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REGULATION (EU) 650/2012 AND TERRITORIAL CONFLICTS OF LAWS IN SPAIN

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1. INTRODUCTION

Since 17 January 2015, all judicial authorities and all other authorities and legal professionals of 25 EU Member States – all of them, with the exception of the UK, Ireland and Denmark – are bound by a new comprehensive body of rules on private international law on cross-border succession matters: Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 (hereinafter ‘the Succession Regulation’).¹

The adoption of this Regulation brought with it a great change in the regulation of cross-border successions. In general terms, the Succession Regulation allows a person to choose the law of their nationality (Article 22) and, failing that, establishes the application of the law of the habitual residence of the deceased unless it is clear from all the circumstances of the case that the deceased was manifestly more closely connected with another State (Article 21).

¹ Council Regulation (EU) 650/2012 of 4 July 2012 of the European Parliament and the Council on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession [2012] OJ L 201, 27 July.

In Spain, the application of these conflict-of-laws rules has created new debates and challenges, especially in light of the most recent statistics of emigration and immigration in the country. Currently, more than five million foreign nationals have their habitual residence in Spain, among which more than 400,000 are over 65 years old.² This means that the application of Spanish law by virtue of the law of the habitual residence of the deceased will not be an exceptional situation. The same is true in those instances where the deceased passed away having their habitual residence in another State, but being more closely connected with Spain. In this regard, one of the factors that may activate the ‘escape clause’ provided in Article 21(2) of the Succession Regulation will be the ownership of the deceased of assets located in Spain. This can be a relevant factor not only for Spanish citizens, but also for foreign nationals.³

However, the potential application of Spanish law goes beyond the Spanish territory. Nowadays, more than 2.5 million Spanish citizens have their habitual residence abroad, nearly one million of them in Europe.⁴ For those who have their habitual residence in a Member State where the Succession Regulation is applicable, this means the possibility of choosing the applicable law to their succession, i.e. Spanish law.

Starting from the above and taking into account the fact that Spain is a non-unified legal system composed of different territories with their own succession law, it is necessary to determine the applicable *territorial* legal regime within Spain. Given the content of the conflict-of-laws rules of the Succession Regulation, this is particularly relevant not only for foreign nationals having their habitual residence in Spain, but also for Spanish citizens interested in the *professio iuris*. There are obviously more examples which may lead to the application of Spanish law, but these are probably the most representative ones.

The Succession Regulation includes a provision that deals with the applicable territorial legal regime in relation to non-unified legal systems.⁵ In particular, Article 36 contains a subsidiary

² See the information provided on the Spanish Ministry of Labour, Migration and Social Security website: <http://extranjeros.mitramiss.gob.es/es/Estadisticas/operaciones/con-certificado/index.html>. In particular, see Tables T1, C5 and G7.

³ It is important to bear in mind that foreign nationals are buying assets in Spain at a higher rate than ever before. See https://elpais.com/elpais/2018/11/14/inenglish/1542206378_088000.html.

⁴ See the latest figures provided by the Spanish National Institute of Statistics: https://www.ine.es/prensa/pere_2019.pdf.

⁵ A general overview of non-unified legal systems in private international law can be found in A. BORRÁS RODRÍGUEZ, ‘Les ordres plurilégislatifs dans le droit international privé actuel’ in *Académie de droit international-Recueil des Cours*, Tome 249, Nijhoff. La Haya 1994, pp. 145–368. See also C. GONZÁLEZ BEILFUSS, ‘Interregional-Interstate Law’, in J. BASEDOW, G. RÜHL, F. FERRARI and P. DE MIGUEL ASENSIO (eds), *Encyclopedia of Private International Law*, Edward Elgar, Cheltenham 2017, pp. 1015–1019; and F. EICHEL,

reference model, where priority is given to the domestic conflict-of-laws rules of the State determined by the Succession Regulation itself. Only ‘in the absence of such internal conflict-of-laws rules’ does the Succession Regulation set forth subsidiary rules, depending on whether the law applicable was determined by the habitual residence or the nationality of the deceased, or by other provisions.

The application of this reference model in Spain is very problematic. One of the main controversial issues deals with the consideration and application of the Spanish internal conflict-of-law rules to designate the specific Spanish succession law: the federal civil law (*derecho civil común*) or a local or regional law enacted by an Autonomous Community (*derechos autonómicos* or *derechos forales* in some regions).

This chapter examines this controversial issue of, on the one hand, how the application of Spanish law can take place through the conflict-of-laws rules of the Succession Regulation and, on the other hand, how to determine the specific succession law applicable in Spain. In particular, attention will be paid to cross-border successions (i.e. cases with a foreign element) as opposed to domestic successions (i.e. cases connected with different territories in Spain), since the values and principles involved in purely national cases are different from those that arise at an international level.

To this end, this chapter is divided into three parts. First, an overview of the substantive regulation of succession law in the different Autonomous Communities of Spain will be given, including a brief summary of the main differences between the federal civil law and/or local or regional laws. This will make clear that it is highly relevant in the Spanish context in which succession law is applicable (see section 2 below). Second, the determination of the law applicable through the conflict-of-laws rules of the Succession Regulation will be considered, looking specifically at the connecting factors used by the Regulation to determine the applicable law (see section 3 below). Finally, the application of Spanish law under the conflict-of-laws rules of the Succession Regulation will be stress-tested, tackling the most relevant situations in which it will be necessary to clarify whether the federal civil law or a local or regional law is applicable (see section 4 below).

‘References to Non-unified Legal Systems’, in S. LEIBLE (ed.), *General Principles of European Private International Law*, Wolters Kluwer, Alphen aan den Rijn 2016, pp. 275–303.

2. SUCCESSION LAW(S) IN SPAIN

Spain is an ‘Autonomous State’, comprising 17 Autonomous Communities and the cities of Ceuta and Melilla. The Spanish model combines elements of a centralised state (for example, the existence of a single constitution) with those of a federal state, as there is a division in several territories with their own legislative and executive powers, following the distribution of competences by the Spanish Constitution.⁶

In particular, in civil law, six of these Communities, based on the Article 149.1.8° of the Spanish Constitution, have the possibility to ‘conserve, modify and develop’ their own civil legislation, albeit with some limitations, particularly the enactment of conflict-of-laws rules, the competence for which remains with the Spanish Federal State. Concerning the topic at hand, Aragon,⁷ the Balearic Islands,⁸ the Basque Country,⁹ Catalonia,¹⁰ Galicia¹¹ and Navarre¹² have all developed different forms of succession law; they have also developed rules for other related areas, particularly for de facto unions/cohabitation/civil unions and local matrimonial property regimes. However, the other Autonomous Communities are directly bound by succession provisions contained in the Spanish Civil Code, which also have a supplementary and subsidiary impact on the legislation of the Autonomous Communities with their own local or regional law.

From a substantive point of view, there are important differences regarding the way in which the different local or regional laws and the federal civil law deal with different aspects of succession law. For instance, the regulation of forced shares/mandatory portions (see section

⁶ C. ELÍAS MÉNDEZ, ‘Spanish Public Law: Constitutional State Law’, in P. DE DIEGO ÁNGELES (eds), *An Introductory Course on Spanish Law and Economics*, Tirant Lo Blanch, Valencia 2014, pp. 102–104.

⁷ Legislative Decree 11/2011 of 22 March of the Government of Aragon approving with the title ‘Foral Code of Law of Aragon’ the consolidated version of the Civil Laws of Aragon.

⁸ Legislative Decree 79/1990 of 6 September, approving the consolidated version of the Civil Laws of the Balearic Islands, particularly amended by Law 3/2009 of 27 April, amending the consolidated version of the Civil Laws of the Balearic Islands concerning the grounds of indignity as to the inheritance and disinheritance and the Law 7/2017 of 3 August, amending the consolidated version of the Civil Laws of Balearic Islands.

⁹ Law 5/2012 of 25 June of the Basque Civil Law.

¹⁰ Law 10/2008 of 10 June of the fourth book of the Civil Code of Catalonia concerning succession law, amended by several laws (Law 25/2010 of 29 July of the second book of the Civil Code of Catalonia concerning the Person and Family Law, Law 6/2015 of 13 May of the harmonisation of the Civil Code of Catalonia and Law 3/2017 of 15 February of digital wills, amending the second and fourth books of the Civil Code of Catalonia).

¹¹ Law 2/2006 of 14 June of the Civil Law of Galicia.

¹² Foral Law 21/2019 of 4 April, amending and updating the consolidated version of the Civil Law of Navarre.

2.1 below), the testamentary formalities (see section 2.2 below) and the order of succession and intestate succession (see section 2.3 below) all differ significantly.¹³

2.1. FORCED SHARES/MANDATORY PORTIONS

Regarding forced shares, only in some territories is there complete freedom of testation (and thus no forced shares) – for example, in Navarre, where forced shares do not have any enforceable economic right, or in the territory of Fuero de Ayala, within the Autonomous Community of the Basque Country, where the testator may exclude the forced heirs from the inheritance.

At the other end of the spectrum, and indeed in the majority of the Autonomous Communities, the law prescribes the relatives of the deceased who might be forced heirs and the specific portions that they might be awarded.

For example, the forced shares for the children of the deceased or their descendants are one-quarter in Catalonia and Galicia, one-third in the Basque Country, one-half in Aragon and one-third or one-half (depending of the number of children of the deceased) in the territories comprising the Balearic Islands. By contrast, in the Spanish Civil Code, the forced share is two-thirds, whereby one-third must be divided equally between the children or their descendants and one-third corresponds to the so-called ‘tercio de mejora’, which allows the testator to improve the position of any of their children or descendants.

Divergences also can be seen between the Spanish Civil Code and the regional forms of legislation regarding forced shares for parents and other ascendants of the deceased in the absence of descendants. For example, in Aragon, the Basque Country and Galicia, ascendants are not awarded with the forced share, whereas in Catalonia and in the territories of Mallorca and Menorca, one-quarter of the share can be granted to parents, but not to other ascendants. By contrast, in the Spanish Civil Code, both parents and, in their absence, other ascendants may receive a portion of the inheritance (one-half or one-third in the case of concurrence with the surviving spouse) by virtue of the law.

¹³ See particularly in the Spanish doctrine J. CASTAÑ TOBERAS, *Derecho civil español, común y foral*, vol. 6-2, Reus, Madrid 2015; and J.J. RIVAS MARTÍNEZ, *Derecho de sucesiones común y foral*, Dykinson, Madrid 2009. For a good summary of the main differences concerning the different succession laws in Spain (although most of the substantive legislation has been replaced/amended in the last few years), see S. CÁMARA LAPUENTE, ‘New Developments in the Spanish Law of Succession’ (2007) 4 *Indret*, http://www.indret.com/pdf/493_es.pdf.

The same is true in the case of the surviving spouse,¹⁴ where their protection takes usually place by the award of different portions of the usufruct depending on whether there are descendants and ascendants or not. For example, the forced share is one-half in the Spanish Civil Code when there are ascendants, one-third when there are descendants and two-thirds in the absence of both. Meanwhile, in Catalonia, the so-called ‘cuarta viudal’ tends to compensate the surviving spouse in order to satisfy their needs according to different criteria.

2.2. TESTAMENTARY FORMALITIES

The approaches to testamentary formalities are also different.

The Spanish Civil Code only allows for the possibility to make a will. However, according to the local or regional law enacted by the different Autonomous Communities, other inheritance instruments in which the testator’s will might be reflected are common. This is particularly relevant in rural areas where inheritance agreements exist, originally as an important tradition in order to plan the inheritance of the agricultural land, etc. Today such agreements still seem to be very popular for the organisation and future development of family businesses.

A similar divide can be observed concerning joint wills, which are prohibited by the Spanish Civil Code, but are possible (and popular) in some Autonomous Communities, such as Aragon, Galicia, Navarre and the Basque Country, each with their own peculiarities that are beyond the scope of the discussion here.¹⁵

2.3. INTESTACY AND ORDER OF HEIRS

Intestate succession also has a heterogeneous legal regulation in Spain. For example, in some Autonomous Communities such as Aragon, Navarre and, in the Basque Country, the territories of Bizkaia, Llodio and Aramaio, there is a part of the estate called ‘bienes troncales’, which are considered as family assets and the division of which takes place among bloodline relatives, i.e. siblings, ascendants and relatives until the fourth degree of consanguinity. As can be inferred, its main goal is to retain family assets undivided between bloodline relatives and consequently the surviving spouse is generally excluded from this part of the assets, and their award takes

¹⁴ This is also relevant for the surviving couple/partner in this section.

¹⁵ See M. CARBALLO FIDALGO, ‘El testamento mancomunado. Análisis comparado de los ordenamientos forales y regulación en la propuesta de código civil de la APFC’ (2019) 103(5) *Revista de derecho privado* 77, 109.

place by other means. But again, the regulation of these ‘bienes troncales’ – the so-called ‘troncalidad’ – differs significantly in the various regions. For example, in the Basque Country and Navarre, the ascendants will receive such ‘bienes troncales’ only in the absence of descendants, whereas in Aragon, it is the siblings who are the first ones to benefit when there are no descendants.

In addition to the issues arising out of the legal institution of ‘troncalidad’, there are also differences as to the order of the heirs when there is no testamentary disposition.

For example, in Catalonia, Navarre and the Basque Country, the surviving spouse/partner is the first in line in the legal order when the deceased has no descendants, whereas in Aragon, the surviving spouse is the second in line behind the ascendants.

Meanwhile, according to the Spanish Civil Code, the surviving spouse will inherit in the absence of any descendant and ascendant. The same is true in the Autonomous Communities of Galicia and the Balearic Islands, where a reference is made to the rules of the Spanish Civil Code, despite the fact that some specific rules are provided for the surviving spouse in these instances.

2.4. SUMMARY: A WIDE DIVERGENCE IN SUCCESSION LAW

The above discussion has shown that succession law in Spain is a legal field where many relevant differences exist. It is obvious that whether the Spanish Civil Code or a local or regional law applies is highly relevant. The possibilities provided by the different territorial legal regimes allow the testator and/or their heirs a multitude of different ways to deal with an estate, all with their own peculiarities and characteristics. Hence, it should be obvious that it would be very problematic if the Succession Regulation simply declared ‘Spanish law’ to be applicable.

3. THE APPLICABLE LAW ACCORDING TO THE SUCCESSION REGULATION

As mentioned in section 1 above, the Succession Regulation has completely changed the law of cross-border successions by the introduction of a new comprehensive body of rules of the so-called three sectors of private international law (international jurisdiction, applicable law, and recognition and enforcement of decisions).

Since this chapter mainly focuses on how to deal with the designation of ‘Spanish law’ as the applicable law, this section will first deal with the most relevant conflict-of-laws rules embodied in Chapter II of the Succession Regulation, namely the exercise of *professio iuris*

(see section 3.1 below) and, in the absence of such a choice, the law determined by the objective connecting factor (see section 3.2 below).

Before starting with the analysis, it is important to remember that the Succession Regulation departs from two basic principles to determine the applicable law, both when it is determined through the objective connecting factor and also through the use of party autonomy. On the one hand, only one law – a unitary system – shall regulate the succession as a whole.¹⁶ On the other hand, the Succession Regulation establishes the universal application of the law applicable, i.e. regardless of whether the law designated by the conflict-of-laws rules of the Succession Regulation is the law of a third country (Article 20 of the Regulation).¹⁷

3.1. CHOICE OF LAW

The Succession Regulation allows a person to choose the law of their nationality either at the time of making the choice or at the time of death to govern their succession (Article 22(1)). The application of this connecting factor has priority over the rest of the provisions dealing with the applicable law in the Succession Regulation. As a consequence, the exercise of *professio iuris*¹⁸ (made by the deceased, not by their beneficiaries) determines the applicable law, regardless of any other circumstances. Choice of law excludes any possibility of *renvoi* and thus provides for legal certainty in the arrangement of succession.

The introduction of (limited) party autonomy in the Succession Regulation is a novelty to some Member States¹⁹ such as Spain, whose former domestic conflict-of-laws rule on succession matters (Article 9.8 of the Spanish Civil Code) did not provide for the possibility of choosing the applicable law.

However, party autonomy is permissible only in a very limited way, namely that only the law of the nationality can be chosen. In particular, a person may choose the law of the nationality they possess at the time the choice is made or at the time of death. There are consequently two points in time at which the *professio iuris* can be developed. Two issues are worth highlighting. First, when the law of the current nationality was chosen, a subsequent

¹⁶ A. BONOMI, ‘Introduction’, in A. BONOMI and P. WAUTELET, *Le droit européen des successions. Commentaire du Règlement (UE) n° 650/2012 du 4 juillet 2012*, 2nd edn, Bruylant, Brussels 2017, pp. 43–45.

¹⁷ A. BONOMI, ‘Application universelle’, in A. BONOMI and P. WAUTELET, above n. 16, pp. 303–305.

¹⁸ An analysis of the possibility of *professio iuris* in succession law (before the application of the Regulation) can be found in J.M. FONTANELLAS MORELL, *La professio iuris sucesoria*, Marcial Pons, Madrid 2010.

¹⁹ D. STAMATIADIS, ‘Article 22. Choice of Law’, in H.P. PAMBOUKIS (ed.), *EU Succession Regulation n° 650/2012: A Commentary*, Beck-Hart-Nomos, Atenas 2017, pp. 213–219.

change of nationality does not lead to a modification of the applicable law. Therefore, if a person wants to regulate their succession according to the law of their new nationality, they must update their previous choice (Article 22(4) of the Succession Regulation). Second, it is possible that a person chooses the law of the nationality they expect to acquire, but which they ultimately do not acquire before their death. In this case, the *professio iuris* will not be valid and the applicable law will be determined by the default rule,²⁰ just as it would be in the absence of any choice.

Finally, where a person holds more than one nationality, it is possible to choose the law of any of their nationalities, regardless of the countries those nationalities refer to (Article 22(1) of the Succession Regulation). The Succession Regulation thus aims to avoid the prevalence of one nationality over another.

3.2. THE DEFAULT RULE

In those instances where the deceased did not choose the applicable law or when the choice was not valid, the Succession Regulation contains a default rule to determine the law governing the succession in Article 21. This provision comprises the application of an objective connecting factor (Article 21(1)) together with an escape clause for exceptional cases (Article 21(2)).

Primarily, it is the application of the habitual residence of the deceased at the time of death that will determine the law governing the succession. The EU legislator has opted for a territorial connecting factor as opposed to a personal one (such as nationality) to determine the *lex successionis*; this is based on the presumption that the deceased's centre of life (including their assets) will be located in the State of their last habitual residence, as in most cases will the heirs. In fact, the prevalence of habitual residence over nationality as an objective connecting factor is currently a trend in EU regulations, just as it used to be in the Hague Conference Conventions.²¹

The Succession Regulation does not provide for a definition of habitual residence. However, there are some recitals in the Regulation the main purpose of which is to ease the interpretation and application of the notion of 'habitual residence'. Thus, the Succession Regulation encourages the competent authority to take into account all the circumstances of the case (recital

²⁰ E. CASTELLANOS RUIZ, 'Article 22. Choice of Law', in A.L. CALVO CARAVACA, A. DAVÍ and H-P. MANSEL (eds), *The EU Succession Regulation: A Commentary*, Cambridge University Press, Cambridge 2016, pp. 333–335.

²¹ J. PIRRUNG, 'Hague Conference on PIL', in J. BASEDOW, K.J. HOPT and R. ZIMMERMANN (eds), *The Max Planck Encyclopedia of European Private Law*, vol. I, Oxford University Press, Oxford 2012, pp. 818–819.

23), particularly those referring to some factors such as the ‘duration and regularity of the deceased’s presence in the State concerned and the conditions and reasons for that presence’. Hence, it is more than clear that the EU legislator intended to provide a flexible concept whereby a case-by-case analysis should be carried out.

However, the flexible approach does not mean that there will not be some difficult cases.²² This is a particular issue that is also addressed in the recitals, where two different situations are mentioned. For example, the deceased may have their habitual residence in the State where they are working while their family is living in a different country. In these instances, recital 24 of the Succession Regulation seems to give prevalence to the personal centre of interests of the deceased over the professional one. But where the deceased resided alternately in two States (for example, they have been travelling constantly from one State to another), recital 24 of the Succession Regulation encourages the competent authority to take into account all the circumstances of the case in order to tackle the application of the law of the last habitual residence of the deceased.

The default rule also includes an escape clause in those instances where the habitual residence does not entail a close and stable link with the deceased and the application of that law therefore might be inappropriate (recital 23 of the Succession Regulation). In these cases, there is the possibility for the competent authority to apply a different law, i.e. the law of the State to which the deceased was manifestly most closely connected (Article 21(2) of the Succession Regulation).

This escape clause is based on an exceptional measure provided in the Regulation that requires that ‘all the circumstances of the case’ reflect a stronger connection with another State. It was included in the Succession Regulation to deal in particular with those cases where the deceased moved to a different State shortly before their death and where the connections/relations with their previous habitual residence were still stronger (recital 25 of the Regulation). In these cases, the Succession Regulation refers to the application of the law closely connected to the deceased instead of the law of the last habitual residence at the time of death.

Despite its good intentions, the introduction of such a clause has not been welcomed by some authors: it might create legal uncertainty and lead to the application of a law foreign to

²² G. PALAO MORENO, ‘Artículo 21. Regla general’, in G. PALAO MORENO and J.L. IGLESIAS BUIGUES (eds), *Sucesiones internacionales. Comentarios al Reglamento (EU) 650/2012*, Tirant Lo Blanch, Valencia 2015, pp. 145–147. Regarding the concept of habitual residence in the Regulation, see particularly J. RE, ‘Where Did They Live? Habitual Residence in the Succession Regulation’ (2018) 54(4) *Rivista di diritto internazionale privato e processuale* 978.

the forum. It has also been argued that its inclusion in the Succession Regulation could have probably been unnecessary, since the very concept of habitual residence itself allows for sufficient flexibility, and that the ‘escape clause’ brings with it the danger of abuse.²³ Moreover, it is not clear who can ask for the application of a law other than that of the last habitual residence – is it the parties involved or the competent authority? The most logical interpretation is arguably that it should be open to all of them.²⁴

4. THE APPLICATION OF ‘SPANISH LAW’ UNDER THE SUCCESSION REGULATION

4.1. THE APPLICABLE LAW IN TERRITORIAL NON-UNIFIED LEGAL SYSTEMS

Once the Succession Regulation has determined the application of Spanish law by virtue of its own conflict-of-laws rules, it is necessary to specify the applicable territorial legal regime: federal civil law or a local or regional law enacted by an Autonomous Community. To this end, the Succession Regulation contains a provision (Article 36) in which a subsidiary reference model is adopted to deal with territorial non-unified legal systems in cross-border situations. This model is a combination of the so-called indirect and direct-reference model systems, where the former has precedence over the latter.²⁵

In the first instance, priority is given to the internal conflict-of-laws rules of the State law provided by the Succession Regulation to determine the applicable territorial legal regime (Article 36(1)), as it happens with the indirect model.

But ‘in the absence’ of such rules, the Succession Regulation directly designates the specific applicable territorial legal regime depending on how the law applicable had been determined (Article 36(2)). First, when a reference is made to the habitual residence, the specific territorial unit in which the deceased had their habitual residence at the time of death will be considered. Second, regarding the connecting factor of nationality, the Succession Regulation refers to the law of the territorial unit with a closest connection with the deceased. Finally, the law of the

²³ A.L. CALVO CARAVACA, ‘Article 21. General Rule’, in A.L. CALVO CARAVACA, A. DAVÍ and H-P. MANSEL, above n. 20, p. 320.

²⁴ Ibid., p. 322.

²⁵ An analysis of the weaknesses of the reference system for multi-unit States in the Succession Regulation can be found in G. CHRISTANDL, ‘Multi-unit States in European Private International Law’ (2013) 9(2) *Journal of Private International Law* 236, 244.

territorial unit in which the relevant element is located makes it possible to specify any reference to other elements as connecting factors. Alongside this, the Succession Regulation sets forth a specific rule for the problems arising in the context of formal validity and territorial heterogeneity (Article 36(3)).

The application of the subsidiary reference model provided in the Succession Regulation means that priority must be given to the existing Spanish internal conflict-of-laws rules to determine if it is the federal civil law or a local or regional one that regulates the succession. In the Spanish legal system, this means the application of Article 16 of the Spanish Civil Code, which states that: ‘Conflict of law which may arise as a result of the coexistence of different civil legislations within national territories shall be resolved according to the rules provided in Chapter IV with the following peculiarities.’ One of these peculiarities consists of the consideration of the civil neighbourhood (*vecindad civil*) as a personal law (Article 16.1.a) of the Spanish Civil Code). In fact, it is in the same Spanish Civil Code where it is provided that ‘the submission to federal civil law or to local or regional law is determined by civil neighbourhood’ (Article 14.1). In general, the Spanish legislator is making a reference to the conflict-of-laws rules used in cross-border situations to specify the applicable territorial legal regime with the correspondent adaptations, e.g. introducing the civil neighbourhood.

It is at this point where the Spanish doctrine is divided.²⁶ According to the majority of scholars, the reference made by Article 16 of the Spanish Civil Code should be interpreted literally, i.e. the conflict-of-laws rules contained in the Spanish Civil Code itself (in succession matters, Article 9.8 of the Spanish Civil Code) will be applicable to determine if the federal civil law or a local or regional law is applicable once the Succession Regulation has designated the Spanish law. However, a minority of scholars support a different view: since some of the conflict-of-laws rules of the Spanish Civil Code (and particularly those dealing with succession law) have been replaced by EU regulations and/or conventions, then the reference of Article 16 of the Spanish Civil Code should be understood to these instruments, i.e. to the conflict-of-laws rules in force in each moment. Consequently, in succession law, Article 9.8 of the Spanish Civil Code will never be applicable for international cases or to determine the applicable

²⁶ Nevertheless, this debate is not new. See recently J.L. IGLESIAS BUIGES, ‘La remisión a la ley española en materia sucesoria y de régimen económico matrimonial’ (2018) 10(1) *Cuadernos de Derecho Transnacional* 233, 247, <https://e-revistas.uc3m.es/index.php/CDT/article/view/4122/2649>; S. ÁLVAREZ GONZÁLEZ, ‘Sobre la aplicación de los Convenios internacionales y Reglamentos europeos en Derecho interregional’ (2018) 18 *Anuario español de Derecho internacional privado* 127, 161; and J.J. ÁLVAREZ RUBIO and U. BELINTXON MARTÓN, ‘Crisis matrimoniales y conflictos de leyes internos’, in M. GUZMÁN ZAPATER and M. HERRÁNZ BALLESTEROS (eds), *Crisis matrimoniales internacionales y sus efectos. Derecho español y de la Unión Europea. Estudio normativo y jurisprudencial*, Tirant Lo Blanch, Valencia 2018, pp. 793–900.

territorial legal regime, since the current conflict-of-laws rules in Spain are those contained in the Succession Regulation.

This chapter has highlighted the reasons to support this latter position in previous publications,²⁷ and they need not be repeated here. The majority of the doctrine and some non-judicial authorities arguably agreed on the first legal position set out in the previous paragraph. Therefore, this chapter will focus on the consequences of this view in practice.

4.2. PARTY AUTONOMY

As previously stated, it is possible for a person to choose the law of their nationality at the time of making the choice or at the time of death (Article 22(1) of the Succession Regulation).

This possibility makes it possible to distinguish, in the case where a Spanish citizen chooses the law of their nationality (e.g. a Spanish citizen living in Spain, but having assets abroad or a Spanish citizen having their habitual residence in another State), different scenarios depending on the moment in which the person made their choice and how the choice was expressed in the last will. However, this raises issues of coherence and coordination between the conflict-of-laws rules of the Succession Regulation and the Spanish domestic provisions (Articles 9.8, 14 and 16 of the Spanish Civil Code) on the determination of the applicable territorial legal regime in Spain (federal civil law or local or regional law).

First, if the deceased chose the law of their nationality at the time of making the choice without any other specification, then it will be necessary to determine which of the different Spanish succession laws is applicable. The subsidiary model of the Succession Regulation for territorial non-unified legal systems (Article 36) gives priority to the domestic conflict-of-laws rules of the State designated by the Regulation to determine the applicable internal regime. In the case of Spain, this means the application of Article 16 of the Spanish Civil Code, where a reference is made to the rules contained in Chapter IV of the Preliminary Title of the Spanish Civil Code. In succession matters, this leads to the application of Article 9.8 of the Spanish Civil Code, but considering the civil neighbourhood of the deceased as their personal law (Article 16.1.1° of the Spanish Civil Code).

The key point, and where practical issues may arise, is the moment at which the connecting factors of both conflict-of-laws rules are fixed. The Succession Regulation refers to the law of

²⁷ P. QUINZÁ REDONDO, 'La plurilegislación del Derecho civil español ante el Derecho internacional privado de la Unión Europea: dinamismo vs. Estatismo', in J. ALCAIDE FERNÁNDEZ and E.W. PETIT DE GABRIEL (eds), *España y la Unión Europea en el orden internacional*, Tirant Lo Blanch, Valencia 2017, pp. 565–571.

their nationality at the time of making the choice (Article 21(1)), whereas Article 9.8 of the Spanish Civil Code refers to the moment of death. When neither the nationality nor the civil neighbourhood of the deceased has changed during their lifetime, the joint application of both provisions is not difficult, but what if the deceased passed away having a different civil neighbourhood or, even more problematically, having relinquished their Spanish nationality in favour of a different nationality?²⁸ In the former situation, a strict application of Article 9.8 of the Spanish Civil Code would lead to the application of the law of the civil neighbourhood at the time of death, which is presumably not what they were expecting when the choice was made. In the latter situation, the outcome is even more problematic: the deceased no longer has a civil neighbourhood at this time, since they are no longer Spanish.

Here a flexible interpretation of both the Succession Regulation and the Spanish internal conflict-of-laws rules is necessary in order to ensure that the succession is governed by a predictable law and, at the same time, that the presumed will of the deceased is considered. Some authors have proposed considering that the choice of Spanish law should lead to an implicit choice of the law of the civil neighbourhood at the time of making the choice or at the time of death, depending on how the choice of the nationality was invoked.²⁹ For example, in the case of a Spanish citizen with a Catalan civil neighbourhood working and living in Germany, this would mean that when they made the *professio iuris* in favour of their Spanish nationality/Spanish law, they actually chose the law of their civil neighbourhood, namely Catalan law.

But does this mean that every Spanish citizen is allowed to choose the law of their civil neighbourhood directly in their will in international cases? At first glance, one might say no, since Article 22 of the Succession Regulation only allows the choice of the law of the nationality of the deceased, i.e. Spanish nationality. Yet if the subsequent application of the federal civil law or the local or regional law depends on the civil neighbourhood of the deceased, then why not allow them to directly choose the law that corresponds to their civil neighbourhood?³⁰ This may contradict the express wording of both the Succession Regulation and Spanish national conflict-of-laws rules for succession, but would be an effective tool to increase legal certainty

²⁸ S. ÁLVAREZ GONZÁLEZ, 'El Reglamento 650/2012, sobre sucesiones y la remisión a un sistema plurilegislativo: algunos casos difíciles o, simplemente, llamativos' (2015) 2(4) *Revista de Derecho Civil* 17, 19.

²⁹ M.E. GINEBRA MOLINS, 'Sucesiones transfronterizas y Estados plurilegislativos. La ley española aplicable a la sucesión y a la validez formal de las disposiciones *mortis causa*', in M.E. GINEBRA MOLINS and J. TARABAL BOSCH (eds), *El Reglamento (UE) 650/2012: su impacto en las sucesiones transfronterizas*, Marcial Pons, Madrid 2016, pp. 250–251.

³⁰ *Ibid.*

and predictability. In any event, what cannot be possible is to allow a person to choose any federal civil law or local or regional law of Spain, regardless of their civil neighbourhood.

4.3. THE LAW APPLICABLE IN THE ABSENCE OF CHOICE: DEFAULT RULES

The application of Spanish law in the absence of choice of law can take place either when the deceased had their habitual residence in Spain at the time of death or, by way of exception, when the deceased was manifestly more closely connected with Spain than with the State where they had their habitual residence. However, the impact of this on Spanish citizens (see section 4.3.1 below) differs from that on foreign nationals (see section 4.3.2 below).

4.3.1. *Spanish Citizens*

In the absence of a choice of law, the Succession Regulation states that the succession shall be governed, as a general/default rule, by the law of the habitual residence of the deceased (Article 21(1)). Thus, when a Spanish citizen passes away having their habitual residence in Spain (the foreign element may come from the assets of the deceased located in different States, for example), Spanish law is to be applied.

As explained above, the determination of the applicable territorial legal regime in Spain (federal civil law or local or regional law) will depend on the application of Article 16 of the Spanish Civil Code, the internal conflict-of-laws rule in Spain (Article 36 of the Succession Regulation). Thus, it will be the civil neighbourhood of the deceased that will determine the relevant Spanish succession law (Article 9.8 of the Spanish Civil Code). In these cases, the Succession Regulation and the Spanish conflict-of-laws rule work in harmony. Both of them refer to the time of death, despite the fact that the application of Spanish law is determined by a territorial criterion (the habitual residence), whereas the determination of the federal civil law or local or regional law is determined by a personal criterion – the civil neighbourhood.

For example, if a person with Balearic civil neighbourhood passes away having their habitual residence in Madrid, and the assets of the estate were located in the south of France, the law applicable to the succession will be the law of the Balearic Islands and not the federal civil law applicable in Madrid (Articles 21(1) and 36(1) of the Succession Regulation and Articles 16.1.1° and 9.8 of the Spanish Civil Code).³¹

³¹ The reader may find more examples concerning the application of Spanish law in C. JIMÉNEZ GALLEGU, *Un comentario notarial. El Reglamento sucesorio europeo*, Consejo General del Notariado, Madrid 2016, pp. 173–184.

The same is in the case where the application of Spanish law occurs, as an exception of the application of the law of the habitual residence, by virtue of the law most closely connected with the deceased (Article 21(2) of the Succession Regulation). This can be the case for a Spanish citizen who passed away having their habitual residence outside of Spain, but whose assets were located in Spain and/or all the heirs had their habitual residence in Spain. This exception clause would lead to the application of Spanish law, and the same procedure would apply for identifying the correct applicable law, either the federal civil law or the local or regional law in accordance with the civil neighbourhood of the deceased.

4.3.2. Foreign Nationals

The application of Spanish law in the case of a foreign national can take place only when the deceased passed away having their habitual residence in Spain or when they died in a different country, but the case was manifestly more connected with Spain (Article 21(1) and (2) of the Succession Regulation).

In order to determine the applicable territorial legal regime in such cases, the reasoning is in principle the same as mentioned above. However, the application of the Spanish conflict-of-laws rule for succession (Article 9.8 of the Spanish Civil Code) is not possible in these instances: foreign nationals, unlike Spanish citizens, do not have a civil neighbourhood. For example, in the case of a German citizen who passes away having their habitual residence in Catalonia, what would be the applicable territorial legal regime? There are different possible answers to this question.³²

One option would be to consider the subsidiary role of the federal civil law and thus to apply the Spanish Civil Code (Article 13.2) to these situations. By contrast, some authors have proposed the application of Article 9.10 of the Spanish Civil Code, where a reference is made to the application of the law of the habitual residence in those instances where a person does not possess a nationality or where this is impossible to determine. However, the preferred option seems to be to turn to the subsidiary connecting factors contained in Article 36(2) of the Succession Regulation, despite the fact that their application is only expressly foreseen ‘in the absence’ of internal conflict-of-laws rules. This proposal suggests that when the internal conflict-of-laws rules exist but fail to indicate or determine the applicable territorial legal

³² J. RODRÍGUEZ RODRIGO, ‘Problemas de aplicación de las normas de conflicto del reglamento sucesorio europeo’, in A.L. CALVO CARAVACA and J. CARRASCOSA GONZÁLEZ (eds), *Litigación internacional en la Unión Europea (IV). Comentario al Reglamento (UE) núm. 650/2012 del Parlamento Europeo y del Consejo sobre sucesiones mortis causa*, Thomson Reuters Aranzadi, Cizur Menor 2019, pp. 264–265.

regime, the solution may similarly be found in Article 36(2) of the Succession Regulation.³³ This is precisely what happens in relation to foreign nationals where the application of Spanish law takes place under the conflict-of-laws rules of the Succession Regulation.

This preference for the subsidiary connecting factor of the Succession Regulation in the specification of the applicable federal civil law or local or regional law is apparently supported by the Spanish General Directorate of Registers and Notaries (Dirección general de los Registros y del Notariado). This can be inferred from the Resolution of 29 July 2015,³⁴ in which the ‘direct application of the law of the territorial unit (Article 36.2 of the Regulation) in succession matters for foreign nationals’ is foreseen.³⁵

Following this approach, the law applicable in the above-mentioned example would be the law of Catalonia: the German citizen lacks a civil neighbourhood (as they are not a Spanish national) and given the fact that the Spanish conflict-of-laws rules do not offer a solution, the applicable law will be determined by the law of the territorial unit in which the deceased had their habitual residence at the time of death. In other words, the application of Spanish law takes place by the general rule (Article 21(1) of the Succession Regulation) and the specification of the Spanish succession law is determined by the subsidiary connecting factor of the reference model followed by the Succession Regulation (Article 36(2)(a)).

Similarly, when the application of Spanish law to a foreign national takes place by virtue of the most closely connected clause, the application of the federal civil law or a local or regional law will depend on the territorial unit in which the relevant element is located (Article 36(2)(c) of the Succession Regulation). Thus, in the case of a German citizen who lived for 20 years in Catalonia but died in Marseille, where they had been living for the previous two years, the law of Catalonia would be applicable to their succession, for example, if the assets of the estate were located in Catalonia.

5. CONCLUDING REMARKS

The application of the Succession Regulation has completely changed the planning of the inheritance in cross-border cases in Spain. The unification of private international law rules clearly aims to ease the free movement of persons in the EU and to promote legal certainty in the organisation of succession. However, together with the advantages provided by the new set

³³ P. QUINZÁ REDONDO and G. CHRISTANDL, ‘Ordenamientos plurilegislativos en el Reglamento (UE) de sucesiones con especial referencia al ordenamiento jurídico español’ (2013) 3 *Indret*, <http://www.indret.com/pdf/992.pdf>.

³⁴ BOE 30.09.2015.

³⁵ Paragraph eight of the decision, translation by the author.

of rules, new challenges and problems arise. This is the case when the Succession Regulation designates the application of Spanish law, since Spain is a territorial multi-unit State composed of 17 Autonomous Communities, among which six have their own succession laws (Aragon, the Balearic Islands, the Basque Country, Catalonia, Galicia and Navarre). The other Communities are bound by the succession rules provided in the Spanish Civil Code.

It is in these instances where it is necessary to determine if the federal civil law or a local or regional law is applicable. To this end, the Succession Regulation contains a conflict-of-laws rule where a subsidiary reference model for territorial multi-unit states is provided. In particular, Article 36 of the Succession Regulation refers to the internal conflict-of-laws rules of the State designated by the Regulation to determine the applicable territorial legal regime. As discussed above, this leads to the application of Article 16 of the Spanish Civil Code, the interpretation of which is much discussed in the Spanish doctrine. Apart from this, it is possible to imagine different scenarios where the problems of coherence and coordination between European conflict-of-laws rules and the domestic rules arise.

The aim of this chapter has been to try to show how this problem may affect cross-border situations connected with the Spanish legal system, since this is by no means only a ‘Spanish matter’. Given the large number of foreign nationals having their habitual residence in Spain, and taking into account the number of Spanish nationals having their habitual residence in a Member State where the Succession Regulation is applicable, this is an issue for all judicial authorities and all other authorities and legal professionals in the 25 Member States involved.