2329 of the *German* Civil Code. See also Secs. 8 et seq. of the *UK* Inheritance (Provision for Family and Dependants) Act.

[230] See Art. 7(2)(c) of the Hague Succession Convention; Art. 1.1(2)(f) and Art. 3.6(2)(n) of the Discussion Paper and ibid. p. 1 et seq. in n. 1 ; Book 26 Sec. 7 No. 4 of the *Finnish* Succession Act. See for *Germany*: BGH 17. 4. 2002, NJW 2002, 2469.

[231] In that direction: *Frankenstein*, Internationales Privatrecht IV (1935) 402, 403.

[232] As advocated by *Miller*, International Aspects of Succession (2000) 229.

[233] *Harris* 195 et seq.; *id.* (supra n. 40) 365.

[234] See *Scheuermann*, Statutenwechsel im internationalen Erbrecht (1969) 116f. However against such a protection of the donee: Münchener Kommentar zum BGB[4] *(-Birk)* X (2006) Art. 25 EGBGB para. 229 (cited: Münch. Komm. BGB *[-Birk]*); *Staudinger (-Dörner)* Art. 25 EGBGB para. 199.

[235] *Harris* 199; *Lehmann*, Aktuelle Entwicklungen im Europäischen Internationalen Erb- und Erbverfahrensrecht, in: Winfried-Kralik-Symposium (supra n. 140) 1–17 (11). See also for lifetime gifts to heirs: Sec. 8 of chapter 1 of the *Swedish* International Successions Act.

2. Testamentary dispositions: formal validity

The deceased will often have modified his intestate succession by testamentary dispositions, by wills, joint wills or succession agreements. As assumed already by the Green Paper[236], some issues arising in connection with testamentary dispositions need special attention. In most legal systems testamentary dispositions are subject to certain *formalities*. The conflict rules for the formal validity of wills and joint wills have been harmonised for the majority of the Member States[237] by the 1961 Hague Convention on the form of testamentary dispositions encompassing joint wills but not succession agreements[238]. According to Art. 1 of the Convention, the formal validity of a disposition is favoured by referring alternatively to different laws: A will is formally valid if its form complies with (a) the law of the place where the testator made it, or (b) the law of a nationality possessed by the testator, either at the time when he made the disposition, or at the time of his death, or (c) the law of a place in which the testator had his domicile either at the time when he made the disposition, or at the time of his death, or (d) the law of the place in which the testator had his habitual residence either at the time when he made the disposition, or at the time of his death, or (e) as far as immovables are concerned, the law of the place where the immovables are situated; all conflict rules refer to the substantive law excluding a renvoi[239]. The same flow chart, in principle, applies to the revocation of a will; however, the revocation will also be formally valid if its form complies with any of the laws according to which the revoked testamentary disposition was valid[240]. Most of the Member States which are *not* bound by the 1961 Hague Convention support a formal validity of testamentary dispositions by employing similar techniques of multiple alternative connecting factors[241].

The favor-negotii approach of the 1961 Hague Convention should be preserved by the European legislator[242]. The Convention bolsters the free-

[236] See Green Paper 5 (Question 3).

[237] See supra n. 20.

[238] Cf. Art. 4 of the Convention.

[239] See Art. 1(1) of the Convention: "internal law".

[240] See Art. 2 of the Convention.

[241] See e.g. Art. 90(2) of the *Bulgarian* Private International Law Code; Sec. 18(2) of the Czechoslovakian Private International Law Act (*Czech Republic* and *Slovakia*); Sec. 36(2) sentence 2 of the *Hungarian* Legislative Decree on Private International Law; Art. 48 of the *Italian* Private International Law Act; Art. 1.61 of the *Lithuanian* Civil Code; Art. 65 of the *Portuguese* Civil Code (see, however, also Art. 2223); Art. 68(3) of the *Romanian* Private International Law Act.

[242] See DNotI 272 et seq.; EESC Opinion para. 4.3; Parliament Report 6 (Recommendation 4); Dutch Reply 4; Estonian Reply 2; Finnish Reply 3; French Reply 3; GEDIP Reply 3; Luxembourgian Reply 2, Polish Reply 2; Swedish Reply 3; Annex B to UK Reply 7; Ulrik Huber Institute Reply 5; *Dörner/Hertel/Lagarde/Riering* 6; *Harris* 216; *Pajor* 375. See also Czech Reply 3.

dom of the deceased to make a will. This view is also shared by Art. 3.3 of the Discussion Paper which simply refers to the 1961 Hague Convention. However, as a means of further ensuring that testamentary dispositions satisfy formal requirements, some modifications – which are not precluded by the Convention[243] – should be made: Firstly, the scope of the rules should be *extended to succession agreements* in order to cover all types of testamentary dispositions, as it is already done by some Member States[244]. Secondly, the flow chart of Art. 1 should be supplemented by an *additional alternative connecting factor*: A testamentary disposition should also be formally valid if it complies with the law which according to the general conflict rule governs the succession or would have governed it at the time the disposition was made[245]. The reference to the actually or hypothetically governing succession law can point to additional laws not mentioned by the present list of applicable laws in Art. 1 of the Convention, for example, in cases of a choice of law[246] or, with regard to third states, if the general rule will accept a renvoi and, thus, point to an additional law[247].

The most important change, though, relates – thirdly – to the *definition* of the term "valid as regards form" in Art. 1 of the Convention. Joint wills and succession agreements are not accepted by all Member States' succession laws. According to some legal systems, they are void because they are regarded as an undue limitation of the freedom to testate[248]. So far, it is unclear how such prohibitions of certain testamentary dispositions have to be characterised and, in particular, whether they affect the formal[249] or material[250] validity of the disposition or whether one has to differentiate according to the purpose of the prohibition[251]. The European rules should make clear that the prohibition of a certain testamentary disposition is always a matter of

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[243] See Art. 3 of the Convention.

[244] See Art. 83(2) of the *Belgian* Private International Law Act; Sec. 27(2) of the *Estonian* Private International Law Act; Art. 26(4) of the Introductory Act to the *German* Civil Code.

[245] See Art. 26(1) sentence 1 No. 5 of the Introductory Act to the *German* Civil Code.

[246] See supra V.

[247] See supra III.

[248] See e.g. Art. 4:93 of the *Dutch* Civil Code; Art. 968 and Art. 1130(2) of the *French* Civil Code; Arts. 368, 1712 and Art. 1717 of the *Greek* Civil Code; Art. 458 and Art. 589 of the *Italian* Civil Code; Arts. 2028, 946 and Art. 2181 of the *Portuguese* Civil Code; Art. 103 of *Slovenian* Succession Act; Art. 669 and Art. 1271 of the *Spanish* Civil Code.

[249] See for *France*: TGI Paris 24. 4. 1980, Rev. crit. d.i. p. 71 (1982) 684 (as to joint wills). See, however, also Trib. Monaco 23. 2. 1995, Rev. crit. d.i. p. 85 (1996) 439 (as to succession agreements).

[250] See Sec. 18(1) sentence 2 of the Czechoslovakian Private International Law Act (*Czech Republic* and *Slovakia*); Art. 64(c) of the *Portuguese* Civil Code.

[251] See for *Germany* as to joint wills: OLG Düsseldorf 6. 2. 1963, NJW 1963, 2227; OLG Frankfurt a. M. 17. 5. 1985, IPRax 1986, 111; OLG Zweibrücken 28. 10. 1991, IPRspr. 1991 No. 149; KG 11. 4. 2000, IPRspr. 2000 No. 95.

formal validity[252]. That solution would not only secure predictability for the testator but would also favour the validity of the testamentary disposition.

Bearing in mind those three issues, a mere reference to the Hague Convention does not suffice. Rather a future European instrument should incorporate and reformulate the 1961 Hague Convention as follows:

Art. 3.3 – Formal validity of testamentary dispositions
(1) [1]A testamentary disposition is formally valid if its form complies with the substantive law
(a) of the country where the testator made the disposition, or
(b) of the country of nationality possessed by the testator, either at the time when he made the disposition, or at the time of his death, or
(c) of the country in which the testator, according to the law of that country, had his domicile either at the time when he made the disposition, or at the time of his death, or
(d) of the country in which the testator had his habitual residence either at the time when he made the disposition, or at the time of his death, or
(e) so far as immovables are concerned, of the country where they are situated, or
(f) which governs, or would at the time of the disposition have governed, the succession by virtue of this Regulation.
[2]The same shall apply to testamentary dispositions revoking earlier testamentary dispositions. [3]The revocation shall also be formally valid if its form complies with any of the laws according to the terms of which, under the first sentence of this paragraph, the revoked testamentary disposition was valid.
(2) The following issues shall also be deemed to affect formal validity:
(a) Limitations of the permitted forms of testamentary dispositions by reference to the age, nationality or other personal conditions of the testator;
(b) qualifications that must be possessed by witnesses required for the validity of a testamentary disposition;
(c) prohibitions of certain types of testamentary dispositions.

3. Testamentary dispositions: existence, material validity, effects and interpretation

Not only the formal validity of testamentary dispositions, but also their existence, material validity, effects and interpretation require special attention[253]. If the general conflict rules for successions were to be applied to

[252] See also DNotI Study 263; Staff Working Paper 14; French Reply 4; Polish Reply 2; *Dörner/Hertel/Lagarde/Riering* 6. Cf. *Lehmann*, Reform 158 in n. 200, 174 and 176. For a characterisation of such prohibitions as affecting material validity: *Nordmeier*, Zulässigkeit und Bindungswirkung gemeinschaftlicher Testamente im Internationalen Privatrecht (2008) 329; *Pajor* 375. For a general prohibition: Luxembourgian Reply 3.

[253] See Green Paper 5 (Question 3).

those issues – as is the case in some Member States[254] – stability interests of the testator could be frustrated because the testator does not necessarily know where his habitual residence will ultimately be and, hence, which law will judge the existence, material validity, effects and interpretation of his disposition. This danger of a change of the governing law is certainly mitigated by a freedom of the testator to choose the governing succession law, for example, on the occasion of making his disposition[255]. Yet the testator will not always know that there is a need for a choice of law, for example, if he does not anticipate a later change of his habitual residence. In the absence of an express choice of law, only the possibility of an implied choice of law would give the courts some flexibility to assume a choice of law where the testator has clearly testated against the background of a certain law which ultimately does not apply to his succession – a possibility which is, however, as already seen, excluded by the Commission's Discussion Paper in Art. 3.2(2). Further stability problems can arise with regard to *joint wills* and *succession agreements* if the general conflict rules for succession were to be applied; a testator could potentially evade a binding disposition by changing the habitual residence or by a later choice of law if the effects of his disposition are governed by the ultimately applicable succession law[256]. The lack of stability is best balanced by applying to the existence, material validity, effects and interpretation of a testamentary disposition the law which would *hypothetically* govern the succession at the time the disposition was made[257]. A similar rule shifting the decisive point of time for certain aspects of testamentary dispositions can be found in some Member State laws[258] and – albeit aston-

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[254] See Art. 80 Sec. 1 No. 5 of the *Belgian* Private International Law Act; Art. 91 No. 9 of the *Bulgarian* Private International Law Code; Sec. 26 No. 1 of the *Estonian* Private International Law Act; Book 26 Sec. 7 No. 6 of the *Finnish* Succession Act; Sec. 36(2) sentence 1 of the *Hungarian* Legislative Decree on Private International Law. See for *English* law: Rules 145 and 146 of *Dicey/Morris/Collins*. See for *France*: Cass. civ. 14. 3. 1961 (supra n. 43) 774. See also Sec. 5 of chapter 1 of the *Swedish* International Successions Act.

[255] See supra V.

[256] *Lehmann*, Die Zukunft des deutschen gemeinschaftlichen Testaments in Europa: Zeitschrift für Erbrecht und Vermögensnachfolge (ZEV) 2007, 193–198 (197 et seq.) (cited: Zukunft).

[257] See Czech Reply 5; Dutch Reply 4; GEDIP Reply 3; German Federal Council Reply 3; Polish Reply 2; Annex B to UK Reply 8; *Mansel* 208; *Lehmann*, Reform 158; *id.*, Zukunft (previous note) 197 et seq.; *Pajor* 375. See also DNotI 264; Staff Working Paper 13; Parliament Report 6 (Recommendation 5[a]); Czech Reply 3 et seq.; Finnish Reply 3; Luxembourgian Reply 2; Ulrik Huber Institute Reply 5.

[258] See Sec. 30(1) sentence 1 of the *Austrian* Private International Law Act; Sec. 18(1) sentence 1 of the Czechoslovakian Private International Law Act (*Czech Republic* and *Slovakia*); Art. 26(5) sentence 1 of the Introductory Act to the *German* Civil Code; Art. 35 sentence 1 of the *Polish* Private International Law Act; Art. 64 of the *Portuguese* Civil Code; Art. 32(2) of the *Slovenian* Private International Law Act; Art. 9(8) sentence 2 of the Introductory Title to the *Spanish* Civil Code; Sec. 6 of chapter 1 of the *Swedish* International Successions Act. See as to capacity to testate for *English* law: Rule 142 of *Dicey/Morris/Collins*.

ishingly confined to succession agreements – in Art. 9(1) of the Hague Succession Convention[259]. However, this special rule should be *supplemented* in cases where the testamentary disposition is not valid under the hypothetically governing succession law. In that case the disposition should nonetheless be valid if it is so under the law *ultimately* governing the succession[260], which might be a different law if the testator has changed his habitual residence or has, in the meantime, chosen a different law. Hence, the actually applicable succession law should cure any defects of the disposition under the hypothetically governing succession law, in which case, though, the effects and the interpretation of the disposition should also be governed by the actually applicable succession law. This "curing" rule – which can be found in some Member States' conflict laws[261] and, again for succession agreements, in Art. 9(2) the Hague Succession Convention – is another expression of the favor-negotii principle which strives to validate the exercise of the freedom to testate.

The special rule shall cover the existence, material validity, effects and interpretation of a testamentary disposition[262]. The German differentiation[263] between the disposition's having validly come into existence – which is covered by the special conflict rule – and the remaining material validity – which is covered by the general conflict rules – might at first sight be preferable because it safeguards that defects which relate to the substance of the testamentary disposition, for example, in connection with the rights of family members, are governed by the law ultimately applicable to the succession[264]. However, this sophisticated solution entails problems of characterising whether a certain defect relates to the valid coming into existence or to the remainig material validity. The term "material validity" should, in particular, cover the *capacity* of the testator to testate[265], although some Member States[266] apply to the capacity to testate the general choice-of-law rule for the capacity of a person, and although capacity is excluded from the scope of the

[259] Cf. also Art. 7(2)(e) of the Convention and *Waters* para. 80.

[260] DNotI Study 263 and p. 264, see also p. 238 et seq. Critically *Lehmann*, Reform 158.

[261] See e.g. Sec. 30(1) sentence 2 of the *Austrian* Private International Law Act (as to material validity).

[262] See Arts. 9(1) and 10(1) of the Hague Succession Convention.

[263] In Art. 26(5) sentence 1 of the Introductory Act to the *German* Civil Code. See also Secs. 5 and 6 of chapter 1 of the *Swedish* International Successions Act.

[264] DNotI Study 238 et seq. Cf. also *Lehmann*, Reform 163.

[265] See Czech Reply 3; German Federal Council Reply 3; Luxembourgian Reply 2; Swedish Reply 3; Annex B to UK Reply 7; Ulrik Huber Institute Reply 5; *Hayton* 360; *Harris* 215; *Rauscher* 729. See, however, also Art. 1(2)(a) of Regulation No. 593/2008 (supra n. 2), which excludes capacity from the scope of the Regulation (exception: Art. 13). Against a European rule: DNotI Study 263; GEDIP Reply 3; *Dörner/Hertel/Lagarde/Riering* 6; *Lehmann*, Reform 157.

[266] See e.g. for *Germany*: BGH 12. 1. 1967, NJW 1967, 1177. Cf., however, also Art. 26(5) sentence 2 of the Introductory Act to the Civil Code.

Hague Succession Convention[267]. Yet the capacity to testate is a succession-related question[268], as also Art. 3.6(2)(e) of the Discussion Paper appears to recognise[269]; different conflict rules in the Member States would endanger the uniform application of the future European conflict rules for succession and wills. However, as in some Member State laws[270] there should be a special rule providing that the loss of capacity to testate caused by a change of the applicable law has no impact on a capacity once obtained by a formerly applicable law[271]. Otherwise a testator who has validly testated might not be able to revoke that disposition if he is now habitually resident in a state according to whose law he has no capacity. A loss of the capacity to testate by moving within the Community would be very questionable under the freedom of movement granted by Art. 18(1) EC[272]. Not covered by the expression "material validity" are rules of the Member States which invalidate as *overriding mandatory provisions* certain testamentary dispositions regardless of the applicable succession law. Some Member States stipulate that the testator is not allowed to bequeath his estate to certain persons, for example, staff of a nursing home[273]. Such provisions apply – similar to the mandatory special succession regimes for certain property already mentioned[274] – by their own virtue and should be accepted by all Member States[275]. The reference to the "effects" of the testamentary disposition covers among other issues the *revocability* of testamentary dispositions: The question whether and how the testamentary disposition *can be* revoked is governed, in principal, by the hypothetically governing succession law at the time the disposition to be revoked was made; the question, however, whether it *has been* effectively revoked by

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[267] Art. 1(2)(b) of the Convention. See also Art. 5 of the 1961 Hague Convention (supra n. 19).

[268] Special rules for the capacity to testate can be found, for example, in Sec. 30 of the *Austrian* Private International Law Act; Art. 90(1) of the *Bulgarian* Private International Law Code; Sec. 18(1) sentence 1 of the Czechoslovakian Private International Law Act (*Czech Republic* and *Slovakia*); Sec. 28 of the *Estonian* Private International Law Act; Book 26 Sec. 10 of the *Finnish* Succession Act; Art. 1.60 of the *Lithuanian* Civil Code; Art. 63(1) of the *Portuguese* Civil Code; Art. 32(2) of the *Slovenian* Private International Law Act; Sec. 3 sentence 1 of chapter 1 of the *Swedish* International Successions Act. See for *English* law: Rule 142 of *Dicey/Morris/Collins*.

[269] See, however, also Art. 1.1(2)(b) of the Discussion Paper.

[270] See Sec. 28(2) of the *Estonian* Private International Law Act; Art. 26(5) sentence 2 of the Introductory Act to the *German* Civil Code; Art. 63(2) of the *Portuguese* Civil Code. See also Sec. 3 sentence 2 of chapter 1 of the *Swedish* International Successions Act.

[271] *Lehmann*, Reform 157.

[272] Cf. supra V.

[273] See e.g. Sec. 14(1) and (5) of the *German* Nursing Home Act.

[274] See supra III and the proposed Art. 3.5(3)(a).

[275] Cf. *Lehmann*, Reform 163 et seq. The Discussion Paper apparently regards those provisions as part of the general applicable succession law: see Art. 3.6(2)(e) and ibid. p. 11 in n. 31.

a subsequent disposition is governed by the hypothetically governing succession law at the time of that second revoking disposition[276].

The question remains whether the special conflict rule for the existence, material validity, effects and interpretation of a testamentary disposition shall also apply to *multilateral* testamentary dispositions, that is, to joint wills and succession agreements[277], as they are defined in Art. 1.2(k) and (i) of the Discussion Paper. As already seen, the prohibition of certain types of multilateral testamentary dispositions should be characterised as an issue relating to the formal validity[278]. No problems arise if the multilateral disposition concerns only the succession of a *single* testator. Here the hypothetically governing succession law supplemented – in case of invalidity – by the actually governing succession law should be applicable[279], as stipulated, for example in Art. 9 of the Hague Succession Convention[280]. Problems, however, arise if the joint will or succession agreement affects the succession of *more than one* testator. If the proposed special rule for testamentary dispositions was applicable, potentially more than one law would govern that disposition: the hypothetically governing succession law of either testator supplemented – in case of invalidity – by the actually governing succession law of either testator. According to one law the disposition could be valid, according to the other law void. Article 10 of the Hague Succession Convention stipulates that, in such a case, all applicable succession laws must *cumulatively* validate the multilateral disposition[281] and that the effects of the disposition are determined cumulatively by the overlap of all applicable laws. This cumulative application of the succession laws applicable to each testator is, however, unconvincing[282]. Apart from requiring the courts to investigate an overlap of different laws the Hague Succession Convention introduces at the choice-of-law level a disguised rule of *substantive law* by invalidating the whole disposition if, under the applicable laws, the disposition is void for one of the testators involved. It should, however, be left to the applicable succession law of the other testator whether the invalidity of the disposition of one testator affects the other disposition as well. Under German law, for example, the invalidity of the will of a spouse contained in a joint will only under

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[276] Cf. DNotI Study 264; Dutch Reply 4; Annex B to UK Reply 9; *Harris* 216; *Lehmann*, Reform 159 et seq. See also Rule 150 of *Dicey/Morris/Collins*.

[277] For an exclusion of joint wills and succession agreements from the scope of the European conflict rules for successions: Annex B to UK Reply 8.

[278] See supra VI.2.

[279] DNotI Study 263; *Dörner/Hertel/Lagarde/Riering* 6.

[280] See also Sec. 29(1) of the *Estonian* Private International Law Act.

[281] See also Sec. 29(2) of the *Estonian* Private International Law Act.

[282] See also Parliament Report 6 (Recommendation 5[b]); Finnish Reply 3; *Rauscher* 745. For a solution similar to Art. 10 of the Convention: DNotI Study 263 et seq.; Dutch Reply 4; Estonian Reply 2; GEDIP Reply 3 et seq.; Slovak Reply 3; Ulrik Huber Institute Reply 6; *Pajor* 375.

certain circumstances affect the validity of the other will[283]. Such a differentiated approach of the governing succession law should not be thwarted by a disguised substantive rule at the level of choice of law. Also an *alternative* application of the governing succession laws faces problems if the disposition is valid according to more than one succession law, as the effects of a disposition cannot be governed by more that one law. A conflict rule for the effects of the disposition would be needed. However, the testators should have the possibility of concluding a *choice-of-law agreement*. The general possibility of each of the testators to unilaterally choose an applicable law[284] does not suffice. There might be rare cases where the testators cannot choose the same law, for example, because they do not share nationality or habitual residence. Similar to Art. 11 of the Hague Succession Convention[285], the parties to a multilateral testamentary disposition should, thus, be able to agree on a law which any of them could designate as the applicable succession law and which shall govern the existence, material validity, effects and interpretation of their testamentary disposition[286]. However, the limitation contained in Art. 12(2) of the Hague Succession Convention, according to which the mandatory protection of third parties according to the generally applicable succession law is not affected by the choice, should not be maintained, already as a matter of principle[287].

The foregoing considerations could be implemented in a future European instrument by the following provision:

Art. 3.4 – Existence, material validity, effects and interpretation of testamentary dispositions

(1) [1]The existence, material validity, effects and interpretation of a testamentary disposition are governed by the law which would have governed the succession of the testator by virtue of this Regulation at the time the disposition was made. [2]In case the disposition is not valid under that law, it is nevertheless valid, if it is so according to the law governing the succession by virtue of this Regulation at the time of the death of the testator. [3]This law then also governs the effects and interpretation of the disposition.

(2) [1]Paragraph 1 shall also apply to the capacity of the testator to make a testamentary disposition. [2]This capacity is not affected by a later change of the governing law.

(3) [1]Parties to a joint will or succession agreement can agree that the existence, material validity, effects and interpretation of their disposition shall be governed

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[283] See Sec. 2270(1) of the *German* Civil Code.

[284] See supra V.

[285] See also Sec. 29(2) of the *Estonian* Private International Law Act.

[286] See DNotI Study 267 et seq.; Staff Working Paper 20; Parliament Report 6 (Recommendation 5); Czech Reply 5; Dutch Reply 4; German Government Reply 4; German Federal Council Reply 5; Swedish Reply 4; Ulrik Huber Institute Reply 8; *Davì* 401 et seq.; *Dörner/Hertel/Lagarde/Riering* 6; *Nordmeier* (supra n. 252) 329; *Rauscher* 745.

[287] See, in general, supra V. and VI.1.

by a law which either of the persons whose succession is affected would have been able to designate in accordance with paragraph 1 of Article 3.2. [2]Article 3.2 applies to the agreement accordingly.

Overriding mandatory provisions which affect the validity of a testamentary disposition are recognised by the proposed Art. 3.5(3)(b)[288].

4. Testamentary trusts and statutory trusts upon intestacy

The Green Paper asks whether special conflict rules should be adopted for trusts created by a testator[289]. This question alludes especially to express testamentary trusts, by which the testator – acting as a settlor – stipulates in a testamentary disposition that after his death the estate or certain parts of the estate are to be held and administered by a trustee in favour of a beneficiary. Such testamentary trusts are characterised differently. Some Member States apply the conflict rules for succession and wills to testamentary trusts by characterising them as ordinary testamentary dispositions[290]. The Hague Trust Convention[291], however, contains common conflict rules for express trusts which cover testamentary trusts as well[292]. As a consequence, Art. 14(1) of the Hague Succession Convention stipulates that the conflict rules for successions do not preclude the application of another law to a trust created by the testator. According to Art. 1.1(2)(i) of the Discussion Paper, trusts should not be covered by the future Regulation at all.

First of all, *testamentary trusts* should be within the scope of a European Regulation on choice of law for succession and wills[293]. Trusts might indeed be, as the preamble of the Hague Trust Convention labels them, a "unique legal institution" of the common law. However, the interests of the settlor of a testamentary trust are recognised also by equivalent institutions in non-common-law Member States: Some effects of testamentary trusts might, for instance, remind a German lawyer of Testamentsvollstreckung or Vor- und

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[288] See supra III.

[289] Green Paper 6 et seq. (Question 11).

[290] See for *France*: Cass. Civ. 3. 11. 1983, Rev. crit. d. i. p. 73 (1984) 336. See for *Germany*: LG Wiesbaden 18. 1. 1960, IPRspr. 1960/1961 No. 138; LG Nürnberg-Fürth 29. 12. 1962, IPRspr. 1962/1963 No. 148; OLG Frankfurt a. M. 2. 5. 1972, IPRspr. 1972 No. 125; BGH 2. 6. 1976, WM 1976, 811; LG München I 6. 5. 1999, IPRspr. 1999 No. 95.

[291] Which is in force for some Member States: see supra n. 23.

[292] See Art. 2(1) of the Convention and *Re Barton (Deceased)*, [2002] EWHC 264 (Ch.) paras. 29 et seq.

[293] Swedish Reply 5; *Lehmann*, Reform 180; *Mansel* 220 et seq.; *Terner* (supra n. 33) 169. For an exclusion: EESC Opinion para 2.13; Parliament Report 8 (Recommendation 9); German Federal Council Reply 6; German Government Reply 5; Polish Reply 4 et seq.; UK Reply 7; Annex B to UK Reply 16; *Harris* 202 et seq.

Nacherbschaft[294]. It is, thus, difficult to understand why a legal concept which relates to successions and has become a common vehicle of estate planning should be excluded from the scope of the uniform conflict rules for that area. An inclusion of testamentary trusts into a European instrument would not necessarily disturb the existing Hague Trust Convention if between the few Member States which are Contracting States its application is preserved. Rather it would warrant that at least testamentary trusts are – unlike now – recognised European-wide; the legal certainty for a testator creating a trust by a testamentary disposition would be enhanced[295].

If testamentary trusts are to be included in the scope of the instrument, the further question arises whether they should be subject to the conflict rules for testamentary dispositions or whether *modifications* are necessary. Without any modification, according to the views taken in this article, the existence, material validity, effects and interpretation of a disposition establishing a testamentary trust would primarily be governed by the law which would hypothetically govern the succession at the time the disposition is made[296], which is either the law of the habitual residence of the testator at this time or the law which the testator has chosen. That law would also apply to the trust itself whose creation would – if trusts are included in the scope of the future instrument – be one of the "effects" of the testamentary disposition. Hence, the testator would only have a limited choice of law. By contrast, the Hague Trust Convention grants the settlor, in principle, an unlimited freedom of choice of law (Art. 6). If the settlor does not designate a governing law, the trust is governed by the law to which the trust is most closely connected (Art. 7). The European instrument should *not* deviate for testamentary trusts from the proposed conflict rules for testamentary dispositions[297]. There is no reason why the settlor of a testamentary trust should have a greater freedom of choice of law than a testator who establishes a civil-law equivalent to a testamentary trust. Furthermore, the application of the conflict rules for testamentary disposition warrants that, in the regular case, testamentary trust and succession in general are subject to the same law and no coordination issues arise, for example, with regard to the protection of family members. Those restrictions to the freedom to testate vis-à-vis the establishment of a testamentary trust can in any event not be circumvented

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[294] See *Kötz*, Trust und Treuhand (1963) 97 et seq.

[295] This is also granted by *Harris* 202, albeit doubting that "a civilian state will be able to recognise or give any meaningful effect" to certain subtleties of English trust law – remaining silent, however, whether this is due to a lack of legal understanding of civilian courts or due to the obscurities of English trust law.

[296] See supra VI.3. and the proposed Art. 3.4(1).

[297] For an adoption of the Hague trust regime: Czech Reply 6; Dutch Reply 6; GEDIP Reply 5; German Government Reply 5; Luxembourgian Reply 5; Polish Reply 5; Ulrik Huber Institute Reply 9; *Mansel* 221.

by separate conflict rules for trusts[298], as shown by the Hague Trust Convention which does not restrict the application of internally mandatory provisions of the governing succession law[299].

However, an inclusion of trusts into the future instrument could be problematic if the applicable law is *unfamiliar* with the institution of trusts. But even if the testator establishes a trust by a testamentary disposition, despite the objectively applicable law containing no provisions on testamentary trusts, this would not necessarily lead to a disregard of the testator's will. Rather the establishment of a testamentary trust can be interpreted as an implied choice of law in favour of a law which contains pertinent provisions and is eligible for a choice by the testator[300]. And even if such a choice of law cannot be inferred, the testamentary trust can be transformed to its closest equivalent under the applicable succession law[301].

However, testamentary trusts are not the only type which should be, from a functional perspective, within the scope of the future conflict rules for successions. In some cases English succession law also creates *statutory trusts upon intestacy*. For example, according to Sec. 33(1) of the Administration of Estates Act, in case of intestacy the estate is held in trust by a personal representative who administers the estate. Furthermore, pursuant to Secs. 46(1), 47(1) of the same Act, after the administration parts of the estate are to be kept by the personal representative in trust for the benefit of certain family members of the deceased; the statutory trust is used as a legal tool for the distribution of the estate. Performing true succession purposes, such statutory trusts should be covered by the future European conflict rules for succession. Yet as far as the trust is created for the administration of the estate, special conflict rules for administration might apply (see infra VI.7.).

It should, though, not be overlooked that the conflict rules for succession and wills will only deal with the question which person is entitled to the property of the deceased. As already seen[302], the question whether the form of entitlement envisaged by the applicable succession law can be implemented on the level of property law is covered by the conflict rules for property and, hence, answered by the lex rei sitae. Therefore, the *property-law consequences* of a trust, which has been validly established under the applicable succession law, will always be limited by the lex rei sitae of the estate[303]. This

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[298] See French Reply 7; Polish Reply 5. Cf. also Green Paper 10 (Question 32).

[299] See Art. 15(1)(c) of the Convention. See also Art. 14(1) sentence 2 of the Hague Succession Convention.

[300] See supra V. See, however, also Art. 6(2) of the Hague Trust Convention.

[301] See e.g. for *Germany*: OLG Frankfurt a. M. 22. 9. 1965, IPRspr. 1966/1967 No. 168a; BayObLG 18. 3. 2003, IPRspr. 2003 No. 99.

[302] See supra III.

[303] See for *France*: CA Paris 18. 4. 1929, Rev. crit. d. i. p. 30 (1935) 149. See for *England*: *In Re Pearse's Settlement*, [1909] 1 Ch. 304.

is, however, nothing new: Under the Hague Trust Convention as well, the lex rei sitae still plays a role with regard to the property-law issues raised by a trust[304]. Against this background, concerns that succession-related choice-of-law rules for trusts in a European Regulation would force the Member States to recognise foreign unknown property rights[305] and, thus, potentially encroach on the Member States' competence with regard to property ownership (Art. 295 EC)[306] do not seem to be justified.

Hence, there should be no exclusion of trusts in the provisions on the material scope of the future European instrument. For the sake of certainty, the inclusion of "trusts created by testamentary dispositions or by the rules on intestacy" should be made clear in the provision on the scope of the applicable law.

5. Rights of the state in heirless estates

An intricate problem of cross-border successions, one which was not addressed by the Green Paper[307], concerns heirless estates. The fate of such bona vacantia is regulated differently in the substantive succession laws. It is a common principle that the state can eventually claim bona vacantia in order to preserve the estate especially for the settlement of debts of the deceased. However, the legal construct providing access to heirless estates differs[308]. Some laws provide that, in cases where no one else would be heir, the state itself is the *final heir*[309]. Consequently, those "final heir" states apply the general conflict rules for successions to bona vancantia; the succession to the state is characterised as a private-law issue. However, according to other Member State laws, the state *appropriates* bona vacantia as a matter of public law by exercising a regalian right[310]. Those "appropriation" states can only effectively appropriate bona vacantia as far as they are situated within their territory: Although an appropriation of extraterritorial property might be lawful according to public international law, at least insofar as a genuine link

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[304] See Art. 12 and Art. 15(1)(d) to (f) of the Convention. Cf. also Green Paper 10 (Question 31).

[305] *Harris* 202 et seq.; *id.* (supra n. 40) 365.

[306] Parliament Report 8 (Recommendation 9).

[307] But by the Staff Working Paper 15 et seq.

[308] A recent comparative overview is provided by *Heckel*, Das Fiskuserbrecht im Internationalen Privatrecht (2006) 9–62.

[309] See e.g. Sec. 1936 of the *German* Civil Code; Art. 1824 of the *Greek* Civil Code; Arts. 565, 586 of the *Italian* Civil Code; Art. 935 Sec. 3 of the *Polish* Civil Code; Arts. 2152 et seq., 2133(1)(e) of the *Portuguese* Civil Code; Arts. 956 et seq. of the *Spanish* Civil Code.

[310] See e.g. Sec. 760 of the *Austrian* Civil Code; Arts. 768 et seq. of the *French* Civil Code; Art. 9 of *Slovenian* Succession Act; Sec. 1 of chapter 5 of the *Swedish* Successions Act; Sec. 46(1)(vi) of the *UK* Administration of Estates Act.

to the "appropriation" state exists[311], the appropriating state will have difficulties in enforcing the public-law appropriation before foreign courts, as courts, at least tradionally, decline to enforce claims of foreign states based on their public law[312].

In merely internal succession cases the results under both systems differ little. The different doctrinal approaches – private-law final heirship and public-law appropriation – do, however, cause problems in cross-border succession cases even if the general conflict rules for succession were harmonised. On the one hand, *positive* conflicts loom if the general conflict rules point to the law of a "final heir" state but parts of the estate are situated in an "appropriation" state: The assets situated in the "appropriation" state would be claimed by both states. On the other hand, *negative* conflicts can arise as well if the general conflict rules point to the law of an "appropriation" state but parts of the estate are situated in a "final heir" state. No state would claim the assets situated in the "final heir" state.

The intricate task of a conflict rule for heirless estates is to solve those conflicts not only for intra-Community but also – more difficultly – for third-state cases. The positive and negative conflicts could be avoided by implementing the solution of the Hague Succession Convention[313], which is also adopted by Art. 3.10 of the Discussion Paper: Art. 16 of the Convention provides that an applicable "last heir" succession law must give way to an "appropriation" state as far as assets situated in the "appropriation" state are concerned. The precedence of the law of the "appropriation" state does solve *positive* conflicts. It recognises that in cases of positive conflicts the succession to the "appropriation" state will always prevail over the succession to the "final heir" state: As a practical matter, the "final heir" state cannot foreclose an appropriation by the situs state; it will always need the help of the courts of the situs state which will apply their own law for bona vacantia in their territory. However, Art. 16 of the Convention does not solve *negative* conflicts if the general conflict rules point to the law of an "appropriation state" but bona vacantia are situated in a "last heir" state[314].

A rather simple solution could be characterising the access to bona vacantia *uniformly* as an ordinary succession law issue and, hence, to subject it to the generally applicable succession law regardless of how the substantive law

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[311] Cf. ICJ 5. 2. 1970, *Barcelona Traction Case*, ICJ Rep. 1970, 3 (105).

[312] See only Rule 3 of *Dicey/Morris/Collins* (supra n. 89). Critically, however, *Dutta*, Die Durchsetzung öffentlichrechtlicher Forderungen ausländischer Staaten durch deutsche Gerichte (2006) 143 et seq.

[313] DNotI Study 264; *Harris* 218.

[314] See DNotI Study 264; Staff Working Paper 16; *Bajons*, Interdependenz 474 et seq.; *Heckel* (supra n. 308) 178.

is shaped[315]. Yet this solution only works for intra-Community cases where all Member States would be bound by such a uniform characterisation, although it might be doubtful whether an "appropriation" Member State could, according to its internal law, appropriate any bona vacantia situated outside its territory even if the European conflict rule points to its law[316]. Positive and negative conflicts could, however, still arise in relation to *third states*: If the general conflict rules point to the law of an "appropriation" third state, that state will not claim property outside its territory – resulting in negative conflicts. At the same time positive conflicts can arise if property is situated in an "appropriation" third state but the general conflict rules point to the law of a "final heir" state.

On first sight, a rather elegant solution for coordinating the different approaches is provided by *English* law: English law characterises the succession in heirless estates according to the lex causae: If the applicable succession law is the law of a "final heir" state, that law shall apply; if, though, that state is an "appropriation" state, the lex or leges rei sitae of the assets shall apply[317]. However, the common-law rule can first be criticised for ignoring that appropriation and final heirship are functionally equivalent; the mere coincidence that the law of an "appropriation" state or a "final heir" state governs the succession should not determine the succession rights of the states involved[318]. Decisive, though, is the fact that also the common-law rule, if adopted European-wide, would fail to avoid positive and negative conflicts in relation to *third states*: If the general conflict rules point to the law of a "final heir" state but some property is situated in an "appropriation" third state, both states would claim succession rights (positive conflict). If, however, the general conflict rules point to the law of an "appropriation" state but parts of the estate are situated in a "final heir" third state, nobody would claim that property (negative conflict).

The best solution appears to be provided by *Austrian* law[319]. Austrian law[320] characterises the succession in bona vacantia as a special issue and subjects that issue to the lex or leges rei sitae of the estate[321]. The lex or leges rei sitae decide whether the state or another person inherits as a final heir or whether the state can appropriate the bona vacantia. Traces of that solution can be found in other legal systems as a unilateral conflict rule combined with a

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[315] See Art. 80 Sec. 1 No. 3 of the *Belgian* Private International Law Act; Art. 67(g) of the *Romanian* Private International Law Act.

[316] *Lehmann*, Reform 185.

[317] See *In the Estate of Maldonado*, [1954] 2 W.L.R. 64 (C.A.).

[318] *Lipstein*, Private International Law, Bona Vacantia and Ultimus Heres: Cambridge L.J. 1954, 22–26 (25 et seq.).

[319] *Bajons*, Interdependenz 475.

[320] See Sec. 29 of the *Austrian* Private International Law Act.

[321] *Briggs* (supra n. 89) 221 et seq.; *Lehmann*, Reform 186.

substantive rule in favour of the respective state[322]. Within Europe the Austrian conflict rule would avoid all positive and negative conflicts. In relation to third states, it would at least avoid positive conflicts. Only negative conflicts can arise where property is situated in a "final heir" third state and, according to its conflict rules, the law of that state would not govern the succession. Although the Austrian rule splits up the estate, this scission of the estate is tolerable; the problems of the dualist approach mentioned earlier[323] do not arise because, with the exception of the state, no (other) heirs exist. The Austrian solution could be codified as follows:

Art. 3.10 – Heirless estates
Where under the law applicable by virtue of this Regulation there is no heir, or the state inherits intestate, the law of the country where the assets of the estate are situated shall govern the succession in those assets.

6. Simultaneous deaths

According to most Member State laws, a person can only inherit if that person survives the deceased[324]. Unlike German law which regards the issue of survival as being subject to the conflict rule for personality[325] the question whether the deceased was survived by a potential heir should be answered by the governing succession law in order to ensure a uniform application of the conflict rules for successions. The issue of survival is related to the general issue of the capacity to inherit, which shall, as Art. 3.6(2)(d) of the Discussion Paper and some Member States' laws[326] recognise, be covered by the conflict rules for successions.

Sometimes, notably in connection with accidents or wars, it is practically impossible to establish which of several persons died first. This uncertainty causes problems if those persons could potentially be heirs of each other, for example, because they are spouses or dependants. Therefore, in cases of uncertainty most laws assume a certain chronology of deaths: According to some laws, it is assumed that the persons died simultaneously[327] and do not

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[322] See Art. 92 of the *Bulgarian* Private International Law Code; Book 26 Sec. 14(2) of the *Finnish* Succession Act; Art. 49 of the *Italian* Private International Law Act; Art. 1.62(3) of the *Lithuanian* Civil Code; Sec. 11 of chapter 1 of the *Swedish* International Successions Act.

[323] Supra III.

[324] See e.g. Sec. 1923(1) of the *German* Civil Code.

[325] See e.g. Art. 9 of the *German* Introductory Act to the Civil Code.

[326] See Art. 91 No. 4 of the *Bulgarian* Private International Law Code; Sec. 24 No. 2 of the *Estonian* Private International Law Act; Book 26 Sec. 7 No. 1 of the *Finnish* Succession Act. See also Slovak Reply 3.

[327] See e.g. Sec. 11 of the *Austrian* Declaration of Death Act; Art. 4:2(1) of the *Dutch* Civil Code; Art. 725–1(1) of the *French* Civil Code; Sec. 11 of the *German* Missing Persons Act; Art. 4 of the *Italian* Civil Code; Art. 33 of the *Spanish* Civil Code.

succeed to each other. Other legal systems assume that one person, for example, the younger, survives the other person[328]. No conflict arises if the succession of all persons involved is governed by the *same* law or the different applicable succession laws contain *identical* assumptions. No conflict arises either if the different applicable succession laws have *divergent* assumptions but lead to *reconcilable* results. If, for instance, the succession law of a husband assumes that husband and wife died simultaneously, whereas the succession law of the wife assumes that the husband survived the wife and correspondingly inherits, the divergent assumptions are reconcilable: the husband inherits from his wife (which is relevant for his heirs) but the wife does not inherit from her husband[329]. A *true* conflict only arises in the rare case that the divergent assumptions for two persons lead to irreconcilable results[330], for example, if under both succession laws the respective other person survives and inherits from the other.

Article 13 of the Hague Succession Convention tries to solve the conflict with a substantive rule which is adopted by Art. 3.9 of the Discussion Paper: It stipulates that, if it is uncertain in what order the persons died and if the applicable succession laws provide differently for this situation or make no provision at all, none of the deceased persons shall have any succession rights. Article 13 goes, however, at least in the English version[331], a little bit too far[332]. The Convention pre-emptively excludes a succession where the different assumptions, as already demonstrated, could be *reconciled*, especially if one of the laws does not contain any provision at all. Therefore, a special substantive rule should be restricted to the rare case where due to divergent assumptions of the applicable succession laws both person would have survived and inherited from each other[333]:

> *Art. 3.9 – Simultaneous deaths*
> Where two or more persons whose successions are governed by different laws by virtue of the Regulation die in circumstances in which it is uncertain whether one person has survived the other person, and where those different laws respec-

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[328] See e.g. Sec. 184 of the *UK* Law of Property Act. See, however, also the restriction for spouses by Sec. 46(3) of the *UK* Administration of Estates Act. See also Arts. 720 et seq. of the old *French* Civil Code.

[329] See, however, also *Jayme/Haack*, Die Kommorientenvermutung im internationalen Erbrecht bei verschiedener Staatsangehörigkeit der Verstorbenen: ZvglRWiss. 84 (1985) 80–96 (96).

[330] See *Staudinger (-Dörner)* Art. 25 EGBGB para. 100.

[331] See the narrower French version of Art. 13: "ces lois règlent cette situation par des dispositions incompatibles".

[332] For an adoption of Art. 13 of the Hague Succession Convention: DNotI Study 264; Dutch Reply 4; Ulrik Huber Institute Reply 6; *Harris* 217. See also GEDIP Reply 4; German Federal Council Reply 3; Polish Reply 3. For an application of the lex fori: Czech Reply 4.

[333] See German Government Reply 3.

tively provide that the other person inherits, none of the deceased persons shall have any succession rights to the other or others.

7. Administration of the estate

The Green Paper[334] raised the question whether the general conflict rules for succession should also determine the law governing the administration of the estate including the liability and settlement of debts of the deceased[335]. The idea of a special conflict rule for the administration of the estate might surprise lawyers in most Member States whose laws regard administration and succession as a unity, subject to the same conflict rule[336]. The Commission's question, however, is quite comprehensible against the background of legal systems which distinguish between administration and succession. For example, according to *English* law, an estate situated in England can only be rightfully collected by a personal representative designated by the testator or the court[337]. Irrespective of the applicable succession law the administration of the estate is governed by the law of the country from which the personal representative derives his authority[338], which is, as far as the administration of property in England is concerned, the lex fori. Also in *Austria* the administration of the estate requires an administration procedure; the estate is assigned to the heirs by a court decision (Einantwortung)[339]. Again irrespective of the applicable succession law, Austrian courts, which mainly have jurisdiction for the administration of property situated in Austria[340], apply their own law to the administration of the estate if proceedings for administration have been initiated in Austria[341]. Provisions with similar effect can be found in other Member States[342].

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[334] Green Paper 5 (Question 1).

[335] Cf. Staff Working Paper 10 et seq.

[336] See Art. 91 Nos. 5–7 of the *Bulgarian* Private International Law Code; Sec. 24 Nos. 4 and 5 of the *Estonian* Private International Law Act; Art. 46(3) of the *Italian* Private International Law Act; Art. 62 of the *Portuguese* Civil Code; Art. 67(e) and (f) of the *Romanian* Private International Law Act. See for *France*: Cass. civ. 22. 12. 1970 (supra n. 85) 467. See for *Germany*: *Staudinger (-Dörner)* Art. 25 EGBGB para. 21.

[337] See *New York Breweries Co. Ltd.* v. *Attorney-General*, [1899] A.C. 62. See also Rules 135 et seq. of *Dicey/Morris/Collins*.

[338] Rule 134 of *Dicey/Morris/Collins*.

[339] See e.g. Secs. 797 and 819 of the *Austrian* Civil Code.

[340] See Sec. 106 of the *Austrian* Jurisdiction Act.

[341] See Sec. 28(2) of the *Austrian* Private International Law Act. Cf. also Sec. 32.

[342] See Arts. 4 and 5(1) of the *Dutch* International Successions Act; Book 26 Sec. 15(1) of the *Finnish* Succession Act; Secs. 1 and 2 of chapter 2 of the *Swedish* International Successions Act.

Different approaches of the Member States as to the law governing the administration should not be maintained[343], notwithstanding the makeshift solution of the Hague Succession Convention[344], which excludes administration from the scope of the harmonised conflict rules and leaves it up to the Contracting States whether they apply to administration the general rules for successions or special national conflict rules. Even if administration and succession are separated by some systems, they are two sides of the same coin. The integrative effect of a choice-of-law instrument on succession and wills would be rather small if the conflict rules for the practically important administration of the estate are not harmonised.

A viable, uniform solution could be to apply the lex fori to the administration of the estate. Already Murad Ferid, in his 1974 Hague Lecture, had advocated such a special conflict rule for administration[345]. Also the 1973 Hague Convention concerning the international administration of the estates of deceased persons[346], which aims to establish an international certificate for personal representatives and which is in force for a few Member States[347], stipulates, at least in principle, that the lex fori governs the designation of the holder of the certificate and his powers[348]. An application of the lex fori to the administration of the estate would have the *advantage* that the courts would not need to apply foreign law, which is often difficult because administration and procedure are strongly connected and the procedural law of the lex fori will be adjusted to the domestic rules on administration but not to foreign law. This advantage relates even to unitary systems which do not distinguish between administration and succession. In those legal systems the administration of the estate is, in the regular case, carried out without any special procedures indeed; the estate with all its assets and liabilities is transferred to the heirs ex lege[349] or by private act[350]. However, the courts in those countries have to support the administration of the estate as well, for example, by issuing inheritance certificates, opening wills, appointing executors or administrators or administering the formalities of the devolution or transmission of the estate. *German* law, so far, has circumvented an application of foreign law to the administration on the level of jurisdiction: German courts only assumed jurisdiction for the administration of estates if

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[343] Ulrik Huber Institute Reply 2; *Haas* 110; *Herweg* 106; *Lehmann*, Reform 169. For an exclusion: UK Reply 7.

[344] See Art. 7(2) and (3) of the Convention and *Waters* para. 81.

[345] *Ferid*, Le rattachement autonome de la transmission successorale en droit international privé: Rec. des Cours 142 (1974-II) 71–202 (169 et seq.).

[346] Of 2. 10. 1973, 11 Int. Leg. Mat. 1277.

[347] The Czech Republic, Portugal, Slovakia.

[348] Art. 3 of the Convention.

[349] See e.g. Art. 724(1) of the *French* Civil Code; Sec. 1922(1) of the *German* Civil Code; Art. 657 of the *Spanish* Civil Code.

[350] See e.g. Arts. 459, 470 et seq. of the *Italian* Civil Code.

German law was applicable[351]. Yet that "Gleichlauftheorie", potentially leading to a denial of justice, has been abandoned by the German legislator recently[352].

Notwithstanding those problems of coordinating domestic procedural law with foreign rules on administration – problems which can be solved by the courts[353] – a special conflict rule for administration pointing to the lex fori should not be adopted. Rather, the *general rules* for successions should, in principle, encompass the administration of the estate[354], as also Art. 3.6(2) sentence 1 and Art. 3.6(2)(i) of the Discussion Paper propose. First of all, the governing succession (and administration) law will, in any case, often be the lex fori if the European instrument adheres to the residence principle and maintains Art. 2.1 of the Discussion Paper according to which the courts of the last habitual residence have primary jurisdiction. Furthermore, a special conflict rule pointing to the lex fori would cause new problems of *characterisation* and *coordination*. On the one hand, it might be difficult to characterise whether a certain rule relates to succession or to administration of the estate if a unitary system is involved; an autonomous definition of administration would have to be developed. On the other hand, different laws would also have to be coordinated under a special conflict rule – not as to procedure and administration indeed but as to succession and administration, a coordination which is especially delicate if succession and administration are conceived as a unity under the applicable laws. Most notably, however, the application of the lex fori to administration would cause *international disharmony* and, partly, a *dualist system*. Notably with regard to third states more than one court could be competent for the administration of the estate (Art. 2.3 of the Discussion Paper); different parts of the estate would then have to be administrated under different laws. The application of different laws to one

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[351] See e.g. BayObLG 13. 11. 1986, NJW 1987, 1148 (1149).

[352] Cf. Sec. 105 of the Act on Family and Non-Contentious Proceedings.

[353] See e.g. for *Germany*: BayObLG 2. 12. 1965, NJW 1967, 447.

[354] See DNotI Study 264; Parliament Report 6 (Recommendation 6, 1st indent); Czech Reply 2; Dutch Reply 1; French Reply 2; GEDIP Reply 1 et seq.; German Government Reply 2; German Federal Council Reply 2; Luxembourgian Reply 1; Swedish Reply 1; *Berenbrok*, Internationale Nachlaßabwicklung (1989) 168 et seq.; Münch. Komm. BGB *(-Birk)* (supra n. 234) Art. 25 EGBGB para. 77; *Brandi* (supra n. 140) 367; *Haas* 109; *Kegel/Schurig* (supra n. 89) 1008; *Lehmann*, Reaktionen 205; *id*., Reform 169; *id*., Ernüchternde Entwicklung beim Europäischen Erbrecht?: Familie, Partnerschaft, Recht (FPR) 2008, 203–206 (205) (cited: Entwicklung); *Mansel* 208; *Sipp-Mercier*, Die Abwicklung deutsch-französischer Erbfälle in der Bundesrepublik Deutschland und in Frankreich (1985) 136; *Tiedemann*, Internationales Erbrecht in Deutschland und Lateinamerika (1993) 77. For a special conflict rule: Finnish Reply 1; Annex B to UK Reply 3; Ulrik Huber Institute Reply 3 et seq.; *Jayme*, Grundfragen des internationalen Erbrechts, dargestellt an deutsch-österreichischen Nachlaßfällen: ZRvgl. 34 (1983) 162–179 (168); *Zillmann*, Die Haftung der Erben im internationalen Erbrecht (1998) 176 et seq.

and the same estate is reminiscent of the problems of the dualist approach and should, here as there, be avoided[355].

Although the general conflict rules for successions should also cover the administration of the estate, a *compromise* is still needed for systems, such as England and Austria, which have a mandatory administration procedure for property situated in their territory. If those laws were required to apply the general conflict rules to the administration of the estate, they would have to give up their mandatory administration procedures if a foreign law governs the succession. A unitary European approach would disrupt the national administration systems[356], although it should be noted that the application of the general conflict rules to administration might, in turn, extend the international scope of those mandatory administration procedures to parts of the estate which are situated abroad but inherited under domestic law. Nevertheless, in order to protect mandatory administration procedures for property situated in those countries, an exception from the general conflict rule should be made along the lines of *Belgian* law. Belgian law stipulates that the administration of the estate is, in principle, governed by the applicable succession law[357] unless the lex rei sitae requires an involvement of the state in the administration[358]. That exception should be adopted[359]. It would allow courts to apply their mandatory administration procedures to property situated in their territory even if the succession is governed by a foreign law, albeit at the price of characterisation and coordination problems as well as partial international disharmony. Also foreign courts would get a tool to recognise special administration procedures. The exception could be formulated as follows:

> *Art. 3.6 – Scope of the law applicable*
> […]
> (3) Notwithstanding the preceding paragraph, the administration of the estate is governed by the law of the country where the estate is situated if that law requires a mandatory administration procedure.

A last remark shall concern the possibility of the heirs to *choose* the law governing the administration of the estate. In *Italy* the heirs can subject the distribution of the estate to the law of the place where the estate is opened

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[355] See supra III.

[356] See UK Reply 7; *Harris* 190 et seq.; *id.* (supra n. 40) 365, 367.

[357] Art. 82 Sec. 1(1) of the *Belgian* Private International Law Act.

[358] Art. 82 Sec. 1(2) of the *Belgian* Private International Law Act.

[359] See DNotI Study 264; Staff Working Paper 11; Parliament Report 8 (Recommendation 8, 1st indent) and 12; *Haas* 110; *Lehmann*, Reaktionen 205; *id.*, Reform 169; *id.*, Entwicklung (supra n. 354) 205.

or to the lex rei sitae[360], in the *Netherlands* to any other law[361]. Such a rule should not be adopted[362]. By their choice, the heirs could impair interests of third parties, notably creditors of the deceased whose claims have to be settled according to the applicable administration rules.

VII. Interaction with Neighbouring Conflict Rules

The considerations in this paper should be concluded with an outlook on the potential interaction of the future European conflict rules for succession and wills with neighbouring legal areas. Succession law is in most legal systems linked to other areas of law, especially family law, property law, contract law and company law – areas which are subject to their own choice-of-law rules. These rules have to be coordinated with the conflict rules for succession and wills. On a very abstract level, four different situations have to be distinguished which flow from the possible hierarchies of conflict rules within the Community.

Firstly, the future conflict rules for successions will have to be distinguished from *overriding* conflict rules which are derived from primary Community law. This relates especially to the already mentioned jurisprudence of the ECJ in *Centros*, *Überseering* and *Inspire Art* regarding the free movement of companies within Europe[363], from which, for example, the German courts infer a conflict rule for European companies pointing to the place of incorporation[364]. Here the question arises whether the freedom of establishment guaranteed by Arts. 43 and 48 of the EC Treaty is affected if the governing company law contains special rules for the succession in certain company shares[365], as is the case in Germany for certain private companies[366]. The answer to the question will, to a lesser extent than under national law, depend on the *doctrinal* characterisation of the issue. Rather similar to the impact of the freedom of establishment on the European Insolvency Regulation[367] with regard to the delimitation of the conflicts rules for insolvency and companies[368], the discussion will, notably, have to focus on (1) the ques-

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[360] Art. 46(3) of the *Italian* Private International Law Act.

[361] Art. 4(2) sentence 1 of the *Dutch* International Successions Act.

[362] DNotI Study 269; *Bauer* 203; *Kruis*, Das italienische internationale Erbrecht (2005) 195 et seq.; *Mansel* 213. For a party autonomy of the heirs: Ulrik Huber Institute Reply 7; *Davì* 409 et seq.; *Henrich* as reported by *Bauer* 203.

[363] See supra V.

[364] BGH 13. 3. 2003, BGHZ 154, 185 (189); 14. 3. 2005, IPRspr. 2005 No. 212.

[365] See *Dutta*, Die Abgrenzung von Gesellschaftsstatut und Erbstatut beim Tod des Gesellschafters: RabelsZ 73 (2009) issue 4 (forthcoming).

[366] See e.g. BGH 10. 2. 1977 (supra n. 77).

[367] Regulation No. 1346/2000 (supra n. 2).

[368] See *Eidenmüller*, Gesellschaftsstatut und Insolvenzstatut: RabelsZ 70 (2006) 474–504.

tion whether the application of a certain succession law prohibits, impedes or renders less attractive the exercise of that freedom[369], (2) the extent to which choice-of-law rules of secondary Community law are subject to the fundamental freedoms at all[370] and (3) whether the application of that law is justified by the so-called four-conditions test[371]. This method of coordinating primary and secondary conflict rules differs from the methods familiar under national law, even if both methods might eventually render similar results.

Secondly, a general problem of future European private international law will be the demarcation of the conflict rules contained in *secondary* Community law. With regard to succession and wills, it will be particularly essential to draw the boundary lines between the present and future European conflict rules for contract (e.g. lifetime gifts and clawback[372], sale of the estate, waiver of succession rights) and matrimonial property (e.g. compensation by increasing the share of the surviving spouse). The pointillist technique employed by the European legislator will necessarily entail frictions, disparities and gaps between the different legislative acts. In order to avoid gaps between the European conflict rules, the courts will have to align the scope of those rules[373]. A recent example where this method of closing gaps by extending the scope of neighbouring instruments could be observed is the delimitation of the Insolvency Regulation and the Brussels I Regulation with regard to jurisdiction for so-called insolvency-related proceedings[374].

Thirdly, the European conflict rules for succession will have to be coordinated with the conflict rules contained in the *conventions of the Member States*. As far as the European rules do not reserve the application of those rules explicitly[375] or tacitly[376], which could be contemplated with regard to the Hague Trust Convention[377], the European rules will, within the borders of Art. 307 EC, prevail over the Conventions of the Member States[378]. How-

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[369] See ECJ 15. 1. 2002 – Case C-439/99 *(Commission* v. *Italy)*, E.C.R. 2002, I-305, para. 22.

[370] See e.g. ECJ 9. 8. 1994 – Case C-51/93 *(Meyhui)*, E.C.R. 1994, I-3879, paras. 11 et seq.; 25. 6. 1997 – Case C-114/96 *(Kieffer)*, E.C.R. 1997, I-3629, paras. 37 et seq.

[371] See e.g. ECJ 30. 9. 2003 (supra n. 151) para. 133.

[372] See supra VI.1. and the proposed Art. 3.4bis.

[373] See Recital 7 of Regulation No. 593/2008 and of Regulation No. 864/2007 (both supra n. 2).

[374] See ECJ 12. 2. 2009 – Case C-339/07 *(Deko Marty Belgium)* (not yet in E.C.R.).

[375] See e.g. Arts. 69 et seq. of Regulation No. 44/2001; Arts. 59 et seq. of Regulation No. 2201/2003; Art. 28 of Regulation No. 864/2007; Art. 25 of Regulation No. 593/2008 (all supra n. 2).

[376] See ECJ 24. 6. 2008 – Case C-188/07 *(Commune de Mesquer)*, E.C.R. 2008, I-4501, para. 81.

[377] See supra VI.4.

[378] See e.g. ECJ 2. 8. 1993 – Case C-158/91 *(Levy)*, E.C.R. 1993, I-4287, para. 22; 27. 11. 2007 – Case C-435/06 *(C)*, E.C.R. 2007, I-10141, paras. 57 et seq.

ever, a precedence of the European rules does not necessarily make those conventions meaningless. Especially if the European conflict rules have been inspired by those conventions – in the present case notably by the Hague Succession Convention – the conventions play an important role in the interpretation of European law as can be shown by recent case law of the ECJ where, for example, the "Hague roots"[379] of the Brussels IIbis Regulation with regard to parental responsibility were considered[380].

Fourthly and finally, the European conflict rules for succession will have to be coordinated with the remaining *national* conflict laws. Here especially the delineation of the conflict rules for succession and wills on the one side and the conflict rules for property, personality and adoption on the other side can be problematic[381]. Again, the process of characterisation will differ from the traditional method of delineating national conflict rules: The focus will lie on the autonomous interpretation of the overriding European conflict rules[382] and their effet utile. Only the rest is national law.

[379] In that case the Hague Child Protection Convention (supra n. 90).

[380] See e.g. Opinion of AG Kokott delivered on 20. 9. 2007 – Case C-435/06 *(C)*, E. C. R. 2007, I-10141, paras. 48 et seq.

[381] See for property supra III. and VI.4. and for personality supra VI.3. and 6.

[382] See supra VI. at note 207.